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Inside This issue

Seaman's Retaliatory Discharge Claims

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Introduction

Under American common law, an employer can terminate his at-will employee for good reason, no good reason at all, and even morally wrong reasons.[1] This rule was not inherited from the English common law. Instead, it originated in this country and is traceable to an American treatise of the late 1800s.[2] The same rule was extended to seamen whose employment, in the absence of a contract providing for a definite term or voyage during which a seaman will be employed, could be terminated by either party at will.[3] Courts in admiralty, however, began carving out exceptions to this rule. As discussed below, presently, a seaman who is employed at will is protected against retaliatory discharge in violation of maritime public policy as defined by the case law and maritime statutes.

I. Retaliatory Discharge Under General Maritime Law

In *Smith*, the court was faced with the question whether a seaman whose at-will employment was terminated because he refused to drop a claim under the Jones

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This article will also be published in the upcoming Volume 64 of the *Revista de Derecho Puertorriqueño* and is also published here with the permission of the author.

1 Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057, 1060 (5th Cir. 1981).

2 *Id.*; H. G. Wood, Law of Master and Servant 282-86 (2d ed. 1886).

3 *Smith*, 653 F.2d at. 1060 *citing* Findley v. Red Top Super Markets, Inc., 188 F.2d 834, 837 n.1 (5th Cir.), cert. denied, 342 U.S. 870 (1951).

(Continued on page 4)

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Managing Editor's Introductory Note

In this edition, we first present an article by Gustavo A. Martinez on Seaman's Retaliatory Discharge Claims. Gustavo reviews the history and development of these claims and gives a detailed analysis of the applicable case law. He reports on all of the bases of protection afforded to seamen employed at will, both statutory and at common law.

We follow with an article by Camille Zuber on the fragility of the Arctic environment, the role of international law in protecting it, and the need for further protections against the risks posed to it by vessel-source pollution such as black carbon and underwater noise. She concludes "[t]he Arctic is one of the most fragile and important ecosystems on Earth, and its protection requires robust international action… The path forward is clear, but continued efforts and collaboration are essential to ensure that the shipping industry can meet the growing regulatory demands and help protect the Arctic marine environment." [Editor's Note: for those interested in matters relating to Arctic shipping and the Arctic environment, we refer you to previous publications in Benedict's Maritime Bulletin, including "Reporting from the Top of the World: We Need To Talk About Indigenous Peoples In Arctic Shipping" by Ilker Basaran, 16 Benedict's Mar. Bull. 33 (First Quarter 2018); "IMO Polar Code: A Historical Achievement For The Future of Arctic Shipping" by Ilker Basaran, 13 Benedict's Mar. Bull. (Third Quarter 2015); and "Northern Sea Route And The Misleading Concept Of 'Ice-Free' Arctic" by Ilker Basaran, 12 Benedict's Mar. Bull. (Fourth Quarter 2014).]

We next present Bryant Gardner's column "Window on Washington." Here, Bryant gives a detailed description of the bipartisan effort in Congress to address the woeful state of American flag shipbuilding and fleet numbers. He reviews the proposed Shipbuilding and Harbor Infrastructure for Prosperity and Security (SHIPS) for America Act. The Act aims to broadly restore and revitalize American shipbuilding and the deep water, international trading US-flag fleet. As Bryant says, the Act would "prioritize maritime affairs within the administration, stand up a strategic commercial fleet, reduce regulatory red-tape hampering the commercial competitiveness of US-flag vessels, tax-incentivize shipbuilding in US yards, strengthen US-flag cargo preference, and bolster American mariner recruiting and retention. He concludes "The effort represents the first serious attempt to reform the US maritime industry in a generation. As the US feels increased pressure to keep up with China's burgeoning maritime industry and reenters serious peer nation military competition, a measure like the SHIPS Act will be necessary to maintain America's place among maritime nations."

Matthew A. Moeller presents a preview of a new challenge to the *Robins Dry Dock* rule that disallows claims for recovery for purely economic damages. He focuses on claims arising out of the allision of the M/V DALI with the Francis Scott Key Bridge, and in particular, the group of claims brought as a class action for loss of revenue and increased costs that continue to incur due to the blockage of the Patapsco River Channel. He concludes "it seems unlikely that the numerous claimants can sustain a class action within the limitation proceeding. However, regardless of whether the claimants ultimately qualify for class action status or not, the fundamental issue is whether the claims ultimately fit into a judicially implied or expressed exception to *Robins Dry Dock* or whether this case results in a novel exception." Stay tuned for developments in this latest challenge to the long standing rule of admiralty law. [Editor's Note: for those interested in another discussion of the *Robins Dry Dock* rule, see "Robins Dry Dock Rule- Still A Clear-Cut Doctrine Of Maritime Law?" by Destinee Finnin Ramos, 16 Benedict's Mar. Bull. 29 (First Quarter 2018).]

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

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

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

Seaman's Retaliatory Discharge Claims

By Gustavo A. Martinez Tristani, Esq.

(Continued from page 1)

Act against his employer, had an action in admiralty for wrongful or retaliatory discharge. Smith, a seaman, suffered an ankle injury while working aboard his employer, Atlas Off-Shore Boat Serv., Inc.'s (Atlas), vessel. After he received treatment and returned to work, Smith informed the Atlas' port captain of his intention to file suit against Atlas under the Jones Act, 46 U.S.C. § 688 (now codified as 46 U.S.C. § 30104). The port captain informed Smith that unless he abandoned his claim he could not return to work for Atlas. When Smith refused to drop the claim, the captain terminated his employment and Smith filed a lawsuit against Atlas under the Jones Act and for retaliatory discharge, a claim presumably based on general maritime law.[4] The district court determined that Smith had been intentionally and wrongfully discharged and awarded him $1,000.00 in punitive damages.

Atlas appealed to the United States Court of Appeals for the Fifth Circuit challenging the existence of a cause of action for retaliatory discharge under general maritime law. The Court found public policy reasons justified the recognition of the cause of action, noting that:

> The employer should not be permitted to use his absolute discharge right to retaliate against a seaman for seeking to recover what is due him or to intimidate the seaman from seeking legal redress. The right to discharge at will should not be allowed to bar the courthouse door. Nor does the struggle affect only the employer and the seaman. To permit the seaman's discharge because he resorts to the courts may result in casting the burden of the employer's reprisal in part on the public in the form of unemployment compensation or social security for the worker or his family.
>
> The recognition of a cause of action in admiralty providing the seaman with relief from a discharge caused by his filing of a claim against the employer is particularly appropriate in light of the admiralty court's protective attitude towards the seaman. The judiciary's leading role in fashioning controlling rules of maritime law and in reshaping old doctrine to meet changing conditions makes the admiralty court peculiarly sensitive to the inequities inherent in the traditional rule. Moreover, this type of cause of action is not without federal precedent.[5]

Based on this policy, the Court reaffirmed the rule that a maritime employer may terminate a seaman at will, but concluded that "a discharge in retaliation for the seaman's exercise of his legal right to file a personal injury action against the employer constitutes a maritime tort."[6]

Relative to the seaman's burden of proof, the Court explained that:

> [I]n order to prevail on the retaliatory discharge claim, the seaman must affirmatively establish that the employer's decision was motivated in substantial part by the knowledge that the seaman either intends to file, or has already filed, a personal injury action against the employer. The employer may, on the other hand, defeat the seaman's action by demonstrating that the personal injury action was not a substantial motivating factor for the discharge.[7]

Furthermore, "[t]he claim . . . may be joined with the seaman's personal injury action under the Jones Act and, like the general maritime law cause of action for unseaworthiness, may be tried to the jury along with the Jones Act claim even in the absence of diversity."[8] It

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4 *Id.* at 1059.

5 *Id.* at 1062-63 (internal citations omitted).

6 *Id.*

7 *Id.* at 1063-64 (emphasis added).

8 *Id.* at 1064 (The decision that the retaliatory discharge claim may be presented to a jury that is also expected to hear testimony concerning the plaintiff's physical injury is, according to some, the most significant aspect of the *Smith* decision. "The danger inherent in this situation is that the charge of abusive firing following an injury, and particularly any evidence supporting the charge, could affect the jury decision as to the personal injury claim itself. Given the reality of such an advantageous position, there may be an incentive to file frivolous suits alleging retaliatory discharge if only to discredit the employer in front of the jury. In some cases, the tactic might serve to increase quantum significantly." *See* Virginia Boulet, *General Maritime Law Provides Seamen Cause of Action for Retaliatory Discharge-Smith v. Atlas Offshore Boat Service*, 6 Mar. Law. 295, 299–300 (1981).

should be noted, however, that when the claim is filed in Federal court and is identified as an action brought in admiralty, no right to jury trial exists.[9]

As far as the extent of damages the seaman is entitled to recover, the Court expressed:

> The employer's retaliatory discharge is properly characterized as an intentional tort, entitling the seaman to compensatory damages caused by the abusive firing, including the seaman's expenses of finding new employment, lost earnings while the seaman seeks another position, and lost future earnings if the seaman's new job provides less remuneration than that earned while the seaman was in the employ of the defendant. In addition to these economic losses, the discharged seaman may be entitled to recover compensatory damages for mental anguish that he may suffer as a result of the wrongful discharge. In determining the amount of compensatory damages to which the discharged seaman is entitled, the seaman's duty to mitigate his losses by seeking new employment is also a consideration. Moreover, the seaman is not entitled to double recovery for any element of damages that is compensable both under his personal injury claim and the retaliatory discharge claim. For example, wages lost between the time of injury and the date the seaman undertakes new employment that are recoverable by the seaman on his Jones Act claim may not also be recovered on the claim for retaliatory discharge. The employer should not, however, be further penalized by the inclusion of punitive damages in the seaman's list of items recoverable.[10]

The Court, thus, reversed the amount of punitive damages awarded by the District Court with instruction on remand to allow evidence on the actual losses suffered by the seaman.[11]

The viability of a seaman's retaliatory discharge cause of action was tested again in *Donovan v. Texaco, Inc.*, 720 F.2d 825 (5th Cir. 1983). In *Donovan*, a seaman (a Coast Guard licensed engineering officer) employed by defendant Texaco Inc. in its deep-sea fleet, complained directly to the United States Coast Guard (USCG) about the condition of the generating equipment on his vessel without first reporting the issue to the Master or the Chief Engineer. The USCG promptly conducted an inspection which revealed no problems with the equipment. Thereafter the seaman told the Chief Engineer that he was the one who had called the USCG. As a result, he was demoted and when he refused to accept the demotion, he was discharged. The seaman complained of retaliation to Occupational Safety and Health Act (OSHA), and an action followed by the then United States Secretary of Labor, Mr. Raymond J. Donovan, against Texaco. Concluding that Donovan lacked jurisdiction to bring the action, the trial judge granted summary judgment for Texaco and Donovan appealed. On appeal, Donovan alleged violation of Section 11(c)(1) of OSHA, which provides that:

> No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.[12]

The Court of Appeals reiterated its prior decision in *Clary v. Ocean Drilling and Exploration Co.*,[13] where the Court held that the OSHA regulations do not apply to working conditions of seamen on vessels in navigation.[14] The Court also found support for this holding in Section 4(b)(1) of OSHA,[15] which declares that "[n]othing in this Chapter shall apply to working conditions of employees with respect to which other

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9 Gaines v. Ampro Fisheries, Inc., 836 F. Supp. 347, 349 (E.D. Va. 1993); Garrie v. James L. Gray, Inc., 912 F.2d 808, n. 5 (5th Cir.1990) (the seventh amendment guarantee of trial by jury does not apply in admiralty actions).

10 *Id.*

11 *Id.* at 1065.

12 29 U.S.C. § 660(c)(1) (2018).

13 609 F.2d 1120 (5th Cir.1980).

14 720 F. 2d at 826.

15 29 U.S.C.A. § 653(b)(1) (West 2018).

federal agencies . . . exercise statutory authority . . . ."[16] Accordingly, the Court concluded that the seaman could not resort to Section 11(c)(1) of the OSHA to support a claim for retaliatory discharge. Because the argument was not made, the Court in Donovan did not consider the viability of a cause of action for retaliatory discharge under general maritime law based on a seaman's complaints about safety violations.

In *Feemster v. BJ-Titan Services Co./Titan Services, Inc.*,[17] the Court examined whether the termination of a seaman for refusing to violate a safety regulation constituted violation of public policy sufficient to justify a cause of action under general maritime law for retaliatory discharge. Feemster, a tugboat captain who worked for BJ–Titan on the M/V JUNE J pushing barges, was asked to push a barge during an eighteen-hour trip without stopping, although BJ–Titan disputed that it forbade stops. Feemster refused to make the trip on the grounds that it was too long to be safely navigated by one person and that it would violate a federal law that generally restricts vessel operation to twelve hours in a twenty-four-hour period.[18] When Feemster continued to refuse to accept the assignment, BJ–Titan management discharged him.[19] Feemster filed a complaint seeking damages, *inter alia*, for wrongful discharge under general maritime law. The district court granted summary judgment for BJ–Titan on the grounds that Feemster's complaint failed to assert a cause of action, and Feemster appealed.[20] Feemster argued that he had an implied right of action under general maritime law for wrongful discharge for refusal to perform an unlawful act, and that his case was analogous to *Smith*.

Before considering whether *Smith* had any application to the case, the Court noted that courts had recognized that, based on public policy considerations, the employment-at-will doctrine could be overridden, "when an employee is discharged for (1) refusal to commit an unlawful act, (2) performance of an important public obligation, or (3) exercise of a statutory right or privilege."[21] The Court noted that *Smith* relied on the third exception to find a cause of action.[22] Feemster sought to apply the first exception to his claim, i.e., that he was terminated for refusing to perform an illegal act.[23]

The Court of Appeals affirmed the District Court concluding that Feemster failed to assert a claim for four reasons. First, public policy considerations were not so clearly implicated as in *Smith*. In *Smith*, the plaintiff had a statutory right to bring a personal injury action against his employer and he was discharged in retaliation for exercising that right. In other words, the employer punished Smith for doing what the law explicitly permitted him to do.[24] The statute at issue in *Feemster*, on the contrary, provided him with no personal

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16 *Id.*; (*Donovan* and *Clary* have been criticized in other circuits for failing to draw a distinction between "inspected" and "uninspected" vessels in applying section 4(b)(1) of the OSHA. Inspected and uninspected vessels are each subject to different laws and regulations. Thus, if a seaman is pursuing a personal injury claim, whether under the Jones Act or for unseaworthiness, the vessel where he suffered the injury could make a difference in the regulations the employer was required to follow. There are two main entities that regulate vessels: the OSHA and the U.S. Coast Guard (USCG). A vessel which has applied for and received a Certificate of Inspection from the USCG is known as an "inspected vessel." 46 C.F.R. §§ 2.01-1–2.01-80 et seq. This may apply to passenger, cargo, and tank vessels. If the vessel is an inspected vessel, it is subject to USCG regulations. An "uninspected vessel," on the other hand, means a vessel not subject to inspection under 46 U.S.C. § 3301 – may not be issued a Certificate of Inspection - that is not a recreational vessel. *See* 46 U.S.C. § 2101 (West). Fishing vessels, tugboats, barges and inland dredges may fall under this class of vessel, which may be subject to OSHA regulations. The Second and Eleventh Circuits have held that OSHA regulations may apply to certain conditions aboard uninspected vessels. For instance, in *Donovan v. Red Star Marine Services*, 739 F.2d 774 (2d Cir.1984), a case not involving retaliatory discharge claim, the Second Circuit held that the Secretary could regulate noise aboard an uninspected vessel because the noise aboard such a vessel was a working condition not regulated by the USCG. *Id.*, at 779. The court distinguished the Fifth Circuit cases as not dealing directly with working conditions on uninspected vessels and rejected the contention that the Secretary had no jurisdiction over seamen working on uninspected vessels. *Id.* at 778–79. Similarly, in *In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir.1986), another case not involving a retaliatory discharge claim, the Eleventh Circuit distinguished the Fifth Circuit cases, and cited the difference between the USCG's pervasively regulated "inspected" and less regulated "uninspected" vessels. *Id.* at 1530-31. *See also* Reich v. Nelson, 843 F. Supp. 20, 24 (E.D. Pa. 1994) ("the Coast Guard has historically viewed its authority to regulate uninspected vessels as limited to the regulation of life-saving and fire-fighting equipment, backfire flame control, ventilation, the reporting of casualties and the licensing of operators[.]"))

