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ADMIRALTY LAW SECTION
ADMIRALITAS

In This Issue

Introduction

Welcome to another issue of *Admiralitas*! Thank you to our contributors for providing Circuit-wide summaries of recent Winter 2022 maritime case law.

If you are interested in contributing to a future issue, whether through providing case law summaries, preparing a featured article, or identifying maritime practitioners, professors, or judges for potential future member spotlights, please let me know. We are always looking for more contributors!

Enjoy!
Adam B. Cooke, Editor, FBA Admiralty
Law Section Board Member

Interview with Attilio M. Costabel

by Michelle Otero Valdes, B.C.S.

Biography

Attilio Costabel began his distinguished legal career in Italy in 1962 as an apprentice at Uckmar Law Office handling general tax law, commercial, admiralty and litigation practice. In 1988, Mr. Costabel opened a Florida office, now called Rumrell, Costabel, Warrington, Thomas & Brock LLP with offices all over the state. As an adjunct faculty member at St. Thomas University School of Law, Mr. Costabel teaches Admiralty and Transnational Litigation.

1. How long have you been practicing law?
   56 Years.
2. What life experience drew you to practice law?
   My father who was in the business of coal trade and his business life was full of maritime litigation. He was actually spending most of his time with a famous Italian lawyer, in whose "footsteps" my father dreamed to see me. Following my father's legal vicissitudes fascinated me. I was in the office of my father's lawyer even before graduating from high school.
3. Where did you attend law school?
   First in Italy, Genoa, 1958-1962, then in Miami, 1984-1987.
4. Where did you begin your practice? What did that practice consist of? How long did you practice?
   I started my practice in Genoa, Italy, first as apprentice (1959) with the top Italian Tax Firm Uckmar, then associate (1962) of the prime Firm of Maritime Law, Mordiglia Law Office. All kinds of maritime law. In the Spring of 1970 I opened my own firm with my wife (an English barrister) in Genoa, and in the late 1970s opened a branch office in London. In 1981 I started moving to the USA for family reasons, and opened an office in the Insurance Exchange of Miami in 1982. I was admitted to the Florida Bar in 1988.
5. What does your current practice consist of?
   My practice is a mix of maritime law and of corporate/ international trade law.
6. How much of your legal practice has been at the federal level? How much of your practice has been at the state level?
   In the United States I have never appeared as counsel of record, but have acted in a supporting role.
7. How did you decide to focus your practice on Maritime and Admiralty law? What led you to practice Maritime and Admiralty law?
   At the time, Genoa was the busiest port in Italy. The possibilities were immense and, again, anything maritime fascinated me.
8. Without disclosing any identifying or otherwise privileged information, what is the biggest or most exciting case you have handled? What was the outcome? Why do you think that was the outcome? If the outcome was negative, what would you have done differently?
   Many. When I was still an apprentice in Italy, I worked with the legendary Uckmar's father in a Supreme Court case that changed Italian tax law. With my modest contribution of research and filing, I shared the success with father Uckmar.
   Next was a case that resolved a complex bankruptcy of one of the largest shipping companies of Italy. That case alone paid for getting my new home and office in London.
   In the past 10 years, I have been involved with the disaster of the "Costa Concordia" wreck.
9. At what point did you decide to teach Maritime and Admiralty law in addition to practicing in the area?
   In 1991 my friend Professor Siegfried Wissner asked me to give lectures on comparative law. My lectures were appreciated, and in 1995 I was asked to teach comparative law.
10. It has been said that those who can't do, teach. You practice Maritime and Admiralty law and teach Maritime and Admiralty law. Why become a law professor while being a practicing attorney?
    It is my belief that teaching and law practice go hand in hand advancing each other.
    In my classes I always use real cases from my practice, so that both the students and myself can see the issues against both backgrounds and gain perspective and solutions.
11. When did you begin teaching Maritime and Admiralty law?
    I believe in 1997, together with international business transactions.
12. Where are you currently teaching?
    St. Thomas University School of Law, Miami.
13. How long have you been the Maritime and Admiralty law professor there?
    From 1997 until today.
14. Are you a full time or part time professor?
    I am Adjunct.
15. As both a practicing attorney and a law professor, how have you balanced the two roles? What has been the most challenging part of balancing the two roles and do you have any advice for balancing these

roles?

The major issue to balance is time. My nights got shorter and shorter, but also happen to be the most productive.

16. Aside from continued legal education (CLE) courses, have you obtained recent certifications or participated in other programs recently? What are these programs and why did you participate in them? Would you recommend these courses to someone practicing in the field of Maritime and Admiralty?

    I have not sought after certifications. In fact, I am giving admiralty certificates to students at the school. Why should I certify myself?

17. As a law professor and a practicing attorney, you have engaged in writing extensively about your field of practice, what do you consider the most significant writing of your scholarship? Why do you believe this is the most significant writing of your scholarship?

    Again, many. But very recently the Supreme Court closed its opinion citing to my article and wishing that my suggestion should be taken into account. In a companion case, one brief relied on the same article citing it for three pages.

18. During your time as a law professor at St. Thomas University College of Law, what courses have you taught within the umbrella of Maritime and Admiralty law?

    Under the Maritime umbrella I have been, and still am teaching

    - **Marine Insurance**
    - **Yachting and Boating**
    - **Travel and Cruising**
    - **International Business Transactions (the course being half on Carriage of Goods by Sea)**
    - **Transnational Litigation**

19. Does the university offer a certificate program in Maritime and Admiralty? If so, how do you go about formulating the required courses? What is the expectation of the students upon completing the certificate? What do you expect students to gain from the certificate? What are the practical benefits of the certificate?

    Yes it does. I drafted the program. The students are expected to be able to show good foundations in admiralty when interviewing with admiralty firms. They gain credibility and will be able to blend into maritime firms seamlessly

20. Does the Maritime and Admiralty program at St. Thomas University College of Law include a practical component? Are students able to use the knowledge gained from the program in a meaningful way that would advance their professional development?

    There is still no practical/clinical component, but we are working at it. We hope to attract prime lawyers from our community.

21. Does the Maritime and Admiralty program at St. Thomas University College of Law also include a social component? Mentorship and alumni relations? Have you connected your previous students who are currently practicing with current or graduating students?

    Yes we have a Student Maritime Law Society. We are reviving it, possibly with a student blog, as soon as the effects of the pandemic subside.

22. What is your view on educational and professional mentorship?

    Extremely important and to be encouraged.

23. In your own education and professional formation, have you had mentors along the way?

    Of course, since my first days in Italy (Uckmar and Mordiglia) then here at my Alma Mater (UM) by Professor Richad Hausler and his wife Dean Jeanette Hausler.

24. How do you see your involvement in the formation of future attorneys? How would you categorize your role in that formation?

    The answer would be too long. In two words: being contagious.

25. What has been the most fulfilling part of being a law professor?

    Realizing that I am actually the one who is learning the most, after seeing the horrible boundaries of my ignorance. Building presentations for each class is what makes my day.

26. What is your expectation of your students?

    That they share with me the belief that there is no end to learning, and we must practice law accordingly.

27. What are the most pressing issues you see as confronting the legal profession today?

    Artificial Intelligence and technology may bring disruption and change to both the judiciary and the profession.

