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PROSECUTION OF BP *DEEPWATER HORIZON* WELL SUPERVISORS ENDS WITH A MISDEMEANOR PLEA FOR ONE AND A TRIAL ACQUITTAL OF THE OTHER

By Michael W. Magner, Avery B. Pardee, Joseph Davis

In the wake of the *Deepwater Horizon* disaster, federal authorities have shown increasing willingness to use criminal charges to address serious personal injuries and deaths in the offshore setting. At least in the *Deepwater Horizon* prosecutions, however, the intricacies of admiralty and maritime law, as well as the limits of federal jurisdiction, have impeded those enforcement efforts.

Donald Vidrine and Robert Kaluza were the Well Site Leaders on board the *Deepwater Horizon* on April 20, 2010, when, in the course of temporarily plugging and abandoning the Macondo well, there were multiple explosions and a fire that resulted in the deaths of eleven crewmen and the sinking of the rig. Vidrine and Kaluza were rescued from the rig along with the other surviving crewmembers. In 2012, a federal grand jury indicted them for their alleged role in bringing about the incident, resulting in charges of eleven counts apiece of seaman's manslaughter and negligent manslaughter, as well as one count apiece of negligently discharging oil in violation of the Clean Water Act. Vidrine and Kaluza were two of five individuals who were criminally charged for conduct related to the spill, and

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Managing Editor's Introductory Note

It is commonly known that the federal authorities often use criminal prosecutions in connection with maritime casualties. We open this edition with an interesting article addressing the intricacies of admiralty and maritime law, as well as the limits of federal jurisdiction, which may impede the government's enforcement efforts in connection with accusations of seaman's manslaughter and negligent manslaughter arising out of the *Deepwater Horizon* disaster.

In our last edition's "Recent Developments" case summaries, we reported on a number of cases addressing limitation of liability actions. Here, we present an article addressing the purposes of the Act and how its scope has expanded and contracted over time, and examining arguments that the Act no longer serves its purpose.

We follow with our regular column "Window on Washington," which this time reports on the current congressional hearing season and the key maritime committees' look into important maritime issues and budgets for maritime agencies.

We are pleased to include in this issue another excerpt from DYNASTIES OF THE SEA, The Shipowners and Financiers Who Expanded the Era of Free Trade by Lori Ann LaRocco published by Marine Money, Inc. We reprinted the chapter on Jacob Stolt-Nielsen and Niels G. Stolt-Nielsen in Benedict's Maritime Bulletin Vol. 13, No. 2, Second Quarter 2015. Here, we include the chapter on Angelika Frangou. Ms. Frangou's example is further evidence that talent will find a way, and that gender does not have to be an obstacle to success in the shipping industry. Her example may further encourage others to follow in her footsteps, not only in the ownership and management of shipping companies, but in all aspect of marine trade. As mentioned in the chapter by one wise observer, it may well be that "the last man standing in the shipping industry will be a woman."

We follow with our regular Recent Developments case reports, and conclude with an excellent review by Dr. Frank L. Wiswall of *Warrior Queens, The QUEEN MARY and QUEEN ELIZABETH in World War II* by Daniel Allen Butler. As Dr. Wiswall notes, this short, entertaining book is as much about relevant pre-War political history, development of the Cunard White Star Line, and the decision to build these two tremendous ships, as it is about the exploits of the Queens during the eight years of their wartime service.

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

Robert J. Zapf

Prosecution of BP Deepwater Horizon Well Supervisors Ends with a Misdemeanor Plea for One and a Trial Acquittal of the Other

By Michael W. Magner, Avery B. Pardee, Joseph Davis

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were the only two charged who were actually on the vessel the day of the explosion.[1]

Ultimately, on December 2, 2015, the government resolved Vidrine's case by accepting a guilty plea to the Clean Water Act charge – a misdemeneanor – and dropped all remaining charges against him. Vidrine's plea agreement called for a probationary term of ten months, 100 hours of community service, and $50,000 in restitution. As with Vidrine, the government dropped all felony charges against Kaluza, continuing to press only the charge of negligent discharge under the Clean Water Act. Kaluza went to trial on the Clean Water Act negligent discharge count that remained against him – and won.

What happened to the government's once-imposing indictments against these two men, and why did it take five years to reach such an underwhelming resolution?

Seaman's Manslaughter Inapplicable as a Matter of Law to BP's Drilling Supervisors

The seaman's manslaughter statute, 18 U.S.C. § 1115, punishes certain people whose "misconduct, negligence, or inattention to" their duties on a vessel cause someone's death. At first glance, this statute appeared to provide the government with a powerful tool in prosecuting Kaluza and Vidrine, as it sets a lower bar for the blameworthiness of the defendant's actions than do most other criminal manslaughter statutes. Generally, to hold a defendant responsible for criminal manslaughter, the government must prove that the defendant acted with some more culpable state of mind, such as recklessness.[2] But under the seaman's manslaughter statute, the government need prove only that a defendant had been "negligen[t]," or "inattenti[ve]" to his duties in the time leading up to the death of the victim.[3]

Kaluza's and Vidrine's attorneys, however, identified a crucial problem with applying the seaman's manslaughter statute in this case. The statute was enacted in 1838, a time when steamboat travel – and deadly steamboat collisions – were common, and it was intended to punish those responsible for navigating steamboats into deadly accidents.[4] But unlike a nineteenth-century steamboat, the *Deepwater Horizon* was not just intended for water transportation, but also for drilling. And Kaluza and Vidrine weren't themselves responsible for navigating the *Deepwater Horizon* – they were Well Site Leaders on the vessel's drilling team, charged not with navigating the *Deepwater Horizon* to the well site but with overseeing its drilling operations once it got there. Given the realities of Kaluza's and Vidrine's duties, the defense moved to dismiss the

[1] The others charged were: Anthony Badalamenti, a Halliburton manager who pled guilty to a misdemenaor charge of destruction of evidence (in violation of 18 U.S.C. § 1030(a)(5)(A)) for instructing an employee to delete computer simulations that were run as part of Halliburton's internal review of the Macondo well, and was sentenced to probation; Kurt Mix, a BP engineer who was initially convicted of one of two felony counts of obstruction of justice for allegedly deleting text messages related to the rate of oil release from the Macondo well following the blowout. He was granted a new trial due to juror misconduct and ultimately pled guilty to a misdemenanor charge of intentionally causing damage without authorization to a protected computer (in violation of 18 U.S.C. §§ 1030(a)(5)(A)(i) and (c)(4)(G)(i)), and was sentenced to probation; and David Rainey, BP's former VP of Exploration, who was charged with obstruction of Congress and making a false statement to the FBI regarding his estimates of the flow rate from the well. The trial judge dismissed the obstruction of Congress charge before Rainey's trial, and Rainey – represented by Brian Heberlig and Reid Weingarten of Steptoe & Johnson LLP and Michael Magner of Jones Walker LLP – was acquitted of the false statement charge after about two hours of jury deliberations. The Task Force elected not to appeal the pretrial dismissal of the obstruction of Congress charge.

[2] For instance, the general federal manslaughter statute, with which Vidrine and Kaluza also were charged, requires that the defendant's conduct "evince[] a wanton or reckless disregard for human life." *United States v. Paul*, 37 F.3d 496, 499 (9th Cir. 1994) (internal quotation marks omitted).

[3] 18 U.S.C. § 1115 (punishing certain persons "by whose misconduct, negligence, or inattention to [their] duties on [a] vessel the life of any person is destroyed").

[4] Act of July 7, 1838, 5 Stat. 304 (explaining that the purpose of the larger statute of which § 115 originally was a part was to "provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam").

seaman's manslaughter charges, arguing that the statute did not apply to members of an offshore drilling vessel's drilling team.

To succeed on this argument, Kaluza and Vidrine would have to deal with the apparent breadth of the statutory text. The statute by its terms applies to "[e]very captain, engineer, pilot, or other person employed on any steamboat or vessel." Seizing on the last phrase in this list, the government opposed the motion to dismiss, contending that even if Kaluza and Vidrine weren't "captains," "engineers," or "pilots," they certainly were "other persons employed" on the Deepwater Horizon, and therefore the statute applied.

Cutting against the government's position was the statutory context. In ordinary communication, if someone says that he is going to the store to pick up "milk, eggs, and other items," no listener would expect him to come back with a new television. The law captures this commonsense idea in the canon of statutory interpretation called *ejusdem generis* (in English, "of the same kind"). Under the principle of *ejusdem generis*, when a general phrase follows a list of specific words describing a statute's subject, the general phrase is interpreted to cover only things similar to those specifically listed.[5] Pointing to this principle, the defense argued in support of the motion to dismiss that the seaman's manslaughter statute applied only to persons who, like "captains," "engineers," and "pilots," are responsible for the marine operations, maintenance, and navigation of the vessel – not members of the drilling crew like Kaluza and Vidrine.

The district court agreed with Kaluza and Vidrine.[6] In an exhaustively researched opinion, Hon. Stanwood Duval, United States District Judge for the E.D. La., explained that never in the statute's 175-year history had it been applied to a defendant who was not at least in part responsible for the vessel's marine operations, maintenance, or navigation.[7] And, rejecting the government's argument that the statute specifically listed "captains," "engineers," and "pilots" simply to ensure that those positions were included, Judge Duval concluded that he saw no reason why this "abundance of caution" idea should overcome *ejusdem generis*, since there was no reason for Congress to think that it needed to specifically address "captains," "engineers," and "pilots" unless it wanted to narrow the statute's scope.[8]

On appeal, the Fifth Circuit affirmed the district court.[9] Cutting to the heart of the case, the Fifth Circuit explained that the seaman's manslaughter statute "was enacted to address the dangers of travel by steamboat, and it is persons responsible for that travel that should be held liable under" it.[10] Thus, because Kaluza and Vidrine "were not responsible for the travel of the *Deepwater Horizon*," they could not be held liable for seaman's manslaughter.[11]

Negligent Manslaughter Challenged on Jurisdictional Grounds

The government also charged Vidrine and Kaluza with 11 counts of involuntary manslaughter under 18 U.S.C. §1112, which requires proof that the defendants acted with gross negligence or with wanton or reckless disregard for human life.[12] The involuntary manslaughter charges were pending until December 2, 2015, when the government moved, "in the interests of justice," to dismiss them. In a written comment quoted by the New Orleans Advocate, a Department of Justice spokesperson said that "circumstances surrounding the case

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[5] Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 199 (2012) (defining the *ejusdem generis* canon as meaning that "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned").

[6] *See United States v. Kaluza*, Criminal Action No. 12-265, 2013 U.S. Dist. LEXIS 173134 (E.D. La. Dec. 10, 2013).

[7] *Id.* at *67–79 (surveying cases applying §1115 and concluding that "[t]he commonality among the case law is that those persons charged under Section 1115 were those persons with some responsibility for the navigation or operation of the vessel.").

[8] Although it is invoked more rarely than *ejusdemn generis*, the government's "abundance of caution" idea has its own Latin name: *ex abundanti cautela*. As the district court explained, the *ex abundanti cautela* canon typically works only if there is some room for doubting whether the specifically listed examples would fall into the general phrase were they not specifically listed. *Id.* at *67.

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

[10] *United States v. Kaluza*, 780 F.3d at 667–68.

[11] *United States v. Kaluza*, 780 F.3d at 667–68.

[12] *See, e.g.*, *Paul*, 37 F.3d at 499.

have changed since it was originally charged, and after a careful review the department determined it can no longer meet the legal standard for instituting the involuntary manslaughter charges."[13] This was a highly unusual move on the part of DOJ – particularly given that the DOJ not only dismissed the charges against Vidrine before his pleading guilty to the Clean Water Act charge, but also those against Kaluza, who vowed to take his case to trial. What made the DOJ decide to give up on these charges?

For one thing, the government's theory that Kaluza and Vidrine acted with criminal intent on the day of the accident was implausible in light of the facts of the case. According to the government, Vidrine and Kaluza were criminally responsible for the deaths because they interpreted the results of a negative-pressure test – the purpose of which was to determine whether the cement that was injected into the well for temporary abandonment would hold against the upward pressure of the oil and gas in the well – in a way that turned out to be wrong. As set out in the factual basis for Vidrine's guilty plea:

> A pressure increase above zero pounds per square inch or fluid flow not otherwise accounted for may be an indication that the well is not secure and that natural gas, oil, or other fluids from the reservoir are entering the well.
>
> . . .
>
> The crew monitored the kill line for pressure or flow, and observed neither for approximately 30 minutes. At that point, with VIDRINE's and Kaluza's knowledge and consent, the negative pressure test was deemed a success and the crew continued with temporary abandonment procedures. As of this time, VIDRINE was aware that the drill pipe pressure continued to register 1,400 psi, which may have been an indication that hydrocarbons in the well were not sealed off as anticipated.
>
> . . .
>
> VIDRINE concluded that the persistent pressure on the drill pipe was the result of trapped manifold pressure and was not an indication that the cement holding back the oil and gas from the reservoir was failing. However, this conclusion did not sufficiently account for the persistent pressure on the drill pipe.

Believing that the negative-pressure test results indicated that it was safe to proceed with the well abandonment, the rig crew began to replace the drilling mud in the riser that connected the rig to the well with seawater. It turned out that the cement was not sufficient to seal the well. Oil and gas rose past the blow-out preventer and reached an ignition source on the rig, triggering multiple explosions. Given these facts, the government would have struggled to prove that Kaluza and Vidrine acted with criminal intent in misinterpreting the negative-pressure test results – after all, they themselves were on the rig and in the scope of danger that would result from any mistake.

But perhaps the even more fundamental problem with the government's theory was the defense's argument that the involuntary manslaughter statute did not apply extraterritorially to conduct occurring outside of U.S. waters and on a foreign-flagged and foreign-owned vessel. Initially, the district court disagreed with this argument. The district court reasoned that under the Outer Continental Shelf Lands Act (OCSLA), federal law applies to all vessels that – like the Deepwater Horizon – are "attached to" and "erected" on the Outer Continental Shelf.[14]

Following the dismissal of the seaman's manslaughter charges, though, Kaluza and Vidrine reasserted the jurisdictional argument.[15] They pointed out that, by its terms, the involuntary manslaughter statute is "site-specific": it applies only to acts committed within "the special maritime and territorial jurisdiction" of the United States.[16] Thus, the defense said, just

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[13] *See* Richard Thompson, *By Dropping Manslaughter Charges, Government's Effort to Hold Individuals Accountable in BP Spill Ends With Whimper*, ADVOCATE (New Orleans), Dec. 2, 2015, http://theadvocate.com/news/14164972-148/prosecutors-ask-to-drop-manslaughter (*last visited Apr. 14, 2016*).

[14] *Kaluza*, 2013 U.S. Dist. LEXIS 173134, at *23–36.

[15] *See* Defs.' Joint Mot. to Dismiss Counts 1–11 for Failure to Charge an Offense and Lack of Jurisdiction, *United States v. Kaluza*, No. 12-265 (E.D. La. Aug. 14, 2015).

[16] Memo. in Supp. of Defs.' Joint Mot. to Dismiss Counts 1–11 for Failure to Charge an Offense and Lack of Jurisdiction at 3–8, *United States v. Kaluza*, No. 12-265 (E.D. La. Aug. 14, 2015).

because the OCLSA extended federal law generally to the Outer Continental Shelf, that statute did not erase the "site-specific" requirement embedded in the text of the involuntary manslaughter statute. In this way, the defense pointed out, the involuntary manslaughter statute resembles other "site-specific" statutes like the federal Wilderness Act – which applies only to "wilderness," and not (the OCSLA notwithstanding) to the Outer Continental Shelf[17] – or the Longshore & Harbor Workers' Compensation Act, which entitles longshoremen injured on the job to compensation only if they were injured "upon the navigable waters of the United States."[18]

Thus, according to the defense, the involuntary manslaughter statute applied only to acts committed within "the special maritime and territorial jurisdiction" of the United States. The term "the special maritime and territorial jurisdiction" of the United States is expressly defined in the Criminal Code as a list of nine categories of places, some expected – e.g., "any vessel belonging in whole or in part to the United States or any citizen thereof," certain other "vessel[s] registered, licensed, or enrolled under the laws of the United States" – and some more unexpected – e.g., "[a]ny island, rock, or key containing deposits of guano."[19] Thus, applying the statutory definition of "the special maritime and territorial jurisdiction" of the United States, and pointing out, among other things, that the *Deepwater Horizon* was a foreign-owned, foreign-flagged vessel that was not "a guano island," the defense asserted that the involuntary manslaughter statute did not apply.[20]

The government initially opposed this reasserted jurisdictional argument before dismissing the charges,[21] and no further comment from the DOJ has been forthcoming on why its "careful review" of the case five years after it was charged led to dismissal. The smart money, however, might say that the government recognized the force of the defense's jurisdictional argument and thought it better to dismiss the charges rather than risk getting an unfavorable opinion on the subject from one of the nation's key maritime jurisdictions. In its opposition, the government had focused heavily on the OCSLA, arguing that that statute's text, policy, and legislative history supported reading the involuntary manslaughter statute to apply to acts occurring on the Outer Continental Shelf.[22] But a myopic focus on the OCSLA risks reading the special jurisdictional element of the involuntary manslaughter statute out of the statute altogether. The government may have perceived that the court was inclined to give effect to the "special maritime and territorial jurisdiction" language, and thus decided to act preemptively to dismiss the charges.

Resolution of the Clean Water Act Charges

The demise of the seaman's and negligent manslaughter charges against Vidrine and Kaluza can be attributed to careful statutory analysis of two intricate, maritime-specific statutes. Following their dismissal, Vidrine pled guilty to a single count of negligently discharging oil that ultimately reached the shoreline of the United States (in violation of 33 U.S.C. §§ 1319(c)(1)(A) and 1321(b)(3)) for incorrectly concluding that persistent pressure on the drill pipe deteted during a negative pressure test was the result of trapped manifold pressure, rather than indicative of a failure of the sealing cement, and moving forward with the process of temporarily abandoning the well. Vidrine was sentenced on April 6, 2016 to 10 months' probation, and was ordered to pay restitution of $50,000 to the National Fish and Wildlife Foundation.

Kaluza's trial on the Clean Water Act charge turned on a more basic factual question: whether Kaluza's conduct actually caused the explosion. At trial, Kaluza argued that it was in fact Vidrine who had made the final call that the negative-pressure test was a success. He further attempted to punch holes in the chain of causation leading from the allegedly negligent interpretation of the negative-pressure test to the explosion and subsequent spill. According to

[17] *See* 16 U.S.C. §§ 1131–1136.

[18] *See* 33 U.S.C. § 903.

[19] 18 U.S.C. § 7.

[20] Memo. in Supp. at 11–23.

[21] *See* United States' Resp. to Defs.' Joint Mot. to Dismiss Counts 1–11 for Failure to Charge an Offense and Lack of Jurisdiction, *United States v. Kaluza*, No. 12-265 (E.D. La. Oct. 1, 2015).