17 873 F.2d 91 (5th Cir. 1989).

18 *See* 46 U.S.C. § 8104(h) (2018) ("an individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an emergency.").

19 *Feemster*, 873 F.2d at 92.

20 *Id.*

21 *Id.* at 93 *citing* Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 Harv. L. Rev. 1931, 1936–37 (1983)).

22 *Id.*

23 *Id.*

24 *Id.*

right to refuse a management directive with which he disagreed, even if it violated the statute. Second, the Court felt it was inappropriate for it to engraft on the statute—a congressional act—an additional provision granting a private cause of action which Congress chose not to give.[25] Third, the Court noted that a denial of a legal cause of action to Feemster did not deny him "a voice in the enforcement scheme and the right to claim the benefits of the statute."[26] He could still complain of safety violations to the USCG and seek its aid to prevent violations.[27] The Court felt that, if Feemster had filed such a complaint and had been fired for doing so, he would have had a stronger argument that his discharge contravened public policy.[28] Such a reaction on the part of his employer, the Court concluded, would have been more akin to true retaliation for exercising a given right as it occurred in *Smith*.[29] Finally, the Court felt that the dispute never ripened to the extent that it could support a claim of retaliatory discharge for his refusal to commit an unlawful act because he merely interposed his judgment that a safety violation would occur if he made the trip and he refused the assignment. Because he was discharged, and never embarked on the journey, there was no violation of law and whether the law would have been violated, was, thus, speculative. The Court concluded that "because the discharge arose in the absence of *a clear requirement by management that Feemster violate the statute*, it [was] difficult to characterize this as a retaliation that offends public policy."[30]

In *Garrie v. James L. Gray, Inc*.,[31] the Court of Appeals addressed a situation similar to the one presented in *Feemster*. In *Garrie*, a seaman named Garrie was asked by his employer to work in excess of twelve hours during twenty-four-hour periods.[32] Garrie refused, claiming that doing so would violate 46 U.S.C. § 8104(h).[33] Garrie, however, never complained to the Coast Guard about his employer's demands. Instead, without identifying his employer or complaining about it, Garrie merely inquired from the Coast Guard if the regulation regarding maximum working hours was still in effect.[34] The Coast Guard informed him that it was.[35] A few days later, Garrie informed his employer that the Coast Guard had confirmed his understanding of the applicable maximum working hours and that it was still his intention to refuse to work more than twelve hours per day.[36] Two days later Garrie was reassigned to another vessel but less than two weeks after, he was laid off as his employer discontinued the position Garrie had been relocated to.[37]

Garrie then filed a lawsuit against his employer for alleged retaliatory discharge, in violation of 46 U.S.C. § 21145,[38] and general maritime law. The District Court dismissed Garrie's action reasoning that Garrie had failed to establish an exception to the employment at-will doctrine in his case.[39] The Court of Appeals affirmed, concluding that merely contacting the Coast Guard to inquire if a statute was still in effect did not satisfy the requirements of Section 2114.[40] The Court also rejected Garrie's retaliatory discharge claim under general maritime law noting first that there is no general cause of action for wrongful discharge under maritime law.[41] Relying on *Feemster*, the Court held that Garrie "had no personal right to refuse a management directive with which he disagreed, even if it violated a safety statute."[42] Instead, the Court held, his remedy was limited to contact the Coast Guard and request its aid in correcting the violation.[43]

In *Meaige v. Hartley Marine Corp*.,[44] the United States Court of Appeals for the Fourth Circuit reviewed the District Court's dismissal of a seaman's action for wrongful termination under general maritime law and West Virginia common law. The seaman, Meaige, was ordered by his employer, Hartley, to pilot a tug on a round

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25 *Id.* ("Congress provided no private right of action for retaliatory discharge. The general purpose of this legislation is to promote maritime safety, but not with employees acting as private enforcers and as private attorneys general; the agent of enforcement is the Coast Guard.").

26 *Id.*

27 *Id.* at 94.

28 *Id.*; Such termination would have been in violation of the Seaman's Protection Act, 46 U.S.C., § 2114(a)(1)(A) (2018), discussed *infra*.

29 *Id.*

30 *Id.* (emphasis added).

31 912 F.2d at 809.

32 *Id*.

33 *Id.* ("On a vessel to which section 8904 of this title applies, an individual licensed to operate a towing vessel may not work for more than 12 hours in a consecutive 24-hour period except in an emergency.").

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.* at 810.

38 The Seaman's Protection Act of 1984, also known as the federal whistleblower statute, 46 U.S.C. § 2114, is discussed in further detail in "The Seaman's Protection Act" of this chapter.

39 912 F.2d at 810.

40 *Id.* at 812-13.

41 *Id.* at 813 (citing *Feemster*, 873 F.2d at 93).

42 *Id.* (quoting *Feemster*).

43 *Id.*

44 Meaige v. Hartley Marine Corp., 925 F.2d 700 (4th Cir.1991).

trip in the Ohio River which sometimes lasted as long as thirty hours and required Meaige to be available around the clock during the entire trip.[45] Although Meaige had made the trip on prior occasions, he refused to make it unless a relief crew was made available.[46] As a result, Hartley terminated him and Meaige filed a lawsuit for wrongful termination alleging that compliance with Hartley's order required him to operate the tug in excess of the maximum number of hours legally allowed by 46 U.S.C. § 8104(h) in a twenty-four-hour period.[47]

The District Court dismissed the action and the Court of Appeals affirmed. As to the claim based on general maritime law, the Court dismissed the same, holding that "there is no private right of action under general maritime law arising from discharge for refusal to carry out an assignment that would violate a federal statute."[48] *Meagie* attempted to distinguish *Feemster* by arguing that he had made the trip in question on numerous times before refusing, and, therefore, the violation of § 8104(h) was not speculative as it was in *Feemster*. The Court rejected the argument noting that "[f]irst, the statute's proscriptions are aimed at employers, and it provides only a small fine for violations. Second, the Coast Guard is the agent of enforcement of maritime safety and seaman protection laws; therefore, Meaige could have complained of safety violations to the Coast Guard and enlist its aid to prevent violations. Third, no private right of enforcement was intended by Congress under § 8104(h).[49] As to Meaige's claim for retaliatory discharge based on West Virginia common law, the Court dismissed it holding that "turning to West Virginia for the rule of decision would clearly undermine uniformity in federal admiralty law".[50]

In *Zbylut v. Harvey's Iowa Management Co. Inc*.,[51] a seaman sought to expand the public policy exception to the employment at will termination doctrine by alleging that his termination resulted from his refusal to falsify the vessel logbooks which, he claimed, violated 46 U.S.C. § 8101 (addressing manning of vessels). The seaman alleged that during the entire time he worked for his employer, he was personally ordered to falsify the engine room logbooks to make it look like the employer was complying with USCG requirements regarding engine room manning requirements, when in fact the employer was not.[52]

The seaman first began complaining about falsifying the logbooks approximately four months after he began working for the employer. In response, he was told by his superior officer to "just do it." When the seaman brought the issue to the attention of the other chief engineer, he was told to "just follow orders and keep your mouth shut."[53] Thereafter the seaman went directly to human resources to complain about his superiors, the log book practices, and harassment he was experiencing for his complaints regarding the log books.[54] Given the perceived inaction on the part of management to follow up on his complaints, the seaman later resigned and filed a lawsuit against his employer contending that the working environment was unbearable and that he was constructively and wrongfully terminated due to his refusal to violate 46 U.S.C. § 8101.

The District Court first noted that "courts applying federal maritime law generally recognize exceptions to the employment at-will doctrine when the employee is discharged for '1) refusal to commit an unlawful act, 2) performance of an important public obligation, or 3) exercise of a statutory right or privilege.'"[55] The Court however noted that both the Fourth and Fifth Circuits had addressed the issue and had expressly declined to extend the list of exceptions to include the refusal to violate a federal safety regulation.[56] Accordingly, the Court dismissed the seaman's action noting that "recognizing a federal cause of action in this instance would exceed the scope of the judiciary's power."[57] The seaman appealed to the United States Court of Appeals for the Eight Circuit. On appeal, the Court first expressed that:

> To prevail on a tort claim for a discharge in violation of public policy, an employee must show (1) a clearly defined public policy protected an activity; (2) the policy was undermined by discharging the employee; (3) the discharge was the result of engaging in the protected activity; and (4) there was no other justification for the discharge.[58]

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45 *Id*.

46 *Id.*

47 *Id.* at 702.

48 *Id.* at 702 (citing *Feemster*, 873 F. 2d at 93).

49 *Id.*

50 *Id.* at 703; see also Cornelio v. Premier Pacific Seafoods, Inc., Not Reported in P.3d (2005), 127 Wash. App. 1037 (declining to expand the public policy exception to the employment at-will doctrine, even if the court accepted as true that "the 16.5-hour work schedule imposed by defendants is injurious to the health and welfare of [its crewmembers]".).

51 250 F.Supp.2d 1104 (2003).

52 Zbylut v. Harvey's Iowa Management Co. Inc., 250 F.Supp.2d 1104, 1106 (2003)

53 *Id.*

54 *Id.* at 1107.

55 *Id.* at 1108 (citing *Feemster*, 873 F. 2d at 93 and *Smith*).

56 *Id.* at 1108 (citing *Meaige*, *Garrie*, and *Feemster*).

57 *Id.*

58 Zbylut v. Harvey's Iowa Mgmt. Co., 361 F.3d 1094, 1095–96 (8th Cir. 2004).

The Court, thus, affirmed the dismissal of the action noting "[w]e discern no clearly defined public policy protecting [the seaman's] activity [as] federal maritime law does not provide a clear public policy against violating section 8101."[59]

In *Baetge-Hall v. American Overseas Marine Corp.*,[60] a seaman (Baetge-Hall, a medical officer) was employed on a maritime prepositioning ship which transported supplies, food, and ammunition for the United States Navy pursuant to a contract with the Sealift Command.[61] As part of her duties, Baetge-Hall was responsible for maintaining the vessels vaccination records and submitting update records to the Sealift Command.[62] Baetge-Hall was terminated after her alleged refusal to take smallpox vaccination.[63] As a result, Baetge-Hall brought action against her employer, the ship's operator, alleging retaliatory discharge under maritime law and 46 U.S.C. § 2114.[64]

Baetge-Hall alleged that her employer terminated her after she declared her intent to seek legal recourse to address the discriminatory treatment she claimed she had received after not taking the vaccination, and to confirm that her employer complied with the Sealift Command vaccination requirements.[65] As to the claim that she had been terminated after she expressed her intent to sue her employer for discrimination, the Court noted that no court sitting in admiralty has recognized the existence of a retaliatory discharge tort under maritime law for a person terminated after declaring an intent to seek legal recourse for an adverse employment action.[66] Accordingly, the Court denied the claim holding that:

> Baetge–Hall cannot establish that she was planning to exercise rights that already existed under maritime law. She intended to seek legal recourse to address the perceived discriminatory treatment she received after not taking the vaccination. While her allegations may raise issues under correlative state or federal law, Baetge–Hall cannot point to any existing maritime law protection against adverse employment action in retaliation for a protest against alleged discriminatory treatment. Maritime law wrongful discharge causes of action were not established to address the type of legal recourse sought by Baetge–Hall. 'Significantly, a primary duty relating to fair and nondiscriminatory employment practices does not already exist under the General Maritime Law and it is not within this Court's power to create one.' Where, as here, there is no indication of strong public policy interests, the Court is hesitant to create a new cause of action under maritime law. Accordingly, Baetge–Hall cannot establish a prima facie case of retaliatory discharge under maritime law with respect to her seeking legal remedies for alleged discriminatory treatment.[67]

Although the courts have been reluctant to expand the public policy exceptions to the employment at-will doctrine to situations involving the termination of seamen refusing to violate safety regulations, or the termination of a seaman in situations such as the ones addressed in *Zbylut*, (termination of a seaman due to his refusal to falsify log books), *Spooner*, (termination of a seaman in violation of visa regulations which allegedly requires employment contracts not to be at-will), or *Boetge-Hall*, (termination of seaman after expressing intent to seek legal recourse in response to adverse employment action), the exception has been expanded to situations where the safety of seamen and the public are at stake.

For instance, in *Seymore v. Lake Tahoe Cruises, Inc.*, the employer discharged a cruise boat captain after he refused to pilot a boat he deemed unseaworthy because it had a leaking hull.[68] The court held that there was a strong public interest in preventing a captain from taking out a leaking vessel and jeopardizing the safety of passengers and crew.[69] The court expressed that:

> Indeed, the public policy at issue here is so strong that 46 U.S.C. sec. 10908 makes it a felony to send or attempt to send to sea a vessel in an unseaworthy state that is likely to endanger the life of an individual. Given the strong public policy at issue in the present case, it is appropriate to recognize a wrongful termination cause of action in favor of a captain terminated for refusing to pilot or order

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59 *Id.* at 1096; *see also* Spooner v. Multi Hull Foiling AC45 Vessel "4 Oracle Team USA", 2015 A.M.C. 2091 at *29 (N.D. Cal. 2015) (declining to extend the public policy exception to the employment at-will doctrine to the termination of a foreign seaman who claimed his termination was in violation of a visa regulation which allegedly required his employment contract not be terminable at-will; the court held that, even if the regulation so requires, "that is not the sort of policy consideration enforceable under maritime law.").

60 624 F.Supp.2d 148 (2009).

61 *Id*.

62 *Id.* at 152.

63 *Id.* at 154.

64 *Id*., at 151.

65 *Id.* at 158.

66 *Id.*

67 *Id.* at 159 (internal citations omitted).

68 888 F. Supp. 1029, 1032 (E.D. Cal.1995).

69 *Id.* at 1035.