28. What do you believe are the solution to those issues?

    Become a Tech wizard. You always need a thief to catch a thief.

29. What is your expectation of the practice of law as it pertains to these issues?

    I am trying to be up to the times. I got a MIT Certificate on Blockchain, to begin, and I am following publications and conferences on AI.

30. What wisdom can you impart on students as they enter the practice of law given your experience?

    Sharing my own.

31. What excites you about the future of the legal profession? What excites you about the future of the practice of Maritime and Admiralty law?

    Artificial Intelligence and technology, the changes they bring, and learning to keep up.

32. Where do you see the practice of Maritime and Admiralty law in the next decade?

    Energy/Environmental issues are bringing changes, as well as mergers of operators creating mammoth groups that will cause medium size and boutique law firms to shrink or disappear.

Case Summaries: Winter 2022

1st Circuit

Negligent Grounding – Dismissal of Third Party Complaint Against Plaintiff / Yacht Purchaser's Agents: This case arises out of the grounding and total loss of a seventy-four (74) foot yacht. Plaintiff Afunday Charters, Inc., purchaser of the yacht, filed suit against the builder, Spencer Yachts, Inc. and employee Joseph D. Spencer alleging that Spencer negligently ran the yacht aground and that Defendants were jointly and severally liable for the loss. Sean Alonzo and Anthony Sabga, agents of Afunday, were on board the yacht when it grounded. Defendants Spencer and Spencer filed a third party complaint against Alonzo and Sabga. This district court granted dismissal of the third party complaint against Alonzo and Sagba. Defendants appealed dismissal of the third party complaint. The United States Court of Appeals for the First Circuit affirmed the judgment of the district court. The First Circuit held that the district court properly dismissed the third-party complaints pursuant to Fed. R. Civ. P. 12(b)(6) because neither Spencer Yachts nor Spencer would incur any meaningful benefit from impleading Plaintiff's agents Alonzo and Saba. *Afunday Charters, Inc. v. ABC Ins. Co.*, 997 F.3d 390 (1st Cir. 2021).

Submitted by George M. Chalos, Chalos & Co., P.C.

2nd Circuit

Shipping - COGSA Pre-Empts State Law Claims: Plaintiff-Appellant Herod's Stone Design ("HSD") filed suit in New Jersey State Court against Defendants-Appellees Mediterranean Shipping Company S.A. ("MSC"), and BNSF Railway Co, ("BNSF") for state law consumer fraud, contract, and tort claims resulting from damages to HSD's cargo. The matter was removed to the United States District Court for the Southern District of New York and Defendants moved for summary judgment. The District Court granted summary judgment in favor of MSC and dismissed the claims against BNSF. The district court held that (1) the U.S Carriage of Goods by the Sea Act ("COGSA") preempted HSD's state law claims; and (2) HSD's claims were barred by the terms and conditions in the sea waybill. HSD appeal the judgment of the district court.

On appeal, HSD argued that COGSA does not have preemptive force over HSD's state law claims. The United States Appellate Court for the Second Circuit affirmed the judgment of the district court. The Second Circuit held that COGSA preempts contrary state law claims of liability where COGSA is extended by a maritime contract and governed under federal law. The Second Circuit further held that the district court properly rejected HSD's time bar argument. *Herod's Stone Design v. Mediterranean Shipping Co. S.A.*, 2021 U.S. App. LEXIS 4269 (2d Cir. 2021)

Jurisdiction - Dispute Between Owner's and Charterer's Insurance Companies Over Alleged Abandonment of Vessel in Brazil Dismissed for Lack of Subject Matter Jurisdiction - Plaintiff Great Lakes Insurance SE ("Great Lakes") filed suit against Defendants American Steamship Owners Mutual Protection and Indemnity Association Inc. ("The American Club"), Shipowners Claims Bureau Inc. ("SCB"), George Gourdomichalis, and Efstathios Gourdomichalis (collectively "Defendants") for conspiring and the purposeful abandonment of the M/V ADAMASTOS (the "Vessel") in Brazil in January 2015. Plaintiff provided marine insurance to Pacific Gulf Shipping Co. ("Pacific Gulf") who entered into a charter party agreement with vessel owner Adamastos Shipping & Trading S.A. ("Adamastos Shipping") for Pacific Gulf to charter the Vessel. Adamastos Shipping was beneficially owned by George Gourdomichalis, and Efstathios Gourdomichalis. The American Club and SCB provided marine insurance to Adamastos Shipping for the Vessel.

On or about July 31, 2014, the Vessel arrived in Sao Francisco Do Sul, Rio Grand. Port State Control authorities in Brazil conducted an inspection of the vessel and found over forty-two (42) deficiencies on board and detained the Vessel. While under detention the vessel broke free of her moorings and grounded. Plaintiff alleged that Defendants failed, neglected, and/or refused to correct the deficiencies and complete the voyage. Plaintiff further alleged that while the Vessel was under detention, Defendants conspired to abandon the Vessel in Brazil. Phoenix Shipping & Trading S.A. ("Phoenix Shipping"), the technical and commercial manager of the Vessel and owned by George Gourdomichalis, and Efstathios Gourdomichalis, submitted notice to the Greek government and asserted that the company ceased operation of the vessel. Phoenix Shipping failed to provide notice to Adamastos Shipping. Thereafter, The American Club terminated the marine insurance for the Vessel.

The United States District Court for the Southern District of New York dismissed the lawsuit against Defendants for lack of subject matter jurisdiction and Great Lakes appealed. On appeal, Great Lakes argued that the district court erred in dismissal of the tort claims. The Second Circuit affirmed dismissal of the action. *Great Lakes Ins. SE v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n*, 848 Fed. Appx. 51 (2d Cir. 2021).

Pleading - *Twombley* and *Iqbal* Pleading Standards Applied to Dismissal of LOLA, Error Not to Permit Amendment: The action arises from a boating accident on the Niagara River where decedent Ahmed A. Umar was struck and killed after falling off his jet ski and was fit by Petitioner Christopher Bensch's pleasure craft. The Estate of Umar filed suit in New York state court against Bensch for wrongful death. Bensch filed an action in the United States District Court for the Western District of New York under the Limitation of Liability Act, 46 U.S.C. § 30501 *et seq*. and invoking the court's admiralty jurisdiction.

Umar moved to dismiss the complaint for failure to state a claim as the complaint provided only two paragraphs of the accident itself. Bensch opposed the motion and also moved for leave to amend the complaint to add an additional sentence on the accident. The magistrate judge recommended that the motion to dismiss be granted and that the motion for leave to amend be denied. In response Bensch filed a second motion for leave to amend to add additional allegations to the complaint. The magistrate judge recommended that the second motion be dismissed on the grounds of bad faith. The district court adopted the recommendation of the magistrate judge, dismissed the complaint, and denied the motions to amend. Bensch appealed.