[22] *Id.* at 4–19.

the defense, it was the failure of other spill-preventing systems in place aboard the vessel that caused the explosion and spill, not Kaluza's and Vidrine's interpretation of the test. In particular, Kaluza identified the failure of certain rig crew members to notice an influx of oil and gas into the rig before the spill, the captain's failure to engage an emergency system that would have disconnected the well from the rig in time to prevent the explosion, and the failure of the vessel's "blowout preventer" device, which was designed to seal the well.[23] These failures, the defense said, were the true proximate cause of the spill.

On the government's side, Vidrine testified against Kaluza, stating that Kaluza had failed to give him certain information that would have affected his interpertation of the negative-pressure test. Further, the government asserted in its trial brief that the failure of other safeguards to prevent the explosion was irrelevant because "those intervening acts were at most failures to prevent the harm put in motion by the defendant's alleged negligence."[24]

After less than two hours of deliberations, the jury returned a verdit of not guilty, leaving the government nearly empty-handed after five years of investigation and prosecution efforts.

The Takeaway

The DOJ's most high-profile recent attempt to apply federal criminal law in the offshore setting was unsuccessful, and even resulted in Fifth Circuit precedent giving the seaman's manslaughter statute a narrower scope than what the DOJ attempted to charge. Nonetheless, although the Fifth Circuit has now held that "company men" like Vidrine and Kaluza are not subject to the low bar for liability imposed by the seaman's manslaughter statute, that statute remains a powerful weapon in the government's arsenal against vessel owners for deaths and serious personal shipboard injuries caused by those performing more traditional seaman's duties. Moreover, although the parties' briefing on the involuntary manslaughter statute has revealed that there is a strong argument that the statute does not apply on the Outer Continental Shelf, the government may well weigh its likelihood of overcoming this argument differently in the future.

As to oilfield workers who work on fixed platforms or semi-submersibles, drillships, or other structures that are more clearly subject to U.S. criminal law under the OCSLA or otherwise, operators, drilling contractors, and other collateral employers would be wise to evaluate their potential criminal liability exposure in addition to any potential civil tort or employer liability exposure. In this era of increasing criminalization by federal authorities of what traditionally was viewed as within the exclusive ambit of civil law, defense interests should consider conducting a thorough internal investigation by experienced criminal counsel of the facts and circumstances of serious incidents to protect attorney-client and work-product-protected interviews, facts, and other evidence.

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[23] *See* Associated Press, *BP Engineer Is Not Guilty in Case From 2010 Oil Spill*, N.Y. Times, Feb. 25, 2016, http://www.nytimes.com/2016/02/26/business/energy-environment/bp-engineer-is-not-guilty-in-case-from-2010-gulf-oil-spill.html (*last visited April 21, 2016*).

[24] United States' Trial Br. and Resp. to Def.'s Objections to United States's Proposed Jury Instructions at 21, *United States v. Kaluza*, No. 12-265 (E.D. La. Feb. 9, 2016).

The Limitation of Liability Act: Arcane But Ours

By Marissa Marriott Henderson

Maritime law enjoys a reputation of being rooted strongly in history, conjuring an image of clipper ships and black-robed jurists in powdered wigs. In many ways the reputation is apt: for example, today's shipowners still benefit from a qualified limited liability right written into United States law in 1851. In essence, this statute caps the liability of the owners of a vessel involved in a marine casualty to an amount equal to their interest in the vessel and its pending freight at the time of the loss. The cap only applies to losses incurred without the owner's "privity or knowledge."[1] This law, the Limitation of Liability Act,[2] was based on a 1819 Massachusetts statute intended to promote shipbuilding and protect, among others, Nantucket whaling ship investors from catastrophic liability when a ship and its valuable whale oil was lost at sea.[3] The Massachusetts law[4] was in turn based on an English Act of 1734.[5] This English Act and its 1813 extension is still readily recognizable in the text of today's Limitation Act.[6] Not surprisingly, then, the Limitation Act has been referred to as arcane and anachronistic. Legal commentators and jurists have long called for the Act's overhaul or predicted its demise.[7] Yet maritime attorneys today must understand the Limitation Act, or "risk facing [unlimited] liability of their own."[8] This article will briefly address the purposes of the Act and how its scope has expanded and contracted over time, then examine arguments that the Act no longer serves its

[1] 46 U.S.C. § 30505(a) & (b).

[2] Now codified at 46 U.S.C. §§ 30501-30512, this statute is the Limitation of Shipowners' Liability Act (the "Limitation Act").

[3] A Maine statute of 1821 for limitation of shipowner liability is also the basis for the Limitation Act.

[4] An act to Encourage Trade and Navigation Within this Commonwealth, 1819 Mass. Acts 193, as amended by Mass. Gen. Laws ch. 32 §§ 1-4 (1935).

[5] A detailed examination of the historical underpinnings of the Limitation Act, while fascinating to this author, is beyond the scope of this article. This topic has been addressed admirably by numerous commentators and jurists, including the following: Dennis J. Stone, The Limitation of Liability Act: Time to Abandon Ship?, 32 Mar. L. & Com. 317, 318-25 (2001); Carter. T. Gunn, Limitation of Liability: United States and Convention Jurisdictions, 8 Mar. Law. 29, 30-31 (1983) ("The United States Limitation Act was a composite: its framework was that of the English statute; apart was borrowed from Maine and Massachusetts statutes; and, the remainder was the product of imaginative American draftsmanship.").

[6] Familiar language is, for example, in the 1734 English Act, which stated ship owners were not liable for "any Loss or Damage" due to embezzlement "without the Privity and Knowledge" of the owner "further than the Value of the Ship or Vessel, with all her Appurtenances, and the full Amount of Freight due or grow due for and during the Voyage." *See* Stone, *supra* note 5, at 321, citing 7 Geo. 2 ch. 15 (1734). The operative language of Limitation Act now in effect provides:

> (a) [T]he liability of the owner of a vessel for any claim, debt, or liability ... shall not exceed the value of the vessel and pending freight.
>
> (b) ... [C]laims ... subject to limitation under subsection (a) are those arising from any embezzlement, loss, or destruction of any property ... shipped or put on board the vessel, any loss, damage, or injury by collision, or any act, matter, or thing ... done ... without the privity or knowledge of the owner.

46 U.S.C. § 30505(a) & (b).

[7] A recent case from August of 2015 includes a quote from a 1977 opinion which agreed with commentary from 1957 that the Limitation Act "has been due for a general overhaul for the past seventy-five years; seventy-five years from now that statement will be still true, except that the overhaul will then be one hundred and fifty years overdue." *See In re American River Transp. Co.*, 800 F.3d 428, 440-41 (8th Cir. 2015) (Riley, C.J., concurring in the judgment) (agreeing with and quoting *Univ. of Tex. Med. Branch at Galveston v. United States*, 557 F.2d 438, 441 (5th Cir. 1977), *cert. den.*, 439 U.S. 820 (1978), which agreed with 1957 criticism of the Limitation Act). We are almost at that prescient 75 year mark, and the Limitation Act suffers the same criticisms but is still the law.

[8] Gunn, *supra* note 5, at 30.

purpose. Along the way, we hope to reveal a snapshot of the Act as applied to modern maritime activities.[9]

The Limitation Act was enacted in response to a tragedy and resulting large judgment against the shipowner in *New Jersey Steam Navigation Company v. The Merchants' Bank of Boston*. In 1840, the steamboat *Lexington*, known as the fastest ship on Long Island Sound, caught fire and all but four of its 143 crew were lost due to overcrowded lifeboats and rough weather. Its owner was held liable for the loss of a crate containing $18,000 in gold and silver coin, which was shipped for the bank with an agreement to limit the ship's liability. The Supreme Court in 1848 would not honor the agreement, finding the ship owner liable for the lost specie due to the owner's "gross negligence."[10] Congress responded in 1851, passing the Limitation Act, primarily for the protection and promotion of the United States maritime commerce, and particularly to allow this sector to compete with the vibrant English shipping sector.[11] Notably, gold was also discovered in California in 1848, and American transatlantic shipping lines did not yet have the English lines' advantage of a cap on liability.

Early litigation under the Limitation Act determined a few issues that still invite criticism today. First, the Supreme Court held the value of the vessel (and therefore the cap on liability) was determined at the *end* of voyage on which the casualty occurred.[12] The worst casualties—in which the ship is sunk—therefore provide the smallest funds for recovery. This seeming inequity became apparent after another maritime disaster—the sinking of the *Titanic*.[13] Also, early on the Court determined that insurance proceeds for a vessel were *not* to be included in the limitation fund.[14] Therefore, even when insurance would otherwise cover a loss, that pot of money is not available to claimants if the vessel owner can prove its right to limitation. Next, the Court in 1914 clarified that foreign vessel owners facing claims in United States courts could invoke limitation rights under the Act.[15] International vessel interests, therefore, fare differently in United States courts than under global liability conventions.[16] This "expansion" of the Act to foreign owners was followed later by an expansion through lower court holdings to purely *recreational* vessels. The expansion to pleasure craft was reluctant, but the Act applies on its face to "vessels," not just "commercial vessels."[17] An early Fifth Circuit case in 1927 found the Act applied to pleasure craft,[18] and Congress failed to address the Act's vessel definition when it made other subsequent amendments. Whether by Congressional design or by poor drafting, the Act

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[9] The article makes no attempt to take a position on the repeal or reform of the Limitation Act. Indeed, as a practicing maritime attorney often representing shipowners, the author is no stranger to filing petitions under the Act.

[10] *New Jersey Steam Navigation Co. v. The Merchants' Bank of Boston (The Lexington)*, 47 U.S. (6 How.) 344, 385 (1848).

[11] *Norwich Co. v. Wright*, 80 U.S. (13 Wall) 104, 121 (1871) ("The great object of the law was to encourage shipbuilding and to induce capitalists to invest money in this branch of the industry.").

[12] *Place v. Norwich & New York Transp. Co*., 118 U.S. 468, 491-93 (1886).

[13] *Oceanic Steam Navigation Co., Ltd. v. Mellor*, 233 U.S. 718 (1914). The owner of the *Titanic*, after over 15 hundred lives were lost at sea, petitioned a New York federal court for limitation of liability in the amount of under $92,000, based on the value of the passage fares, pending freight, and 14 recovered lifeboats. *See The Titanic*, 209 F. 501, 502 (S.D.N.Y. 1913). The limitation action was tried in 1915, and before verdict a global settlement was reached in the amount of $664,000. Robert D. Peltz, The *Titanic's* Legacy: The History and Legal Developments Following the World's Most Famous Maritime Disaster, 12 U.S.F. Mar. L.J. 45, 54-55 (2000).

[14] *Norwich*, 118 U.S. at 493-502.

[15] *Mellor*, 233 U.S. at 732-34. The Court had held the Act applicable to foreign vessels as far back as 1881 in *The Scotland*, 105 U.S. 24 (1881).

[16] The limitation of liability conventions in place internationally, but not in the United States, are beyond the scope of this article. Though a vast oversimplification, the 1976 International Convention on Limitation of Liability for Maritime Claims, accepted in much of the globe, has generally higher limits (*not* based on post-casualty value), it applies more broadly to an array of shipping actors, and it is incredibly tough to defeat the right to limitation. *See* International Convention on Limitation of Liability for Maritime Claims, November 19, 1976, 1456 U.N.T.S. 221.

[17] 46 U.S.C. §30502 ("[T]his chapter ... applies to seagoing vessels and vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.").

[18] *See Warnken v. Moody*, 22 F.2d 960, 961-62 (5th Cir. 1927) (limitation of liability allowed to owner of 30-foot duck hunting and fishing boat).

now applies to recreational vessels and their "weekend sailors."[19] Owners of yachts, powerboats, small johnboats—all have a right to limit liability. Indeed, courts have found even personal watercraft—jet skis—are subject to the protections of the Act.[20]

There have also been some notable contractions of rights under the Limitation Act. Another major maritime tragedy and outrage caused Congress put breaks on the Limitation Act in 1936. Owners of the *Morro Castle*, the fiery deathbed for 130 people while *en route* from Havana to New York in 1934, petitioned to limit their liability to a mere $20,000. Appalled, Congress created a new fund under the Act for injury and death cases, based on the tonnage of the vessel, when the limitation fund was otherwise inadequate.[21] Congress increased this so-called "death fund" to $420 per gross registered ton of seagoing vessels in 1984. To put this amount in perspective, the tonnage-based death fund in the *El Faro* case is a little over 13 million dollars, while the value of the vessel post-casualty was zero and its pending freight value was just over two million dollars.[22] However, now that the Act applies to pleasure craft, which are generally not oceangoing or have tonnage, this death fund does not help claimants injured or killed in a recreational boating casualty.

Congress has considered repeal or drawback of the Limitation Act on a few occasions. In 1966, a bill was introduced to repeal the Act, in response to the sinking of the *Yarmouth Castle*, with 90 lives lost on the Miami to Nassau cruise route. However, while other provisions regarding insurance and fire safety passed, the part of the bill to repeal the Limitation Act did not. Likewise, after the 2010 *Deepwater Horizon* oil spill, involving a drilling unit recognized as a "vessel" under maritime law, Congress considered amending the Act. The most recent high-profile maritime disaster, the October 2015 sinking of the *El Faro* in a hurricane while en route from Florida to Puerto Rico, has generated renewed interest in the repeal of the Act.

The Limitation Act has been eroded over time through both environmental legislation and judicial tweaking. Certain environmental liabilities, which can be massive, are not subject to limitation under the Act. Most notably, the Oil Pollution Act of 1990 imposes liabilities not subject to limitation.[23] Since liability for environmental cleanup can be nearly unlimited, these statutory exceptions to limitation significantly undermine the purposes of the Limitation Act. Indeed, while Transocean, the rig/"vessel" owner in the *Deepwater Horizon* litigation, filed a petition under the Limitation Act, the court found against limitation because Transocean had privity and knowledge of its employees' negligence.[24]

Judicial gloss on the arcane term "privity or knowledge" has made it more difficult for vessel owners to be granted limitation. Once a claimant establishes owner negligence, the owner must then prove its lack of privity or knowledge as to the factors giving rise to the loss. Early attempts to define the term focused on an owner's actual participation in or knowledge of factors in the loss. However, the concept has expanded beyond actual knowledge to include constructive knowledge. Over time, courts, possibly hostile to limitation petitions, have held owners to a more stringent duty to inspect and inquire into vessel safety and seaworthiness under the Act's "privity or knowledge" analysis. For example, in a recent case in the Eastern District of New York, the trial court denied limitation to a

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[19] *Gibboney v. Wright*, 517 F.2d 1054, 1057 (5th Cir. 1975) (finding "little reason for allowing private owners of pleasure craft to take advantage of the somewhat drastic for the injured claimants provisions of the Limitation Act" but noting it must heed caselaw and the statute's text).

[20] *See Keys Jet Ski, Inc. v. Kays*, 893 F.2d 1225, 1230 (11th Cir. 1990).

[21] 46 U.S.C. § 30506(b).

[22] *See In re Sea Star Lines, LLC*, No. 3:15-cv-1297 (M.D. Fla. Filed Oct. 30, 2015) (Verified Complaint).

[23] However, claims by the government under Section 408 of the Rivers and Harbors Act, which prohibits injury to public works on navigable waters, are subject to limitation under the Act. *See In re American River Transp. Co.*, *supra* note 5, at 437. Another tactic used by the government to try to go around the Limitation Act is to argue repeal by implication in a newer statute.

[24] The complexities of the BP/*Deepwater Horizon* litigation are well beyond the scope of this article.

recreational boat owner, finding he should have investigated and discovered the vessel's maximum weight and passenger capacity.[25] Moreover, courts increasingly charge corporate vessel owners with the knowledge of a wider scope of people within the corporate organization. In an era when safety management systems required for some vessels under SOLAS require extensive crew reporting to the company, it has become increasingly difficult for an owner to prove lack of privity or knowledge. The right to limit liability now turns on a fact-intensive inquiry. Accordingly, whether limitation will be allowed is often uncertain.

Gone are the days when Nantucket whaling ship investors would send their whaling ships to sea for two or more years, without communication or control, and at the risk of being liable for far more than their individual investment in the ship. Today, technology makes master and crew reachable at all times, and the vessel can be constantly monitored. The corporate form protects personal wealth by affording limited liability. Marine insurance covers vessel owners' risks. Indemnity agreements can shift liability risks, and they are generally enforceable under American maritime law.

Moreover, the Limitation Act is out of step with its origins now that owners of *recreational* vessels have the right to limit under the Act. It seems odd that a statute created to protect and encourage investment in the American transatlantic shipping economy now protects an individual, weekend day tripper on his bass boat or jet ski.

Examples abound of harsh and seeming unfair application of the Limitation Act. The value of the vessel is determined at the *end* of a voyage. A burned or sunk vessel is worth nothing. Paradoxically, then, the largest casualties tend to create the smallest recovery funds. The Limitation Act is back in the public eye with last year's *El Faro* disaster. However, thanks to the 1936 and 1984 amendments to the Act increasing the death fund by ship tonnage, the limitation fund for the 33 deceased crew interests is not insignificant—over 15 million dollars. Indeed, there have been several settlements with crew in the *El Faro* case, and the district court may never have to address whether the owners are entitled to limitation. Perhaps the death fund amendments have tempered the Act just enough to allow it to survive public scrutiny—at least until another disaster with many deaths and injuries results in a woefully inadequate limitation fund.

However, until Congress acts to repeal or reform the Limitation Act, it is the law.[26] Proponents of the Act enjoy its continued existence, while opponents may find some comfort knowing limitation is often uncertain due to judicial expansion of the concept of owner privity or knowledge. The Act still exists as a maritime defense tool, but caselaw gives injured claimants a fighting chance at defeating limitation. The Act has remained on the books through several unpopular periods, and Congressional inertia and perhaps maritime industry support keep the Act alive. Relic of the past or not, maritime attorneys need to understand how to use the Limitation Act or to defeat it, depending on which side of the lawsuit they are on.

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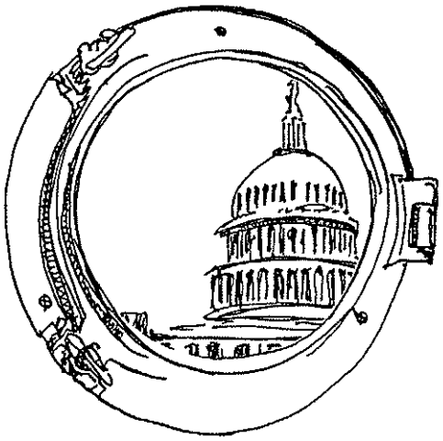
[25] *In re Treanor*, __ F. Supp. 3d. __, 2015 A.M.C. 2857, 2869 (E.D.N.Y. Nov. 6, 2015). A 34 foot Silverton with a passenger capacity of 10 was carrying 27 people for a July Fourth voyage; it capsized and three children drowned.

[26] "Congress enacts statutes, not purposes, and courts may not depart from the statutory text because they believe some other arrangement would better serve the legislative goals." *In re Cavanagh*, 306 F.3d 726, 731-32 (9th Cir. 2002).