> another to pilot a vessel that the captain reasonably believes is unseaworthy, posing an undue risk of death or serious injury to passengers or crew.[70]

Similarly, in *Borden v. Amoco Coastwise Trading Co.*,[71] a tugboat captain was terminated after he twice expressed safety concerns in refusing to pilot a recently repaired tug carrying toxic chemicals into the path of a major storm. Although the court agreed with the defendant that *Feemster* provided the proper analysis, it held that *Feemster* must be read in light of *Smith*.[72] The *Borden* court relied on the public interest in preventing a captain from piloting a vessel he reasonably believed was unseaworthy, especially when the vessel carried highly toxic chemicals and a full crew, to hold that the public policy concerns were sufficiently strong to overcome the at-will presumption.[73] In recognizing that, based on public policy considerations, the employment at-will doctrine could be overridden under the facts of the case, the court held that:

> In addition to fears about his crew's safety and his pollution concerns, Plaintiff further asserts that had he sailed the tug in its condition at the time of the impending storms, he would have been in violation of 46 U.S.C. § 10908, which prohibits sending an unseaworthy vessel to sea that will endanger the life of an individual. . . . Section 10908 is directed at any seaman and imposes a $1000 fine, five years imprisonment, or both. See 46 U.S.C. § 10908. Like in Smith, the public policy implications in this case are strong indeed. . . . [T]he public policy at issue here is so strong that § 10908 makes it a felony to send to sea a vessel in an unseaworthy state when lives are at stake. . . . The Court today recognizes a strong public policy in protecting the safety of not only seamen, but the public as well, and the sanctity of our coastlines. These considerations, coupled with the public policy implications surrounding § 10908, are sufficient to overcome the at-will presumption. Thus, the public policy exception is clearly applicable in this case.[74]

In *Greta v. Surfun Enterprises, LLC*, a seaman filed a complaint for wrongful termination against his employer who terminated him for his alleged refusal to take a vessel on a fishing and scuba diving trip that would have put the vessel in direct path of a tropical storm, and would have arguably be in violation of Section 2302 of Title 46, which provides, in relevant part, that:

> A person operating a vessel in a negligent manner or interfering with the safe operation of a vessel, so as to endanger the life, limb, or property of a person is liable to the United States Government for a civil penalty of not more than $5,000 in the case of a recreational vessel, or $25,000 in the case of any other vessel.[75]

The employer moved to dismiss the complaint arguing that the seaman had failed to identify a specific public policy that supported his wrongful termination claim.[76] The court rejected the employer's motion noting that the seaman's allegations were sufficient to state a wrongful termination claim because he alleged he was terminated for refusing to violate Section 2302 which, the court held, is a statute that sets forth a substantial and fundamental public policy of maritime safety.[77] The Court explained that:

> This statute embodies a fundamental and clearly established public policy of promoting maritime safety, or, at the very least, discouraging the operation of a vessel in a manner that poses unreasonable risks to the life, limb, or property of a person. In light of the significant civil penalties attached to violation of § 2302, as well as the statute's applicability beyond mere private conduct, it can be inferred that the policy effectuated by the statute is intended to benefit the public at large. *A wrongful termination action based on section 2302 is cognizable because allowing an employer to fire a crew member at will for refusing to take unreasonable or unlawful risks that could result in serious injury to passengers would create an unacceptable "incentive for the [crew member] to risk human life in order to retain his employment*.[78]

Finally, in *Baiton v. Carnival Cruise Lines, Inc*., the District Court of Appeals in Florida addressed the situation of a seaman who was terminated by his employer after agreeing to testify on behalf of a former co-worker in a Jones Act claim and refusing to testify

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70 *Id.* (emphasis added).

71 985 F. Supp. 692 (S.D. Tex.1997).

72 *Id*. at 697. ("[T]he primary inquiry is whether public policy considerations in particular factual circumstances are sufficient to override the at-will doctrine. Simply stated, clearly important public policy concerns were not at issue in Feemster. Such concerns were at issue in Smith, and such concerns are at issue here.").

73 *Id.* at 698.

74 *Id.*

75 Not Reported in Fed. Supp., 2013 WL 12204908, at *4-5 (S.D. Cal. 2013).

76 *Id.* at 3.

77 *Id.* at 5.

78 *Id.* (internal citations omitted) (emphasis added).

falsely for the employer.[79] The Court agreed that expanding the retaliatory discharge cause of action was warranted under the facts of the case holding that:

> In our view, allowing retaliation against an employee for truthful testimony, or refusing to give false testimony, strikes at the heart of the adjudicatory process. The court's ability to render fair judgments in maritime personal injury cases is dependent upon the parties' ability to obtain the truthful testimony of witnesses. Here, as in Smith, allowing a retaliatory discharge would constitute "an abuse of the employer's absolute right to terminate the employment relationship when the employer utilizes that right to contravene an established public policy." 653 F.2d at 1062. Accordingly, we conclude that the cause of action recognized in Smith is applicable to the retaliatory discharge of an employee where that discharge was motivated in substantial part by the employee's giving, or agreeing to give, truthful testimony in a personal injury action against the maritime employer, or a refusal to give a false statement in such a proceeding.[80]

The trend in the case law illustrates that when a seaman employed at-will is terminated for refusing to work in violation of a safety regulation, the violation of which does not reasonably place the seaman or fellow crew members, the environment, or the public at large in imminent risk of danger, the courts will not find the termination to be in violation of public policy. However, if the seaman's termination results from his filing of, or threat to file, a Jones Act action against his employer, or for agreeing to testify on behalf of a fellow seaman in such action against their employer, or for his refusal to engage in conduct that places his safety, the environment or the safety of the crew or public at large at risk, the termination will be deemed in violation of "strong" maritime public policy, and a tort. In such an action, the seaman will be entitled to recover compensatory damages, including compensation for mental anguish, but will not be allowed to recover punitive damages.[81]

It should also be noted that the cause of action for retaliatory discharged under general maritime law has only been applied to seamen, and not to other "maritime workers" such as *longshoremen*. Thus, in *Ardleigh v. Schlumberger Ltd.*, the Fifth Circuit confronted the issue of whether a maritime employee had a cause of action for retaliatory discharge under general maritime law.[82]

Ardleigh worked for Schlumberger as a wireline engineer. His duties included providing services to oil companies in the Gulf of Mexico.[83] Ardleigh was injured on a crew boat en route to a drilling platform operated by Shell Offshore, Inc.[84] Ardleigh's initial Jones Act claim failed because the district court refused his plea for seaman status.[85] Even though injured on a vessel, Ardleigh could not qualify as a seaman under the "fleet doctrine" because he was "not permanently attached to nor performing a substantial part of his work on an identifiable group or fleet of vessels."[86] The determination of this issue was dispositive, disabling Ardleigh's claim of "retaliatory discharge, threat of retaliatory discharge, and interference with maritime rights."[87] The *Ardleigh* court limited *Smith* to its facts, and declined to "create a new cause of action" for employees who were not Jones Act seamen.[88] The court in *Ardleigh* cited with approval a prior Fifth Circuit case, *Buchanan v. Boh Brothers Construction Co., Inc*.,[89] where a construction worker's claim for retaliatory discharge under general maritime law was denied, even though he qualified as a maritime worker under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[90] The *Buchanan* court pointed out that the LHWCA contains its own retaliatory discharge

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79 661 So.2d 313 (Fla. 3d DCA 1995).

80 *Id.* at. 315; *See also* Reyes v. Energy Transp. Corp., No. 96 CIV. 3321 (JSM), 1997 WL 256923, at *2 (S.D.N.Y. May 16, 1997) ("The rationale behind the public policy exception, therefore, requires that if an individual has a cause of action if fired for bringing a Jones Act claim, an individual also has a claim when discharged for testifying on someone else's behalf."); Edgar v. Tyson Seafood Grp., Inc., No. C97-1443Z, 1999 WL 1293563, at *2 (W.D. Wash. Apr. 28, 1999) (Recognizing a cause of action for retaliatory discharge based on public policy considerations because "[t]he intoxication of crew-members poses a serious safety threat to all seamen on a vessel; allowing an employer to fire a captain at will for attempting to do something about drinking aboard his vessel 'would create an incentive for the captain to risk human life in order to retain his employment.'") (*citing* Seymore v. Lake Tahoe Cruises, 888 F. Supp. 1029, 1035 (E.D. Cal.1995))

81 Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. 1981).

82 832 F.2d 933 (5th Cir. 1987).

83 *Id.* at 933- 34.

84 *Id.* at 934.

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 741 F.2d 750 (5th Cir. 1984).

90 33 U.S.C. § 902(3)(4).

cause of action.[91] However, since the construction worker brought his claim under the Jones Act, the court declined to apply the LHWCA retaliatory discharge cause of action.[92] From these cases, it is apparent that *Smith* has not been extended to *nonseamen*.

A. Statute of Limitations

An action from retaliatory discharge must be filed within three years from the date of the termination.[93] The seaman's protection against retaliatory discharge, however, is not limited to those situations recognized under general maritime law. As discussed below, federal maritime statutory law also affords seamen employed at-will protection against retaliatory discharge.

II. The Seaman's Protection Act

In response to the Court's decision in *Donovan*, Congress passed the Seaman's Protection Act of 1984, also known as the federal whistleblower statute, 46 U.S.C. § 2114 (SPA).[94] The SPA, as amended,[95] provides that:

> (a) (1) A person may not discharge or in any manner discriminate against a seaman because—
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> (A) the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred; or
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> (B) the seaman has refused to perform duties ordered by the seaman's employer because the seaman has a reasonable apprehension or expectation that performing such duties would result in serious injury to the seaman, other seamen, or the public.
>
> (C) the seaman testified in a proceeding brought to enforce a maritime safety law or regulation prescribed under that law;
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> (D) the seaman notified, or attempted to notify, the vessel owner or the Secretary of a work-related personal injury or work-related illness of a seaman;
>
> (E) the seaman cooperated with a safety investigation by the Secretary or the National Transportation Safety Board;
>
> (F) the seaman furnished information to the Secretary, the National Transportation Safety Board, or any other public official as to the facts relating to any marine casualty resulting in injury or death to an individual or damage to property occurring in connection with vessel transportation; or
>
> (G) the seaman accurately reported hours of duty under this part.
>
> (2) The circumstances causing a seaman's apprehension of serious injury under paragraph (1)(B) must be of such a nature that a reasonable person, under similar circumstances, would conclude that there is a real danger of an injury or serious impairment of health resulting from the performance of duties as ordered by the seaman's employer.
>
> (3) To qualify for protection against the seaman's employer under paragraph (1)(B), the employee must have sought from the employer, and been unable to obtain, correction of the unsafe condition.
>
> (b) A seaman alleging discharge or discrimination in violation of subsection (a) of this section, or another person at the seaman's request, may file a complaint with respect to such allegation in the same manner as a complaint may be filed under subsection (b) of section 31105 of title 49. Such complaint shall be

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91 741 F. 2d at 752; 33 U.S.C. s 948a ("It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee as to his employment because such employee has claimed or attempted to claim compensation from such employer, or because he has testified or is about to testify in a proceeding under this [Act].").

92 *Id.* at 752.

93 *See* McCartney v. Kanawha River Towing, Inc., 921 F. Supp. 1504, 1505 (S.D.W. Va. 1996) ("A three-year period for retaliatory discharge actions is consistent with "the exclusive nature of federal admiralty law" and promotes "uniformity of application throughout the nation" and is therefore the appropriate statutory time-parallel of laches in the maritime tort of retaliatory discharge.")

94 Baetge-Hall v. Am. Overseas Marine Corp., 624 F. Supp. 2d 148, 157 (D. Mass. 2009).

95 As originally enacted on October 30, 1984, the SPA only sought protection of a seaman against his/her termination for reporting or intending to report to the U.S. Coast Guard violations to Subtitle II (Vessels and Seamen) of the then Chapter 46 (Shipping) of the United States Code. The SPA was later amended by the Maritime Transportation Security Act of 2002, which became into effect on November 25, 2002, to add the protection currently contained in Section 2114(a)(1)(B) and award the prevailing party in the action the recovery of costs and attorney's fees not to exceed $1,000.00. The SPA was amended again by the Coast Guard Authorization Act of 2010, enacted October 15, 2010, which among other provisions, now includes the additional protected activity contained in subsections 2114(a)(1)(C) through (G).

> subject to the procedures, requirements, and rights described in that section, including with respect to the right to file an objection, the right of a person to file for a petition for review under subsection (c) of that section, and the requirement to bring a civil action under subsection (d) of that section.[96]

If a seaman is discharged in violation of the statute, he may bring an action in an appropriate district court seeking back pay and any other appropriate relief, including punitive damages.[97]

Effective October 15, 2010, the SPA requires the exhaustion of an administrative procedure before an action for retaliatory discharge in violation of the SPA can be filed in court. The rules governing the procedure are codified in 29 C.F.R. § 1986 but generally, a seaman alleging discharge, discipline, or discrimination in violation of the SPA, or another person at the seaman's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred.[98] No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If a seaman is unable to file a complaint in English, OSHA will accept the complaint in any other language.[99]

Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint by providing the respondent with a copy of the complaint, redacted in accordance with the Privacy Act of 1974,[100] and other applicable confidentiality laws.[101] Within twenty days of receipt of the notice of the filing of the complaint, the respondent may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position.[102] Not later than sixty days after receiving a complaint, the Secretary of Labor is required to conduct an investigation, decide whether it is reasonable to believe the complaint has merit, and notify, in writing, the complainant and the person alleged to have committed the violation of the findings. If the Secretary of Labor decides it is reasonable to believe a violation occurred, the Secretary of Labor must include with the decision findings and a preliminary order for the relief provided under the statute.[103]

The relief can include the taking of an affirmative action to abate the employer's violation; reinstatement of the seaman to his or her former position with the same pay and terms and privileges of employment; and payment of compensatory damages, including back pay with interest and compensation for any special damages sustained as a result of the discrimination (i.e., punitive damages), including litigation costs, expert witness fees, and reasonable attorney fees.[104]

Not later than thirty days after the notice from the Secretary of Labor, the complainant and the person alleged to have committed the violation may file objections to the findings or preliminary order, or both, and request a hearing before an Administrative Law Judge (ALJ). The filing of objections does not stay the reinstatement ordered in the preliminary order. If a hearing is not requested within the thirty days, the preliminary order is final and not subject to judicial review.[105] A hearing must be conducted expeditiously and not later than 120 days after the end of the hearing, the ALJ is required to issue a final order.[106] A party

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96 46 U.S.C. § 2114 (2018); 49 U.S.C. § 31105 (2018) which is the whistleblower provision within the Surface Transportation Assistance Act (STAA) was passed by Congress in 1983 to "protect [ ] employees in the commercial motor transportation industry from being discharged in retaliation for refusing to operate a motor vehicle that does not comply with applicable state and federal safety regulations or for filing complaints alleging such noncompliance." *Koch Foods, Inc. v. Sec'y, U.S. Dep't of Labor*, 712 F.3d 476, 478 (11th Cir. 2013) citing *Brock v. Roadway Express*, 481 U.S. 252, 255 (1987).

97 46 U.S.C. § 2114(b) (2018); *see also* Gaffney v. Riverboat Services of Indiana, Inc., 451 F.3d 424 (7th Cir. 2006) (concluding that compensatory and punitive damages, not just equitable remedies such as injunction and reinstatement with back pay, are available to seamen under whistleblower statute permitting court to order "any appropriate relief" in their action for retaliatory discharge or discrimination because of protected conduct); Notably, when Gaffney was decided, Section 2114's last amendment in 2010 had not yet taken place and no expression was made by the court as to the limitation cap, if any, on punitive damages. As the statute currently reads, the amount of punitive damages that can be awarded for violation to Section 2114 are limited to a maximum of $250,000.00. *See* Section 2114(b) and 49 U.S.C. § 31105(b) ((3)(C). It should be noted the contrast between a cause of action for retaliatory discharge under general maritime law, where punitive damages are not recoverable, and the action filed pursuant to Section 2114 which allows recovery of those damages.

98 *See* 49 U.S.C. § 31105(b)(1) (2022).

99 29 C.F.R. § 1986.103 (2023).

100 5 U.S.C. 552a (2022).

101 29 C.F.R. § 1986.104(a) (2023).

102 *Id.* § 1986.104(b).

103 49 U.S.C. § 31105(b)(2)(A) (2022).

104 *Id.* § 31105(b)(3)(A).

105 *Id.* § 31105(b)(2)(B).

106 *Id.* § 31105(b)(2)(C).

adversely affected by an order issued after a hearing before an ALJ may file a petition for review, not later than sixty days after the order is issued, in the court of appeals of the United States for the circuit in which the violation occurred or the person resided on the date of the violation.[107] Importantly, if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the seaman, the seaman may bring an original action at law or equity for *de novo* review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury.[108]

The SPA's goal is to guarantee that, "when seamen provide information of dangerous situations to the Coast Guard, they will be free from the debilitating threat of employment reprisals for publicly asserting company violation' of maritime statutes or regulations."[109] To assert a cause of action for retaliation under the SPA, the seaman is required to allege and prove that: (1) the seaman engaged in protected activity; (2) the seaman's employer knew of the protected activity; (3) the seaman suffered an adverse employment action; and (4) the protected activity contributed to the adverse employment action.[110] Seamen seeking to invoke the protection of the federal whistleblower statute must establish that their employer was aware of their intent to report them to the Coast Guard, or another appropriate federal agency, before an adverse action was taken.[111] A plaintiff may not bring a claim under 46 U.S.C. § 2114(a) for retaliatory discharge if he did not tell anyone before he was fired that he was planning to complain and reported the employer to the Coast Guard only after he was terminated.[112]

107 *Id.* § 31105(d).