The United States Court of Appeal for the Second Circuit affirmed in part, reversed in part, and remanded the action to the district court. The Second Circuit held that the complaint insufficiently plead Rule F(2) of the Supplemental Rules of Admiralty or Maritime Claims and failed to satisfy the plausibility standard under *Twombly* and *Iqbal* standard under Fed. R. Civ. P. 8(a). The Second Circuit further held that Plaintiff's second complaint satisfied the plausibility standard by its addition of additional factual allegations. Finally, the Second Circuit found that the district court erred in denying Plaintiff's leave to amend because the owner did not act in bad faith by arguing about the pleading standard for maritime claims. *Bensch v. Estate of Umar*, 2 F. 4th 70 (2d Cir. 2021)

Salvage - Salvor Established Entitlement to Salvage Lien Where Ferry was in "dire situation" Due to Engines Being Rendered Non-operational by Waves: The M/V AVA PEARL (the "Vessel") was owned by Rhode Island Fast Ferry. The Vessel was engaged in its routine passenger transport from Oak Bluffs, Massachusetts to Quonset Point, Rhode Island when the when the Vessel was struck by three (3) waves. The three (3) waves caused a small portable heater to strike the Vessel's emergency stop button which prevented the engines from operating. The Captain of the Vessel called "mayday" and dropped anchor. Cape Waterman, Inc., d/b/a Sea Tow Cape and Islands ("Sea Tow") responded and towed the Vessel to the Vineyard Haven Harbor

On March 20, 2019, Sea Tow filed an action in the United States District Court for the District of Massachusetts to recover salvage. A bench trial was held in the matter and the Court issued its findings of facts and conclusions of law. The Court awarded Sea Tow $66,500 in salvage, costs, and prejudgment interest. The Court held that Sea Tow successfully established a claim for salvage because the Vessel was in a dire situation. The Court further held that the award of $66,500 was appropriate because the degree of danger from which the Vessel was rescued was not particularly great and the risk incurred by the salvors in securing the property was limited. . *Cape Waterman, Inc. v. M/V AVA PEARL (O.N. 1238374)*, No. 19-10523-LTS, 2021 U.S. Dist. LEXIS 104607 (D. Mass. June 3, 2021).

Marine Insurance – Choice of Law Provision in Policy Supported Dismissal of Bad Faith Claim: Martin Andersson ("Andersson") purchased a marine insurance policy from Great Lakes Insurance SE ("Great Lakes") or his catamaran, The Melody. Andersson warranted that he would maintain The Melody in a seaworthy condition, and that he would not sail beyond Florida, the Bahamas, and the Caribbean Sea or farther than 150 miles. The Melody sustained damage when it hit a breakwater near the Dominican Republic. Great Lakes refused to cover the costs of salvage, repair, or replacement on the grounds that Andersson failed to maintain the vessel in a seaworthy condition and because he sailed outside of the bounds under the Policy.

Plaintiff Great Lakes filed an action in the United States District Court for the District of Massachusetts against Defendant Andersson for declaratory judgment to determine that it had no obligation to reimburse Andersson for any losses. Andersson filed counterclaims for breach of contract, equitable estoppel, and bad faith insurance claim settlement practices under M.GL. ch. 176D §3(9)(b), (d), and (e). Plaintiff moved for judgment on the pleadings and argued that Andersson's counterclaim for bad faith is barred under the Policy's choice of law provision because it arises under Massachusetts law rather than New York law. The Court granted Plaintiff's motion. The Court found that New York law applied and that Andersson failed to show that the application of New York law to his counterclaim would have conflicted with any well-established principle in federal maritime law or that New York had no substantial relationship to the parties or the transaction. *Great Lakes Ins. SE v. Andersson*, No. 4:20-40020-TSH, 2021 U.S. Dist. LEXIS 45723 (D. Mass. June 21, 2021)

Pleadings – Court Dismissed Claim for Negligent Misrepresentation Due to Lack of Allegations of Close Degree of Trust: - Overseas Moving Specialists, Inc. ("Overseas Moving") booked a shipment of cargo with Cargo Logistics International, LLC ("Cargo Logistics") from New York to Ashdod, Israel and described the cargo as 202 pieces of medical and office equipment. Overseas Moving inaccurately described the cargo in the bill of lading and consignee Tevel Logistics, Ltd. ("Tevel")failed to accept delivery of the cargo. Overseas Moving refused to declare the cargo abandoned which caused Cargo Logistics to incur demurrage and loss of shipping privileges with Zim Shipping Line ("Zim"). Plaintiff Cargo Logistics filed an action in the United States District Court for the Eastern District of New York to recover damages against Defendants Overseas Moving, and its owner, president, and chief executive Boaz Aviani for breach of contract, negligent misrepresentation, and fraud. Defendants moved to dismiss all claims against Aviani and the negligent misrepresentation and fraud claims against Overseas Moving.

The Court granted the motion to dismiss in part and denied the motion in part. The Court granted dismissal of Plaintiff's

claim for negligent misrepresentation and held that while Plaintiff relied on the representations of Defendants, Plaintiff did not allege a closer degree of trust between the parties than that of the ordinary buyer and seller, as required for a negligent misrepresentation claim. The Court denied dismissal of Plaintiff's claim for consequential damages because Plaintiff's allegations were more than speculative that it had a business relationship with Zim, lost it because of Defendants' unwillingness to declare the cargo abandoned after Tevel failed to collect the cargo, then regained shipping privileges with the nonparty after it paid the container fees were more than speculative. *Cargo Logistics Int'l, LLC v. Overseas Moving Specialists, Inc.*, 20-cv-2130 (MKB), 2021 U.S. Dist. LEXIS 163988 (E.D.N.Y. Aug. 30, 2021).

Pleadings – Colorado River Abstention Doctrine Inapplicable to Maritime Lien Claim When Concurrent Action Voluntarily Dismissed and Plaintiff Granted Leave to Amend to State Facts Giving Rise to Maritime Lien: Plaintiffs 192 Morgan Realty, LLC and Morgan Williamsburg, LLC ("Plaintiffs") commenced a Supplemental Rule C action against Defendants Aquatorium, LLC, Moretti Designs, LLC, and Jonathan Yaney ("Defendants") to recover dockage fees for the pleasure craft, Schamonchi, owned by Defendants. Clear Blue Waters Project LLC ("CBWP") moved to intervene and dismiss the action on the grounds that a parallel state court action requires Colorado River abstention and that Plaintiffs have failed to state a claim for relief. Magistrate Judge Levy recommended that CBWP's motion be denied in part and that Plaintiffs be given an opportunity to amend the complaint. The Court denied CBWP's motion to dismiss and found that there was no parallel state court action because Plaintiffs voluntarily dismissed the state court action. CBWP further argued that Plaintiffs failed to state a claim for relief. The Court considered the sufficiency of Plaintiffs' pleadings and found that the pleadings were insufficient. However, the Court allowed gave Plaintiffs leave to amend the complaint to allege requisite facts giving rise of a maritime lien under Supplemental Rule C. *192 Morgan Realty, LLC v. Aquatorium*, LLC, No. 20-cv-3627, 2021 U.S. Dist. LEXIS 212990 (E.D.N.Y. Nov. 3, 2021).

Submitted by George M. Chalos, Chalos & Co., P.C.