WINDOW ON WASHINGTON



HEARING THEM OUT

By Bryant E. Gardner

Spring is in the air, and congressional hearing season is here. Although it seems likely that hopeful appeals for the return of "regular order" in which appropriations bills make their way up from committee into law "the way they are supposed to" will again founder upon the rocks and shoals of a sharply divided Congress, key maritime committees are nevertheless making their way forward with hearings on important maritime issues and budgets for maritime agencies.

On March 8, 2016, the Senate Committee on Commerce, Science, and Transportation's Subcommittee on Surface Transportation and Merchant Marine Infrastructure, Safety and Security held a hearing to examine the role of the Federal Government and the state of the U.S. maritime industry.[1] During the hearing, Chair Deb Fischer (R-NE) and Ranking Member Cory Booker (D-NJ) brought different but complementary perspectives to the questioning of the witnesses and priorities for discussion. In her opening statement, the Chair highlighted the need to address congestion in our ports and intermodal network in order to keep up with freight tonnage expected to grow 40% in the next 30 years, problems with sexual assault at the U.S. Merchant Marine Academy, and the U.S. Maritime Administration's ("MARAD") mismanagement of hiring practices and program implementation. Senator Booker opened by highlighting the dire state of the U.S.-flag Merchant Marine trading internationally, and the need to take further steps to address crumbling infrastructure to reduce freight congestion.

Administration witnesses testifying at the Senate hearing included U.S. Maritime Administrator Paul N. "Chip" Jaenichen, Federal Maritime Commission Chairman Mario Cordero, Superintendent of the U.S. Merchant Marine Academy Rear Admiral James Hellis, and Assistant Inspector General for the U.S. Department of Transportation Mitch Behm. In his opening testimony, Administrator Jaenichen contrasted the growth in

[1] Written witness testimony and video of the hearing is available at the Senate Committee on Commerce, Science, and Transportation website, http://www.commerce.senate.gov/public/index.cfm/hearings?ID=C76DD7C3-A482-4702-9405-50784BFB0E3C (*last visited April 21, 2016*).

the domestic cabotage trade fleet subject to the Jones Act[2] with the rapid decline in the international U.S.-flag fleet, which has fallen from 106 vessels to a historic low of 78, a loss of over a quarter of the fleet. The result, according to the Administrator, is that we as a nation will be severely challenged to meet the national defense sealift readiness requirements established by the Department of Defense. Pursuant to longstanding U.S. maritime strategy, the U.S.-flag merchant fleet provides the needed sealift for war and national emergency at a fraction of the cost of government-owned assets, providing carriage for over 95% of the materiel deployed in the Iraq and Afghanistan wars pursuant to the Voluntary Intermodal Sealift Agreement program. Responding to questioning from Senator Booker, Mr. Jaenichen indicated he needs about 45 more ships under U.S. flag to "be where I would be comfortable." Moreover, the Administrator reported that the industry faces a "perfect storm" because there has been a dramatic shortfall in government-impelled cargo due to the MAP-21 Act reductions in cargo preference requirements from 75% to 50%[3] for international food aid and a shrinking military footprint overseas, and additionally because new Standards for Training Certification and Watchkeeping ("STCW") requirements will likely result in the decertification of less active mariners.

Mr. Behm reported on his office's recent findings regarding weaknesses in MARAD's management controls, workforce development, and program implementation, including failure to implement fully plans from MARAD's 2012 workforce analysis. Although Mr. Behm indicated that MARAD has improved in some program areas, such as TIGER Grant oversight and the historic preservation program, gaps remain in MARAD controls, particularly in ship disposal and vessel transfer, posing risks of waste, fraud, abuse, and operational lapses. Additionally, he committed that the Inspector General's office is monitoring MARAD's progress in implementing the Merchant Marine Academy's sexual assault prevention programs. Under questioning from Senator Fischer, Mr. Behm reported that both MARAD and the school have been very proactive in addressing the issues highlighted by his office, and that they have committed to tight timelines for addressing the shortcomings, with particular emphasis on the sexual harassment issue.

Federal Maritime Commission Chairman Cordero noted industry trends including low shipping rates in the face of excess vessel capacity, increasing consolidation among carriers, and an all-time record number of complex operating agreements among carriers and marine terminal operators filed with the Commission putting strain on Commission resources. Additionally, Mr. Cordero indicated that the Commission is keeping an eye on freight congestion in ports especially, and the impact of Safety of Life at Sea treaty amendments coming into force regarding container weights and mass in conjunction with the Coast Guard as lead agency.

Superintendent Hellis highlighted recent steps to improve the academy at King's Point, including an aggressive capital improvements campaign, reaccreditation of the school's programs by the Middle States Commission on Higher Education, leadership development, and steps to address recent problems stemming from sexual assault allegations at the academy. Among other initiatives, the academy has ramped-up training of midshipmen, and participates in an inter-academy working group to share best practices with the other service academies.

Senator Maria Cantwell (D-WA) questioned Administrator Jaenichen about what specifically his agency is doing to promote West Coast ports through the National Strategic Freight and Highway Grant Program. Mr. Jaenichen reported that his Department has published notice of the availability of funding opportunities for $800 million in the first tranche of "Fixing America's Surface Transportation" or "FAST" Act[4] funding, coined "FASTLANE Grants" and intended to fund

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[2] The Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988 (1920), popularly referred to as the "Jones Act," requires that vessels engaged in the movement of merchandise between two points in the United States be carried on vessels built in the United States and owned, controlled, and crewed by U.S. citizens.

[3] The Cargo Preference Act of 1954, codified as amended at 46 U.S.C. § 55303, requires that 50% of civilian cargoes be carried by U.S.-flag vessels. Food aid cargoes were subject to a requirement of 75% U.S.-flag participation until repealed by the Moving Ahead for Progress in the 21st Century Act ("MAP-21"), Pub. L. No. 112-141, 126 Stat. 405 (2012).

[4] Fixing America's Surface Transportation ("FAST") Act, Pub. L. No. 114-94, 129 Stat. 1312 (2015).

critical freight and highway projects to fortify the multimodal freight system pursuant to the Act's Nationally Significant Freight and Highway Projects program.[5] For its part, MARAD is working to ensure the inclusion of ports, and particularly small ports, in the FASTLANE Grant program without emphasis on East versus West Coast ports. Responding to Senator Klobuchar (D-MN), Mr. Jaenichen reported that the Department of Transportation has been able to direct $524 million to ports through the seven rounds of "Transportation Investment Generating Economic Recovery" or "TIGER" Grants since 2009.[6] Through these programs and other initiatives, MARAD has focused on reducing congestion caused by the advent of ever-larger "mega-container ships" using the grants and other MARAD programs to further integrate the marine transportation system into surface transportation planning.

Along similar lines, the members of the Committee and witnesses exchanged views regarding the impact of the larger vessels on East and Gulf Coast Ports following opening of the expanded Panama Canal, likely to occur next year. Mr. Jaenichen opined that containerized cargo flows will remain primarily through West Coast ports, but that there may be some increases along the Gulf Coast, noting that until the Bayonne Bridge airdraft problem is solved, only one terminal in the Port of New York and New Jersey can accommodate the larger vessels. The Administrator also speculated that the widened canal will impact energy movements, pointing out that 6% of LNG vessels can fit through the canal now but 86% will be able to transit the canal once the locks are completed. Drawing from his background as a Commissioner with the Port of Long Beach, Federal Maritime Commissioner Cordero related that his agency's 2014 study on port congestion found that the new larger container vessels often strain the availability of labor and the ability of trucks to move the containers out of the port, resulting in 2-3 hour truck lines. Administrator Jaenichen added that multi-partner shipping alliances operating to fill the new mega-ships, chassis availability, and limited gate hours, generally required pursuant to agreements with the surrounding communities, also contribute to congestion, long truck lines, and resultant lost income for truckers serving these large vessels, and offered that MARAD is working closely with industry stakeholders and through the TIGER and FASTLANE Grant programs to address proactively the port congestion problem.

A week later, the House Committee on Transportation and Infrastructure's Subcommittee on Coast Guard and Maritime Transportation held a hearing to examine the President's Fiscal Year 2017 budget request for the Coast Guard and maritime transportation.[7] Opening the hearing, Subcommittee Chairman Duncan Hunter (R-CA) characterized the Administration's annual proposed budget cuts to the Coast Guard as a "reckless game" and a "yearly game of chicken that is not conducive to recapitalizing the Coast Guard's fleet or in sustaining its missions." Additionally, Representative Hunter rejected the Administration's proposal to convert the Food for Peace international food aid program, which provides much of the cargo base essential for sustaining the U.S. Merchant Marine trading internationally, into a cash and voucher program eliminating the shipment of U.S.-grown food aid overseas in the American owned, operated, and crewed ships that provide national defense sealift readiness in times of war and national emergency. Ranking Member John Garamendi (D-CA) echoed these sentiments, stating that now is not the time to cut over $800 million from the Coast Guard, and expressing disappointment that the Administration's proposal to gut the Food for Peace program comes back year after year, despite inaction in Congress. Additionally, Representative Garamendi criticized the Administration's proposal for its failure to fund the MARAD Title XI program providing guarantees for projects at small shipyards.

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[5] USDOT Requests Applications for $800 Million New FASTLANE Grant Program, https://www.transportation.gov/FASTLANEgrants (*last visited April 21, 2016*). The program is authorized at $4.5 billion through 2020.

[6] TIGER Discretionary Grants, https://www.transportation.gov/tiger (*last visited April 21, 2016*). Transportation Investment Generating Economic Recovery ("TIGER") is a supplementary discretionary grant program included in the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115 (2009).

[7] Written witness testimony and video of the hearing is available at the House Committee on Transportation and Infrastructure website, http://transportation.house.gov/calendar/eventsingle.aspx?EventID=399880 (*last visited April 21, 2016*).

The witness panel appearing before the House subcommittee included U.S. Coast Guard Commandant Admiral Paul Zukunft, MARAD Administrator Jaenichen, and Federal Maritime Commission Chairman Cordero. Admiral Zukunft began his testimony by thanking the members for the largest appropriation in Coast Guard history in fiscal year 2016, and reported upon the progress the Coast Guard has made in recapitalizing its assets and the uptick in drug and smuggling interdiction operations. Compelled to support the Administration's budget, the Commandant indicated that the 2017 proposal "continues to reflect this vital investment in your 21st Century Coast Guard," noting the $150 million earmarked to accelerate acquisition of a new heavy Polar Icebreaker, and also funding for procurement of the first Offshore Patrol Cutter intended to recapitalize the Medium Endurance Cutters, some of which are over 55 years old. Additionally, Representative Hunter questioned the Commandant about the feasibility of scanning 100% percent of containers to catch smugglers of weapons of mass destruction and other contraband, which Admiral Zukuft deflected as an impossible gridlock scenario with current technology. Furthermore, the Admiral indicated that there is little room in the budget for the purchase of another Great Lakes ice breaker, leaving reliance upon the existing 140-foot ice breaker, the MACKINAW, and memoranda of agreement with Canada for joint service.

Congressman Garrett Graves (R-LA) raised questions about the significance of the Jones Act, directing the question at the Commandant, who volunteered that "You take the Jones Act away the first thing that goes away are the shipyards. And what goes behind that is the mariners." Additionally, he reported that, without the Jones Act cabotage regime keeping commercial work in U.S. yards, the development and construction of Government assets, including those in the Coast Guard's recapitalization pipeline, would be much more difficult and expensive due to the resultant erosion of the U.S. defense industrial base. Administrator Jaenichen chimed in support, adding that there are currently 32 large vessels under construction in 40 different yards across the U.S. which would not occur without the Jones Act. The Commandant also indicated that repeal of the Jones Act would likely have a negative impact upon safety and environmental compliance in the United States, because the domestic vessels are generally held to a higher standard of compliance than their foreign-flag counterparts. Finally, the Commandant briefly fielded questions reflecting industry concerns about new Safety of Life at Sea ("SOLAS") requirements regarding the verified gross mass of containers to aid in stability calculations, reporting that most foreign carriers are now in compliance and so far implementation appears to be proceeding smoothly.

Knowing well his audience, Administrator Jaenichen opened his testimony by clarifying that the Administration's budget request for the Maritime Security Program, which provides funding to a core fleet of 60 militarily useful U.S.-flag commercial vessels in the international trade in exchange for their availability to the Federal Government, was penciled prior to the December 2015 uptick in authorization for that program from $3.1 million per vessel annually to approximately $5 million. Additionally, Representative Graves questioned Mr. Jaenichen about his agency's decision to put out for bid two of the Maritime Security Program contracts held by International Shipholding Corporation from Representative Graves' home state of Louisiana. The Administrator reported that the contracts have not been filled with operating vessels since September of 2015, despite program requirements that vessels remain in operation under the contracts, and that MARAD has been working with and imploring International Shipholding to fill the vacancies. Further, he indicated that his agency would shortly make a decision about the final disposition of the contracts.

Ranking Member Garamendi sharply criticized Mr. Jaenichen for the Administration's budget proposal to eliminate the food aid cargo base upon which the internationally trading U.S.-flag fleet relies. Mr. Jaenichen reported that there has been a 40% drop in food aid cargo and a 75% drop in Department of Defense cargo since 2012, with a resultant 26% loss in the fleet, with more ships and mariners on the block if the Administration's proposal to convert the food aid program to cash goes forward. Under questioning from Representative Garamendi, the Administrator conceded that, from a sealift readiness standpoint we are currently in the "amber zone" but that moving forward with the food aid proposal could move us into the "red zone," particularly with respect to concerns regarding the number of mariners available to fully man the government

reserve sealift assets such as the MARAD National Defense Reserve Fleet.

Chairman Hunter continued the questioning of the Maritime Administrator, asking when the Administration intends to unveil its "National Maritime Strategy" which kicked-off with two symposia in early 2014—one focused on the domestic Jones Act fleet and the other focused on the international trading fleet. As is so often the case, the agency's response is that the final product is held up in "interagency review" which usually means the Office of Management and Budget ("OMB"), hopefully to be available in "a couple of months."

Commissioner Cordero reported on the Commission's progress implementing the new Commissioner term limits and attorneys' fees rules and increased focus on port congestion mitigation. He also reiterated the challenges posed by the increased influence of foreign-controlled vessel-sharing alliances, consolidation among carriers,[8] and record level carrier and marine terminal operator filings with the Commission, underscoring the strain upon Commission resources, which have not kept pace with the 5% annual growth in the container trade that the Commission must monitor. As Chairman Cordero noted "Rigorous monitoring of foreign-based ocean carriers is the preventative prescription for protecting American shippers and consumers."

The House Committee on Armed Services also held a pair of hearings in March 2016 aimed at examining the state of U.S. sealift capacity and the state of the Merchant Marine. First, the Subcommittee on Readiness held a hearing on March 15, 2016 regarding the readiness of the U.S. Transportation Command ("TRANSCOM"), which provides transportation and logistics support to the various combatant commands of the Department of Defense.[9] General Darren McDew, Commander, TRANSCOM, indicated that the reduction of the international fleet to only 78 ships presents a "challenge" to his command and called for further dialog about how important the U.S.-flag international commercial fleet is to the nation. Furthermore, he called for an increase in the $3.1 million stipend provided to the MSP fleet to help soften the impact of reduced government cargoes on those 60 ships, which leaves open the question of how to keep the remaining 18 outside the program, and how to regain the dozens of other ships lost in the last few years resulting in what Administrator Jaenichen described as a borderline "red zone" scenario. General McDew also warned that history has taught us that we cannot rely upon foreign merchant fleets for sealift needs, and speculated that the 60-ship MSP fleet size does not include needed insurance in case of wartime attrition.

Second, during the March 22, 2016 hearing before the Subcommittee on Seapower and Projection Forces, Lieutenant General Stephen Lyons, TRANSCOM, U.S. Army, testified as to the importance of the commercial U.S. Merchant fleet for carrying military cargoes where needed, and in supplying mariners to crew Defense Department assets including its prepositioned ships.[10] He indicated that "We think our reliance on the commercial industry for ships and mariners is a cost-effective means of providing military sealift when compared to the cost of building an equivalent government capability." However, he reported that "[W]e are in a downward trend in the number of mariners. We're very, very concerned. We're right on the margin between medium and high risk to be able to mobilize that fleet." Lastly, he indicated that the average age of vessels in the government-owned organic sealift fleet is approximately 40 years, reaching its service life in 2050, and therefore the Navy is developing a sweeping sealift recapitalization plan.

Responding to further questioning from Subcommittee Chairman Randy Forbes (R-VA) about the impact of the MAP-21 reduction of Food for Peace U.S.-flag cargo preference requirements from 75% to 50% U.S.-flag carriage, MARAD Administrator Jaenichen reported: "[W]e estimated at that time we

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[8] Specifically, Chairman Cordero referenced the CMA-CGM merger with Singapore-based carrier NOL, and the absorption of China Shipping into China Ocean Shipping Company ("COSCO").

[9] Video of the hearing is available at the House Committee on Armed Services website, https://armedservices.house.gov/legislation/hearings/us-transportation-command-2017-readiness-posture-0 (*last visited April 21, 2016*).

[10] Video of the hearing is available at the House Committee on Armed Services website, https://armedservices.house.gov/legislation/hearings/logistics-and-sealift-force-requirements-0 (*last visited April 21, 2016*).

would lose somewhere between nine and twelve ships. We've subsequently lost 28," citing tandem cuts in Defense Department cargoes. Finally, Mr. Jaenichen indicated that the key is "[T]he mariners themselves. They are a strategic national asset. That is what allows us to provide national security. If there were any other workforce sector that supported national security, that had experienced a 20 percent reduction in the number of people, there would be a public outcry. This is a crisis in the making and we're not talking about it." Similarly, Mr. Scott DiLisio, Director, Strategic Mobility/ Combat Logistics Division, U.S. Navy, testified that "So what we've described is a catastrophe in the making, as the quality of the mariner pool begins to shrink, as the numbers shrink, the people that are going to be on the pointy end delivering Marine Corps and Army equipment are also going to be at risk."

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DYNASTIES OF THE SEA: The Shipowners and Financiers Who Expanded the Era of Free Trade

CHAPTER SIX

Angeliki Frangou

Shipping's Triple Threat*

By Lori Ann LaRocco

While the term triple threat often refers to those in theatre who can sing, dance and act, if there is one shipping industry executives who deserved a title for multi-disciplinary talent it is Angeliki Frangou, CEO of the public company, Navios Maritime Holdings (NYSE:NM). Besides her savvy financial acumen, her mechanical engineering background and a family lineage in shipping dating back to the 1700s, Frangou has dazzled the industry with a lengthy list of creative deals. In the process, she has built an empire and earned a reputation as the most powerful woman in shipping.

Speaking in her energetic style, Frangou explained how her diverse background has given her an edge in today's shipping world. "My banking background provided me the opportunity to understand how capital was sourced and the need to diversify access to capital. The shipping industry needed to become attractive to debt and equity investors, and I recognized an early opportunity to attract investors through interesting structures. On the other side, my engineering background and shipping knowledge created the foundation for operational excellence, and it is operational excellence that makes a difference in difficult markets."