108 *Id.* § 31105(c).

109 Gaffney v. Riverboat Services of Indiana, Inc., 451 F.3d 424, 444 (7th Cir. 2006) *quoting* Passaic Valley Sewerage Comm'rs v. United States Dep't of Labor, 992 F.2d 474, 478 (3d Cir.1993).

110 Harley Marine Servs., Inc. v. U.S. Dep't of Labor, 677 F. App'x 538, 541 (11th Cir. 2017); 29 C.F.R. § 1986.104(e) (2023); *see also Gaffney*, 451 F. 3d at 452 ("the ultimate question is whether the discharge or other adverse action would have taken place but for the engagement in the protected activity").

111 Robinson v. Alter Barge Line, Inc., 513 F.3d 668, 671 (7th Cir.2008).

112 *See also* Bird v. Foss Mar. Co., No. C 07-05776 WDB, 2009 WL 10692087, at *6 (N.D. Cal. Aug. 31, 2009) citing Baetge-Hall, supra, at 157-58.

III. Claims Under States' Whistleblower Statutes

It should be noticed that, although the United States Court of Appeals for the Fourth Circuit in *Meaige*, did not allow the prosecution of an action for retaliatory discharge based on West Virginia common law, as "turning to West Virginia for the rule of decision would clearly undermine uniformity in federal admiralty law,"[113] the Seventh Circuit has taken the opposite position.

In *Robinson v. Alter Barge Line, Inc.*, the plaintiff, a deckhand on a barge owned by the defendant, complained to management on three occasions that crew members were using illegal drugs while on duty. Shortly after the third report he was fired and brought suit for retaliatory discharge.[114] The seaman filed claims for retaliatory discharge based on maritime law and Illinois law. The defendant moved to dismiss all claims, including the seaman's claim for retaliatory discharge based on Illinois' common law tort of retaliatory discharge.[115] The district court dismissed all actions, agreeing also with the defendant that the state common law claim was preempted by the SPA and general maritime law.[116]

On appeal, the Court of Appeals reversed the district court's dismissal of the state common law claim. Finding that there was no conflict between the state's common law and the general maritime law on retaliatory discharge claims, the Court held that a "[s]tate may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."[117]

A majority of courts seem to agree with *Robinson*. For instance, in *Baiton*,[118] the seaman also asserted a claim under the Florida whistleblower statute, sections 448.101–4.105, Florida Statutes (1993).[119] The Court noted that "[t]the whistle-blower statute provides in part

113 Meaige v. Hartley Marine Corp., 925 F.2d 700,703 (4th Cir.1991).

114 *Robinson*, 513 F.3d at 670.

115 *Id.* at 671.

116 *Id.*

117 *Id.* at 672. (citing Just v. Chambers, 312 U.S. 668 (1941)

118 661 So. 2d at 315 (where the Court held that a seaman has a cause of action for retaliatory discharge under general maritime law if the discharge was motivated in substantial part by the seaman's giving, or agreeing to give, truthful testimony in a personal injury action against the maritime employer, or a refusal to give a false statement in such a proceeding)

119 *Id.*

that '[a]n employer may not take any retaliatory personnel action against an employee because the employee has: . . . (3) Objected to, or refused to participate in, any activity, policy, or practice of the employer which is in violation of a law, rule, or regulation. . . . An employee who has been the object of a retaliatory personnel action has a cause of action for damages, reinstatement, and injunctive relief."[120] The Court observed that Baiton had alleged that he had been fired for refusing to lie under oath and that, since perjury was a crime under Florida law, he was claiming to also have a cause of action under Florida's whistleblower statute.[121] The employer, on the other hand, claimed that the Florida whistleblower statute was preempted by federal general maritime law relating to retaliatory discharge. The Court rejected the argument holding that:

> Carnival reasons that Baiton does not have a claim for wrongful discharge under Smith, an argument we have rejected. Carnival contends that any cause of action for retaliatory discharge must be recognized exclusively under general maritime law, and that no additional or different remedy can be created under state law.
>
> We confine our analysis to the factual context presented by this case, namely, an alleged discharge for refusal to give false testimony. The Medina case, about which this controversy revolves, was a lawsuit filed in the circuit court within this district, in Dade County, Florida. We perceive no inconsistency with federal law or federal policy by application of the Florida whistle-blower statute in this factual context.[122]

[120] *Id.* citing §§ 448.102(3), 448.101(5), 448.103 and Forrester v. John H. Phipps, Inc., 643 So.2d 1109 (Fla. 1st DCA 1994).

[121] *Baiton*, 661 So. 2d at 315.

[122] *Id.* (emphasis added) (*citing* Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1273–74, 1278–81 (1st Cir.), *cert. denied*, 508 U.S. 981 (1993)) (finding that state statute prohibiting discrimination against handicapped was not preempted by maritime law, where plaintiff, who never had an on-the-job problem with alcohol, was removed from his position as chief engineer of Exxon oil tanker for having voluntarily entered, and successfully completed, a month-long alcohol rehabilitation program a year before Exxon Valdez accident); Edgar v. Tyson Seafood Group, Inc., 1999 WL 1293563 (W.D. Wash. Apr. 28, 1999) (denying summary judgment of state law claim for wrongful discharge on basis that termination of ship captain for trying to control intoxication of crew-members posed a serious safety threat to all seamen on a vessel and further finding that allowing an employer to fire a captain at-will for attempting to do something about drinking aboard his vessel "would create an incentive for the captain to risk human life in order to retain his employment"); Morgan v. Tyson Seafood Group Inc., 1997 WL 882599 (W.D. Wash. Sept.24, 1997) (concluding that Washington's anti-discrimination law does not conflict with federal admiralty law, and the Jones Act and general maritime law leave room for additional legislation in the area of employment discrimination); Borden v. Amoco Coastwise Trading Co., 985 F. Supp. 692 (S.D. Texas 1997) (holding that ship captain, under Texas employment law, may proceed on a claim for wrongful discharge in violation of public policy when he alleged that he was fired for refusing a management directive to sail a recently-leaking vessel then carrying toxic chemicals into a storm); Clements v. Gamblers Supply Mgmt. Co., 610 N.W.2d 847 (Iowa 2000) (permitting ship captains' state claims for retaliatory discharge against employer that managed riverboat casino, based upon captains' discharge after one captain informed management that he would not cooperate in structural modifications that would affect boat's stability in absence of Coast Guard approval); Hoddevik v. Arctic Alaska Fisheries Corp., 94 Wash.App. 268, 970 P.2d 828 (Div. 1, 1999), amended by, 975 P.2d 563 (Wash. App. Div. 1, 1999), *cert. denied*, 528 U.S. 1155, 120 S.Ct. 1161, 145 L.Ed.2d 1072 (2000) (a Jones Act seaman, who was a Washington state citizen, was allowed to sue his Washington employer for sexual discrimination under Washington state law); Belanger v. Keydril Co., 596 F.Supp. 823 (E.D.La.1984), *aff'd*, 772 F.2d 902 (5th Cir.1985) (the court held that a seaman did not have a claim for age discrimination under general maritime law, but allowed his age discrimination claim to proceed under Louisiana law); Winkler v. Coastal Towing, L.L.C., 2001-0399 (La. App. 1 Cir. 4/11/02), 823 So. 2d 351 (Tug boat captain, who was temporarily laid off due to his refusal to bring empty barges to designated location, was allowed to pursue action against employer for compensatory and equitable relief pursuant to Louisiana statute providing that employer shall not take reprisal against employee who in good faith, and after advising employer of violation of law, refuses to participate in employment act or practice that is in violation of law, the court noting that, in case involving Louisiana plaintiff, Louisiana defendant, and facts that occurred solely in Louisiana, federal maritime law does not preempt Louisiana statute).

In cases involving termination of a seaman for exercising protected conduct, consideration, thus, should always be given to state whistleblower statutes as such statutes can also form the basis of a retaliatory discharge claim.

Conclusion

As the ward of admiralty, a seaman employed at-will enjoys significant protection against retaliatory terminations resulting from the exercise of "protected activity." The seaman is protected against retaliatory discharge when the same results from the exercise of rights afforded by general maritime law, as well as when he testifies in legal proceedings to assist other seaman in their exercise of those rights. General maritime law also protects seamen from retaliation when his termination results from his refusal to engage in conduct that puts his safety, the environment, or the safety of fellow crewmembers and passengers at risk.

The SPA affords protection against retaliatory discharge when the seaman gets terminated for engaging in the protected activity enumerated by the statute (including, reporting violations of maritime safety regulations to pertinent agencies, refusing to perform duties when the seaman has a reasonable apprehension that performing such duties would result in serious injury harm, testified in proceedings brought to enforce maritime safety regulations, notifying the vessel owner or the Secretary of a work related injury, cooperating with safety or casualty investigations by the Secretary or the National Transportation Safety Board, or accurately reporting hours of duty). Although an action under the SPA is subject to the exhaustion of administrative procedures, the SPA allows the recovery of punitive damages and attorney's fees, elements of damages which, with the exception of certain maintenance and cure claims, are not recoverable under the general maritime law. In any case involving a seaman's claim for retaliatory discharge, consideration should always be given to the pertinent state's whistleblower statute as, depending on the jurisdictional district and/or circuit, the same can also be relied upon by the seaman to support his/her claim.

Protecting the Arctic Marine Environment: The Role of International Maritime Law

By Camille Zuber*

The Arctic is undergoing rapid transformations due to climate change, shifting its landscape from ice-covered regions to water-based areas. This transition, driven by atmospheric and oceanic warming, is compounded by growing economic activity in the region, such as shipping routes and the exploitation of natural resources like oil and natural gas. The increasing use of Arctic passages like the NorthWest Passage (NWP) and the NorthEast Passage (NEP) has made the region more accessible, offering shorter shipping routes compared to traditional passages. However, the rise in shipping and resource extraction poses a severe threat to the delicate Arctic environment, particularly through vessel-source pollution, such as black carbon and underwater noise.

Why Should We Care About the Arctic?

The Arctic is warming at a rate more than twice the global average, with temperatures expected to rise by 3-4°C in the next 50 years, according to the 2007 IPCC report. This rapid warming, compounded by a 50% reduction in Arctic sea ice since 2000, has wide-reaching impacts. Although melting sea ice doesn't directly contribute to rising sea levels, it accelerates ocean warming by replacing reflective ice with darker ocean surfaces that absorb heat rather than reflecting it. This disturbance of atmospheric and oceanic patterns contributes to stronger weather events, such as hurricanes.

Furthermore, the Arctic environment is uniquely vulnerable to pollution due to the ice-albedo feedback effect. Black carbon and other airborne pollutants, when deposited on sea ice, prevent it from reflecting sunlight, further accelerating the melting process. As economic activities like Arctic shipping increase, the concentration of pollutants in the region has grown, and it is essential to regulate and mitigate these threats to preserve the Arctic.

The Growth of Arctic Shipping and Pollution

Shipping traffic in the Arctic has significantly increased, with a rise of 37% in the number of ships and a doubling of the total distance sailed in Arctic waters. The growing activity is largely attributed to large-scale resource projects, such as the Mary River Mine in Nunavut and the Yamal Gas Project, which have introduced more bulk carriers and gas tankers to the region. This uptick in maritime traffic has led to higher emissions of pollutants, including greenhouse gases, sulfur dioxide (SOx), nitrogen oxides (NOx), and black carbon, all of which contribute to global warming and harm Arctic ecosystems.

While the International Maritime Organization (IMO) has taken steps to address black carbon and other pollutants, the regulatory measures remain insufficient and non-binding.

The IMO's Regulatory Response

The IMO has developed international regulations to address the growing environmental threats posed by Arctic shipping. **Annex VI of MARPOL**, a key convention playing a central role in addressing pollution from ships, limits emissions of nitrogen oxides (NOx), sulfur oxides (SOx), and particulate matter. However, black carbon is notably absent from the annex's specific provisions, despite its growing significance.

The **Marine Environment Protection Committee (MEPC)** of the IMO has recently taken steps toward regulating black carbon emissions from ships. In October 2023, the MEPC adopted two non-binding resolutions—one that outlines best practices for reducing black carbon emissions in the Arctic and another that provides guidelines on monitoring, measuring, and reporting black carbon. Though these measures are a step in the right direction, they remain voluntary and lack enforcement power. The IMO has also urged Member States and ship operators to voluntarily adopt cleaner fuels and propulsion technologies that could reduce black carbon emissions in Arctic waters.

Additionally, the **IMO's 2023 revised Initial Strategy on GHG (Greenhouse Gas) emissions** aims to reduce international shipping emissions by 40% by 2030 compared to 2008 levels. This strategy, which includes actions to reduce black carbon, is a crucial part of the IMO's approach to mitigating climate change impacts in the Arctic.

Another important development is the **Heavy Fuel Oil (HFO) Amendment to MARPOL Annex I**, which went into effect on July 1, 2024. This amendment bans the use of HFO in Arctic waters, although exemptions exist. For example, vessels with compliant fuel tank designs under the **Polar Code** and ships with waivers from Arctic coastal nations can still use HFO until 2029. This is part of the broader goal to phase out harmful fuels from Arctic shipping, in line with environmental and climate objectives.

One of the most important tools in the IMO's regulatory toolkit is the establishment of **Emission Control Areas (ECAs)**. These are designated zones where stricter measures are applied to limit pollutants like SOx, NOx, and particulate matter. In March 2024, the IMO officially recognized ECAs in the Canadian and Norwegian Arctic waters, which will help reduce black carbon emissions by up to 25%. The goal is to expand these ECAs to the broader Arctic region, further curbing pollution in vulnerable areas.

The Ongoing Issue of Underwater Noise Pollution

Despite significant progress in addressing airborne pollutants, **underwater noise pollution** remains largely unregulated. The Arctic Ocean presents a unique acoustic environment due to its ice-covered waters, where sound travels differently than in temperate oceans. Anthropogenic noise from ships, particularly in the Arctic, can travel long distances and disrupt marine life. Studies show that noise levels in the Arctic increased significantly between 2013 and 2019, doubling or tripling in some areas.

Marine mammals, such as whales and seals, rely on sound for communication, navigation, and hunting. Increased noise from ships interferes with these vital functions, causing stress and even physical harm. For instance, in the Canadian Arctic, studies have shown that narwhals exposed to shipping noise experience stress levels 200% higher than normal. Moreover, ships pose a direct danger to marine mammals through vessel strikes and entanglement in fishing gear, both of which contribute to the declining health of Arctic species.

Despite these threats, international legal frameworks have failed to adequately address underwater noise pollution. The **International Convention for the Safety of Life at Sea (SOLAS)** and other IMO guidelines only focus on noise pollution aboard vessels, and the IMO's 2014 guidelines for reducing underwater noise are non-binding. The IMO has also issued recommendations for creating **Particularly Sensitive Sea Areas (PSSAs)** where shipping activities could be restricted to protect vulnerable marine ecosystems, but the Arctic has not yet been designated as a PSSA.

The **IMO's Sub-Committee on Ship Design and Construction** did make some progress in January 2024 by agreeing to take action to reduce underwater noise pollution from shipping, but the recommendations remain voluntary. The IMO continues to seek data from the shipping industry on how to best mitigate noise pollution in Arctic waters.