3rd Circuit

Admiralty Jurisdiction, Sovereign Immunity and the Act on Prevention of Pollution from Ships: On November 16, 2021, the Third Circuit Court of Appeals issued a precedential landmark ruling reversing the district court's dismissal of damage claims against the government for lack of subject matter jurisdiction and remanding the matter to the U.S. District Court for the District of Delaware for further proceedings. The NEDERLAND REEFER (the "Vessel") arrived at the Port of Wilmington, Delaware on February 20, 2019, to discharge a cargo of refrigerated bananas from Chile. Following a shipboard inspection, a US Coast Guard Captain of the Port Notice Letter dated February 22, 2019 was issued advising that the Vessel's departure clearance was being withheld and the Vessel was being detained pursuant to 33 U.S.C. § 1908(e) of the Act to Prevent Pollution from Ships (APPS - 33 U.S.C. § 1901, et seq.). The Owner and Operator of the Vessel acceded to the government's demands for an "Agreement on Security" to get the vessel back in service and provided, *inter alia*, a surety bond totaling $1,000,000 which was answerable for any claims *in rem* against the Vessel; agreed to continue to employ, house, feed, insure and pay total wages of the thirteen detained sailors; agreed to waive personal jurisdiction defenses; and agreed the security would stand in place of the *res*. In exchange, the United States agreed to allow the Vessel to depart and agreed to not arrest, seize, or attach the Vessel or any other property of the Owner or Operator.

Despite the Owner and Operator promptly meeting all the obligations in the Agreement on Security, the government unreasonably delayed the release of the Vessel for thirty-six days. Nederland Shipping Corporation ("Nederland") commenced an action in the District of Delaware seeking to hold the government liable for breach of the Agreement on Security and seeking an award for damages as set out at 33 U.S.C. § 1904(h), which provides: "A ship unreasonably detained or delayed by the Secretary acting under the authority of this chapter is entitled to compensation for any loss or damage suffered thereby."

The government moved to dismiss the lawsuit for lack of subject matter juris-

diction. District Judge Andrews agreed, ruling that there was no subject matter jurisdiction over the dispute, because the Agreement on Security was not a maritime contract and 33 U.S.C. 1904(h) did not include a waiver of sovereign immunity. The district court further found that any cause of action, whether brought as a breach of contract or statutory claim must be brought in the Federal Court of Claims pursuant to the Tucker Act (28 U.S.C. § 1491(a)(1)).

Nederland appealed the decision to the Third Circuit Court of Appeals. In reversing the district court, the Third Circuit succinctly summarized the issues: "The fight over the contract claim is thus whether it is a maritime claim and so properly subject to admiralty jurisdiction. As to the APPS statutory claim, the fight is whether 33 U.S.C. § 1904(h) waives sovereign immunity." The Third Circuit answered both questions affirmatively and reversed the district court on both causes of action.

Specifically, the Third Circuit ruled that the Agreement on Security is a maritime contract with the primary objective being to return the vessel to her maritime trade. The Court summarized, "the essential character and purpose of the Agreement was not to secure the Vessel and crew in port; that was already done. The *primary objective* of the Agreement was rather to set the Reefer free to pursue maritime commerce." (emphasis added). The Court went on to explain that the Agreement has a "genuinely salty flavor."

The Circuit Court further found that Nederland Shipping is entitled to pursue its statutory cause of action under 33 U.S.C. §1904(h) in the district court, as the statute waived sovereign immunity as Congress provided a cause of action available for any ship unreasonably delayed or detained by the government (stating "[N]o other actor could logically be held liable. The federal government causes the unreasonable detention, and the federal government thus provides compensation for the resulting loss or damage.").

Finally, the Third Circuit rejected the government's argument that the claims were to be exclusively heard by the Federal Court of Claims under the Tucker Act, stating "[c]laims premised upon statutes that provide for independent causes of action and that waive the government's sovereign immunity need not be channeled through the Tucker Act." The Third Circuit held that the after-the-fact remedy provided by 33 U.S.C. § 1904(h) is such a statute that provides an independent cause of action and therefore jurisdiction for the claim exists in the district court. *Nederland Shipping Corporation v. United States of America*, 2021 U.S. App. LEXIS 33920 3d. Cir. 2021).

Submitted by George M. Chalos, Chalos & Co., P.C.

LHWCA Immunity, Borrowed Servant Doctrine and Seaman Status: Defendant Maersk's CBA with a seafarer's union allowed it to hire temporary employees for ship repairs and maintenance while its vessels were in port. Plaintiff was hired as a day engineer to work on Maersk's vessel and was injured during his assignment. He understood his work was for one day, and that he would not be sailing with the ship. The day engineers were supervised by an employee of 3MC, a company supplying Maersk with employees to assist with supervision of day engineers. Plaintiff filed suit in state court alleging common law negligence. After his case was removed to federal court, plaintiff added 3MC as a defendant and added a Jones Act claim. Defendants filed motions for summary judgment arguing plaintiff was not a Jones Act seaman and his negligence claims are barred by the exclusivity provisions of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.* The District Court granted the motions, and the Court of Appeals affirmed. The court explained the LHWCA's comprehensive no-fault compensation benefits for work-related injuries provides the exclusive remedy to a covered maritime employee and displaces the employee's common-law right to bring a tort action against the employer and fellow employees. 33 U.S.C. §§ 904, 905(a), 933(i). An "employer" under the LHWCA includes a "borrowing employer" under the borrowed servant doctrine. To determine whether a borrowed employee relationship existed, the court looked to "(1) whether the borrowing employer was responsible for the borrowed employee's working conditions and (2) whether the employment was of such duration that the borrowed employee could be presumed to have acquiesced in the risks of his new employment." The court found that plaintiff was a borrowed employee when Maersk retained ultimate control over his work and the work area, requested and planned plaintiff's work on the ship, outlined the specific projects to be completed and provided the necessary tools for the job. Additionally, plaintiff's experience as a temporary employee and the nature of the assignment allowed him to quickly understand and acquiesce to the risks of working on the ship. The court also affirmed the lower court's finding that 3MC's supervising employee, who was also temporarily assigned to the job and was under Maersk's control, was likewise Maersk's borrowed servant. Thus, plaintiff was barred from pursuing common law tort claims against both defendants. Finally, the court held plaintiff did not qualify as a Jones Act seaman when he was hired to complete discrete repairs on the ship while it was in port and was not scheduled to go to sea. His connection to the vessel did not meet the second prong of the *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) two-prong seaman status test. The test requires the individual to contribute to the function of the vessel and have a connection to a vessel or group of vessels in navigation that is substantial in duration and its nature. The second prong separates sea-based maritime employees entitled to greater Jones Act protection from land-based workers like plaintiff with only transitory or sporadic connection with a vessel in navigation which does not regularly exposes them to the perils of the sea. *Fetter v. Maersk Line Ltd.*, No. 20-1426, 2021 WL 2978881 (3d Cir. July 15, 2021).

Submitted by Aksana M. Coone, Law Offices of Aksana M. Coone

4th Circuit

Contracts Disputes Act / Interpretation of Settlement Agreement: The Fourth Circuit, sitting in admiralty, considered the appeal of an award of summary judgment in a government contracts dispute under the Contracts Disputes Act. The Appellant was a shipyard who contracted with the government to repair three Navy ships: the USS Thunderbolt, the USS Tempest, and the USS Hurricane. After disputes arose concerning repairs of the USS Tempest, the government set off payment on repairs for the USS Hurricane. The parties then litigated and settled their dispute regarding the USS Tempest.