Like many members of multigenerational shipping families, Frangou remembers being on board vessels as early as she could walk. "It has been a way of life. Listening to how my father approached problems and seeing how he crafted solutions was what I did as a youth. You don't realize it, but this process becomes part of your DNA." Like most children, she was in a race to grow up. Frangou chuckled when recalling a time when she was around six or seven. "I was on board a vessel with my father, brother and sister, and I couldn't go to the cargo hold because of my age. So my biggest thing was, 'When will I grow up and be able to go down to the cargo hold?' "

Frangou studied mechanical engineering in the U.S. at Fairleigh Dickinson University, graduating summa cum laude. She earned her master's degree in mechanical engineering from Columbia University. She then trained on Wall Street, working in banking as a credit analyst before leaving in the early 1990s to form her own dry bulk shipping firm, Franser Shipping. "When I had the opportunity to enter shipping and start my company, this was something I didn't really think twice about. I went!" You could hear the smile in her voice.

In 1998, Frangou learned a valuable lesson about the importance of timing in the markets. She was managing the high-yield process for a $280 million bond offering at her father's company, Good Faith Shipping. After a promising start, the difficult markets made the offering expensive for the company, and Frangou decided to abandon the deal. She recognized that the market opportunity had passed and the cost of capital being offered was not something the company could digest. As a result, she went back to the core shipping business, knowing she would return to the markets one day.

Frangou's flair for financial engineering is legendary in the shipping industry. She defied the naysayers who questioned the timing of the initial public offering (IPO) of her new company, International Shipping Enterprises, Inc. (NASDAQ:ISE), a Special Purpose Acquisition Company (SPAC) set up to buy unspecified dry bulk businesses. Ultimately, she shocked the market by raising about $200 million in a blind pool. Prior to this deal, the SPAC technique had been used infrequently and for small capital raises. Subsequent to Frangou's deal, the technique caught on with Wall Street dealmakers, ultimately raising billions of dollars.

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Angeliki Frangou

The IPO soared. In late August 2005, Frangou got ISE shareholder approval to acquire Navios for around $600 million. Navios was known for being at the forefront of using Forward Freight Agreements, or financial derivatives. Frangou's panache for financial engineering gave her a deep understanding of the acquisition's potential. She beat out competitors, including major investment banks, hoping to add to their commodities desks, and other strategic operators, looking to add depth to their operations. Under Frangou's leadership, Navios grew from six owned vessels to 30. In the process, Frangou expanded the company's core management team and transformed Navios into a balanced trading and shipping company, offering direct ownership, long- and short-term vessel chartering, and contracts for cargo transportation. The strategies paid off. Only one year post-acquisition, the Navios fleet exploded in tonnage by 212 percent. Today, Navios boasts an enterprise value of $1.6 billion and the Navios group of public companies – all offshoots from the acquisition – have a combined enterprise value of $3.7 billion.

In mid-2008, Frangou created a second blank-check venture, raising about $250 million to purchase assets in distress during the crisis affecting the shipping industry. Navios Acquisition purchased 13 product tankers and in 2010, seven VLCCs. These deals were completed through a combination of bank finance and debt from the capital markets.

Our conversation about crisis and opportunity provided a natural segue to discussing private equity. When asked if private equity would be a welcome source of capital, Frangou quickly jumped in. "Private equity is good, but I think it's relatively expensive money. For understandable reasons, private equity wants significant governance rights and the ability to review commercial decisions. In addition, they need to justify deployment of capital. However, shipping companies have the deal flow, industry expertise and operational capabilities. What they need at times is capital, and it seems expensive to give up such a large bundle of rights for only capital. While we have been able to work with a couple of PE [private equity] firms on the basis of our personal relationships, we have found public capital to be significantly cheaper than the private equity."

The Navios Altamira – A 2011 built 179,165 DWT Panamax Bulk Carrier

Finding Balance

Frangou characterizes the current environment as delicate. "At Navios, we have always focused on controlling our operating costs. It is part of our culture, and as a result, we have managed to keep our operating costs very low compared to our peers, about 33 percent below industry average. In a robust market, people look past this accomplishment. In a difficult market, such as the one we are operating in now, it can be the difference that equals survival, and investors are attuned to the importance. My job, regardless of the market, is to maintain the culture. I recognize it's important to run efficiently, in every market. You cannot create an operationally efficient company, if you are in the middle of a crisis. You have to foster this culture before a crisis, in order to overcome it."

Frangou added, "you can position yourself during a crisis. Take a look at Navios. When the crisis started, we had significant debt maturities in 2014. We critically reviewed our balance sheet and refinanced quickly to defer repayment of debt into 2017. At the same time, we decided to de-leverage in an orderly fashion over time. As an example, we reduced our leverage to 50 percent net debt to capitalization as of June 2012."

Doing all of this takes the right culture and creating this culture requires the right people. "The biggest asset you have in a shipping company is your people," Frangou said. "With the right people and the right culture, you merely need to allow your team the latitude to create. They will outperform your expectations." In the end, assets are just a small portion of the story.

In terms of building a team, Frangou goes beyond the university degree or the CV. She listens to her candidates and learns what they consider important. "Shipping is really a demanding business – it operates globally and around the clock. There is no down time. Unless you really like it, and it is your passion and hobby, you are not going to be able to really excel," she stressed. "We want people that have curious minds, that are willing to learn and don't think that they know everything. They need to be willing to learn a new thing every day, because every day you will have a new problem."

Frangou seeks to develop a cultural melting pot – to mirror the world in which she operates. "I think it's good to have diverse views, because that will lead to understanding which companies will be successful and which will not."

Frangou's ability to adapt and quickly master a situation, be it financial or technical, is described as "amazing" by those who work with her. Ted Petrone, Frangou's right-hand man and President of Navios Maritime Holdings, (who worked for Navios before the acquisition), said Frangou is always several steps ahead in her planning. "She can take complex spreadsheets or information and crystalize it within minutes," Petrone said. "She just doesn't envision the here and now. She is always looking towards the future. We are always keeping up with her. What I have found over the years is that she has extraordinary vision, she see the turns in the road ahead well before most, and leads her team. I joke around saying the last man standing in shipping will be a woman."

The industry showed its respect and admiration for Frangou when it named her Connecticut Maritime Association Commodore for 2011. In her honor, all past Commodores wore her signature pearl necklace (which, ironically, she did not wear to the event).

Being a natural leader, Frangou surrounds herself with other team players who possess inquisitive minds. "In business, you cannot say that one person can do everything. It is impossible. So you have to have teamwork, from the way you arrange the vessels operationally to the way you are acting in the public market. You have to be one team. You cannot have one part of the corporation as the ivory tower and the rest considered to be the engine room. It is one team, flat, and it has to work together."

Connecticut Maritime Association Commodores: Left to right:Sean Day, Philippe Louis-Dreyfus, Angeliki Frangou 2011 CMACommodore, Morten Arntzen, Gerhard Kurz and Richard du MoulinPhoto courtesy of Chris Preovolos

Seeing Beyond Crisis

Petrone said one of the key pieces of Frangou's strategy is her ability to see past the cycles, a point she underscored. "You have to see beyond the trees…the true cycle of the forest in front of you. You have to have a global view of events and their effect on one another; you cannot just look at one continent, or one segment," she stressed. "To do this,

you need a worldwide network of people, because at the end of the story, you need to be local. You need local knowledge and local relationships to be effective. As they say, all politics are local." She said one of her greatest assets is her network of contacts and family members that enables her to keep a constant pulse on the industry. "The one thing I inherited from my family is a worldwide network that came from my father, and three generations of people he knew around the world," she continued. "You would be surprised at how small the world is. You would be surprised at how quickly you can know what is happening thousands of miles away. We keep track of all the global centers of shipping, and that means we need to be current on activities in Greece, Norway, Asia and South America. When you are in the right circles, the information comes to you and at the same time, from a commercial side, you too are affected by the same things around the world."

Future of Shipping

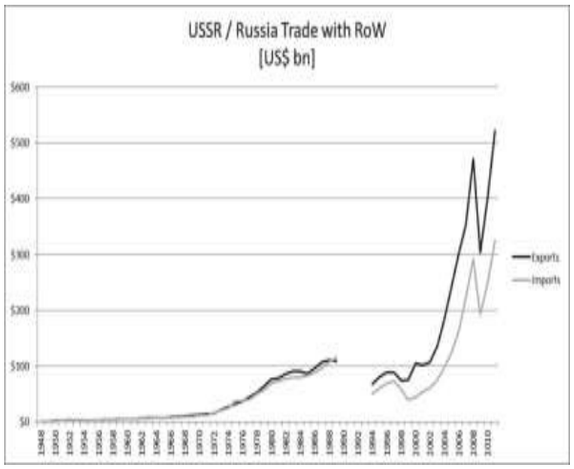
Over the last 30 years, shipping has greatly expanded into various segments, such as liquefied natural gas. Frangou credited innovation and nationalization as the reason for this evolution. There is a direct correlation between the opening of trading ports and the growth of the shipping market and with each milestone or setback in the global economy, the shipping industry runs a parallel track.

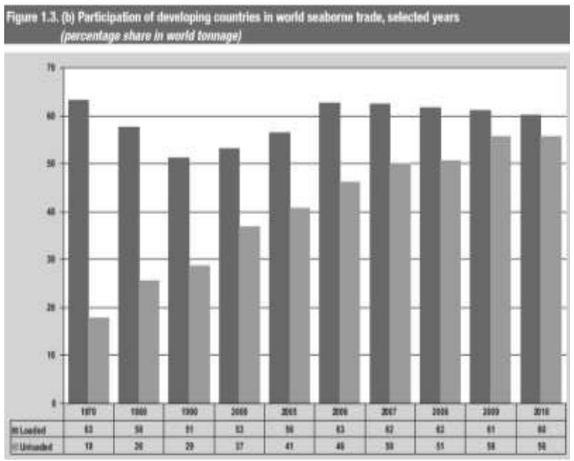
"Shipping is affected by so many things around the world, everything from politics to financial conditions, to weather," Frangou said. "You have to be very alert to changes. You need to be able to follow and position yourself." Keeping tabs on the competition is something all good leaders do. "Leaders do not follow so that they can imitate," she emphasized. She watches her competitors to develop her plan of action. Seeing where competitors position themselves and how they view the situation can lead to understanding their strategy. Frangou also keeps close tabs on the financial markets, emerging markets and technical details of the shipping markets.

From the "big block" of China/India to the "silk route" from South America to Asia, Frangou sees exciting growth for the industry. She said the next big thing will be development in Africa. "The reality is, with the population growth in Asia and the resources in South America, this is the inevitable trade growth. It's amazing, because it is totally different from where I started my career 22 years ago."

At that time, the U.S., Europe and Russia were the big markets. Shipowners were positioning their vessels based on the growing season in the U.S. and the trade between U.S. and Russia. "This has disappeared, totally, now," she said.

Source: WTO Statistics Database





Source: UNCTAD Review of Maritime Transport, 2011

Energy Evolution

Changing patterns of commodity consumption are another big game changer in the transportation sector. In the oil market, for example, Frangou said the U.S. used to be the backbone for the VLCC shipping segment, but China has taken its place because the U.S. has become a net energy producer versus importer. "Our VLCCs are local.

They are positioned in the Far East and China and it doesn't matter where you get the oil from – either the Gulf or Africa or even Venezuela. The crude trade has changed, but based on overall global trading patterns, the U.S. is the real backbone in the world market."

Although industry leaders cannot foresee every problem, there are some that become glaringly apparent. For Frangou, it was the European sovereign debt crisis turning into a banking crisis. "The sovereignty of Europe is something we have been paying close attention to. You are not going to have banks that are able to lend and, on the other side, there is no easy substitute to European banks. You really have to work hard to find other sources of debt, because at the end of the story, shipping is a capital-intensive business."

Looking back at 2008, which was the last global squeeze after Lehman's collapse, Frangou said you knew something was happening but you couldn't foresee the magnitude of the crisis. "At Navios, we were looking at the global squeeze in a different light than everyone else. We thought it would be a very painful, long process whereas everyone else thought the squeeze of the banks after Lehman Brothers would be temporary. But we were right. In the U.S., the system worked and acted quickly to put policy and action to work". In Europe, in contrast, the policy by definition under the confederated system could not be quickly coordinated or even agreed upon and the "America" problem soon showed up on European shores in the form of an E.U. crisis. Today, this crisis is localized in Spain and Italy, as well as other peripheral countries. Frangou observed that "the failure to focus efforts early on allowed problems to mushroom into a full-blown banking crisis threatening various counties' membership in the European Union." She added, "today, European lenders are shrinking their balance sheets in dollar denominated loans. You had the second largest bank in Germany, Commerzbank, moving away from shipping. At the beginning of this crisis, while we did not understand the magnitude of the fallout, you knew things like this were going to happen."

Strengthening Global Trade

When looking at the future of global trade, Frangou identifies the need for Europe to resolve its sovereign debt crisis as the number one thing that must happen in order to strengthen the global system. "You'll have banks being able to function again. In Europe, 70 percent of the companies borrow from banks. There is no functional debt capital market. As a result, the banks are the engines of growth." Other trade worries include protectionism and socialism, because they negatively impact trade.

Frangou may have the ear of Greek and European business leaders, but she said it is political leaders that need to make the tough decisions and act with discipline so they can give hope to the next generation. "The biggest issue in Europe is that the politicians were making false promises to the youth. Anyone who knows anything about reality knew the promise of employment for life in the public sector would never to be fulfilled. Europe must change its attitude. This is a European cultural problem. We don't teach entrepreneurism. We allow that to be offshored to the U.S. and elsewhere. But we need to come to grips with the fundamental understanding that there is no free lunch ... that government not only does not currently have the capability to provide the jobs it promised, it never had this capability and we are just now beginning to pay the price for this overextension by prior generations of political leaders." Frangou stressed the need for governments to breed entrepreneurship and encourage private enterprise to grow. "Private enterprises are the ones that will employ people. They know how to take risks. We need to adopt this culture of risk-taking, reform our process of business and allow the private sector to provide answers. I think we will be positively surprised if we do so, and stuck in an ugly position if we don't."

Down Cycle Protection

No matter what the cycle, there always will be expectations of new regulatory challenges and different types of vessels entering the market. However, at the end of the day, no matter the regulatory climate or the ships in your fleet, Frangou said you will need to protect your down side in order to survive. "You have to be very vigilant and protect your down cycle. You have to be conservative, because every company will be affected by a down cycle. The only difference is in how well you recognize it, how well you are prepared for it and how well you adjust for it. If you are not looking for the changes in the market, they will surprise you. If you are not prepared for a

difficult market, you will be overwhelmed by it. You need to always remember, we are in a cyclical business characterized by volatility and you need to make this phenomenon your friend, not your enemy."

Frangou offered a few examples from her own experience. At the peak of the market, in 2006, Navios was doing 5- and 10-year deals, because they had good margins. "We were offered $55,000 per day on a charter-out contract with a 5-year duration; why shouldn't you fix it? You just about recovered the cost of your vessel during the life of the contract and then had 20 years of useful life left! At the time, investors were publicly questioning our decision to hedge our vessels rather than trading them on the lofty spot markets. Yet, only a year later, these same vocal investors were congratulating us for securing attractive long-term deals, as the bubble in the spot market had popped and people were unsuccessfully scrambling to secure employment. The reality is you just have to use common sense. Investors are paying us to be fiduciaries for their assets, and we need to act responsibility for the long term."

The problem in this cycle, she said, was an explosive combination of too many newbuildings, and the disappearance of financing. This had led to weakness for many of the industry players. "One of the unique functions we have at Navios is a credit committee," Frangou explained. "Our credit committee reviews all of our charters to ensure that once a charter is signed, we will indeed collect the revenue agreed. The committee reviews the proposed company's financial statements critically, including current market exposure. We also take into account the company's industry reputation. We talk to management and ask ourselves how they acted in prior difficult conditions."

This financial strategy allows Frangou to speak with confidence. She doesn't flinch when looking into the future. "We are able to say today that with our current contracted revenues, we don't care where the market is. This takes a lot of work, and active work to do it. But it can be accomplished."

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Lori Ann LaRocco is an American journalist and is also the author of "Thriving in the New Economy" (Wiley, 2010) and the book, "Opportunity Knocking" (Agate Publishing, 2014).

RECENT DEVELOPMENTS

Admiralty Jurisdiction

Brown v. Porter, 2016 U.S. Dist. LEXIS 17634 (N.D. Ill. Feb. 12, 2016)

On August 7, 2013, John Brown was a passenger on a boat piloted by Ralph Porter on Lake Michigan between Navy Pier and the 31st Street Harbor. Porter operated the vessel too fast and failed to warn Brown to brace himself. Brown was then thrown around the boat's cabin and injured as a result.

Brown brought suit against Porter for tort in state court. Pursuant to 28 U.S.C. § 1333, Porter removed to admiralty court, and Brown moved to remand to state court. The issue before the court was whether this case falls within admiralty jurisdiction.

The court first noted that, to fall under admiralty jurisdiction, the tort must "bear a significant relationship to traditional maritime activity." This test has two requirements: locality and connection-to-maritime-activity. The court reasoned that the locality requirement is satisfied because the incident occurred on Lake Michigan.

The second requirement has two issues: first, whether the incident has a potentially disruptive impact on maritime commerce, and second, whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. There was no argument that being on a boat in Lake Michigan is a traditional maritime activity. The disruptive impact test focuses on possible consequences to maritime activity, not actual consequences. The court reasoned that this requirement was satisfied because Porter's behavior may have adversely impacted maritime commerce in a number of ways, including crashing into another boat or pier. As a result, the court concluded that the case fell within 28 U.S.C. § 1333 admiralty jurisdiction.

Notwithstanding the applicability of admiralty jurisdiction, the next issue was whether the saving-to-suitors clause applied, and thus whether removal was appropriate. The court noted that admiralty jurisdiction is exclusive only to cases where a vessel or thing is itself treated as the offender. For other cases in which admiralty jurisdiction is available, the plaintiff has the choice of proceeding in state or federal court.

Porter argued that a 2011 amendment to 28 U.S.C. § 1441(b) eliminated the plaintiff's right to remove to federal court. The court ruled that 28 U.S.C. § 1441(b) is limited exclusively to cases under the 28 U.S.C. § 1332(a) diversity jurisdiction and that this eliminated the possibility of it allowing the removal of 28 U.S.C. § 1333 admiralty cases. Further, the amendment and its legislative history do not mention 28 U.S.C. § 1333 or admiralty jurisdiction, and the implied repeal doctrine is too narrow to support a holding that it rendered a 28 U.S.C. § 1333 rule obsolete. As a result, Porter's argument to defeat that the saving-to-suitor clause fails, and the case was remanded to state court.

Submitted by DJC/VCR

Matter of Complaint of Christopher Columbus, LLC, 2016 U.S. Dist. LEXIS 41995 (E.D. Pa. March 30, 2016)

The dispute arose out of the injury to a passenger during a physical altercation with other passengers on board the Ben Franklin Yacht which occurred while the vessel was in the process of docking at the end of a cruise.