The Path Forward: Tackling Black Carbon and Underwater Noise

To protect the Arctic, it is essential to adopt a comprehensive approach that addresses both **black carbon** and **underwater noise**. Key actions include:

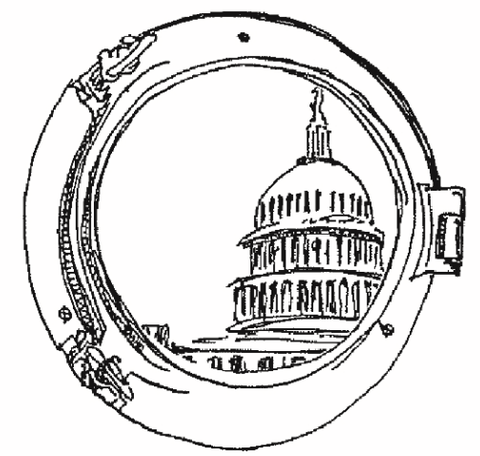
- **Slowing down vessels** in sensitive Arctic areas, a practice known as "slow steaming," which reduces both emissions and noise pollution. This approach has proven successful in other regions, such as the Port of San Diego, where a Vessel Speed Reduction (VSR) program reduced NOx and CO2 emissions by over 60%.
- **Adopting alternative fuels** such as **biofuels, LNG**, and potentially **green hydrogen**, which can significantly reduce emissions of greenhouse gases and black carbon.
- **Implementing noise management plans** for Arctic shipping and encouraging the development of quieter ships. New technologies, such as AI-driven systems that detect whale presence in shipping lanes, could be used to minimize the impact of noise on marine mammals.
- **Monitoring and reporting** to provide the necessary data for regulatory improvements. For example, the IMO has called on member states to report on the actions taken to reduce black carbon emissions in the Arctic.

Furthermore, it is essential to expand **Emission Control Areas (ECAs)** and establish **Particularly Sensitive Sea Areas (PSSAs)** in Arctic waters to protect the marine environment and the species that depend on it.

Conclusion

The Arctic is one of the most fragile and important ecosystems on Earth, and its protection requires robust international action. While the IMO has made significant progress in addressing black carbon and other pollutants, much more needs to be done, especially in terms of regulating underwater noise. The shipping industry, supported by international law and regulation, must act swiftly and responsibly to minimize its impact on the Arctic environment. With the right legal frameworks in place, the Arctic can be safeguarded for future generations, ensuring the health of its ecosystems and the sustainability of its economic activities. The path forward is clear, but continued efforts and collaboration are essential to ensure that the shipping industry can meet the growing regulatory demands and help protect the Arctic marine environment.

Window on Washington



SHIPS Shape

By Bryant E. Gardner*

The one thing folks in DC seem to agree on these days is the need to stay ahead of peer competition with China and the danger an ascendant China poses for US economic and national security. Since China entered into the World Trade Organization, its economy and its military capability have grown in leaps and bounds. While US shipbuilding capacity has largely atrophied to the point of producing only Jones Act and US military vessels required by law to be built in the US, it has become increasingly difficult to find economically competitive shipyards anywhere outside of China. Even the Department of Defense has sought permission to buy foreign-built vessels for sealift. By some accounts, China has a merchant fleet of up to 5,500 vessels, while the US has only approximately 90 US-flag ships in the international trades, supported by stipends available through the Maritime Security Program, Tanker Security Program, Cable Security Program, and by government-impelled cargo preference.

In 2024, Senator Mark Kelly (D-AZ), who is a proud graduate of the US Merchant Marine Academy, and Representative Mike Waltz (R-FL), former Chairman of the Readiness Subcommittee of the House Armed Services Committee, who has since left Congress to become President Trump's National Security Advisor, began circulating early drafts of the Shipbuilding and Harbor Infrastructure for Prosperity and Security (SHIPS) for America Act.[1] The lawmakers worked closely with affected stakeholders in the US maritime and shipbuilding industries to produce the draft legislation. Ultimately, on December 19, 2024, Senators Kelly and Todd Young (R-IN), together with Representatives John Garamendi (D-CA) and Trent Kelly (R-MS), introduced the Act, following Rep. Waltz's agreement to serve as incoming President Trump's National Security Advisor. While Rep. Waltz can be expected to help shepherd the measure from his perch in the White House, the bill's sponsors are also in key positions to advance the measure. Senator Kelly sits on the Senate Armed Services Readiness Subcommittee, Senator Young is the Ranking Member on the Senate Commerce Committee

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[1] Awaiting bill number at the close of the 118th Congress.

Maritime Subcommittee, Representative Kelly is the Chairman of the House Armed Services Seapower Subcommittee, and Representative Garamendi serves as both the Ranking Member of the House Armed Services Readiness Subcommittee and a member of the House Transportation Committee Maritime Subcommittee.

The SHIPS Act aims to broadly restore and revitalize American shipbuilding and the deep water, international trading US-flag fleet. Introducing the bill, Senator Kelly stated, "We've always been a maritime nation, but the truth is we've lost ground to China, who now dominates international shipping and can build merchant and military ships much more quickly than we can."[2] Senator Young pronounced:

> America has been a maritime nation since our founding, and seapower was a significant contributor to our rise to being the most powerful nation on earth. Unfortunately, the bottom line now is America needs more ships. Shipbuilding is a national security priority and a stopgap against foreign threats and coercion. Our bill will revitalize the U.S. maritime industry, grow our shipbuilding capacity, rebuild America's shipyard industrial base, and support nationwide workforce development in this industry. This legislation is critical to our warfighting capabilities and keeping pace with China.[3]

Longtime champion of the US Merchant Marine Rep. Garamendi announced:

> For far too long, the United States neglected our maritime industries and the critical role they play in our national and economic security – this ends with the *SHIPS for America Act*. I have spent over ten years working to revitalize the U.S. maritime industry in order to strengthen our national economy, create good-paying American jobs, and support our national security during peacetime or war. This bill represents the most substantial and comprehensive approach to have America compete and lead globally, and I'm proud to lead it alongside Senator Kelly, Senator Young, and Representative Kelly. Today, less than 200 oceangoing ships fly the American flag, the *SHIPS for America Act* will empower our shipyards and marine merchants to uphold our country's status as a leader in the maritime industry. [4]

"Strengthening America's shipbuilding capacity and revitalizing our commercial maritime industry is critical to both our national security and economic resilience. I look forward to continuing to work alongside Senator Mark Kelly, Senator Todd Young, and Congressman John Garamendi to secure our nation's maritime future," said Rep. Kelly.[5] The bill is supported by a broad coalition of American labor, US-flag ocean carriers, ports, shipbuilders, and maritime schools.[6]

The bill weighs in at a substantial 343 pages of legislative text and is multifaceted, aiming to prioritize maritime affairs within the administration, stand up a strategic

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[2] Press Release, Office of Sen. Kelly, Sen. Kelly, Sen. Young, Rep. Garamendi, Rep. Kelly Introduce SHIPS for America Act to Revitalize US Shipbuilding and Commercial Maritime Industries (Dec. 19, 2024).

[3] *Id*.

[4] *Id*.

[5] *Id*.

[6] *Id.* The following organizations have endorsed the SHIPS for America Act: Shipbuilders Council of America, American Shipbuilding Suppliers Association, American Association of Port Authorities, National Defense Transportation Association, American Maritime Partnership, USA Maritime, American Maritime Congress, American Waterway Operators, National Association of Waterfront Employers, Marine Machinery Association, American Iron and Steel Institute, American Compass, Maritime Accelerator of Resilience, Maritime Institute for Research and Industrial Development, New American Industrial Alliance, Consortium of State Maritime Academies, Philly Shipyard, General Dynamics NASSCO, Govini, U.S. Marine Management LLC, Pasha Hawaii, Ocean Shipholdings, American President Lines, Tote Inc., Saltchuk Marine, TMA Blue Tech Inc., Blue Water Autonomy, Seafarers International, American Maritime Officers, United Steelworkers, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, the AFL-CIO Metal Trades Department, the AFL-CIO Maritime Trades Department, International Federation of Professional and Technical Engineers, California State University Maritime Academy, Maine Maritime Academy, Small Shipyard Grant Coalition, Alliance for American Manufacturing, Offshore Marine Services Association, Chamber of Shipping of America, AFL-CIO, International Propeller Club, Ports America, Transportation Institute, Navy League of the United States, Oceantic Network, American Steamship Owners Mutual Protection & Indemnity Association, Inc., USMMA Alumni Association, OPA 90 Forum, Blue Sky Maritime Coalition, Crowley, American Roll-On Roll-Off Carrier, Maersk Line Limited, Farrell Lines, Matson, Overseas Shipholding Group, Inc., Waterman Logistics, Fairwater, U.S. Ocean Inc., LS GreenLink USA, Inc., International Organization of Masters, Mates & Pilots, Sailors' Union of the Pacific, International Association of Machinists and Aerospace Workers, the AFL-CIO Transportation Trades Department, RBC Logistics, Marine Engineers' Beneficial Association, American Maritime Officers Service, Great Lakes Maritime Academy, Texas A&M Maritime Academy, San Jacinto College, Senesco Marine, Patriot Maritime, Tri-Tec Manufacturing, LLC, Hapag-Lloyd USA, LLC, Liberty Maritime, Northeast Maritime Institute, and Massachusetts Maritime Academy.

commercial fleet, reduce regulatory red-tape hampering the commercial competitiveness of US-flag vessels, tax-incentivize shipbuilding in US yards, strengthen US-flag cargo preference, and bolster American mariner recruiting and retention.

Title 1 of the Act would establish the position of Maritime Security Advisor within the White House, to coordinate maritime affairs and policy and produce a national maritime strategy. Congress has regularly called upon successive administrations to produce a coherent national maritime strategy with limited success. The Maritime Security Advisor would lead the Maritime Security Board, also within the Executive Office of the President, responsible for establishing the size of the US-flag fleet, setting national priorities for next-generation maritime technological innovations, coordinating US-flag cargo preference for government-impelled cargo, coordinating interagency efforts to privilege US-flag vessels, and providing oversight of the Maritime Security Trust Fund to fund the bolstered US-flag fleet as discussed further below. Title 1 would also eliminate the existing Maritime Transportation System National Advisory Committee, and requires the Federal Maritime Commission (FMC) to submit annual reports to the Board and congressional maritime committees evaluating the competitiveness of the US-flag fleet in foreign commerce.

Title 2 would establish a Maritime Security Trust Fund, modeled after the Highway Trust Fund and Aviation Trust Fund, to create a dedicated funding mechanism independent of the annual congressional appropriations process.[7] The fund would support numerous existing maritime programs and institutions, including the US Merchant Marine Academy, the state maritime academy training vessels, Title XI loan guarantees, the Small Shipyard Grant Program, the Port Infrastructure Development Program, US-flag vessel cargo preference cost reimbursements, and various mariner recruitment and retention programs. The Trust Fund would also fund the new Shipbuilding Financial Incentives and Strategic Commercial Fleet Programs. The Trust Fund would be funded by an elimination of the cap on the regular tonnage tax on vessels arriving from ports other than North America or the Caribbean[8] and by eliminating the suspension of tonnage taxes and light money for Russian, Chinese, Iranian, and North Korean vessels, effectively imposing a duty on cargo transported by such vessels.[9] The Trust Fund would also be funded by tariffs on Chinese articles pursuant Section 301 of the Trade Act of 1974 and penalties from shipping-related customs, load line, vessel measurement, coastwise trade, log book, mariner misconduct, false statements, Shipping Act, port security, and other maritime violations.

Title 3 would establish the various national maritime strategy, capabilities assessments, and reports regarding sealift and economic maritime capabilities, prioritizing commercial vessels, and the privileging of US-flag vessels. This section of the bill also directs the US Maritime Administration (MARAD) to build, acquire, and operate a sufficient fleet of US-flag vessels in coordination with the Secretary of Defense through the existing Maritime Security, Tanker Security, and Cable Security Fleet Programs, and a new Strategy Commercial Fleet Program. Title 3 also strengthens the FMC's ability to take action against foreign carriers.

Title 4 would establish the Strategic Commercial Fleet of US-built, US-flagged vessels in international commerce, with the goal of a 250-ship fleet. Carriers, or shipyard-carrier teams, submit proposals to MARAD, which evaluates the proposals on a best-value basis, thereafter providing operating payments to subsidize and make commercially competitive US-flag vessels for operation in foreign commerce. Unlike the current Maritime Security and Tanker Security Programs, the operating payments are not hard-coded in statute. Industry stakeholders have expressed some concerns about disparate agreements under the program, and the broad discretion MARAD would have in awarding such agreements.

Vessels would be included in the Strategic Commercial Fleet for seven years, with two eligible renewals for a total of 21 years. If an agreement is not renewed, the carrier receives a payment based upon the remaining life of the vessel. Initially, foreign-built vessels may be enrolled in the Fleet on an interim basis, with no foreign-built vessels eligible to enter the fleet after fiscal year 2029. MARAD must begin with not less than 10 vessels in the fleet by the date two years after enactment and not less than 20 vessels by the date five years after enactment. Industry observers have expressed concerns that US yards will be unable to meet the demands of the program, and also that the US-build requirement could make the vessels uncompetitive with open registry

[7] Other provisions pertaining to the Maritime Security Trust Fund are found in Title 7 of the SHIPS Act.

[8] 46 U.S.C. § 60301; *see also* Sen. Mark Kelly, SHPS for America Act Section-by-Section Analysis (Dec. 19, 2024), https://www.kelly.senate.gov/wp-content/uploads/2024/12/SHIPS-for-America-Act_Section-by-Section_12.19.24.pdf.

[9] 46 U.S.C. § 60304.

vessels. However, the US shipyards are an important constituency needed to carry the bill toward successful adoption. Accordingly, some have suggested that the federal government take on the build obligation, allowing economies of scale by building an entire class of vessels, thereafter leasing the vessels to US-flag operators.

Not less than a quarter of the Fleet contracts must go to "Section 2" US citizens qualified under 46 U.S.C. § 50501, and there is a preference for tank vessels to satisfy the Defense Department's articulated need for that capacity. As with the current Maritime Security and Tanker Security Programs, vessels may be owned by a U.S. citizen trust and demise chartered to a documentation citizen, or by a defense contractor that operates or manages other US-flag vessels for the Defense Department. The question of whether to prefer Section 2 citizens, and to what degree, will likely fracture the internationally trading US-flag operators, as it has in the past.

The legislation authorizes $150 million for the Strategic Commercial Fleet Program beginning in fiscal year 2025, increasing to $2.1 billion in fiscal year 2034. For reference, the current Maritime Security Program stipend is scheduled to be $6.5 million in fiscal year 2025, which, at that rate, would permit 25 Strategic Commercial Fleet vessels at that rate. However, Strategic Commercial Fleet vessels generally are ineligible for government preference cargoes unless no other ships are available to carry such cargoes and are subject to a US-build requirement, such that a significantly higher stipend would likely be required for Strategic Commercial Fleet vessels to maintain commercial viability.

US-flag vessels are currently subject to a 50% duty on repairs carried out abroad absent a trade agreement. Title 4 of the Act would raise the duty to 200% for any repairs carried out in "countries of concern," most notably China, unless MARAD waives the duty following the operator's good-faith effort to conduct repairs at a US yard.

Cargo preference enforcement has long plagued MARAD, with shipper agencies shirking the rules, especially the U.S. Agency for International Development, which routinely fails to meet even the existing 50% requirement, and not counting as shipped foreign those cargoes that it places in foreign bottoms pursuant to self-granted waivers. Ttile 4 of the legislation would reduce gamesmanship by consolidating compliance across all-of-government at the White House, conforming the existing 50% requirement for civilian agency cargoes to the 100% requirement applicable to military and Export-Import Bank cargoes, and restoring the US-flag premium reimbursement mechanism for certain agricultural food aid cargoes. Additionally, Title 4 would establish a new commercial cargo preference, requiring that within 15 years no less than 10% of cargo from China arrive on US-flag vessels, phasing in the requirement by 1% per year beginning five years after the date of enactment. The requirement would be enforced by MARAD, which will gain the authority to impose a fine equal to the amount greater than the cost of using a US-built, US-flagged vessel. Some in the industry have questioned whether MARAD can actually enforce this requirement, given its difficulty enforcing even government-impelled cargo preferences. US-flag vessels would also receive berthing priority at US ports.