At issue was the release of claims from the USS Tempest settlement. The Fourth Circuit concluded that the language of the release regarding the USS Tempest was broad enough to include the release of any claim for the withheld payment on the USS Hurricane. The Court held that a provision releasing all claims "arising out of or in any way relating to the [Tempest] Contract" encompassed a claim for full payment on the USS Hurricane contract. Despite the existence of two separate contracts, in the absence of any specific reservation in the settlement agreement preserving the setoff claim, the Court concluded the parties must have intended for that claim to be released as part of the Tempest dispute. *E. Coast Repair & Fabrication, LLC v. United States*, 16 F.4th 87 (4th Cir. 2021).

5th Circuit

Jurisdiction - No Personal Jurisdiction over Non-U.S. Shipowner Under Rule 4(k)(2) for Collision with U.S. Navy Vessel in Non-U.S. Waters. Is This Still the Law?: As discussed in the last *Admiralitas* Case Survey, the original Fifth Circuit panel set up a call for an *en banc* rehearing in the case of *Douglass v. Nippon Yusen Kabushiki Kaisha*, 996 F.3d 289 (5th Cir. 2021), which involved a collision between a Japanese ship and a U.S. Navy destroyer in Japanese territorial waters causing the deaths of seven U.S. sailors and injuries to at least forty other Navy crewmembers. In the earlier panel opinion, the Fifth Circuit affirmed the District Court's ruling that personal jurisdiction over the Japanese vessel owner/charterer could not be constitutionally established under Federal Rule 4(k)(2). However, both the original and concurring opinions called into question the correctness of the prior Fifth Circuit precedent set forth in *Patterson v. Aker Solution, Inc.*, 826 F.3d 231 (5th Cir. 2016) and recommended rehearing *en banc*. On July 2, 2021, the Fifth Circuit vacated the original panel's decision and ordered that the matter be reheard *en banc*. The Rehearing *en banc* was held on September 21, 2021. No decision has been rendered at this date. Stay tuned.

Seaman Status - Crewmembers on Liftboats Who Work as Crane Operators are Not Exempt Seamen under FLSA for Overtime Purposes: As discussed in the last *Admiralitas* Case Survey, the Fifth Circuit in *Adams v. All Coast, L.L.C.*, 988 F.3d 203 (5th Cir. 2021) reversed a summary judgment by the District Court in favor of the employer where the District Court had found that licensed able-bodied seamen employed upon liftboats, but who spent substantial work time as crane operators, were considered exempt seaman under the Fair Labor Standards Act (FLSA) as to the payment of overtime. A petition for rehearing *en banc* was denied over the written dissent of two judges. Thereafter, the original panel opinion was withdrawn and substituted with a new opinion from the same panel, which again reversed the District Court's decision and remanded for further factual findings as per the court's instructions. The new opinion notes that the crane operators were not doing seamen's work of aiding in the navigation of the liftboats when operating the cranes, but were performing "industrial work" loading and unloading the customers' equipment and crews during the period that the liftboats were jacked up next to an offshore platform. The Fifth Circuit held that the plaintiffs' crane operation was not seaman work for the purposes of the FLSA seaman exemption from overtime. The matter was remanded to determine if the crane operators might qualified for the exemption otherwise, but noted that since crane operation is not considered seaman's work, if the District Court determines such work makes up a "substantial amount" of their work time, the plaintiffs/crane operators will not be exempt from overtime. Additionally, the panel's substituted opinion again reversed the District Court's summary judgment in favor of the employer with regard to the crewmember cooks onboard the liftboats, and remanded for the District Court to determine how much time the cooks actually spent preparing food for the vessels' crew (considered a "nautical duty") compared to the time spent preparing food for non-crew members, such as passengers or contractors. The Court noted that if the cook time for non-crew (assumed to be "differing work" or non-nautical work) was "substantial" (more than 20 percent of the work week), then the crewmember cooks would not be considered exempt seaman from the FLSA overtime rules. *Adams v. All Coast, L.L.C.*, 15 F.4th 365 (5th Cir. September 30, 2021).

Maintenance and Cure - Contribution Claim from Third Party Not Precluded by a Second Accident Requiring Maintenance and Cure to Same Seaman – The District Court held that the maintenance and cure contribution claim arising from an injury to a seaman caused by a collision between the vessel operated by the seaman's employer and the third party vessel ended when that same seaman's prior condition was aggravated by a subsequent accident three years later not involving the third party vessel, but while the seaman was working for the same employer. The Fifth Circuit reversed the District Court noting that the creation of a "new rule

for contribution claims involving multiple accidents" relieving the third party from contribution as a matter of law if the seaman is involved in a second accident was unfounded, because contribution claims for maintenance and cure could be analyzed "under familiar tort principals of causation." The Fifth Circuit stated that the "clear law governing contribution claims in this circuit" is that a third party is liable for the employer's payment of maintenance and cure "to the extent" that the third party's negligence "caused or contributed" to the employee's injury, and thus the need for maintenance and cure. The question of whether the third party's negligence "caused or contributed to the need for maintenance and cure payments" was a fact question to be determined by the trier of fact. *Poincon v. Offshore Marine Contractors, Inc*, 9 F.4th 289, (5th Cir. 2021).

Summary Judgment - Unsupported Speculation Does Not Prevent Summary Judgment in Favor of Vessel Owner in a 905(b) Turnover Duty Case – The Fifth Circuit affirmed a summary judgment dismissing a 905(b) claim against the vessel owner regarding a marine surveyor who was injured on the vessel when he fell from the top of a hatch he was inspecting. Testimony of the surveyor and other witnesses noted that no one actually observed any "foreign substance" or grease in the area of the slip-and-fall, but following the plaintiff's return home, he examined his work boots and noticed a "little bit" of grease on the tip of the boot. Reviewing the evidence *de nova*, the Fifth Circuit affirmed that since neither the plaintiff nor any eyewitness actually observed the grease in the area of the fall, the assumption that the later-discovered spot of grease on the boot came from the area of the fall was nothing more than "unsupported speculation" insufficient to defeat a summary judgment. *Patil v. Amber Lagoon Shipping*, 2021 WL 3889288 (5th Cir. August 31, 2021). (This case was not selected for publication by the Court in West's Federal Reporter.)

Arbitration - "Speedy" Arbitration? Case Ends Twenty Years Later – In 1999, a foreign seaman was injured on a vessel in international waters off the coast of Louisiana after making stops at U.S. ports. The seaman sued his employer and vessel owner/managers in Louisiana State Court back in 2000, which was removed to Federal Court, remanded to State Court in 2002, ultimately stayed by the State Court in 2006 against all defendants, including the vessel owner/managers as well as his employer, finding that the arbitration clause in the employment contract was enforceable as a matter of law. The seaman finally arbitrated the matter in India against only his employer wherein he obtained an arbitration award. The vessel owners/managers then filed a new federal lawsuit to confirm the Indian arbitration award under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (9 U.S.C.§207) and to enjoin the seaman from pursuing further litigation against the vessel owners/managers. The District Court granted summary judgment to terminate the seaman's "increasingly quixotic bid" to get higher damages in the United States. The Fifth Circuit agreed and affirmed, holding that the seaman's failure to include the vessel owners/managers in the arbitration when ordered by the State Court to proceed to arbitration against all parties, constituted a failure to prosecute his claims against the vessel owners/managers, such that the seaman could not "double dip via litigation." Thus, ending the claim after twenty years. *Neptune Shipmanagement Services PTE, Ltd v. Dahiya*, 15 F.4th 630 (5th Cir. 2021).