The injured party brought an action in state court against the vessel interests. The vessel interests then filed a petition for exoneration or limitation in federal court under the Limitation Act. Prior to reaching the merits in the federal case, the Court raised the issue of subject matter jurisdiction *sua sponte.*

In support of jurisdiction, Christopher Columbus, LLC first argued that the Limitation Act contained a self-executing grant of admiralty jurisdiction. The Court, in declining to exercise jurisdiction under this theory, summarily noted that every appellate court

reaching this question had concluded that the Limitation Act does not provide an independent basis for jurisdiction.

The Court next examined in depth Christopher Columbus's argument, based on testimony that the passengers continued to fight as they were ushered off of the vessel and onto the dock, that the Extension Act applied, and provided an independent basis for jurisdiction. In support, Christopher Columbus cited *Tagliere v. Harrah's Ill. Corp*., 445 F.3d 1012 (7th Cir. 2006), in which Judge Posner held that satisfaction of the test set forth in the Extension Act conclusively establishes admiralty jurisdiction without the need to further meet the two part tort jurisdiction test as set forth in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995) to establish jurisdiction under 28 U.S.C. § 1333(1).

The Claimant argued that the Extension Act was not intended to relieve the parties of the constraints of the *Grubart* test, and that the Petitioner must meet both the location test and both prongs of the maritime connection test for jurisdiction to be established under the circumstances.

The Court, noting the circuit split, first espoused the potential benefits of Judge Posner's bright line jurisdictional rule for Extension Act cases. Then, the Court determined through an examination of *Grubart* and authority from the Fifth and Eleventh Circuits that nothing in *Grubart* or the Extension Act relieved Christopher Columbus from the full burden of establishing that the facts met both the location and maritime connection tests.

Turning to the facts at hand and applying them to the tests in turn, the Court ultimately determined that the first prong of the maritime connection test was not met and that fights between patrons on board a vessel that is in the immediate process of docking presents concerns that are too remote from those underlying the primary purpose of admiralty jurisdiction.

Submitted by JTC

Arbitration

Zurich Am. Inc. Co. v. Team Tankers A.S., 811 F.3d 584 (2d Cir. 2016)

In this appeal, the Second Circuit considered whether: (1) the District Court erred in confirming an arbitral award; and, (2) the District Court erred in awarding the prevailing party in the arbitration the fees and costs incurred in seeking to confirm the arbitral award.

The District Court confirmed the arbitral award in finding that: (1) the panel had not manifestly disregarded the Carriage of Goods By Sea Act in coming to its decision; and, (2) the undisclosed illness of the panel chairman did not constitute "corruption" or "misbehavior" as defined under the Federal Arbitration Act ("FAA"). The Second Circuit easily dismissed the appellant's arguments regarding the appropriateness of the arbitral award, and upheld the District Court's decision confirming the award.

Regarding the award of fees, the District Court found that the charter agreement provision, which provided that "[d]amages for breach of this Charter shall include all provable damages, and all costs of suit and attorney fees incurred in any action hereunder," authorized the appellee carrier to recover fees and costs incurred in connection with seeking to confirm the arbitral award in the District Court. The Second Circuit, however, reversed the Order allowing the appellee carrier to recover fees and costs in the District Court proceeding, and held that the contractual provision at issue only authorized an award of fees against a party who breached the charter agreement. The Second Circuit found that the appellant shipper did not breach the charter agreement by initiating the District Court Action because: (1) while the parties agreed to arbitrate, they also consented to confirmation of the arbitral award in any court of competent jurisdiction, including in the District Court pursuant to the FAA; and, (2) a finding to the contrary would be unenforceable because the charter agreement read in that way would authorize the District Court to confirm the arbitral award while effectively preventing that same court from ensuring compliance of the award with the FAA. In addition, the Second Circuit disagreed that an award of costs and fees was warranted under 28 U.S.C. § 1927 as the appellants arguments, while unconvincing, were not so unconvincing as to show that they were posed for an improper purpose.

Submitted by SPB

DOHSA

Martins v. Royal Caribbean Cruises Ltd., 2016 U.S. Dist. LEXIS 42516 (S.D. Fla. Mar. 29, 2016)

Plaintiffs filed suit for the wrongful death of Briana Martins that was allegedly caused when she ate bacteria-ridden food aboard the defendant's cruise ship and then received negligent treatment from the shipboard medical staff. Plaintiffs individually sought recovery for extreme emotional distress due to the defendant's negligence. Defendant moved to dismiss the complaint in whole or in part.

The first issue was whether the Death on the High Seas Act ("DOHSA") preempted the plaintiffs' emotional distress claims. The court noted that the plaintiffs were alleging that they had sustained emotional distress, not as a result of Briana's death, but as a direct result of having witnessed Briana's suffering resulting from defendant's negligence. The court concluded that, although DOHSA may preempt claims for emotional distress due to a loss of a loved one, it did not apply to emotional distress suffered directly by a plaintiff present at the scene of a loved one's death.

The court then looked whether sufficient facts were pled to support claims for negligent infliction of emotional distress. Such a claim required allegations that plaintiffs were more than witnesses to a traumatic event but that they were within the zone of danger and felt threatened by imminent physical harm. The plaintiffs alleged they were potentially harmed because they were eating the same food as Briana at the time of her death and had physical contact with her or bodily fluids during her illness that could have caused them to become ill. The court found such allegations sufficient to withstand a motion to dismiss. The court further concluded that any claims under state law or the law of the Bahamas were preempted by DOHSA. The court concluded that DOHSA and maritime law precluded application of any state or foreign law and dismissed such claims.

Jones Act

Desmore v. Baker Hughes Oilfield Operations, Inc., 2016 U.S. Dist. LEXIS 15084 (E.D. La. Feb. 8, 2016)

This action arose as a maritime personal injury case when Desmore was injured on the Ensco 87 as a result of the failure of a side entry sub clamp that resulted in Desmore's left hand being trapped between a wire line and a sheave. Desmore was working for a company providing pipe conveyed logging services aboard the Ensco 87. This accident caused two of Desmore's fingers to be amputated and left him with permanent hand damages. Ensco, the owner of the Ensco 87, filed a motion for summary judgment and Desmore filed an opposition to said motion.

The two central issues in the motion were: (1) assuming for the moment that Desmore is not a Jones Act seaman, Desmore's only possible claim against Ensco would be for vessel negligence under the Longshore and Harborworkers Compensation Act; and (2) even if Desmore is a Jones Act seaman, the record does not support a finding that the Ensco 87 was unseaworthy, because the wire that injured Desmore was not "the type of gear regularly or traditionally found on ships as a regular piece of ship's gear." The Court denied Ensco's motion for summary judgment.

The Court declined to resolve the first issue stating that it did not receive adequate briefing from either party on it.

In regard to Ensco's second argument, the Court looked to the Fifth Circuit's decision in *Drachenberg* and decided that rather than focusing the appurtenance analysis on ownership or control, courts instead focus on whether the equipment in question was "used to perpetuate the mission and purpose of the vessel."

The Court decided that the equipment involved in Desmore's injury was appurtenant to the Ensco 87 even though the equipment was controlled by Desmore's employer and was only on board temporarily.

Submitted by SMM

In Re: New York City Asbestos Litigation, 2016 N.Y. Misc. LEXIS 23 (NY. Sup. Ct. Jan. 4, 2016)

A widow whose husband died in or about 2014 from mesothelioma, initiated an asbestos-related Jones Act claim arising from her husband's exposure to asbestos in the Merchant Marine.

Texaco, Inc. moved to dismiss the complaint based upon a release which was signed in 1997 in connection with a Jones Act claim filed on behalf of the decedent, who was then alive, in the Northern District of Ohio. The 1997 release settled the Ohio case for damages caused by exposure to products manufactured, sold or used by Texaco including known and unknown injuries resulting from exposure to asbestos, silica, smoke and carcinogenic chemicals, excluding, benzene products. The 1997 release provided that it was interpreted under the Jones Act and general maritime law.

Texaco's motion for dismissal also sought sanctions. Plaintiff opposed the motion claiming that the Federal Employment Liability Act (FELA), which was applicable through the Jones Act, had heightened release standards which were not met in this case because the release was comprised of boiler plate language and did not mention cancer or mesothelioma or the "quantity, location and duration or potential risks" as required by federal law. Plaintiff also maintained that the modest amount of money provided demonstrated that her husband did not intend to release a future mesothelioma claim, and that, at a minimum, there is a question of fact as to whether her husband was aware of the claim and whether he intended to release that claim. In addition, plaintiff argued that Texaco could not have obtained release of this claim because there was no "existing controversy" as mesothelioma was not in controversy at the time of the release.

In reply, Texaco maintained that FELA was inapplicable, but even if it was, the release was still enforceable because the release contained specific language which clearly contemplated a second injury and plaintiff's counsel controlled the distribution of the settlement funds given that the settlement involved a lump sum for a number of cases.

The Court initially noted that federal law would apply to this maritime action initiated in state court. The court noted, however, that neither party had addressed which Circuit's law should apply, acknowledging a split among the federal courts in deciding whether a FELA release bars a claim for future injuries. Despite this, the Court found that under the standards of either the Third or Sixth Circuit, Texaco failed to meet its burden of proof to demonstrate that the decedent understood he was releasing a future claim for mesothelioma or that it was a risk known to him. The Court noted that, if the law of the Sixth Circuit was applied, the release was void because it did not reflect a bargained-for settlement of a known claim for a specific injury, and that, if the Third Circuit's standard controlled, the release was void because it contained a laundry list of diseases which the employee may attack as boiler plate. It was noted that the Second Circuit had adopted the Third Circuit standard.

Submitted by SPB

Nevor v. Moneypenny Holdings, LLC, 2016 U.S. Dist. LEXIS 5580 (D.R.I. Jan. 14, 2016)

Plaintiff brought a Jones Act claim against his employer for injuries allegedly sustained while performing an at sea transfer between two of the employer's vessels.

The Court conducted a four day bench trial in which it concluded that the plaintiff was involved in sailing at its top level. On March 28, 2011, the crew of the *Vesper* was moving the vessel from St. Thomas to St. Maarten in order to prepare for her next race in St. Barts. The plaintiff and two others comprised the *Vesper* crew, which was not the usual professional race crew. Prior to leaving St. Thomas, the Captain of the *Vesper* did not have the crew report to Customs for clearance in St. Thomas before sailing to St. Maarten, but, rather collected passports and sent the *Vesper* to St. Maarten, while the *Vesper* Captain remained behind to deal with Customs. Customs, however, required the crew of the *Vesper* to attend in person in order to allow clearance. As a result, the other vessel, the *Odd Job*, was sent to pick up the crew of the *Vesper* in order bring them back to St. Thomas for Customs clearance. In order to transfer the crew from the *Vesper* to the *Odd Job*, an at sea transfer in the open sea was performed.

In attempting the transfer, the vessels separated, and the plaintiff slipped on the *Odd Job*, clinging to the lifeline of the *Vesper* in order to save himself from

going into the water. The plaintiff's bicep was torn from the bone in his right upper arm when it got hung up on the lifeline. In evaluating the at sea transfer, the Court found that the owner of the vessels was negligent for failure to have an adequate number of crew members on the *Vesper*, failure to move to calm waters for transfer, failure to tie the two vessels together prior to transfer, failure to apply a non-skid product to the *Odd Job*, and a failure to provide proper training procedures.

In evaluating plaintiff's conduct, the Court found that plaintiff exercised the requisite degree of care for his own safety that a reasonable seaman would exercise in such circumstances. The Court rejected the owner's defenses that the transfer at sea was part of the job of racing boats, that the transfer at issue in this case was done in the typical way, that an experienced seaman like plaintiff, should have asked for assistance, and because they were not supported by the facts, credible testimony, or the law. Total damages in the amount of $1,460,458 plus interest and costs were awarded to the plaintiff.

Submitted by SPB

Panzarella v. H&L Towing, Inc., 2016 U.S. Dist. LEXIS 18666 (E.D.N.Y. Feb. 16, 2016)

Plaintiff was allegedly injured and lost his eye while employed as a deckhand by H&L Contracting, LLC ("HLC"). H&L Towing, Inc. ("HLT"), an affiliate of HLC, was the owner of the tug on which the plaintiff was employed

Plaintiff asserted a Jones Act claim against HLC and unseaworthiness claims against both HLT and HLC. The Court noted that an unseaworthiness claim could not be brought against both HLC and HLT as such a claim could only be asserted against either the legal owner of a vessel, or the owner *pro hac vice* of the vessel at the time of the alleged injury. HLC moved for summary judgment on the plaintiff's unseaworthiness claim on the grounds that it was not the owner *pro hac vice* of the vessel at the time of the alleged injury.

The Court found that HLT did not completely and exclusively relinquish control of the vessel to HLC sufficient to make HLC the owner *pro hac vice* of the vessel at the time of the alleged injury because: (1) the intent behind the charter was not to transfer exclusive control to HLC, but, rather to address an issue of accounting between affiliates; (2) the payment structure in the charter agreement demonstrated that HLC only paid for the vessel on an hourly basis when it was in use; and, (3) HLT paid for $40,000.00 in repairs to the vessel, maintained insurance on the vessel, and allowed the vessel to dock at its berth during the charter period.

The Court distinguished the case of *Karvelis v. Constellation Lines S.A.*, 806 F.2d 49 (2d Cir. 1986), where the effective result was that the ship owner and charterer were held jointly and severally liable for an unseaworthiness claim, on the grounds that: (1) there was no controversy between the owner and charterer in *Karvelis* as there was a unity of interest between the owner and charterer; and, (2) *Karvelis* did not directly address the issue in this case of whether the owner or the charterer should be liable for unseaworthiness, but, rather whether the owner and charterer could be liable for unseaworthiness.

Submitted by SPB

LHWCA

Ceres Marine Terminals, Inc. v. Director, Office of Workers' Compensation Programs, 2016 U.S. App. LEXIS 5510 (4th Cir. 2016)

Jackson, a longshoreman employed by Ceres, was operating a forklift on a pier in Portsmouth, Virginia when he accidently struck and killed a co-worker with the lift. Jackson sought and received psychological treatment and was diagnosed with PTSD related to the accident. He filed a claim under the Longshore and Harbor Workers Compensation Act for benefits related to his psychological injury.

Ceres requested, pursuant to 33 U.S.C. § 907(e), an independent medical examination, and OWCP referred Jackson to a psychiatrist for examination. In contrast to Jackson's treating physician, the IME physician found that Jackson did not suffer from PTSD. Based on the results of the IME, Ceres disputed the claim.

Before the ALJ, Ceres argued that Jackson did not suffer a compensable injury within the meaning of the LHWCA because he was not in the zone of danger. Further, Ceres argued that the IME opinion was entitled to dispositive weight with

regard to Jackson's medical diagnosis. The ALJ disagreed on both counts, and found, based on the totality of the medical evidence, that Jackson had suffered a compensable injury and that there was no zone of danger requirement under the LHWCA. Ceres appealed to the Board, which upheld the ALJ's decision.

In upholding the Board's decision on appeal, the Fourth Circuit found that nothing in the plain language of the LHWCA made the opinion of an independent medical examiner binding on the parties, and further noted that Ceres's reliance on Supreme Court's decision in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), a case involving the zone of danger test under the Federal Employers Liability Act, was misplaced, as tort principles were not applicable to the LHWCA.

Submitted by JTC

Johnson v. Abe's Boat Rentals, Inc., 2016 U.S. Dist. LEXIS 3500 (E.D. La. Jan. 12, 2016)

This action arose when Johnson, a payroll employee of Wood Group PSN, Inc. ("Wood Group") assigned to work as a mechanic aboard Apache Corporation's ("Apache") production platform SP 24 W-1, was injured in a collision of the M/V MISS SYDNEY, owned by Apache, and the M/V JASON ABE, owned by Abe's Boat Rentals, Inc. ("Abe's"). Wood Group's relationship with Apache was governed by a master service contract. At the time of the collision, the M/V MISS SYDNEY was operated by Morel, a payroll employee of Island Operating Company (Island) who was also assigned to work on SP 24 W-1. Johnson was aboard the vessel in order to return to shore in Venice, LA.

Johnson filed suit against Abe's and Island under general maritime law seeking damages for his sustained injuries. Abe's filed a cross-claim against Island, alleging negligence on the part of Morel, the operator of the M/V MISS SYDNEY. Abe's brought a third party claim against Apache, and tendered Apache as a direct defendant of Johnson. Abe's contended that Apache's own actions were negligent, both in regards to untrained personnel and a lack of procedures regarding safe operation of its vessels.

Both Apache and Island filed motions for summary judgment against Johnson. Apache also filed a motion for summary judgment against Abe's. Apache contended that, because Johnson was covered by the Longshoreman's and Harbor Worker's Compensation Act ("LHWCA") and because he was a borrowed employee under the LHWCA, Johnson and Abe's were precluded from recovery against Apache. Island also argued that because the LHWCA was applicable, the borrowed employee doctrine precluded recovery from them.

The Court, in denying the motions for summary judgment, found that a genuine issue of material fact existed as to whether the LHWCA was applicable to the case. Whether the LHWCA is applicable depends on a two part test, the situs test and the status test. The Court was satisfied Johnson met the situs test, which focuses on where the employee was injured, stating that Johnson's injury "apparently occurred on the MISS SYDNEY while on navigable waters of the United States." However, the Court found that Abe's had sufficiently established that there were unresolved genuine issues of material fact as to whether the status test had been satisfied. The status test requires the claimant to be a person engaged in maritime employment at the time of their injury. If the claimant's presence aboard a vessel is merely transient or fortuitous, the claimant is not covered by the LHWCA. The Court found that the record did not support Johnson being aboard the MISS SYDNEY for anything other than traveling to and from the work site.

The Court also denied summary judgment as to Abe's negligence cause of action against Apache. Apache argued that under the borrowed employee doctrine, it could not be vicariously liable to Abe's for torts related to Johnson's on-the-job injuries. In declining summary judgment on that claim, the Court first stated that it was depended on resolution of the LHWCA coverage discussed above. Further, the Court found that Abe's negligence claim was not based upon the theory of *respondeat superior*, but rather upon negligent acts of Apache itself. Those acts included allowing untrained personnel to operate its vessels, allowing its vessels to be operated in poor weather conditions, and for failing to set procedures for the safe operation of its vessels. The court found that Apache failed to address how Abe's would be barred from raising such a direct tort claim against Apache, even assuming the LHWCA was applicable.

Submitted by SMM

Limitation of Liability

In Re 37' 2000 Intrepid Powerboat, 2016 U.S. Dist. LEXIS12279 (M.D. Fla. February 2, 2016)

Owners of a 37' 2000 Intrepid Powerboat Boat, Brenda J. Ruth and Donald Ruth, sued for exoneration from, or limitation of, liability arising from a June 20, 2015 voyage of the Vessel. The Ruths asserted that the value of the Vessel at the time of the incident was no more than $85,000 and stipulated in an Ad Interim Stipulation of Value and Stipulation for Costs that within fifteen (15) days after the demand by any claimant they will issue and file a letter of undertaking in the amount of $85,000. The Ruths moved for Entry of an Order approving the Ad Interim Stipulation. The Court found that the Ruths had complied with Supplemental Rule F(1), Federal Rules of Civil Procedure and approved the Ad Interim Stipulation of Value and Stipulation for Costs. The Court also approved for publication the Ruths' Amended Notice of Petition for Exoneration from or Limitation of Liability and enjoined the further prosecution of any action or proceeding against the Vessel or the Ruths arising from the Incident.