Documenting a vessel in the US is costly under current procedures, but vessels enrolled in the Maritime Security Program can utilize an expedited reflagging process, adopted by the Coast Guard, that only requires meeting class requirements. Title 4 of the legislation would expand this option to all US-flag vessels. Furthermore, the legislation would amend the 1851 Limitation of Liability Act to allow recovery of up to 10 times the value of the vessel and freight then pending for foreign-flag vessels, likely a nod to ongoing limitation proceedings arising out of the Baltimore bridge collapse.

Title 5 of the legislation would establish shipbuilding financial incentives for US yards. First, it authorizes $250 million annually for MARAD to provide financial assistance to aid in the construction of oceangoing vessels other than those enrolled in the Strategic Commercial Fleet or make investments in shipyards or their component manufacturers. The Title also provides $100 million per year as assistance for small shipyards, transforms the Title XI Federal Ship Financing Program [10]into a revolving loan fund with proceeds generated by loans reinvested into the program seeded by $100 million from the Maritime Security Trust Fund. Title XI funding would also be expanded to cover reflagging costs and expenses to make vessels more militarily useful. The bill also makes changes to the Capital

[10] The Title XI program provides long-term government loans at below-market interest rates to build and recondition vessels at US yards. *See* MARAD, Federal Ship Financing Program (Title XI), https://www.maritime.dot.gov/grants/title-xi/federal-ship-financing-program-title-xi.

Construction Fund (CCF),[11] allowing funds to be held longer, expanding the profits eligible for deposit, allowing companies without existing US-flag vessels to create CCF accounts, and expanding the program to allow marine terminal operators to create CCF accounts for the replacement of equipment at marine terminals unless such equipment is of Chinese manufacture. Additionally, marine transportation systems, including US-flag vessels, shipyards, and marine terminals would be added to assets eligibility for Department of Energy loan guarantees.[12]

The US mariner pool has been greatly stressed in recent years, as retirements and an aging workforce have contributed to a lasting mariner shortage. The SHIPS Act takes direct aim at this problem. Pursuant to Title 6 of the Act, workers employed on a US-flag vessel or at a US shipyard for 10 years (and 150 days at sea for a mariner) would be eligible for public service loan forgiveness. Mariners would also become eligible for educational assistance under the GI Bill and become eligible to attend the Naval Postgraduate School. Mariner relicensing costs would also be reimbursed, and mariners serving at least seven years at sea would be eligible for noncompetitive federal employment, similar to veterans. The bill also sets up a mariner retention program with two tracks to keep them in reserve for strategic sealift needs: (1) reserve members may work shoreside jobs and receive short-term vessel deployments to maintain credentials, and (2) after completing US-flag service obligations, maritime academy graduates may serve on foreign-flag vessels to maintain their credentials. Moreover, the legislation strengthens the Military to Mariner Program, places the US Merchant Marine Academy on equal footing with other service academies, including crediting attendance with credit toward federal retirement benefits. Moreover, the legislation mandates stricter enforcement of sea time service obligations for King's Point graduates, funds fuel for the state maritime school training vessels, and modernizes the merchant mariner credentialing process.

Lastly, Title 7 of the Act includes a handful of tax provisions aimed at making the US maritime industry more competitive. The Act establishes a 33% investment tax credit for investments in the construction, repowering, or reconstruction of vessels in US yards, provided such vessels are documented under the US flag for 10 years, subject to a claw back. An additional credit of 5% would be available for vessels entered in a US-headquartered P&I Club, and another 2.5% credit for classification of the vessel with a US society. The bill would also exclude from taxable income payments under the Maritime, Tanker, and Cable Security Programs, the Shipbuilding Financial Incentives Program, the Strategic Commercial Fleet Program, the Small Shipyards Grant Program, and the Port Infrastructure Development Program. Investments in US yards would also qualify for a 25% credit.

It remains to be seen whether any, some, or all of the SHIPS Act will make its way into law. However, as noted above, the lead sponsorship roster for the bill is promising. The effort represents the first serious attempt to reform the US maritime industry in a generation. As the US feels increased pressure to keep up with China's burgeoning maritime industry and reenters serious peer nation military competition, a measure like the SHIPS Act will be necessary to maintain America's place among maritime nations.

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[11] The Capital Construction Fund is a program administered by MARAD allowing deferral of taxes on vessel earnings to be used for the construction of US-flag vessels. *See* MARAD, Capital Construction Fund, https://www.maritime.dot.gov/grants/capital-construction-fund.

[12] The guarantees currently exist for innovative technologies reducing greenhouse gases pursuant to the Energy Policy Act of 2005. 42 U.S.C. § 16513.

Key-ing In On The Purely Economic Claims Following The Baltimore Bridge Collapse

By Matthew A. Moeller[1]

The allision between the M/V DALI and the Francis Scott Key Bridge shortly after the ship left the Port of Baltimore resulted in numerous deaths, damage to the vessel, cargo, the bridge, and the disruption of port traffic and area commerce. The incident resulted in numerous claims from a variety of claimants. However, one group of claimants is particularly interesting as they appear poised to challenge the application of a longstanding, entrenched rule of maritime law that has largely stood the test of time despite many past yet unsuccessful attempts to do the same.

I. The Incident and the Claims

In the early morning hours of March 26, 2024, a Singaporean-flagged cargo ship, the M/V DALI, owned by Grace Ocean Private Limited and managed by Synergy Marine Private Limited, struck the bridge, causing it to collapse into the Patapsco River. Less than a week after the incident, Gray and Synergy filed an action for limitation of liability in federal court in Maryland under the Limitation of Shipowner's Liability Act, which allows shipowners to limit their liability to the value of their vessel and its cargo following a maritime incident, which in this case was just under $44,000,000.

Claimants and claims run the gamut from wrongful death claims filed by the families of the six construction workers who died in the collision to survivors of the collision, including the claims of a Maryland state inspector and a construction worker, to an individual claim for $6,000 worth of household goods on board the ship. The United States brought a claim for $103,078,056 under the Rivers and Harbors Act, Oil Pollution Act, and general maritime law for costs borne in responding to the incident, which resulted in a settlement. The nearly fifty-year-old bridge was a major thoroughfare and conduit connecting roadways around the Port of Baltimore and served as a critical access point to businesses in that area. The interesting group of claimants is the group that asserts claims that could refocus the district and appellate courts on the modern-day application of a nearly 100-year-old ruling.

II. The *Robins Dry Dock* Rule

Since the U.S. Supreme Court's 1927 decision in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927), plaintiffs have generally been unable to recover for purely economic losses absent some proprietary interest in the physically damaged property. In *Robins Dry Dock*, the time charterers of the steamship Bjornefjord sued Robins Dry Dock Repair Company for the loss of use of the steamer due to the company's negligence. The negligence and vessel damage occurred when the ship was off-hire and docked to fulfill a docking requirement under the charter party. The damage caused a delay, and Robins Dry Dock settled with the ship's owners. The issue was whether the time charterers could recover for losses resulting from the delay caused by the damage to the vessel. The Supreme Court held that the time charterers could not recover.

The Court reasoned that the time charterers were not parties to the contract between Robins and the owners and could not recover for any breach. The court determined that any damage to the ship was a tort in favor of the owners, not the charterers. The Court further reasoned that the charterers' loss was purely consequential and arose solely from their contractual arrangement with the owners. As a general rule, a tort committed against one person does not render the tortfeasor liable to another merely because of an existing contract between the injured party and the third party, especially when the contract was unknown to the wrongdoer. Additionally, the Court noted that there was no legal basis for the charterers to claim damages directly since any recovery for loss of use should go to someone who has a direct claim against the tortfeasor, which the charterers did not have, either in contract or in tort.

III. The Class Action for Purely Economic Claims

On September 24, 2024, Baltimore-based American Publishing, LLC filed a claim for loss of revenue and increased costs that it continues to incur due to the blockage of the Patapsco River Channel. Specifically, American claims that its income plunged 84% in April compared to the same month in 2023, and that before the collapse, it had a flourishing business, with increasing distribution and significant advertisement revenue from area businesses, but the collapse caused a dramatic halt in business activities. American also filed

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as a class representative on behalf of others similarly situated. Additionally, eight claimants, characterized as "container claimants," brought claims individually and on behalf of others similarly situated for economic losses and increased costs for containerized cargo delivered to Gray and Synergy and onboard the DALI at the time of the collapse. While the claims' amount is not specified, the allegations are that the amount will exceed the $5,000,000 threshold.

A) The threshold issue of a class action in a limitation proceeding

Supplemental Rule A of The Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Proceedings ("the Supplemental Rules") states that the general Federal Rules of Civil Procedure are applicable in admiralty proceedings except to the extent that they are inconsistent with the Supplemental Rules. The United States Court of Appeals for the Fifth Circuit held that a class action may not be instituted in a limitation of liability proceeding, finding that Rule 23 and Supplemental Rule F are incompatible due to three inconsistencies: (1) the class action interferes with the concursus contemplated by the limitation of liability proceeding; (2) the notice requirements of the limitation proceeding are more restrictive than in a class action; and (3) "the entire thrust of Supplemental Rule F is that each claimant must appear individually and this is obviously inconsistent with the class action." *Lloyd's Leasing Limited v. Bates*, 902 F.2d 368, 370 (5th Cir.1990). Fifth Circuit district and other federal district courts have followed *Lloyd's Leasing*. *See, e.g*., *Humphreys v. Hal Antillen*, *N.V*., 1994 WL 682811 (E.D. La.1994); *Golnoy Barge Co. v. M/T SHINOUSSA*, 1991 WL 267941 (S.D. Tex.1991); *Great Lakes Dredge & Dock Co. v. City of Chicago*, 1996 WL 210081 (N.D. Ill.1996). However, this is not an issue the United States Court of Appeals for the Fourth Circuit has squarely addressed. However, *In the Matter of the Complaint of Ingram Barge Company, as Owner of the ING4727*, the United States District Court for the Eastern District of Louisiana seemed to leave open the possibility of a class action in a limitation proceeding if the case could be distinguished from the line of Fifth Circuit jurisprudence holding to the contrary. No. 05–4419, 2006 WL 1004998 (E.D. La. Apr. 12, 2006).

B) The potential application of *Robins Dry Dock*

The class action claimants have expressly denied the applicability of *Robins Dry Dock*, asserting that it does not apply to intentional or reckless acts, nor does it apply to public nuisance claims or intentional interference with business relationships and has been preempted by CERCLA, under 42 U.S.C. § 9607(h). The claimants seem to rely on opinions from the United States Courts of Appeals for the First, Fourth, and Fifth Circuits that involve cases of negligently caused financial harm resulting in added expense, loss of trade, and business interruption, as well as negligent interference with contractual relations. *See Barber Line A/S v. M/V Donau Maru*, 764. F.2d 50 (1st Cir. 1985); *Marine Nav. Sulphur Carriers, Inc. v. Lone Star Industries, Inc*., 638 F.2d 700 (4th Cir. 1981); and *Dick Myers Towing Service, Inc. v. U.S*, 577 F.2d 1023 (5th Cir. 1978). In each case, the circuit courts affirmed the district court decisions in favor of the defendants. In *Dick Myers Towing Service*, the Fifth Circuit found that a plaintiff, in such a case, could not recover for interference with his contractual relations unless he showed that the interference was intentional or knowing. Moreover, in *Marine Nav. Sulfur Carriers, Inc.,* the Fourth Circuit articulated that recovery in such cases for negligence or public nuisance theories have been limited to plaintiffs such as clamdiggers or commercial fishermen in environmental (i.e., oil spill) cases because the economic losses flow directly from the action of escaping oil onto life in the sea. In *In re Deepwater Horizon*, 784 F.3d 1019 (5th Cir. 2015), a much more recent decision cited by the class claimants, the Fifth Circuit found *Robins Dry Dock* barred claims for damages by Mexican states resulting from criminal negligence, but not those resulting from intentional criminal obstruction of congressional investigation.

IV. Will *Robins Dry Dock* apply?

Given the current body of Limitation of Liability jurisprudence, it seems unlikely that the numerous claimants can sustain a class action within the limitation proceeding. However, regardless of whether the claimants ultimately qualify for class action status or not, the fundamental issue is whether the claims ultimately fit into a judicially implied or expressed exception to *Robins Dry Dock* or whether this case results in a novel exception. Throughout their claim, the class action claimants repeatedly and continuously stated that intentionality resulting from Grace and Synergy's decision to initiate the voyage based on their economic self-interest, despite their knowledge that the vessel was not ready for safe navigation, privity with the claimants has been established. Whether they can sufficiently prove those allegations and whether such proof would result in the claimants escaping the application of *Robins Dry Dock* remains to be seen. But, even after nearly 100 years of little evolution concerning the rule, there is always a chance for change, a slight adjustment, or a nudge in a particular direction.

Recent Developments

Cruise Lines

Campbell v. SP Cruises OPCO Ltd., 2024 U.S. Dist. LEXIS 223038 (S.D. Fla. Dec. 10, 2024)

This case arose when the plaintiff was injured leaving the bus during a shore excursion while on a cruise with the defendant cruise line. The defendant cruise line sold tickets to specific shore excursions, including an excursion to Krka National Park (KNP) at a scheduled stop in Croatia. The plaintiff signed a shore excursion waiver prior to attending the excursion. After reaching KNP and debussing at the park entrance, the plaintiff alleges she was struck by the tour bus that had taken her to KNP, causing her to be thrown into an adjacent ravine which caused serious injuries. The plaintiff filed suit against the defendant and others for negligence, indicating that the ticket contract adopted the Athens Convention through specific terms, thus voiding the shore excursion waiver.

The defendant cruise line filed a motion to dismiss alleging that by agreeing to the ticket contract, the plaintiff expressly waived its liability for any injury occurring during shore excursions. The defendant cruise line argued that the Athens Convention was inapplicable beyond the specific terms that were incorporated into the ticket contract. Because of the alleged validity of the excursion waiver, the defendant cruise line argued that the plaintiff had insufficiently pled a claim on which relief could be granted, warranting dismissal.

"Where the contract terms are clear and unambiguous, the court will look to that alone to find the true intent of the parties." *Caradigm USA LLC v. PruittHealth, Inc.*, 253 F. Supp. 3d 1175, 1185 (N.D. Ga. 2017) (citing *Greenberg Farrow Architecture, Inc. v. JMLS 1422, LLC*, 339 Ga.App. 325, 329, 791 S.E.2d 635 (2016)). Nevertheless, where ambiguities in cruise ship ticket contracts exist, such ambiguities are resolved against the carrier. *Wajnstat v. Oceania Cruises, Inc.*, 2011 U.S. Dist. LEXIS 157871 (S.D. Fla. July 12, 2011).

Courts in the United States District Court for the Southern District of Florida have routinely held terms of a ticket contract that disclaim or limit liability are binding under maritime law. *See Verna v. Seven Seas Cruises De R.L., LLC*, No. 13-23051-CIV, 2018 U.S. Dist. LEXIS 162610 (S.D. Fla. August 28, 2018). The *Wajnstat* court applied a two-part test to determine whether a cruise line reasonably communicated an important term of the contract to the passenger: (I) the physical characteristics of the contract; and (II) any extrinsic factors indicating the passenger›s ability to become meaningfully informed. *Wajnstat*, 2011 U.S. Dist. LEXIS 157871, 2011 WL 13099034, at *3.