Limitation of Liability Act - Time Limit Not Jurisdictional – Fifth Circuit overrules the Case of *Eckstein:* The Fifth Circuit reviewed a district court's holding that the court lack subject matter jurisdiction over an untimely filed Limitation of Liability action based on the Fifth Circuit precedent in *Eckstein Marine Serv. L.L.C.*, 672 F.3d 310, 315–16 (5th Cir. 2012) which held that "a challenge to the timeliness of a limitation action is a challenge to subject matter jurisdiction." However, after the decision in the *Eckstein* case, the Supreme Court in *United States v. Kwai Fun Wong*, 575 U.S. 402, 135 S.Ct. 1625 (2015) held that time limitations in federal statutes such as the Federal Tort Claim Act were *non*jurisdictional unless Congress "clearly stated" that the time limitation was meant to be jurisdictional. As such, the Fifth Circuit noted that the intervening change in the law warranted a review as to whether the six month time limitation in the Limitation of Liability Act (46 U.S.C §30511(a)) was intended by Congress to limit the courts' subject matter jurisdiction. Finding "no clear textual indication" of such intent, the Fifth Circuit overruled the *Eckstein* holding and held that the time limitation set out in the Limitation of Liability Act was nonjurisdictional such that the District Court's decision dismissing the case for lack of subject matter jurisdiction was reversed and remanded accordingly. *In Re: Bonvillian Marine Services, Inc.*, 2021 WL 5708449, ____ F.3d_____ (5th Cir. December 2, 2021).

Limited Discovery Permitted Only as to Evidence Whether Garnishee Entitled to Sovereign Immunity – The Fifth Circuit allowed an immediate appeal on a discovery order in a garnishment case brought by a fuel supplier to enforce an arbitral award for non-payment for fuel obtained against Haiti's Bureau de Monetisation de Programmes d'Aide au Developpement (Bureau). The fuel supplier used a Rule B attachment to seize funds owned by Bureau in the possession of another fuel supplier (BB Energy) located in the United States. While the Rule B attachment was vacated, the District Court deferred the dismissal of the attachment to determine if attachment was available on the grounds of enforcing an arbitral award. The garnishee move to dismiss the case based on the Foreign Sovereign Immunities Act (FSIA) and the District Court issued an order allowing broad general discovery to proceed before ruling on the motion to dismiss. Because the FSIA provides immunity from costs, time and expense related to litigation as well as liability and because the sovereign immunity claim can be raised by a garnishee holding a foreign sovereign's property, the Fifth Circuit held that the discovery order was immediately appealable. On appeal, and the Fifth Circuit held that the discovery order should be modified so that discovery was limited to verifying allegations of specific facts crucial to an immunity determination. *Preble-Rish Haiti, S.A. v. BB Energy USA, LLC*, 2021 WL 5143757 (5th Cir. November 4, 2021). (This case was not reported in West's Federal Reporter.)

Demurrage Damages on Default Judgment with Personal Jurisdiction Affirmed - A foreign vessel owner filed

suit in the district court against Elephant Group, a Nigerian business, alleging that the Elephant Group chartered its vessel to deliver cargo to Nigeria in 2016 but failed to obtain proper permissions for the cargo which resulted in the port authorities preventing the unloading of the cargo, and causing the vessel to be detained for two and a half years. The vessel owner sought damages for demurrage, supply and maintenance charges against Elephant Group asserting a maritime attachment and garnishment pursuant to Federal Rule of Civil Procedure Supplemental Rule B of assets that the vessel owner alleged were present in the district. A default judgment was ultimately obtained against the Elephant Group for failing to answer the amended complaint, even though the Elephant Group attempted to make a restricted appearance under Rule E(8). The default judgment was appealed to the Fifth Circuit. The Fifth Circuit affirmed that the district court had personal jurisdiction finding that the vessel owner's good faith allegations in its complaint of assets in the district were the "jurisdictional facts" that generated Rule B *in personam* jurisdiction over the Elephant Group. The Fifth Circuit also affirmed the default judgment finding that the Elephant Group failed to present meritorious defenses to jurisdiction, which requires "definite factual allegations, as opposed to mere legal conclusions" and legal conclusions were all that the Elephant Group presented. *Tango Marine S.A. v. Elephant Group Limited*, 2021 WL 5755415, ____ F.3d_____ (5th Cir. December 3, 2021).

Submitted by Douglas W. Truxillo, Onebane Law Firm

6th – Circuit – No Cases

7th Circuit

LOLA – Vessel Owner Does Not Have Independent Right to Exoneration from All Liability: Decedent drowned after a vessel he worked on capsized in a lake. His employer and vessel owner filed a limitation of liability action in federal court under 46 U.S.C. § 30505(a), seeking to limit its liability to $25,000, its interest in the vessel. The vessel owner also sought exoneration of liability, which the court noted is missing under section 30404 but is mentioned in Rule F(2) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, an appendix to the Federal Rules of Civil Procedure. The lower court granted decedent's widow's motion to vacate the injunction it had earlier entered and allow her to file her claims in state court pursuant to the Saving-to-Suitors Clause, 28 U.S.C. § 1333(1). Vessel owner filed an interlocutory appeal under 28 U.S.C. § 1292(a)(1) and (a)(3) arguing the decision conflicts with *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001). The Court of Appeals affirmed. The court described the common practice of a claimant filing a stipulation waiving a claim of *res judicata* and agreeing that the federal court's decision as to the owner's maximum liability will control in the event a state court sets a higher figure. The claimant filed such a stipulation as to the limitation of liability but not as to exoneration of liability, asserting a state court is competent to decide whether the vessel owner bears any liability at all. The appellate court first examined whether any federal statute entitles a vessel owner to have a federal judge determine exoneration, and concluded the answer is no. Neither § 30505 nor § 30506 mention exoneration, so any entitlement to exoneration would lie in common law of admiralty. The court reasoned that Rule F is a restatement of old admiralty decisions and is not in itself a limit of liability or a reservation of exclusive federal jurisdiction, as the federal rules cannot abridge substantive rights or affect subject-matter jurisdiction. The court in *Lewis* summarized the common law decisions that led to Rule F, including the right of a single claimant to proceed in state court under the Saving-to-Suitors Clause. In situations where multiple claims would likely exceed the value of the vessel, it is appropriate for the federal judge to retain all aspects of the litigation including deciding whether the vessel owner is entitled to exoneration. However, in all other cases, it is enough for the federal court to set the maximum amount of recovery that a state court may allow. Stating it another way, the court held there is no independent federal right to exoneration. Citing to *Lewis* at 454, the court reiterated that "[W]here ... the District Court satisfies itself that a vessel owner's right to seek limitation will be protected, the decision to dissolve the injunction [and permit suit in state court] is well within the court's discretion." The court concluded that because decedent's widow is the only claimant seeking recovery, the district court can set the vessel owner's maximum level of liability based on the criteria in § 30505(a) which will fully protect the vessel owner's federal statutory rights. The lower court acted with its discretion to permit the substantive claim to proceed in state court. Notably, the court also held that no stipulations or concessions were even necessary under *Lewis*, as protections also come from statutes and judicial orders. Thus, when lifting or modifying an injunction to permit state court litigation, a federal district court judge should enter those orders essential to safeguard federal rights under § 30505(a). *Roen Salvage Co. v. Sarter*, 17 F.4th 761 (7th Cir. 2021).