Submitted by SMM

In the Matter of The Complaint of Central Contracting & Marine, Inc., 2016 U.S. Dist. LEXIS 32832 (E.D. Mo. March 15, 2016)

On July 16, 2015, the M/V DANNY BRADFORD struck scaffolding that was protruding below the Eads Bridge's center arch. James Pigue, an employee of Thomas Industrial Coatings, was sandblasting inside the scaffolding above where the vessel struck. He fell from the scaffolding and died.

Pursuant to 46 U.S.C. §§ 30501-30512, Central Contract & Marine, the owner of the M/V DANNY BRADFORD, sought to limit its liability by alleging that resulting damage occurred as a result of factors for which they are not responsible or were caused by or were contributed to be caused by acts or omissions of others for which they lacked any privity or knowledge.

Central Contract & Marine claimed that the value of the vessel, plus its cargo, involved in the incident was $589,702, and posted security in that amount. On the same day a Motion for Order Directing Issuance of Notice and Restraining Suits was filed. The court granted the motion, consistent with the dictates of the Limitation Act, enjoining the commencement of further prosecuting of any action or proceeding against Plaintiff in connection with the incident. Subsequently, the claimants filed a Motion to Dismiss Limitation of Liability Complaint, a Motion to Increase the Limitation Fund, and a Motion to Lift the Stay and Injunction Order.

The first issue before the court was whether to lift its injunction pursuant to Fed. R. Civ. P. Supp. R. F(3). Claimants argued that Central Contract & Marine's negligence caused Mr. Pigue's death, and thus it was not entitled to limit its liability. The court concluded, however, that under the Rule 12(b)(6) standard, claimants were seeking a ruling on factual matters prematurely. Thus, the motion to dismiss was denied.

The second issue before the court was whether to dissolve the stay to allow the claimants to proceed in state court. The court noted that state courts may adjudicated claims against the limitation fund so long as the vessel owner's right to seek limitation of liability is protected, which can happen on of two ways: First, when the limitation fun exceeds the total of all claims. The court noted this was inapplicable. Second, when there is a single claimant, when that one claim exceeds the value of the fund. The court concluded that this exception does not apply because there are several claimants. Accordingly, the motion to lift the stay was denied.

Submitted by DJC/VCR

Matter of Osage Marine Services, Inc., 2016 U.S. Dist. LEXIS 5086 (E.D. Mo. Jan. 15, 2016)

Petitioner Osage Marine Service, Inc. ("Osage") was an owner of M/V CHARLIE BOY, a towing vessel on the Mississippi River. On July 19, 2015, the M/V CHARLIE BOY sank at or near Mile 172 of the Upper Mississippi River, killing Oliver Johnson, Osage's employee.

Osage subsequently brought an action pursuant to 46 U.S.C. §§ 30501-12 to limit its liability to $30,000,

which Osage claims was the value of the M/V CHARLIE BOY. Osage moved the court for an order approving the security value in the form of a letter of undertaking in the amount of $30,000 by Osage's insurers. On September 24, 2015, the court entered an order approving the security for value, issued notice to all claimants, and stayed all legal proceedings pending final disposition.

Claimants moved to dissolve the restraining order to allow them to proceed with their Jones Act and maritime wrongful death actions in state court, and filed stipulations concerning the court's exclusive jurisdiction over matters regarding the limitation fund.

The court first noted that state courts may adjudicate claims against the limitation fund so long as the vessel owner's right to seek limitation of liability is protected. It then noted that there are two kinds of limitation cases in which claimants can pursue their remedies in a forum of their choosing: first, when the limitation fun exceeds the total of all claims; second, with a single claimant, when only one claim exceeds the value of the fund. In the second, a claimant can pursue an action in state court if he or she concedes all questions of limitation of liability will be decided by the district court.

The court reasoned that the present claim falls squarely in the second category. The court concluded, however, that the claimants' stipulation to concede questions of limitation would be decided by the district court did not apply to all vessel owners, which included the entity that charted the M/V CHARLIE BOY on the date of the incident. Accordingly, the claimants' motion to dissolve the restraining order was denied.

Submitted by DJC/VCR

In re the Complaint and Petition of RLB Contracting, Inc., as Owner of the Jonathan King Boyd its Engines, Gear, Tackle, etc. in a Cause for Exoneration from or Limitation of Liability, 2016 U.S. Dist. LEXIS 9973 (S.D. Texas Jan. 28, 2016)

Plaintiff RLB Contracting, Inc. ("RLB") filed this action to seek exoneration from or a limitation of its liability to Claimants Alfredo Elizondo ("Elizondo"), Mario Garza ("Garza"), and Juan Montoya ("Montoya") (collectively, "Claimants"), each of whom had an individual personal injury action for damages pending against Petitioner RLB in three separate state court cases. Each of the three claimants alleged that he was injured while performing his duties aboard Petitioner's vessel, the Dredge *Jonathan King Boyd* (the "Dredge") and each injury was alleged to have occurred on separate days and under separate circumstances. The aggregate damages claimed by Claimants were $7,500,000. RLB filed a verified Ad Interim Stipulation for value and a Letter of Undertaking representing that its interest in the vessel was $1,600,400.00. Claimants filed claims in the limitation action and moved to lift the stay, arguing that their stipulations were sufficient to protect RLB's rights under the Limitation of Liability Act. RLB opposed the motion.

In considering whether the stipulations were sufficient, the Court stated that a stipulation accepted by the Court must be sufficiently clear and definite for the Court to enforce it or to enable the Court to enter a final judgment in accordance with its terms. In this case, where the aggregate claims total $7.5 million were made by three separate Claimants for injuries arising from three separate incidents, and where the limitation fund was approximately $1.6 million, the Court ruled that the Claimants' Stipulations appeared in conflict and provided no clarity on how a final judgment should be written if the recoverable claims exceed the limitation fund.

The Court found that although stipulations and agreements that adequately safeguard Petitioner's absolute right to the Limitation Act's liability cap ultimately may be reached, there were inadequacies in the present Stipulations of Claimants that required Claimants' Motion to Lift Stay be denied. The Court found that the case should remain before it for the conduct of pretrial discovery. The Court found that it serves the interests of all parties for one forum to give oversight to pretrial discovery regarding Claimants' claims. Therefore, the Court denied Claimants Alfredo Elizondo, Juan Montoya, and Mario Garza's Motion to Lift Stay.

Submitted by SMM

In re Sterling Equipment, Inc., 2016 U.S. Dist. LEXIS 20263 (E.D.N.Y. Feb. 17, 2016)

Sterling Equipment, Inc. filed a petition for limitation of liability in connection with damage which

allegedly arose out of an allision involving a Sterling barge and a tug boat owned by Henry Marine.

The Sterling barge was being towed by the Henry Marine tug when the allision occurred. The Coast Guard found that the Nassau County Bridge Authority's ("NCBA") "unreasonable delay" in opening the Atlantic Beach Bridge may have been the cause of the allision, and recommended a penalty against the NCBA. The NCBA filed a claim against Sterling and others in a separate proceeding in the Supreme Court of New York alleging that the defendants negligently and/or recklessly operated the tug causing an allision with the bridge.

Prior to the expiry of six months after it received written notice of the state court action, Sterling initiated the instant limitation proceeding. The Court issued an order restraining further prosecution of claims related to the accident and directing potential claimants to appear and respond to the petition on or before a date certain. The Court further ordered Sterling to give potential claimants and the public notice of the action.

Sterling gave the proper notice, and no answers, claims, or motions were filed within the requisite time period. Sterling then moved for the entry of a default judgment as to NCBA and Henry Marine pursuant Supplemental Rule F(4).

No party opposed the motion for default judgment or responded in any way. The Court therefore granted Sterling's Motion, and (1) entered a default judgment against NCBA and Henry Marine; (2) entered an order defaulting all claimants who failed to file; and, (3) barred all future claims in connection with the incident.

Submitted by SPB

Maintenance & Cure

Block Island Fishing, Inc. v. Rogers, 2016 U.S. Dist. LEXIS 27307 (D. Mass. March 3, 2016)

Plaintiff was allegedly injured when he fell off the top bunk and injured his torso while working on board a Block Island fishing vessel. At the time of the incident, plaintiff was employed as a commercial fisherman by Block Island.

Upon his return to port, plaintiff was diagnosed and treated for a fractured rib. On November 4, 2013, plaintiff's treating physician cleared him to return to work without restrictions. In August of 2014, however, plaintiff's treating physician indicated that Plaintiff was not yet fit for duty. On November 18, 2014, plaintiff's treating physician concluded that plaintiff's condition had improved to the point that no "further formal follow-up" was necessary.

Plaintiff's counsel and an agent for Block Island had ongoing disputes regarding the amount of maintenance for monthly rental expenses due the plaintiff. Despite claiming that he was paying $1,600.00 a month in rent, the undisputed evidence ultimately proved that plaintiff's monthly rent had not exceeded $800.00 per month since November of 2013.

Block Island filed a complaint seeking: 1) a declaratory judgment as to whether it had any continuing obligation to pay plaintiff maintenance and cure; and, 2) a declaratory judgment as to whether it is entitled to the return of $13,027.80 in overpayments of maintenance and cure as a result of plaintiff's failure to provide accurate information regarding his expenses and medical treatment. Plaintiff filed a counterclaim alleging negligence under the Jones Act (Count I), unseaworthiness (Count II), continuing maintenance and cure (Count III), negligent or intentional failure to provide maintenance and cure (Count IV), and lost wages (Count V).

Block Island moved for summary judgment on both Counts of its Complaint, and on Counts III and IV of plaintiff's counterclaim.

The Court denied Block Island's prayer for return of $13,027.80 in overpayments of maintenance and cure. In doing so, and while noting some contrary authority, the Court agreed with the Fifth Circuit case, *Boudreaux v. Transocean Deepwater, Inc.*, 721 F.3d 723, 728 (5th Cir. 2013), which held that "once a shipowner pays maintenance and cure to the injured seaman, the payments can be recovered only by offset against the seaman's damages award — not by an independent suit seeking affirmative recovery." In its reasoning, the Court cited the interest in protecting seaman as wards of the Court, and noted that Block Island would still be able to offset any excess payment against any award the plaintiff recover under his Jones Act claim.

The Court also denied Block Island's motion for summary judgment on plaintiff's Counterclaim seeking recover for intentional and negligent failure to provide maintenance and cure prior to November 3, 2014. The Court noted that, while an employer is entitled to investigate a claim for maintenance and cure before tendering any payments, the issue of the prompt and proper payment of maintenance and cure is a matter for the jury to decide.

Regarding Block Island's request for a declaratory judgment as to whether it had any continuing obligation to pay plaintiff maintenance and cure, the Court noted that maintenance extends as long as the seaman is capable of improving through medical treatment, and terminates when "medical science can do no more." The Court found that the plaintiff reached maximum medical cure on November 18, 2014 because, while plaintiff complained that he still had trouble breathing and continues to feel pain, he offered no medical evidence to contradict his doctor's evaluation that he had achieved the maximum feasible recovery as of that date. For this reason, the Court declared that November 18, 2014 was the date of the termination of Block Island's maintenance and cure obligation.

Regarding Block Island's request for attorneys' fees as a result of plaintiff's counsel' allegedly bad faith conduct throughout the litigation, the Court noted that the request came too late as this request should have been made at the time of previous motions which were granted.

Submitted by SPB

Stermer v. Archer-Daniels-Midland Co., 2016 La. App. LEXIS 361 (La. Ct. App. Feb. 24, 2016)

Jones Act claim Archer-Daniels Midland Company, the parent company of Plaintiff Adrienne Stermer's employer (ARTCO), appealed an award of attorney fees for work to secure maintenance and cure payments. In the trial court, Stermer brought a Jones Act claim against ARTCO for damages, including maintenance and cure damages. ARTCO contested that Stermer was injured and contested the payment of maintenance and cure. The trial court found in Stermer's favor and awarded her damages including $150,000 in attorney fees based, in part, of ARTCO's arbitrary and capricious act in failing to pay maintenance and cure timely. On appeal, the Third Circuit Court of Appeals in Louisiana upheld the judgment and the finding that ARTCO was arbitrary and capricious, but reversed the attorney fee award because the trial court made no findings as to how it determined the amount of the award. On remand, the trial court made findings of fact and awarded Stermer more than $300,000 in attorney's fees. ARTCO appealed that award claiming that the trial court erred in awarding fees for time spent after maintenance and cure benefits were commenced and in improperly allocating the time Stermer prosecuted the maintenance and cure benefits as opposed to the other claims.

The Third Circuit Court of Appeals in Louisiana upheld the trial court fee award finding that the trial court's ruling on remand was well-reasoned and did not constitute a manifest error. The court held that Stermer was entitled to fees for work done in proving the maintenance and cure claim at trial because ARTCO's payment of maintenance and cure benefits was a conditional tender that required Stermer to prove her claim at trial. Further, the trial court's original findings that ARTCO was arbitrary and capricious in withholding maintenance and cure benefits were not improper and thus applied to the appeal. In addition, the court held that the trial court did not commit manifest error in allocating the time spent on prosecuting the maintenance and cure claim as all of the damages claims were "intertwined."

Judge Pickett dissented on the ruling that Stermer was entitled to fees after ARTCO began paying maintenance and cure. ARTCO's conditioning of its payment "under protest" had no legal significance, it paid the benefits and Stermer incurred no additional burden from that designation. Based on that fact, ARTCO should not have been ordered to pay fees once it began paying maintenance and cure.

Submitted by SMM

Marine Insurance

Lakeshore Sail Charters, LLC v. Acadia Ins. Co., 2016 U.S. Dist. LEXIS 30257 (N.D. Ill. March 7, 2016)

Plaintiff Lakeshore Sail Charters, LLC ("Lakeshore") purchased a seventy-nine foot schooner for use on the Great Lakes and, to insure the vessel, took out a policy from Acadia Insurance Company

("Acadia"), which covered damage to the vessel while voyaging the Great Lakes. In additional, Lakeshore purchased several endorsements which expanded its coverage, including a Loss of Earnings Endorsement, a Medical Payments Endorsement, and an endorsement expanding coverage to include a one-time trip from Maine to Chicago. The final endorsement required a certificate of inspection from the Coast Guard.

The ship encountered bad weather en route to the Great Lakes and sustained significant damage. The time needed to complete the repairs caused the ship to miss multiple festivals, and therefore lose expected profits. Lakeshore's claim for repairs for $100,700.64 was approved in the amount of $63,661.86. Lakeshore estimated its lost net profits at $385,000, but had a policy cap of $250,000. Acadia denied that claim in its entirety, and stated that the Loss of Earnings Endorsement was not in effect because the ship did not have a new certificate of inspection from the Coast Guard.

Lakeshore claimed that Acadia breached its contract to insure Lakeshore against damage to a sailing vessel and against resulting lost earnings. Both sides moved for summary judgment, and Acadia moved to strike two affidavits Lakeshore submitted in support of its motion. The affidavit and supporting affidavit at issue were submitted from Karen Randall, the manager of Lakeshore, contending the loss of earnings. Acadia's motion to strike based on her lack of qualifications and a lack of documentation to support the claim. This motion was denied because business owners are allowed to testify as to lost profits, even without being qualified as an accountant.

The court chose to apply state law interpretive rules because no admiralty law exists to guide the interpretation of the contract provisions at issue. The law of the state with the greatest interest in the dispute will apply. Here, the court decided Illinois law would govern because Lakeshore was an Illinois company and Acadia chose to insure the vessel on trips in the Great Lakes.

The court agreed with Lakeshore that the untitled endorsement was unambiguous and was not a limitation on the Loss of Earnings endorsement because it did not reference "fare paying passengers" like the untitled endorsement. As a result, no certificate of inspection was necessary to enforce the Loss of Earnings endorsement. Further, Acadia conceded that Lakeshore had a valid certificate of inspection for the trip from Maine to Chicago when the accident took place, and could not have gotten one for traversing the Great Lakes until it arrived there. Finally, Acadia claimed it did not need to pay because Lakeshore provided no sufficient proof of its loss, but the endorsement required only a good-faith estimate, so this argument was dismissed. As a result, Lakeshore's motion for summary judgment on the loss of earnings claim was granted.

Lakeshore next claimed that Acadia breached its contract by denying the remainder of the repair costs claim. The majority was for crew costs, which the court found unnecessary to the repair of the ship, and Acadia's summary judgment motion was granted as to that point. As for the remaining costs, the court finds that Lakeshore did not submit any evidence to support its claims, and thus granted Acadia's motion for summary judgment.

Finally, Lakeshore claimed that 215 Ill. Comp. Stat. § 5/155, which allows for recovery of attorneys' fees and/or statutory damages, applied to admiralty cases, and specifically admiralty cases concerning insurance coverage. The circuits are split on this issue. The court did not decide the issue, however, because Lakeshore could not meet the requirements even if the statute applied. There was no evidence that Acadia's denial of the claim was "vexatious and unreasonable." Any bona fide dispute over coverage is sufficient to resist such a claim, and Acadia presented enough evidence to sustain a bona fide dispute.

As an alternative to its claims that Acadia unreasonably refused to pay, Lakeshore claimed that Acadia took an unreasonably long time to pay. The court rejected this argument because Lakeshore presented no evidence as to why the length of time was unreasonable, only stating the length of time it took. Finally, Lakeshore's claim for statutory damages was tied to no concrete numbers, and therefore the court denied it.

Submitted by DJC/VCR

Markel American Ins. Co. v. Vantage Yacht Club LLC, 2016 U.S. Dist. LEXIS 8490 (Appeal Pending).

David Bagger was an employee of Vantage Yacht Club ("Vantage"), a boat rental company. Markel Insurance Co. ("Markel") insured one of the boats available for rent. On August 24, 2012, Brian Garland and a group of friends attempted to rent a boat, but were unable to pay for it. Bagger took the group on a boat ride regardless, using the boat insured by Markel. Bagger is not a licensed boat captain. Garland and his friends did not sign a rental agreement to use the boat. After the boat ride, Bagger docked the boat and Garland fell into the water and drowned.

Garland's estate brought a variety of negligence claims against Vantage as a result of the drowning. Primarily, Garland's estate alleged that Garland was caused to fall into the water because of the unsafe dock. Vantage's insurance policy covered liabilities arising from "ownership, maintenance, or use of" the boat at issue. The policy expressly required that (1) Vantage's Insured Property stay seaworthy during the life of the policy; (2) Vantage stay in compliance with all laws and regulations concerning its operations; and (3) that all persons who use the Insured Watercraft sign a rental contract. The policy also expressly excluded coverage for bodily injury caused by the use of Vantage's watercraft while it is used to carry passengers, and bodily injury not in the course of the rental business operation.

The court noted that the policy covered liabilities that arise out of the use of the boat, but that the complaint alleged that Garland fell after the boat ride and because Vantage did not take proper safety precautions with regard to the dock, not the boat. As a result, the incident was outside the scope of the policy, and Markel had no duty to defend Vantage.