The United States District Court for the Southern District of Florida agreed with the defendant cruise line that the Athens Convention did not void the shore excursion waiver contained in the ticket contract because the United States has neither signed nor ratified either the Athens Convention or the 2002 Protocol. According to the Vienna Convention on the Law of Treaties, "[a] treaty does not create either obligations or rights for a third State without its consent." The court explained that the United States Court of Appeals for the Eleventh Circuit has previously held that cruise ship ticket contracts may incorporate specific provisions of the Athens Convention without being bound by all provisions of that Convention. *See Farris v. Celebrity Cruises*, 2011 U.S. Dist. LEXIS 163567 (S.D. Fla. Jun. 29, 2011), *aff'd*, 487 F. App'x 542 (11th Cir. 2012). As a result, the court held that the incorporation of a provision of the Athens Convention as a term of the ticket contract did not cause the ticket contract in its entirety to fall under the scope of the Convention or any of the laws of the European Union. Because the shore excursion waiver was thereby validated, the court granted the defendant's motion to dismiss for the plaintiff's failure to state a claim.

Submitted by CEP

Jones Act

Brown v. APL Marine Services, Ltd., 2024 U.S.Dist. LEXIS 195550 (N.D. Cal. 2024)

Quentin Brown, a wiper aboard the M/V PRESIDENT WILSON, filed suit against APL Marine Services claiming that his supervisors and fellow crewmembers witnessed "relentless, exhausting, and damaging emotional and physical advances" from Yasin Berber, a reefer technician aboard the same ship. This harassment culminated in sexual assault that Brown reported to his supervisors, but his supervisors failed to act.

Brown's claims against APL included Jones Act negligence, unseaworthiness, and intentional and negligent infliction of emotional distress under Title VII of the Civil Rights Act. APL moved to dismiss the Jones Act claim, but the Court declined to do so. The Court also declined to dismiss the unseaworthiness claim finding that the allegations against Berber were sufficiently "savage and vicious" to cause the vessel to be unseaworthy. While those claims survived initial motions to dismiss, the Court ultimately found that Brown's Jones Act claim did not have sufficient evidence to survive summary judgement as he could not show that "the assault was committed by his superior for the benefit of the ship's business," and that if the assault was foreseeable officers failed to prevent it. Despite granting summary judgement on the Jones Act claim, the Court denied summary judgement for the unseaworthiness claim.

Submitted by CC

Limitation of Liability

Anchorage Yacht Basin, Inc. v. Perez (In re Anchorage Yacht Basin, Inc.), 2024 U.S. Dist. LEXIS 230277 (M.D. Fla. Dec. 20, 2024)

This action arose when a drowning death occurred while the decedent was on Petitioner's boat. Petitioner filed a limitation action and moved for a monition and injunction requiring all claims arising out of this boating incident to proceed in the limitation action. The decedent's estate then sought to lift the stay to file a wrongful death suit in state court.

The United States District Court for the Middle District of Florida stated that courts have attempted to give effect to both the Limitation Act and the saving to suitors clause whenever possible, by identifying two sets of circumstances under which the damage claimants must be allowed to try liability and damages issues in a forum of their own choosing. The first circumstance arises where the limitation fund exceeds the aggregate amount of all the possible claims against the boat's owner. The second circumstance exists where there is only one claimant. In genuine "multiple-claims-inadequate-fund" cases, the courts have not allowed damage claimants to try liability and damages issues in their chosen fora, even if they agree to return to the admiralty court to litigate the boat owner's "privity or knowledge." This is because, without a concursus in the admiralty court, the claimants could secure judgments in various courts that, in the aggregate, exceed the limitation fund.

The court recognized this case as a classic multiple claims inadequate fund case and denied the petition for leave to file a wrongful death claim in state court.

Submitted by SMM

In re John, 2024 U.S. Dist. LEXIS 222223 (M.D. Fla. Dec. 9, 2024)

This case arose out of a collision between two vessels on navigable waters east of Manatee County, Florida. The petitioner filed suit seeking exoneration from, or limitation of, liability for the accident. The respondent moved to dismiss, arguing, among other things, that the petitioner's vessel – a 2023 Crownline E235XS – was excluded from limitation under the Limitation of Liability Act, 42 U.S.C. § 30501 *et seq.*, because the statute does not apply to "covered small passenger vessels" such as the petitioner's vessel and because the petitioners did not own the vessel.

The Limitation of Liability Act applies to "seagoing vessels and vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters." 46 U.S.C. § 30502(a). But, beginning on December 23, 2022, the Limitation of Liability Act no longer applied to "covered small passenger vessels." *Id*. at § 30502(b). Moreover, it was the petitioner's burden to show, in the petition, that the Limitation of Liability Act applied. *E.I. Du Pont De Nemours & Co. v. Bentley,* 19 F.2d 354, 354 (2d Cir. 1927).

The petition stated that during the voyage the petitioners had "rental and dominion control over the vessel" and the vessel carried "guests." The respondents argued that having "rental and dominion control" over the vessel is insufficient to prove ownership to invoke the protections of the Act. The United States District Court for the Middle District of Florida disagreed, reminding that other courts have expanded the definition of owner or charterer to encompass parties in analogous situations who exercise dominion and control over a vessel, thus being owners *pro hac vice*. The court found these allegations sufficient to establish that the petitioners were owners *pro hac vice* such that the Limitation of Liability Act covers them.

The petition did not allege, however, anything concerning the vessel's weight, whether it was a wing-in-ground craft, nor the number of passengers on the vessel. As a result, the court recommended dismissing the petition without prejudice as it failed to plead facts sufficient to demonstrate that the Limitation of Liability Act applied to the vessel.

Submitted by CEP

Marine Insurance

Barrios v. Centaur, LLC, No. 23-30892, 121 F.4th 515, 2024 U.S. App. LEXIS 29170 (5th Cir. Nov. 15, 2024)

The obligation to procure a Protection & Indemnity insurance policy with coverage "*not less than* the P&I SP-23 (Revised 1/56) form of policy" in a marine contract is clear, explicit, and leads to no absurd consequences when construed with other insurance requirements according to the United States Court of Appeals for the Fifth Circuit. It requires coverage for liabilities for personal injuries to crew/employees.

In this case, a dock owner entered into a master service contract with a construction contractor for a dock facility project. An employee of the construction contractor was injured while transferring a generator from a crew boat to the construction contractor's barge. The crew boat was owned and operated by a third-party, who sought the benefit of the insurance procurement provision in the master service contract. Although not a party to the master service contract, it was undisputed that the crew boat owner/operator was a proper third-party beneficiary to the contract.

The Fifth Circuit found clear error with the district court's conclusion that the procurement provision was ambiguous. The SP-23 form is "a benchmark for insurance procurement requirements in the marine insurance industry," which covers personal injuries to crew/employees. Accordingly, the plain and ordinary meaning of the master service agreement, by obligating the construction contractor to procure a P&I policy "not less than the P&I SP-23 (Revised 1/56) form of policy or its equivalent," required that the construction contractor obtain a P&I policy that included crew/employee coverage. The construction contractor breached the master service contract by failing to obtain such coverage.

The Fifth Circuit also rejected the district court's conclusion that the procurement provision was ambiguous because it created the possibility of duplicative coverage with a workers' compensation insurance policy, which the master service agreement also required. Duplicative coverage, according to the district court, would trigger the escape clauses in the two policies and lead to the absurd result of no coverage at all under either policy. To the contrary, the Fifth Circuit explained that mutually repugnant escape clauses make both policies liable for the claim under Louisiana law (which applied to the policies). "Consequently, any assertion that interpreting the [master service contract's] language according to its ordinary meaning would result in an absurd consequence — nugatory insurance policies — falls apart." The insurance procurement provision was enforceable.

Submitted by WMF

Guardian Ins. Co. v. Lopez-Marrero, No. 24-1063 (BJM), 2024 WL 5145527, at *1 (D.P.R. Dec. 17, 2024)

Guardian Insurance filed this federal jurisdiction claim in admiralty, seeking declaratory judgment against its insured, Defendant Lopez, on the issue of whether there is coverage under its policy for Lopez's alleged vessel damages. In June 2022, Guardian issued a marine insurance policy to cover a vessel that Lopez purchased. The policy was renewed in June 2023 and the renewal period was until June 2024. After Lopez bought the vessel, he stored it in a dry rack at a marina. Lopez certified to Guardian he inspected the rack and that it conformed with the vessel's manufacturer's recommendation for dry storage.

Before the end of the initial policy period, a crack in the hull of the vessel appeared; however, Lopez alleges he did not notice the damage until just after Guardian's policy was renewed. Lopez notified Guardian of the damage and filed a claim with them for coverage on the policy. The next day, Guardian started investigating the claim. Guardian retained a surveyor and a naval architect to determine the exact cause of the damage. They concluded the vessel's "hull had a manufacturing/construction defect arising out of an inadequate infusion process of the resin system." They recommended further testing to be certain.

Guardian attempted to settle the claim with Lopez before having to incur more expenses on testing, but they were unable to reach an agreement. Guardian then proceeded with the additional testing, which concluded that the damage was caused "by non-conformities and/or manufacturers defect or defect which over time were exacerbated to the point of failure from the vessel being moored on a work type-rack." Based on this finding, Guardian denied Lopez's claim under specific exclusions in the policy, namely the exclusion for damages caused by manufacturing or design defects. Guardian also claimed that Lopez failed in his duty to inspect and certify that the cradle/rack in which the vessel was stored actually conformed to the manufacturer's recommendation, and that, if the vessel's damage was caused by the way it was stored, no coverage would be afforded either.

In its declaratory judgment action, Guardian sought a declaration from the court that: (1) the claim was excluded by the policy and, therefore, no payment was

due to Lopez; (2) the policy was void ab initio because the vessel was unseaworthy at the inception of the policy; and (3) in the alternative, if the policy was valid and it provided coverage, then Lopez was not entitled to the full policy limit and an adjustment of loss needed to be done. Lopez moved for dismissal of Guardian's second and third claims under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

As to Guardian's claim that the policy was void ab initio, the United States District Court for the District of Puerto Rico found that Guardian sufficiently pled said claim under admiralty law, as there is an absolute implied warranty of seaworthiness applicable to all maritime insurance contracts and that warranty requires the insured vessel be seaworthy at the inception of the policy or, if it is not, then the policy is void. Underwriters at Lloyd's v. Labarca, 260 F.3d 3, 7 (1st Cir. 2001); Great Lakes Insurance SE v. Andersson, 89 F.4th 212, 217 (1st Cir. 2023). Nonetheless, the court held that Guardian had in fact waived any argument it may have had pursuant to the absolute warranty of seaworthiness when it denied Lopez's claim on the basis of a supposed exclusion by the policy, instead of avoiding the policy outright. The court explained that by sending a letter denying the claim based on the exclusions included in the policy, Guardian had accepted that there was an insured interest, i.e., the vessel, under the policy. As such, the District Court dismissed Guardian's second cause of action, with prejudice.

As to Guardian's claim for an adjustment of the loss claimed, Lopez argued it should be dismissed as well because Guardian did not appraise the vessel prior to the loss as required by the policy. Guardian countered that the policy allowed for the valuation to be done post-lost. While the District Court agreed that the policy did indeed say that, it explained that Guardian was nevertheless required to plead facts sufficient to allege the cause of action for adjustment of loss. Without any allegations in its pleadings regarding any appraisal or vessel valuation, the court found itself unable to glean a plausible cause of action. As a result, the District Court dismissed Guardian's third case of action, but without prejudice.

Submitted by KLR

Wapiti Energy, LLC v. Clear Spring Prop. & Cas. Co., No. 4:22-CV-01192, 2025 U.S. Dist. LEXIS 4002 (S.D. Tex. Jan. 8, 2025)

This case was the subject of a prior note, 22 BENEDICT'S MAR. BULL. [127] (Fourth Quarter 2024), when the United States Court of Appeals for the Fifth Circuit resolved that the potential for an injunction, pursuant to a Louisiana possessory action, to compel removal of a stranded barge satisfied the "compulsory by law" condition in the common wreck removal clause of a protection and indemnity policy. On remand, the parties disputed another condition to coverage under the wreck removal clause: whether the vessel was a "wreck."

Based upon its survey of caselaw defining a "wreck," the district court concluded that "what seems to be the most important variable in 'wreck' inquiries is whether the vessel is 'navigable.'" Despite the lack of a "unanimous" definition of a "navigable vessel," the "general agreement" among courts is that navigability refers to a vessel's capability to move and operate independently.

The insurer argued that the barge was not a "wreck" because it was floated free from the marsh and towed without any need for maintenance or repair as a consequence of the grounding. In the court's opinion, however, "[a] vessel does not need to require maintenance or repair to be considered 'unnavigable' or a 'wreck' . . . ." The court found that the barge was a wreck because it needed pulling power to remove it from the marsh and was unable to unmoor itself and independently navigate through the water. The court did not explain whether the barge would have required a crew to unmoor and a tug to navigate irrespective of the stranding. The court granted summary judgment to the insured.

Submitted by WMF

Maritime Liens

Machias Sav. Bank v. F/V RICH ENDEAVOR, No. 1:24-CV-00027-LEW, 2024 WL 3439886 (D. Me. July 17, 2024), *report and recommendation adopted*, No. 1:24-CV-00027-LEW, 2024 U.S. Dist. LEXIS 144351 (D. Me. Aug. 14, 2024)

Machias Savings Bank sought to enforce a maritime lien against the vessel F/V Rich Endeavor and its owner. The bank filed a motion for an interlocutory sale of the vessel and for leave to sell the vessel before the case is fully resolved and bid on it using the debt owed to them instead of cash. The magistrate recommended granting the bank's motions, allowing the sale and credit bid, as defendant did not deny the material allegations and did not respond to requests for admissions.

[Editor's Note: The Court subsequently granted the bank's motion for summary judgment *in rem* against the

vessel and a deficiency judgment *in personam* against Colyn Rich. 2024 U.S. Dist. LEXIS 202712, 2024 WL 4711099 (D. Me. Nov. 7, 2024.]

Submitted by VD

Naval Logistics, Inc. v. Petrus, 2024 U.S. Dist. LEXIS 186004 (S.D. Fla. Oct. 11, 2024)

This action arose when Defendant's vessel sank in the Miami river and was salvaged. The vessel was taken to a shipyard for a haul out and then moved by Plaintiff to a second marina. The vessel sank a second time in the new marina. Plaintiff salvaged the vessel and notified Defendant of the second sinking. When Plaintiff presented its invoice to Defendant for the tow, second salvage, and other services, Defendant paid for the tow and storage costs but not the salvage expenses. Plaintiff filed suit alleging breach of contract and a maritime lien for necessaries and ultimately filed a motion for summary judgment.

The court found that Defendant acknowledged that Plaintiff performed the second salvage, did not object to the salvage, and thanked Plaintiff for salvaging the vessel. Defendant then entered into an agreement with Plaintiff that listed himself as the owner of the vessel and agreed to pay Plaintiff for all services provided by Plaintiff including charges for haul out, launch, storage, work and other repairs.

The court granted Plaintiff's motion directed to the breach of contract claim. In regard to the lien, the court stated that for a party to establish a maritime lien in a vessel: (1) the good or service must qualify as a 'necessary'; (2) the good or service must have been provided to the vessel; (3) on the order of the owner or agent; and (4) the necessaries must be supplied at a reasonable price.

The court found that Plaintiff successfully showed that the services (repairs, supplies, towage, use of a dry dock, docking and storage, salvage) it provided to the vessel were necessaries. The court also found that Plaintiff satisfied the third element by showing that Defendant directed Plaintiff to provide these services. Finally, the court found that the services were performed at reasonable prices, largely because Defendant agreed to the storage and other prices in the Agreement with Plaintiff. The court also noted that Defendant had made a partial payment to Plaintiff for the necessaries.