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8th – Circuit – No Cases

9th Circuit

LHWCA and Extra Work Days: The U.S. Court of Appeals for the Ninth Circuit considered as a matter of first impression whether Section 10(a) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 910(a), applies when a worker who usually worked a five-day week also worked some extra days, resulting in more than 260 days worked in a year (in this case 264). *Id.* at 920, 922. The Court examined Congress' intent in enacting the Section 10(a) formula for calculating compensation, finding it was intended to apply to workers who work a five- or six-day workweek unless the employment was for less than a full year or the work was "'seasonal, intermittent, [or] discontinuous . . . .'" *Id.*, *quoting* S. Rep. No. 80-1315, at 6, *reprinted in* 1948 U.S.C.C.A.N. 1979, 1982.

The Court stated that the Section 10(a) formula was intended to be efficient and "contemplated some inaccuracy;" although it "slightly underestimated" the worker's earning capacity when working more than 260 days in a year, that result was insufficient "to overcome the statutory presumption" and justify applying Section 10(c) to determine the compensation due instead. *Id.* at 920; *see* 33 U.S.C. § 910(c). *Martin v. Sundial Marine Tug & Barge Words, Inc.*, 12 F.4th 915 (9th Cir. 2021).

CA State Meal, Rest and Wage Law Not Applicable to Outer-Continental Shelf: In two cases, the Ninth Circuit considered whether California's meal and rest period and wage-statement requirements apply to workers on the outer continental shelf ("OCS"). In each case, the Court found that they do not, reasoning that under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1333(a)(2)(A), an adjacent state's laws are only deemed to be federal law applicable to workers on the OCS where federal law is silent on an issue. *See Mauia*, 5 F.4th at 1072-73, *Newton*, 860 Fed. Appx. at 537.

The Court noted that the Fair Labor Standards Act ("FLSA") and its implementing regulations address meal and rest periods and wage-payment records. *Mauia*, 5 F.4th at 1073-74; *Newton*, 860 Fed. Appx. at 537. Although federal law does not require employers to provide such and does not specify the form of such records, it addresses both issues "by specifying that all rest periods and non-bona fide meal periods must be compensated" and requiring employers to maintain wage-payment records. *Mauia*, 5 F.4th at 1073; *Newton*, 860 Fed. Appx. at 537-38; *see* 29 U.S.C. §§ 201(c), and 29 C.F.R. §§ 516.2(b), 785.18, 585.19(a).

The fact that California's requirements for meal and rest periods and wage-statements are more prescriptive was irrelevant. Since "federal regulations address meal and rest periods [and wage-payment records], there is no gap in federal law for state law to fill." *Mauia*, 5 F.4th at 1074, *quoted in Newton*, 860 Fed. Appx. at 537-38. Consequently, California's meal and rest period and wage-statement requirements do not apply to workers on the OCS. *Newton v. Parker Drilling Mgmt. Servs.*, 860 Fed. Appx. 536 (9th Cir. 2021), and *Mauia v. Petrochem Insulation, Inc.*, 5 F.4th 1068 (9th Cir. 2021).

Submitted by Arthur Severance

10th Circuit – No Cases

11th Circuit

Damages – Prejudgment Interest for Past Pain and Suffering: In this maritime personal injury case, the 11th Circuit affirmed a trial court ruling denying the Plaintiff's request for prejudgment interest on a lump sum damages award that did not distinguish the amount for past vs. future pain and suffering. Prejudgment interest is not recoverable for future pain and suffering. Notwithstanding, the jury entered a lump sum damages award for past and future pain and suffering. The 11th Circuit ruled that the Plaintiff did not provide an objective method for the district court to determine upon which portion of the judgment, if any, to award prejudgment interest. The Plaintiff did not request a jury instruction on prejudgment interest, or an instruction that the jury should return an itemized verdict. *Lebron v. Royal Caribbean Cruises, Ltd.*, No. 20-14449, 2021 U.S. App. LEXIS 20551 (11th Cir. July 12, 2021).

Marine Insurance / Conflict of Laws – Significant Relationships Test: In this marine insurance coverage dispute, an issue arose relative to the choice of law as between Florida (Fla. Stat. § 627.428(1)) where bad faith is not required to recover attorney fees from the insurer and Georgia where an insured must establish bad faith to gain a fee entitlement. The 11th Circuit upheld the trial court ruling that Florida law must be applied under the Restatement (Second) of Conflicts of Law's "most significant relationship" test. The insurance contract was negotiated in Florida, it was finalized by delivery to a Florida insurance broker, the parties expected that the insured's boat would be moored in Florida, and the insurer calculated its rates based on the risk being in Florida. *RMI Holdings v. Aspen Am. Ins. Co.*, No. 20-14525, 2021 U.S. App. LEXIS 20926 (11th Cir. July 15, 2021).

Passenger Claims and Pleading Standards for Causation: In this passenger personal injury action, the 11th Circuit affirmed the dismissal of the Plaintiff's complaint on "shot gun" pleading grounds for failure to properly allege causation. The Plaintiff fell on the gangway of a cruise ship and alleged a number of

different theories of potential negligence. The trial court *sua sponte* ruled that the Plaintiff failed to plausibly plead causation because she never identified which one, if any, of the cruise ship company's alleged failures caused the alleged unevenness of the gangway flooring, she failed to plausibly allege causation as to her negligent failure to follow policies claim, and she did not allege facts concerning which company policy was allegedly not followed causing her injuries. The Court held that naked assertions, devoid of further factual enhancement, were not sufficient to state a plausible claim for relief. *Taylor v. Royal Caribbean Cruises, Ltd.*, No. 20-14754, 2021 U.S. App. LEXIS 23650 (11th Cir. Aug. 10, 2021).

Passenger Claims for COVID-19 Dismissed for *Forum Non Conveniens*: In this passenger personal injury matter, the 11th Circuit affirmed a district court's dismissal of a potential class action asserting that the defendant failed to properly take precautions to prevent an outbreak of COVID-19 on *forum non conveniens* grounds. Although the representative Plaintiff was a Wisconsin citizen and the cruise departed from Florida, the Court applied a modified *forum non conveniens* analysis given that the passenger ticket called for suit to be filed in Italy and for the application of Italian law. The Court held that the risks and difficulties associated with COVID-19 were foreseeable, and that the Plaintiff failed to meet his burden of proving that the pursuit of his claims in Italy would subject him to fundamental unfairness as he had not established he would have to travel to Italy in order to pursue his case, the forum selection clause in his ticket contract did not contravene public policy since the forum selection clause did not effectively limit defendants' liability for negligently causing personal injury, and, as Italy had a significant relationship to the dispute, it was not unfair to burden Italian jurors with resolving it. *Turner v. Costa Crociere S.P.A.*, 29 Fla. L. Weekly Fed. C244 (U.S. 11th Cir. August 19, 2021).