Beyond this, the court found that Vantage breached the warranties at issue, again removing Markel's duty to defend Vantage. However, the doctrine of strict compliance requires that the warranty at issue concern "facts material to an insurance risk." Markel did not argue that any of the warranties it relied on to void the policy were material, and therefore the court did not hold that the alternative argument of breach of warranty voided the policy.

Finally, the court did not accept Markel's alternative argument that the policy exclusions eliminated its duty to defend the underlying state action, stating that Markel cited no evidence to support its arguments. However, as discussed above, Markel's motion was granted because the incident was outside the scope of the agreement.

Submitted by DJC/VCR

Naquin v. Elevating Boats, L.L.C., 2016 U.S. App. LEXIS 5329 (5th Cir. Mar. 22, 2016)

Elevating Boats was the owner of a land-based crane that collapsed, seriously injuring one of its employees and killing another worker. The injured worker filed suit under the Jones Act and prevailed at trial. That ruling was ultimately upheld on appeal. Elevating Boats then filed a third-party complaint against its insurers claiming that they had failed to defend and indemnify it in connection with the underlying lawsuit. One of the insurers moved for summary judgment claiming that it did not owe coverage for a land-based incident. The district court granted the motion.

The policy at issue provided that the insurer would indemnify Elevating Boats for any sums the insured became liable to pay as owner of the vessel and had paid in respect of any casualty or occurrence. Applying Louisiana law in the absence of controlling federal maritime precedent, the Fifth Circuit refused to read the policy in the piecemeal fashion suggested by Elevating Boats that coverage was afforded to a vessel owner for any amounts it had paid following a casualty. The court further concluded it was bound by its prior decision in *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580 (5th Cir. 1971), which required there be some causal connection between the operation of a vessel and the resultant injury. As the underlying injury did not arise out of Elevating Boats' conduct as vessel owner, there was no coverage under the insurance policy. Thus, the Fifth Circuit affirmed the district court's grant of summary judgment in favor of the insured.

Submitted by KMM

OCSLA

Mays v. Chevron Pipe Line Co., 2016 U.S. Dist. LEXIS 23047 (W.D. La. Feb. 23, 2016)

James Mays was an employee of Furmanite, which had contracted with Chevron to provide valve maintenance services for Chevron at its facilities onshore and offshore. Mays was working on a platform operated by Chevron in Louisiana territorial waters and was killed when a valve stem was expelled and struck him in the head. His survivors filed suit against Chevron, which asserted the claims were barred by the Louisiana Workers Compensation Act because Chevron was the worker's statutory employer. Chevron moved for summary judgment accordingly.

Plaintiffs contended that payment of benefits under the Longshore and Harbor Workers Compensation Act after Mays' death precluded application of the Louisiana act. The court concluded that this rule was applicable only where the injured worker was entitled to benefits under the LHWCA. The court then held that Mays was not entitled to benefits under the LHWCA through the provision of OCSLA extending LHWCA benefits to workers injured as the result of operations on the Outer Continental Shelf. Even though the accident did not have to take place on the OCS for a worker to get LHWCA benefits, there still had to be a substantial nexus between the work being done and production on the OCS. The court found such a substantial nexus to be missing. The court could find no causal link between work on the OCS and plaintiff's death. Thus, he was not entitled to benefits under the LHWCA. Thus, Chevron could assert the statutory employer defense.

The court then concluded that Chevron had not presented sufficient or competent summary judgment evidence as to one of the Chevron entities sued in the case. It found that the other entity was a statutory employer under Louisiana law and dismissed it from the case.

Submitted by KMM

Petrobras America, Inc. v. Vicinay Cadenas, S.A., 2016 U.S. App. LEXIS 4277 (5th Cir. Mar. 7, 2016)

Plaintiff Petrobras contracted with Technip to construct five riser systems to move crude oil from wellheads on the seabed to floating production storage facilities on the surface of the sea. Tether chains connected the risers to huge nitrogen-filled buoyancy cans to keep tension on the risers so that they would not kink and impede the flow of oil. Technip subcontracted the manufacture of these chains to defendant Vicinay. The chains supplied by Vicinay were defective and broke causing the loss of the riser system, loss of use of the storage facility, and loss of oil and gas production.

Petrobras and its insurer sued Vicinay in the district court asserting jurisdiction in admiralty and under the Outer Continental Shelf Lands Act ("OCSLA"). Vicinay moved for summary judgment arguing that plaintiff's claims were barred under the economic loss doctrine. All parties assumed maritime law governed the case. The district court also applied maritime law and granted Vicinay's motion. The insurers then sought to amend their complaint and alleged that Louisiana law, not maritime law, applied to the claim through OCSLA. The magistrate judge denied leave to amend, and the district court upheld that ruling. Underwriters appealed that ruling as well as the district court's grant of summary judgment to Vicinay.

The first issue for the Fifth Circuit was whether the choice of law argument was waived. The Fifth Circuit noted that the plaintiffs pled subject matter jurisdiction under OCSLA in their complaint, which triggered the choice of law rules under OCSLA. The court further observed that OCSLA's choice of law rules were mandatory and could not be waived or avoided. Thus, the insurer's choice of law argument was properly made.

The court then turned to the question of whether maritime or the law of the adjacent state applied under OCSLA. That question, in turn, depended on whether maritime law applies of its own force based on principles of location and maritime nexus. The court declined to determine whether the location test was satisfied and focused its attention on the maritime nexus test. The court found there was no potential disruption of maritime commerce where a component failed on an underwater structure in an offshore production installation causing the structure to fall to the sea floor. Moreover, the court noted that actions connected to the development on the Outer Continental Shelf were not maritime in nature.

Accordingly, the court concluded that Louisiana law, not maritime law, governed plaintiffs' claims. Accordingly, it reversed the district court's grant of

summary judgment and remanded for further proceedings.

Submitted by KMM

Tetra Technologies, Inc. v. Maritech Resources, Inc., 2016 U.S. APP. LEXIS 3214 (Feb. 24, 2016)

Tetra and Vertex were parties to a Master Service Agreement for Vertex's employees to provide work for Tetra. Vertex was obligated to defend and indemnify Tetra for injuries by Vertex' employees and to list Tetra as an additional insured on insurance policies. Tetra entered into an agreement with Maritech to salvage a decommissioned oil platform, and Tetra retained Vertex to perform some of the work. One of Vertex's employees was working as a rigger from a Tetra barge when he was injured. He filed suit against Tetra. Tetra, in turn, filed suit against Vertex and its insurer. The parties filed cross motions for summary judgment on the enforceability of the indemnity provision. The district court ruled in favor of Tetra, and Vertex and its insurer appealed.

The Fifth Circuit noted that the injury arose on the Outer Continental Shelf with jurisdiction under OCSLA. The issue, then, was whether maritime law or state law applied. The first issue for the court was whether the controversy arose on an OCSLA situs. The court noted that this question looked to where the focus of the specific work was to be performed not just the location of the injury. Reviewing the record on appeal, the Fifth Circuit concluded that it could not determine whether the injury occurred on an OCSLA situs. It could not determine whether the majority of Vertex's work was to be performed on a vessel or on a platform. Thus, the court could not conclude that the injury arose on an OCSLA situs.

The court then looked to whether federal maritime law would apply. The court again found little record evidence concerning the workers' duties to allow it to determine whether there was a maritime contract at issue. Unable to determine whether there was an OCSLA situs, the court could not determine whether maritime or state law would apply.

The district court had not determined whether there was an OCSLA situs because it held that Louisiana law would not void the indemnity agreement. The Fifth Circuit, however, concluded otherwise and held that a contract to salvage a platform from a decommissioned well had a nexus to a well under Louisiana law. Such a conclusion made the Louisiana Oilfield Indemnity Act applicable and would serve to void the indemnity provision if state law applied. As the Fifth Circuit could not conclude whether maritime or state law applied, remand was warranted to resolve the issue.

Submitted by KMM

Oral Contracts

Matter of Complaint of Moran Philadelphia, 2016 U.S. Dist. LEXIS 44422 (E.D. Pa. 2016)

This suit arose out of damage to a barge crane owned by Rhoads Industries, Inc. while it was being moved by a Moran Towing Corporation tug. On November 8, 2012, a Rhoads representative telephoned Moran and requested that it provide tug services to shift the crane barge. Other than this telephone call, there was no paperwork or emails that were immediately sent by Moran to Rhoads. The next day, Moran performed the services. During the movement, a section of the crane boom on the barge contacted the overhanging antenna platform of the U.S.S. John Fitzgerald Kennedy twice, causing each to sustain damage.

Rhoads filed suit against Moran for the damage. Moran moved for Partial Summary Judgment, seeking a determination that the Schedule of Rates, Terms and Conditions published on its website applied to the move based on custom in the tug industry and the course of dealing between the parties. Though Moran did not invoice Rhoads for the subject move, Rhoads had used Moran 11 times over the past 14 months, providing an invoice for each move which contained a notice that the move was subject to the online terms.

Rhoads argued that it should not be bound by Moran's online terms because Moran did not provide Rhoads a copy of the terms, did not provide Rhoads an invoice for the subject move purporting to incorporate the online terms, and that there was no course of dealing between the parties because Moran was not Rhoads's exclusive towing company.

The Court, in granting Moran's motion, found that the Schedule of Rates, Terms and Conditions applied to the move based on the custom in the industry to contract orally for work which would be subject to other terms established by the course of dealing between the parties. It further found that Moran's 11 moves for Rhoads was sufficient to establish a course of dealing and that Rhoads had adequate notice of the incorporation of the online terms.

Submitted by JTC

Practice and Procedure

Bennett v. Moran Towing Corporation, 2016 U.S. Dist. LEXIS 11305 (S.D. Texas Feb. 1, 2016)

Plaintiff, Wilbert Bennett ("Bennett") sued Defendant Moran Towing Corporation ("Moran Towing") asserting claims for personal injury under the Jones Act, 43 U.S.C. § 1349 and general maritime law. Bennett is a United States citizen who currently resides in the country of Honduras. Bennett alleged that he was injured in Puerto Rico while conducting discharge operations while working for Moran Towing as a crewmember aboard the M/V MARY ANN MORAN. Bennett received the majority of the medical treatment for these injuries in Houston, Texas and he continues to travel from Honduras to Houston to receive this treatment. Moran Towing is a New York corporation whose corporate offices are located in Connecticut. Moran Towing moved to transfer this case to the United States District Court for the District of Connecticut, New Haven Division, pursuant to 28 U.S.C. § 1404(a) alleging that this district would serve as a more convenient forum.

28 U.S.C. § 1404(a) allows a district court to transfer a civil action "for the convenience of parties and witnesses, in the interest of justice ... to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). The Court analyzed several factors to determine whether to transfer the action. Under 28 U.S.C. § 1404, the preliminary question for the district court is whether the suit could have been filed originally in the destination venue of Connecticut.

Next, the Court must determine whether on balance the transfer would serve "the convenience of parties and witnesses" and "the interest of justice," by weighing a number of private and public interest factors. The private concerns include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive. The public concerns include: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws of the application of foreign law.

In weighing the private and public concerns, the Court found that the District of Connecticut is not a more convenient venue and concluded that a transfer would not serve the convenience of parties and witnesses and otherwise promote the interest of justice and denied Defendant Moran Towing's Motion to Transfer Venue.

Submitted by SMM

Bland v. Omega Protein, Inc., 2016 U.S. Dist. LEXIS 7887 (W.D. La. Jan. 21, 2016)

This case arose under general maritime law when Bland, a Jones Act seaman and crewman of the F/V RACOON POINT, was struck in the head by a metal ring and injured while engaged in fishing operations. The RACOON POINT was owned and operated by Bland's employer, Omega Protein, Inc. ("Omega"). Bland moved for summary judgment in its favor on the issue of whether Omega arbitrarily and capriciously refused to provide maintenance and cure.

Generally, when there are doubts or ambiguities regarding a seaman's right to receive maintenance and cure payments, those doubts are to be resolved in favor of the seaman. However, a ship-owner is not required to immediately begin paying a claim when received, but rather may make a reasonable investigation of the claim prior to paying it. If a ship-owner unreasonably rejects the claim after investigation and the seaman is due maintenance and cure, the

ship owner becomes liable for maintenance and cure in addition to compensatory damages. If it is further found that the denial was arbitrary and capricious, then the owner may also be liable for punitive damages.

Bland's injury occurred on May 3, 2013. Bland was diagnosed with three skull fractures and underwent reconstructive procedures to repair them. By May 30, 2013, he was released to return to work without any restrictions by his treating physician, Dr. Noel, who found that Bland had reached maximum medical improvement. Subsequently, Bland moved to North Carolina and was seen on several occasions by another doctor, Dr. Puente, who ultimately opined that Bland was suffering from a traumatic brain injury, post-traumatic stress disorder, and depression, all related to the May 3, 2013 injury. Bland made a renewed claim for maintenance and cure, which Omega refused to pay.

In denying Bland's motion for summary judgment, the Court relied heavily on *Tullos v. Resource Drilling*, 750 F. 2d 380, (5th Cir. 1985), stating that summary judgment was not appropriate where there are conflicting medical diagnoses. The Court found that there was "extensive controversy" regarding whether Bland suffered a brain injury as a result of the accident, and that there were genuine issues of material fact regarding whether Bland's cognitive defects were related to a brain injury sustained as a result of the accident, or simply due to Bland's low IQ. In so finding, the Court cited the opinion of Dr. Noel that Bland had reached maximum medical cure by May 30, 2013. Further, the Court cited the report of a neuropsychologist, retained by Omega to review Bland's medical records, which directly conflicted with Dr. Puente's findings. Due to the conflicting opinions, the Court found summary judgment inappropriate.

Submitted by SMM

Energy Marine Services, Inc. v. DB Mobility Logistics AG, 2016 U.S. Dist. LEXIS 7406 (D. De. Jan. 22, 2016)

Plaintiff Energy Marine Services, Inc. ("EMS") obtained a maritime arbitration award against Schenker Libya for Transport Services Company ("Schenker Libya") in London for breach of a charter party. Plaintiff then filed this civil action to enforce the award, naming several entities in the DB Mobility Logistics AG ("DBMLAG") family of companies as defendants, including subsidiary Shenker Libya, and attaching DBMLAG property within the District.

DMBLAG moved to dismiss for failure to state a claim under Rule 12(b)(6). EMS argued that DMBLAG was liable for the judgment against Schenker Libya pursuant to alter-ego, agency, and/or partnership theories, and additionally argued that Rule E of the Supplementary Rules for Admiralty and Maritime Claims governed in admiralty attachment proceedings under Rule 9(h) to the exclusion of Rule 12(b)(6).

The Court determined that a motion under Rule 12(b)(6) was the proper vehicle to seek dismissal of the underlying suit, whether it involved attachment or not, and that a motion under Supplemental Rule E was the proper vehicle to request that the Court vacate a maritime attachment in appropriate cases.

The Court then found that EMS had failed to state a claim against DBMLAG under its alter ego, agency, and partnership theories and dismissed the claims against DBMLAG.

Submitted by JTC

Fick v. Exxon Mobile Corp., 2016 U.S. Dist. LEXIS 14164 (E.D. La. Feb. 5, 2016)

This action arose as a maritime personal injury case. Fick alleged that he and an associate were shrimping using a Carolina Skiff boat in a navigable waterway when the boat struck a pipe to the well owned by Exxon. Fick and his associate filed this suit against Exxon alleging that Exxon was negligent and sought compensatory and punitive damages under the general maritime law. Before the Court was a motion to reconsider filed by Exxon in response to the Court granting Fick's motion in limine to exclude testimony by Exxon's expert. The Court had initially ruled that Exxon failed to establish by a preponderance of the evidence that its expert was qualified by scientific, technical, or other specialized knowledge to testify as an expert in this matter. The Court also found that Exxon's expert lacked the education, experience, and expertise necessary for him to express the opinions contained in his report.

On its motion for reconsideration, Exxon argued that the Court inadvertently overlooked the Field Work Composite Drawing attached to Exxon's opposition to Fick's motion to exclude. Exxon argued that this led the Court to make a factual error, as the Court concluded that Exxon's expert "had no survey on which he could rely." Exxon further argued the Court should reconsider its order because its expert hired a survey company to survey the area surrounding Fick's allision site, and "[a] very thorough survey was completed by a very competent, international survey company, all under the direction of" Exxon's expert. Exxon also clarified that its expert's expertise is in interpreting survey data and not in performing surveys.

The Court granted Exxon's motion to reconsider and vacated its order prohibiting Exxon's expert from testifying. The Court then granted Fick's motion to exclude testimony in part and denied it in part and held that Exxon's expert may testify to as to part of his expert opinions.

Submitted by SMM

ING Bank N.V. v. Temara, 2016 U.S. Dist. LEXIS 1180 (D. Md. Jan. 5, 2016).

This matter began in District of Maryland with Plaintiff arresting a vessel to enforce a maritime lien for failure to pay for bunkers supplied to the ship while in Balboa, Panama, in October 2014. The sale of bunkers was arranged by O.W. Bunker & Trading A/S, which assigned its rights to Plaintiff ING Bank, N.V., pursuant to a security agreement.

CEPSA Panama, S.A., moved to intervene, alleging that it was the physical supplier of the bunkers to the vessel, that it had a maritime lien against the vessel for the unpaid bunkers, and that ING Bank, as assignee of O.W. Bunker & Trading, was liable for O.W. Bunker & Trading's nonpayment of CEPSA's bunker bill. The vessel's owner, Cimpship Transportes Maritimos, S.A., appeared, posted a bond, and secured the vessel's release.

O.W. Bunker & Trading's Terms and Conditions contained a forum-selection clause directing that "any dispute and/or claim arisen in connection with a Vessel detained by Seller at any port, place or anchorage within the United States shall be submitted to the United States District Court for the Southern District of New York."

ING filed a motion for summary judgment to dismiss CEPSA Panama's intervening complaint based on the forum selection clause in the O.W. Bunker & Trading Terms and Conditions. CEPSA argued that its claims against the vessel and ING were not governed by the Terms and Conditions because it was not a party to the contract. The Court, reasoning that "it would be wrong to allow an intervenor's interest to outweigh the primary party's interest in having the case proceed in the proper forum," granted ING's motion and transferred the case to the Southern District of New York.

Submitted by JTC

Johnson v. Pacarini USA, Inc., 2015 U.S. Dist. LEXIS 0973 (La. Ct. App. 4th Cir. Feb. 24, 2016)

Mr. Johnson, a longshoreman, filed a case for injuries against his employer and co-employee. The trial court granted defendants' ex parte motion to dismiss for abandonment, finding Plaintiff had initiated no activity in the case from July 2009 until July 2013.