Maintenance and Cure – Misrepresentation of Prior Debilitating Medical Condition: In this maritime maintenance and cure case, the 11th Circuit affirmed the trial court's judgement in favor of the defendant based on the "McCorpen Defense" (McCorpen v. Central Gulf S.S. Corp., 396 F.2d 547 (5th Cir. 1968). The district court found that: (1) Ms. Witbart had a serious, debilitating medical condition that predated her employment with Mandara Spa; (2) Ms. Witbart intentionally misrepresented and concealed her preexisting condition from Mandara Spa before her initial and subsequent employment contracts; (3) the undisclosed condition was material to Mandara Spa's decision to hire Ms. Witbart; and (4) there was a causal connection between the withheld condition and the condition Ms. Witbart complained of in her lawsuit.

Significantly, the 11th Circuit rejected the Plaintiff's interpretation of Vaughan v. Atkinson, 369 U.S. 527 (1962). Ms. Witbart claimed that Vaughan required courts hearing maintenance cases to construe disputed medical evidence in the seaman›s favor. The 11th Circuit disagreed and explained that Vaughan resolved an ambiguity in favor of a seaman regarding the amount of maintenance and cure owed by the shipowner. Vaughan did not state that all ambiguities, or even evidentiary ambiguities, were to be resolved in every seaman›s favor. The 11th Circuit cautioned that such a reading would strip district courts of their ability to make credibility determinations when confronted with conflicting evidence during a bench trial. *Witbart v. Mandara Spa (Haw.), LLC*, 860 F. App'x 175 (11th Cir. October 8, 2021).

No Interlocutory Appellate Jurisdiction on Order Compelling Arbitration Where Stay Pending Arbitration Entered: In this maritime arbitration matter, the Plaintiff sought to appeal the District Court's order compelling arbitration. The 11th Circuit explained that interlocutory appellate jurisdiction was lacking because the district court entered a stay pending arbitration rather than a dismissal. The Court noted that an order compelling arbitration and dismissing the case would have been final and appealable. *Martinez v. MSC Cruises S.A.*, No. 21-12935-C, 2021 U.S. App. LEXIS 30301 (11th Cir. Oct. 8, 2021).

Maritime Liens – Vessel on the Hard Undergoing Repairs Not a Dead Ship: In this breach of contract case, the district court properly exercised maritime jurisdiction pursuant to the plaintiff's maritime lien over the M/Y "Alchemist". The 11th Circuit affirmed the trial court's rejection of the Defendant's argument that the yacht was not a vessel within the Federal Maritime Lien Act and was a "dead ship". The Defendant argued that the vessel was non-functional and ceased being a vessel because she sat on land for some time with no power. The Court noted that the Supreme Court has held that when a ship is being repaired, its character does not depend on whether the repairs are made while she is afloat, while in dry dock, or while hauled up by ways upon land because admiralty jurisdiction extends to all. The Court rejected the assertion that the vessel had been permanently withdrawn from navigation citing The Jack-O-Lantern, 258 U.S. 96, 100 (1922) (noting that even when only the skeleton of an old vessel remains and is extensively repaired, admiralty jurisdiction exists). *Am. Marine Tech, Inc. v. World Grp. Yachting, Inc.*, No. 21-11336, 2021 U.S. App. LEXIS 30660 (11th Cir. Oct. 14, 2021).

LHWCA - No Duty Owed by Vessel Owner to Contractor Diving on Vessel to Clean Hull Where Crew Did not Know of his Presence: In this maritime wrongful death case, the shipowner was able to pull the Plaintiff's claims into federal court by filing a petition for Exoneration From and/or Limitation of Liability. Discovery commenced and the court entered summary judgment in favor of the shipowner. The court found that the Plaintiff was an independent contractor diving on the vessel to clean the hull. The Plaintiff, however, never notified the crew that he was present before he began his dive. The Court also faulted the Plaintiff for failing to employ a dive flag, as required by safety regulations. More specifically, at the time of the Plaintiff's arrival, all crew members were inside the vessel. Even though the Plaintiff's employer customarily notifies the vessel when they are about to commence diving operations, the Plaintiff never did so. Instead, he approached the vessel without identifying himself or notifying the crew members on the vessel that he had arrived and was about to begin his dive. Because he then immediately entered the water without ever announcing his presence, no member of the crew was aware that he was under

the boat. The Plaintiff also failed to mark his presence in the water with a diver flag, as required by regulation. Unaware of the Plaintiff, the Chief Mate began the process of activating a bow thruster on the yacht to move it closer to the dock. Before activating the thruster, the mate walked around the vessel and looked into the water—he saw no bubbles. Seeing no danger, the mate activated the thruster, tragically killing the Plaintiff.

On summary judgment, the district court concluded that the Plaintiff was a "covered worker" within the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901 («Longshore Act») who could assert a claim against the vessel under section 905(b) of the Act. The court considered the three duties a vessel owes a contract harbor worker under that statute, as set out in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981): (1) a general duty to "turnover" a vessel in a safe manner to workers, (2) a duty to exercise reasonable care in the areas of the ship under active control of the vessel, and (3) a duty to intervene. The district court reasoned that "the premise of all of the *Scindia* duties is that the vessel crew knows that workers are present to work on the vessel.» The court found that the vessel owed no duty to the Plaintiff because "[n]ot only did the Plaintiff fail to notify anyone on the vessel of his presence or work operations, he submerged himself under the water—he became invisible to the crew." Accordingly, the court concluded that the vessel did not violate any duty owed to the Plaintiff, and granted summary judgment. The Court also concluded that even if the Longshore Act did not apply, meaning that general negligence principles applied, the Plaintiff raised no triable issues of fact regarding the vessel's negligence under maritime law as the vessel lacked actual or constructive notice of a risk-creating condition. *Brizo, LLC v. Carbajal*, No. 20-11204, 2021 U.S. App. LEXIS 32400 (11th Cir. Oct. 29, 2021).

Submitted by Michael W. McLeod

About the Contributors

George M. Chalos is the principal and founding member of CHALOS & CO, P.C. Mr. Chalos received his Bachelor of Science degree in Business Administration from the University of Vermont and his Juris Doctor degree from St. John's University School of Law. Mr. Chalos has been engaged in the practice of maritime, admiralty and insurance law for nearly twenty years, and is experienced in all facets of civil and criminal maritime matters, casualty and pollution response, Marpol, Oil Pollution Act of 1990 ("OPA '90"), Clean Water Act ("CWA"), and insurance coverage, defense, and handling of primary, excess, and reinsurance claims. Mr. Chalos is licensed to practice before the Supreme Court of the United States; all trial and appellate courts sitting within the states of New York, Texas, Utah, as well as the United States District Courts for the Southern, Eastern & Northern Districts of New York; the District of Connecticut, the Southern and Eastern District of Texas, the District of Utah, the Central District of Illinois, the Northern District of Florida, the District of Columbia and the First, Second, Fourth, Fifth, Ninth, and Eleventh Circuit Courts of Appeals.

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