On appeal, Mr. Johnson argued a letter written by his then-counsel on November 12, 2010, inquiring whether opposing counsel had any objection to setting the matter for trial, was sufficient action to defeat the abandonment argument. The Appellate Court considered Louisiana District Court Rule 9.14 and Louisiana Statute Art. 561. Under the Court Rule, no letter to counsel is required in order to set a case for trial; rather, plaintiff's counsel could simply have filed a motion to set. Under the La. Statute, abandonment occurs when the parties fail to take any step in the prosecution of the case for three years. Under Louisiana case law, the statute has three requirements: (1) a party take some "step" in the prosecution or defense of the action; (2) the step must be taken in the proceeding and, with the exception of formal discovery, must appear in the record of the suit; and (3) the step must be taken within three years of the last step taken by either party.

Under the manifest error standard of review, the Appellate Court found the Trial Court was not "clearly wrong or manifestly erroneous" in its findings. Because Louisiana District Court Rule 9.14 does not require a letter be sent to opposing counsel before setting a case for trial, the November 12, 2010 letter did not meet the criteria for Louisiana Statute

Art. 561 as activity furthering the case. The dismissal for abandonment was affirmed.

Submitted by SMM

Lugo v. Carnival Corp., 2015 U.S. Dist. LEXIS 173398 (S.D. Fla. Dec. 31, 2015)

Plaintiff Andres Lugo, *pro se*, filed a negligence claim against Defendant Carnival Corporation in the Southern District of Florida for injuries sustained on a cruise. During the cruise, Lugo fell from a ladder descending a bunk bed and injured his head. Lugo claimed that Carnival was negligent in failing to remedy the hazardous ladder situation as well as warn Lugo of the danger that the ladder posed.

Carnival moved for summary judgment arguing that any hazard the ladder created was an open and obvious condition. Lugo's response to Carnival's summary judgment motion was procedurally defective and Lugo did not controvert Carnival's Undisputed Statement of Facts. Therefore, the court accepted Carnival's statement of facts as true.

The Southern District of Florida granted Carnival's summary judgment motion finding that the alleged dangerous ladder condition was open and obvious. The court reasoned that Lugo and his family's use of the room and ladder for days before the accident demonstrated that any danger the ladder created was open and obvious. The court noted that even if the danger was not open and obvious, Carnival was entitled to summary judgment because there was no evidence that Carnival had actual or constructive notice that the ladder may be dangerous.

Submitted by SMM

Malin International Ship Repair & Drydock, Inc. v. Oceanografia, S.A. de C.V., 2016 U.S. App. LEXIS 5387 (5th Cir. Mar. 23, 2016)

Plaintiff owned a shipyard in Galveston, Texas. It performed work for the defendant but never received payment. It then brought suit for breach of contract and *quantum meruit*.

Defendant was the bareboat charterer of the M/V KESTREL. The charter agreement provided that it would purchase bunkers for the vessel at the current market price. Plaintiff attached the fuel bunkers aboard the vessel pursuant to Supplemental Admiralty Rule B two weeks after defendant took possession of the vessel. Defendant and the owner of the vessel moved to vacate the attachment on the grounds that defendant did not yet have title to the bunkers because they had not paid for them. The district court denied that motion.

Plaintiff then moved or summary judgment on its claims against defendant. It contended that defendant's agent had bound defendant for the repairs or that the invoices were ratified by defendant. The district court granted summary judgment to plaintiff. Defendant appealed both the order denying the request to vacate the attachment and the ruling on summary judgment.

Regarding the attachment, the Fifth Circuit defined the issue as whether the bunkers were defendant's tangible or intangible personal property. The court noted that the type of property interest sufficient to create a right to attachment is not defined in Rule B. Finding no clear precedent in maritime law, the Fifth Circuit turned to state law to determine whether defendant had sufficient interest.

Applying Texas law, the court noted that the charter agreement contemplated that defendant would purchase the bunkers at the time of delivery. It did not contemplate that payment would be made before title would pass. Thus, the court found that title passed on delivery. As such, defendant held an attachable interest in the bunkers so the district court was correct in refusing to vacate the attachment.

Turning to defendant's appeal of the summary judgment ruling, the court noted there was undisputed evidence that defendant agreed to pay plaintiff's invoices, thus ratifying the work that was done. The court found no issue of material fact as to the nature or amount of invoices and affirmed the district court's ruling.

Submitted by KMM

Sapp v. Wood Group PSN, Inc., 2015 U.S. LEXIS 173109 (E.D. La. Dec. 30, 2015)

Plaintiff Randall Sapp, a platform mechanic, sued multiple defendants including Abe Boat Rentals in the Eastern District of Louisiana for workplace

injuries. Sapp claimed that under Louisiana law Abe Boat Rentals was negligent and that this negligence caused Sapp's injuries. Abe Boat Rentals delivered a valve to a platform. Sapp alleged that Abe Boat Rentals signaled platform workers, including Sapp, to lift the valve and that Sapp injured himself when doing so.

Abe Boat Rentals moved for summary judgment, arguing that it held no duty to Sapp under maritime law or Louisiana law. Abe Boat Rentals claimed that even if it owed a duty to Sapp, there was no evidence it breached that legal duty. Abe Boat Rentals contended that any injury that Sapp sustained was too attenuated to be foreseeable. Sapp responded that Louisiana law applied via the Outer Continental Shelf Lands Act and the location of the platform on which the accident occurred, and that summary judgment should be denied on the issue of duty due to factual disputes and credibility concerns.

The Eastern District of Louisiana denied Abe Boat Rentals' summary judgment motion. The court agreed with Sapp that Louisiana law applied based on the OCSLA. Under Louisiana law, an independent contractor owes at least a duty to refrain from creating an unreasonable risk of harm or a hazardous condition to third parties. The court determined that Abe Boat Rentals was an independent contractor and thus summary judgment on the issue of duty was not warranted. Further, the court noted the accident and Sapp's injury was not too attenuated to be foreseeable. Additionally, the court found that a genuine issue of material fact existed as to whether Abe Boat Rentals, through its deckhand, knew that the work site was unsafe. Finally, the court noted that Abe Boat Rentals presented no evidence or argument that it did not breach a duty if one existed.

Submitted by SMM

Trotter v. 7R Holdings, LLC, 2016 U.S. Dist. LEXIS 42680 (D.V.I. March 30, 2016).

Michelle Trotter ("Trotter") was hired to serve as a chef on The M/Y OLGA, a yacht registered in the British Virgin Islands ("BVI") and owned and operated by Defendant 7R Charters Limited.

Trotter flew to St. Thomas, United States Virgin Islands, to meet the vessel, which was docked in St. Thomas for provisioning. The OLGA moved to Scrub Island, BVI, shortly thereafter, and while it was docked at Scrub Island, Trotter descended a set of stairs and fell, suffering injuries.

Trotter filed a complaint in the U.S. District Court for the Virgin Islands, asserting claims under the Jones Act and for unseaworthiness and maintenance and cure. Defendants appeared and filed a motion to dismiss for *forum non conveniens*, asserting that the appropriate forum for this matter was the BVI, where the injury occurred. Trotter asserted that the BVI was not an adequate forum because BVI courts are not obligated to apply the Jones Act to maritime claims and a jury trial would be unavailable.

The court noted that, when jurisdiction exists, a plaintiff's choice of forum should rarely be disturbed. But, citing *Eurofins Pharma U.S. Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 160 (3d Cir. 2010), the court found that it had the discretion to dismiss a case when: "(1) an alternative forum has jurisdiction to hear the case; and (2) when trial in the plaintiff's chosen forum would establish oppressiveness and vexation to a defendant out of all proportion to the plaintiff's convenience, or when the chosen forum is inappropriate due to the court's own administrative and legal problems."

In ultimately dismissing the case on *forum non conveniens* grounds, the court noted, among the factors cited as persuasive, that: (i) the accident occurred in the BVI and the BVI had jurisdiction to hear the case if brought in that forum; (ii) the BVI's judicial system was competent and capable of adequately dealing with the legal claims despite the fact that Plaintiff's Jones Act remedies, including the right to a jury trial, would be unavailable to her there; (iii) many of the potential fact witnesses resided in the BVI; (iv) foreign nationals were beyond the Court's subpoena power, which may prove to be problematic if the Court retained jurisdiction; and (v) trial in the BVI would provide a more expeditious and inexpensive process for the parties.

Submitted by JTC

In Re: Xarelto (Rivaroxaban) Products Liability Litigation, 2016 U.S. Dist. LEXIS 8739 (E.D. La. Jan. 26, 2016)

This case arose out of a discovery dispute between the Plaintiff's Steering Committee ("PSC") and Defendants in multi-district litigation ("MDL") over alleged defects in the prescription drug Xarelto. Both parties agreed that Plaintiffs were entitled to the custodial file of any current or former employee of Defendants that Plaintiffs sought to depose. The parties disagreed over whether Plaintiffs were entitled to the deponent's personnel file. The PSC contended that the relevance of the personnel files to their "rush to the market" theory of liability and in discovering employee bias weighed in favor of discovery. Defendants contended that the personnel files were not relevant to any claims or defenses, and that the privacy interests of the employees trumped Plaintiff's request.

The Court first explained that *Coughlin v. Lee*, 946 F. 2d 1152 (5th Cir. 1991) governed personnel file production. In *Coughlin*, the Fifth Circuit found that the lower court failed to weigh the competing privacy and discovery interests at issue, and remanded for consideration of ten factors outlined in *Frankenhauser v. Rizzo*, 59 F.R.D. 339 (E.D. Pa. 1973).

The Court found that six of 10 factors from *Frankenhauser* were applicable to the PSC request: (1) "the impact upon persons who have given information of having their identities disclosed;" (2) "whether the information sought is factual data or evaluative summary;" (3) "whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;" (4) "whether the plaintiff's suit is non-frivolous and brought in good faith;" (5) "whether the information sought is available through other discovery or from other sources;" and (6) "the importance of the information sought to the plaintiff's case." The Court found factors 1and 6 most relevant to the case, and found that the request for personnel files raised serious privacy concerns for employees. The Court concluded that the Plaintiffs failed to show sufficient relevance and particularity to its "rush to the market" theory and interest in discovering employee bias, and denied Plaintiffs' request for deponent personnel files.

Submitted by SMM

Seamen

Buras v. Sea Supply, Inc., 2015 U.S. Dist. LEXIS 1307 (La. Ct. App. 1 Cir. Feb. 29, 2016)

Buras, a seaman injured on a vessel, sought to have a release he had signed after reaching maximum medical improvement declared null and void. By his own choice Buras was unrepresented at the time he read and signed the release. In his Declaratory Judgment action to have the release set aside, he argued he was not fully aware he was giving up rights by signing the release. The trial court granted defendants' motion for summary judgment on the issue, and Buras appealed.

The Louisiana Appellate Court considered four factors in determining the validity of a seaman's release: (1) adequacy of the consideration, (2) the medical advice available and given to the plaintiff, (3) the legal advice available and given, and (4) the arms length of the parties (whether there was "overreaching"). In support of their summary judgment motion, the defendants had provided a transcript of the meeting between the adjuster and Buras. In the court's view, the testimony was clear that each of Buras' rights was explained to him clearly and accurately, and that Buras had consistently declined to get an attorney. Also, the deposition testimony of Buras made clear he understood his rights before executing the release and no one coerced him to sign it.

Though the Court noted that seamen are wards of the court and entitled to the court's careful consideration, the law does not impose a fiduciary duty on ship owners to serve as legal advisors to their employees. The Appellate Court affirmed the summary judgment for the defendants.

Submitted by SMM

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Warrior Queens, The QUEEN MARY *and* QUEEN ELIZABETH *in World War II*, Daniel Allen Butler, 175 pp., plus Photos, Acknowledgements, Bibliography and Index; Stackpole Books, Mechanicsburg, PA, 2002

By F. L. Wiswall, Jr.

This is a short book, but very well worth reading. As related in the earlier review of *Churchill Goes to War*, the *QUEEN MARY* was used by Winston Churchill in three of his wartime journeys, but the greatness of service of the two Queens in the era of the Second World War and until their retirement in the late 1960s clearly deserves far more attention. The *Warrior Queens* is as much a book about relevant pre-War political history, development of the Cunard White Star Line, and the decision to build these two tremendous ships, as it is about the exploits of the Queens during the eight years of their wartime service.

Both vessels were built by John Brown and Co., Ltd. on the river Clyde, the *QUEEN MARY* being the first and laid down in 1930 as "Hull No. 534." Owing to delay as a result of the economic crash, work on her was suspended and she was not launched until 1934. The *MARY* entered commercial service in 1936 and on her second try won the Blue Riband for the Atlantic crossing. In her first full year of service she carried 56,895 paying passengers; she was the largest ship in the world and not even warships were larger until the U.S. aircraft carriers of the 1960s.

The second of the Queens was not a true 'sister ship'; the *ELIZABETH* was laid down in 1936 after literally thousands of tests of hull design, was more efficient in propulsion, looked different in profile and in structural dimensions, and though both were over 80,000 gross tonnage, she was larger than the *MARY* by 3,000 tons. The *ELIZABETH* did have better sea-keeping qualities, whereas the *MARY* rolled and corkscrewed frequently and on one occasion, having been hit by a freak wave, rolled to about 2° of the capsize point; nevertheless the *MARY* remained the faster ship and did not lose the Blue Riband until the *S.S. UNITED STATES* captured it.

In 1939 Winston Churchill as new First Lord of the Admiralty at the outbreak of the War made the decision first as to the *MARY* and later as to the *ELIZABETH* that they should serve as troopships. The *MARY* had to be converted and this meant removing and storing virtually all of the cabin fittings as well as making material alterations and installing many new facilities for a vastly increased passenger complement. Part of this work was done in England but for both Queens the major part was done in Sydney, Australia. The conversion of the *ELIZABETH* took much shorter time, as she had never sailed commercially and most of the work for her intended passengers had never been done. In May 1940 the *MARY* left Sydney and delivered 5,000 Australian troops to Gourock on the Clyde, Scotland; after other troop voyages, in April 1941 alone both Queens carried 10,000 Australian and New Zealand troops to the Suez. A serious problem revealed itself, in that both liners – built for the North Atlantic run – had no air conditioning. Long voyages with oven-like heat in the occupied spaces resulted not only in crew discomfort but in illness and death among the troops, and the temperature did indeed drive men mad. On the *ELIZABETH* in July 1941 there was a heat-induced revolt among the troops and the ringleaders were taken to England, tried and sentenced to prison; despite this problem over 80,000 troops were transported from Australia by the Queens in eight months of 1941.

Following the U.S. declarations of War in December 1941 *MARY's* first voyage with American GIs was from New York to Sydney in February 1942 and more were carried on the same voyage by both Queens over several months. The major annoyance to the crews from the transport of Americans were the 'tons' of used chewing gum left in all manner of spaces aboard the ships which had to be painstakingly cleared of the mess, along with having to account at the end of each voyage for 50,000 empty bottles from soda embarked for the GIs that needed to be returned to Coca-Cola. The Queens were placed under control of the U.S. Navy for the duration of hostilities but were to be manned by Cunard crews – all expenses including crew wages

being paid by the United States. At the outset of the effort to transport American troops to the U.K. ("Operation Bolero"), General George Marshall queried the Staff Captain of the *MARY* whether she could be modified to carry as many as 15,000 troops – the transport of one entire Division on one voyage. Captain Grattridge made some calculations and said that at the right tide with a 54-foot draft she would very barely clear the top of the Holland Tunnel, provided that all troops were centered in the ship to prevent list and instructed not to move until a clear signal was given; Marshall consented and it was done on each departure.

In July of 1943 the *MARY* carried 15,740 troops and 943 crew on one voyage from New York to Gourock – the largest number of people ever embarked on one ship. A typical load of supplies for 12-13,000 troops was 155,000 lbs. of meat; 124,000 lbs. of potatoes; 76,000 lbs. of flour; 53,000 lbs. of eggs, butter and powdered milk; 31,000 lbs. of fruit; 31,000 lbs. of coffee, tea, and sugar; 20,000 lbs. of ham and bacon; 20,000 lbs. of jams and jellies; 4,600 lbs. of cheese; 6,500 tons of fresh water; 50,000 bottles of soft drinks; 5,000 cartons of cigarettes; 400 lbs. of candy; and unspecified amounts of razor blades, soap, shampoo, shaving cream, etc. No chewing gum was allowed.

Though both of the Queens were fitted with guns enabling reasonable combat against a surfaced U-Boat, their primary defensive measure was simply speed; faster than any warship or other large vessel, they could not be convoyed across the Atlantic in a traditional manner. To or from New York they were escorted over a certain distance from the port by the fastest warships available and the same was done entering or leaving Gourock; between these escort positions, painted in camouflage grey, they ran alone at full speed in precalculated zigzag patterns.

In this context, the particular tragedy of a voyage takes one entire chapter of this book – the October 1942 collision between the *QUEEN MARY* and the escorting cruiser *HMS CURACOA*. The ships were at all relevant times in clear sight of each other, over a long approach, and the known facts of the case are set out in great detail. The *MARY* was under specific orders requiring her to carry out the mandated zigzags and under no circumstances to stop her progress – these general instructions had to be generally known to all escort vessels. The end result of their maneuvers was that the *MARY* cleaved the *CURACOA* in two forward of her engine room by a "T-bone" collision. Only two officers and 99 crew of *CURACOA* were saved – 388 perished. The collision was kept quiet as a War secret, thus the official inquiry did not take place until 1945 under the chairmanship of a former Admiralty Judge, Mr. Justice Pilcher; the proceedings took 18 months and the decision was that all fault should be placed upon the cruiser. The Admiralty appealed and the Court of Appeal reduced the degree of fault to the cruiser to 2/3 and the remainder to Cunard White Star; the latter appealed to the House of Lords, but the decision of the Court of Appeal was upheld. Rather surprisingly the book (like the inquiry) made no mention of the real possibility of hydrodynamic interference; the cruiser was certainly too close to the bow of the *MARY* but hydrodynamic forces have been shown to attract the smaller vessel of those in close proximity across the bows of the larger ship.

The return voyages to America were not empty of passengers – there were wounded U.S. and Canadian troops taken care of by specially-installed facilities and medical personnel, and of course there were vast numbers of Axis prisoners-of-war to be transported to camps in 'the new world.' Ultimately there were many thousands of U.S. and Canadian troops to be returned home from action, and finally engagement of the *MARY* in "Operation Diaper" for which many passenger comforts were restored to her; she brought nearly 13,000 British war brides to New York and 16,000 to Halifax – and in many cases their children as well – to be reunited with their husbands. Meanwhile, in February 1946, the U.S. Navy returned the *ELIZABETH* to the Admiralty, and in September the *MARY* as well; they were finally transformed into the passenger liners for which the Queens are best remembered today.

In September of 1967 the Queens crossed courses with each other in mid-Atlantic for the last time. The *MARY* finished her voyage in Long Beach, where she remains as a hotel and tourist attraction. After a time the *ELIZABETH* was sold to shipowner C. Y. Tung; she perished in a fire of suspicious origin in Hong Kong harbor in January 1972, and was scrapped.

The *QUEEN MARY* and the *QUEEN ELIZABETH* sailed more than 1,100,000 miles and carried more than 15,000,000 military passengers in World War II service. This astounding record justifies Winston Churchill's praise of the *Warrior Queens* that "Without their aid the day of final victory must unquestionably have been postponed."

*****

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