The court granted Plaintiff's motion finding that Plaintiff established all four required elements to prove that it had a maritime lien on the vessel. However, the court noted that even though the breach of contract and maritime lien counts overlapped in requested relief, Plaintiff was not entitled to double damages even though Defendant's actions constituted two grounds of recovery.

Submitted by SMM

Practice and Procedure

Geico Marine Ins. Co. v. Miller, 2024 U.S. App. LEXIS 26185 (11th Cir. Oct. 17, 2024)

This case arose out of a mechanical failure suffered by a yacht during its sea test. The defendant's marine mechanic disassembled the failed engine and ultimately determined that it had suffered a connecting rod bearing failure, which resulted in other damage to the engine. The marine mechanic described the malfunction of the connecting rod bearing as the "primary cause" of the failure. The defendants filed a claim with their insurer, the plaintiff, which it denied. The plaintiff then sued their insureds, the defendants, seeking a declaratory judgment that the damage they claimed was not covered by the policy. The defendants countersued for breach of contract.

The parties shared an expert who published a report determining that there was likely an issue with the bearings causing a mechanical breakdown. During the deposition of the plaintiff's corporate representative, the corporate representative testified that Geico agreed that there was a latent issue with the bearings causing the mechanical breakdown and that latent issue is just another word for latent defect.

The parties filed cross motions for summary judgment. The district court granted the plaintiff's motion, explaining that "the record lacks evidence of a latent defect," so the exception to the latent defect exclusion wouldn't apply, and that the "loss is excluded by the policy's mechanical breakdown exclusion." The district court determined the corporate representative's testimony didn't provide evidence of a latent defect because it was "entirely speculative" and he "wasn't qualified to testify about any alleged defect," so there was "no competent evidence of a latent defect."

On appeal, the defendant argued that the corporate representative's testimony created a genuine issue of material fact as to the existence of a latent defect in the yacht's engine. The United States Court of Appeals for the Eleventh Circuit agreed, reversing the district court's grant of summary judgment to the plaintiff insurer. The court explained that "[s]peculation does not create a genuine issue of fact; instead, it creates a false issue,

the demolition of which is a primary goal of summary judgment[,]" *Cordoba v. Dillard's, Inc*., 419 F.3d 1169, 1181 (11th Cir. 2005). The plaintiff's corporate representative was not giving lay opinion as she was testifying as the insurer's rule 30(b)(6) designee. As a result, the Eleventh Circuit held that there was evidence from which a reasonable jury could conclude that the latent defect was also the efficient cause of the engine's failure and reversed summary judgment.

Submitted by CEP

Greene v. Cosco Shipping Camellia Ltd., 2024 U.S. Dist. LEXIS 205423 (S.D. Ga. Nov. 12, 2024)

This matter was before the Court on Defendant COSCO Shipping Camellia Limited's Motion for Reconsideration of the Court's Order denying its request for summary judgment on Plaintiff's negligence claim. Plaintiff was working as a longshoreman aboard Defendant's ship when he was injured. On the day of the incident, the Vessel's crew had rigged the gangway before cargo operations began. Shortly after the longshoremen began embarking the Vessel via the gangway, the gangway's handrail collapsed.

No longshoremen were injured in this first incident. Based on the video footage, it appeared that the mate supervised the process of the longshoremen raising the gangway rail into place. Once the handrail was seemingly raised into place, the video appeared to depict the mate leaning over the handrail to inspect the pin before ascending the gangway to the Vessel. Roughly thirty minutes later, Plaintiff descended the gangway and, as he reached the bottom landing, the handrail again collapsed, causing him to fall onto the dock below. Plaintiff filed this suit alleging a variety of negligence-based theories on the part of Defendant with regard to the handrail.

The parties agree the handrail collapsed because a locking pin came out of place. However, the parties disagree as to what caused the pin to fall out. Plaintiff maintained that the pin was negligently installed, and that this negligence was attributable to the Vessel's crew. Defendants simply maintained that they did not know what caused the pin to fall out, but that the installation, and thus any negligent installation of the pin, was solely attributable to the longshoremen.

The decision to grant a motion for reconsideration is committed to the sound discretion of the district court. *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1216 (11th Cir. 2000). Motions for reconsideration are to be filed only when "absolutely necessary" where there is: (1) newly discovered evidence; (2) an intervening development or change in controlling law; or (3) a need to correct a clear error of law or fact. *Bryan v. Murphy*, 246 F. Supp. 2d 1256, 1258-59 (N.D. Ga. 2003); *Greene v. Bd. of Regents of Univ. Sys. of Ga.*, No. 4:21-CV-277, 2023 WL 5837501, at *29 (S.D. Ga. Sept. 8, 2023).

Defendant argued that the Court committed two errors. First, it claimed the Court, in denying summary judgment, improperly considered and relied upon a theory not presented by Plaintiff, specifically that the locking pin had some defect (as opposed to having simply been installed negligently). Additionally, Defendant claimed that the Court misconstrued 33 U.S.C. § 905(b) and *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981), in allowing what is "effectively" an (impermissible) unseaworthiness or strict liability claim to proceed to a jury. ("By allowing Plaintiff's claim to proceed despite no identification of a specific hazard attributable to alleged negligence of the crew as opposed to the longshoremen, the Order also inadvertently has allowed an unseaworthiness claim to go to the jury.")

The Court re-reviewed the parties' original briefing. The Court found that the Defendant correctly pointed out that the Court should not have considered evidence when deciding whether Plaintiff made the necessary showing as to each of the Scindia duties. Defendant also correctly asserted that Plaintiff instead repeatedly claimed that the locking pin had been negligently installed prior to the second collapse. In light of the foregoing, the Court reconsidered its decision to consider and rely on the evidence of a defect in the pin.

Accordingly, the Court found that at trial, Plaintiff would not be permitted to present the jury with a theory that the locking pin that was in the handrail at the time of the collapse that caused Plaintiff's fall was itself defective in some way as Plaintiff waived any such theory by not presenting it in his summary judgment briefing or otherwise notifying Defendant that he asserted any claim of a defective pin.

The Court granted in part and denied in part Defendant's Motion for Reconsideration. The Court found that the Plaintiff did not present evidence to support a theory that the locking pin was defective. Therefore, the Court reconsidered and vacated its determinations that Plaintiff could proceed on his claim that Defendant breached the turnover duty and the duty to intervene. The Court did not reconsider or vacate its determination that Plaintiff presented sufficient evidence that he was injured due to Defendant's breach of the active control duty.

Submitted by JAP

Johnson v. Cashman Dredging & Marine Contracting Co., No. 23-11870-JEK 2024 WL 5170265, at *1 (D. Mass. Dec. 19, 2024)

Johnson brought a Jones Act claim against his employer Cashman arising out of injuries he allegedly suffered while working as a seaman on Cashman's vessel, "when he was knocked off a tug by a new crane operator who had not been trained properly." During discovery, Cashman produced an incident report regarding its investigation into and findings about what happened. Johnson then moved the court for an order of spoliation against Cashman for its alleged failure to investigate the incident immediately after it happened resulting in "physical evidence as well as witness observations being 'irreplaceably lost.'" In its opposition, Cashman asserts that it did in fact investigate immediately and issued a report based on Johnson's statement at that time that the wind caused the incident.

The United States District Court for the District of Massachusetts began its opinion distinguishing Johnson's claim from usual spoliation claims, noting that it is "not based on the actual destruction of evidence but on a failure-to-collect evidence theory." Such a theory, the court explained, has not been endorsed or adopted by the United States Court of Appeals for the First Circuit as a basis for a spoliation claim. The court emphasized that when deciding whether spoliation has occurred, it "must first determine whether an act of destruction occurred." *Gordon v. DreamWorks Animation SKG, Inc*., 935 F. Supp. 2d 306, 313 (D. Mass. 2013). A finding of actual destruction though is not enough by itself to warrant sanctions. "Fundamentally, a court's decision whether to sanction a party for allegedly spoiling or destroying evidence depends on a finding that the party had a duty to preserve the evidence in question, which it breached." *Ortiz v. City of Worcester*, No. 4:15-CV-40037-TSH, 2017 WL 2294285, at *2 (D. Mass. May 25, 2017).

Johnson asserted that Cashman had a duty to preserve evidence on two grounds. First, he claimed the duty to investigate arises from admiralty law. The court instantly rebuffed this claim finding instead that "No such duty arises" from the admiralty law cited by Johnson. Second, Johnson claimed the duty to investigate arises from Cashman's own company policies, which provided that "injuries should be investigated, employee and witness statements should be gathered, evidence should be preserved, and pictures taken." The court sidestepped the legal question of duty, however, by noting that Cashman had investigated the incident at the time it happened based on Johnson's original statement on the cause. The District Court concluded that "Johnson's theory change [on cause] does not support a spoliation claim," and denied Johnson's motion accordingly.

Submitted by KLR

Podziewski v. Cabras Marine Corp., 2024 U.S. Dist. LEXIS 213415 (D.N. Mar Is. 2024)

Cabras Marine ("Cabras"), a Guam corporation, and Saipan Crewboats ("Crewboats"), a Northern Mariana Islands corporation, jointly provided ferry services between the ships of the Maritime Prepositioning Force in the Mariana Islands. Kyle Podziewski, a U.S. citizen residing in Saipan, was injured while riding as a passenger on a ferry owned by Cabras. He filed suit in the Superior Court for the Commonwealth of the Northern Mariana Islands against Cabras and Crewboats, asserting a claim for negligence. The defendants removed the action based on the court's original admiralty jurisdiction and the jurisdiction of the Suits in Admiralty Act (the "SAA") and the Public Vessels Act (the "PVA"). Podziewski moved to remand.

Under 28 U.S.C. § 1333(1) "[t]he district courts shall have original jurisdiction, . . .[over] [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." *Podziewski*, 2024 U.S. Dist. LEXIS 213415, at * 4. However, the "saving to suitors" clause within that statute bars removal of general maritime claims unless diversity jurisdiction or an independent basis for federal question jurisdiction applies. *Id.* at * 4. The saving to suitors clause does not apply to claims falling under the SAA or the PVA, which belong to the exclusive jurisdiction of the federal district courts. *Id.*

Citing the majority rule, Chief Judge Manglona held that the case was not removable under the court's admiralty jurisdiction. Under *Romero v. Int'l Terminal Operating Co*., 358 U.S. 354, 362-70 (9th Cir. 2001), the saving to suitors clause bars removal of general maritime claims to federal court unless some other jurisdictional basis exists. *Podziewski*, 2024 U.S. Dist. LEXIS 213415, at * 6. Here, Podziewski's complaint asserted a negligence claim against the defendants as the provider of the ferry services and operator of the vessel which caused his injuries. These are general maritime claims which fall under the savings to suitors clause. *Id*. at * 7.

Defendants next argued the case was removable based on the SAA and PVA. Under the SAA, "a civil action in admiralty in personam may be brought against the ["U.S."] in cases where, "if a vessel were privately owned or operated . . . a civil action in admiralty could

be maintained." 46 U.S.C. § 30903. Under the PVA, "[a] civil action in personam in admiralty may be brought, or an impleader filed, against the [U.S.] for . . . damages caused by a public vessel of the ["U.S."]." 46 U.S.C. § 31102.

The court articulated that, while Podziewski may have been injured when he was on "[a] ladder ... attached permanently to the rear of the prepositioning ship" (a federally owned vessel), that alone is insufficient to establish that his claims fall under the SAA or PVA. *Podziewski*, 2024 U.S. Dist. LEXIS 213415, at ** 12-13. The record before the court did not support that a federally owned vessel, U.S. employee or conduct resulting from the operation of a federal owned vessel caused Podziewski's injuries. *Id*. at * 13. On the contrary, the record suggested that the actions of the defendants Cabras and Crewboats and their employees were the but-for cause of his injuries. *Id*. Accordingly, the court remanded the case. *Id*.

Submitted by GP

TWC Acqua Ltd. v. Rfib Grp. Ltd., 2024 U.S. App. LEXIS 28292 (11th Cir. Nov. 7, 2024)

This action arose when a yacht suffered interior damage when heavy rain created leaks causing water to enter into the interior of the cabin. Plaintiff, the owner of the yacht, notified its insurance company and sought indemnification for the damages. Defendant, the insurance broker, did not indemnify Plaintiff. As a result, Plaintiff sued Defendant for breach of a marine insurance contract. Plaintiff then moved for a default against Defendant for failing to appear and defend the suit. The clerk granted the default the next day.

Seven days after the default, Defendant appeared for the first time and moved to set aside the entry of default. In its motion, Defendant argued that it had good cause for failing to appear or file a responsive pleading in time because there appeared to have been a misunderstanding between Plaintiff's Counsel and Defendant's prior Counsel regarding the scope of the extension of time to respond to the Complaint. The district court denied Defendant's motion to set aside the entry of default concluding that Defendant failed to show good cause as required to set aside the default. The court noted that Plaintiff's and Defendant's purported agreement for an extension of time was not self-executing absent court approval, which Defendant never sought.

The district court then denied Defendant's motion for reconsideration and granted Plaintiff's motion for final default for liability but withheld judgment on damages without more evidence regarding same. Defendant appealed three of the district court's orders: (1) the order denying Defendant's motion to set aside the entry of default, (2) the order denying Defendant's motion for reconsideration, and (3) the order granting in part Plaintiff's motion for a default judgment as to liability.

Defendant's first argument on appeal was that the district court erred by finding that Plaintiff's service of process conferred personal jurisdiction over Defendant. The court denied Defendant's appeal finding that a party's right to dispute personal jurisdiction on insufficient service of process grounds is waived if the party fails to assert that objection in his first motion under Rule 12. Defendant challenged the district court's entry of default judgment but did not challenge service of process or personal jurisdiction in any of its briefs or motions.

Defendant next argued that the district court erred by finding that it had subject matter jurisdiction over this action despite the insurance policy's forum selection clause specifying New York as the proper forum. The court ruled that binding precedent foreclosed this argument. The United States court of Appeals for the Eleventh Circuit has held that "motions to dismiss based upon forum-selection clauses ordinarily are not properly brought pursuant to [Federal] Rule [of Civil Procedure] 12(b)(1)." Lipcon v. Underwriters at Lloyd's, London, 148 F.3d 1285, 1289 (11th Cir. 1998).

In Lipcon, the Eleventh Circuit rejected the appellees' argument to the contrary "because the basis upon which the defendants seek dismissal—namely, that the agreement of the parties prohibits the plaintiff from bringing suit in the particular forum—is unrelated to the actual basis of federal subject matter jurisdiction." Id. The Eleventh Circuit concluded that forum selection clauses raise issues of improper venue, not subject matter jurisdiction. The district court had original subject matter jurisdiction over this action because Plaintiff asserted its sole claim under 28 U.S.C. § 1333. The policy's forum selection clause did not divest the district court of its original subject matter jurisdiction. Accordingly, the Eleventh Circuit ruled that the district court did not err in finding that it had subject matter jurisdiction over this action.

Defendant next argued that Plaintiff failed to plausibly allege breach of contract in the complaint and therefore a default judgment was not proper. Specifically, Defendant argued that it was not the insurer and thus Plaintiff's complaint failed to state a cause of action. In granting the default, the district court accepted as true that Plaintiff had a marine insurance contract with Defendant that Defendant breached by failing to investigate, respond to, and indemnify losses that

Plaintiff asserted. However, the insurance policy attached to the complaint contradicted Plaintiff's allegations in that it specifically identified Defendant as the insurance broker, not the insurance company.

Plaintiff argued that the district court did not abuse its discretion by denying Defendant's motion for reconsideration when Defendant raised its broker status argument in that motion but not in its initial motion to vacate the entry of default. However, the Court of Appeals found that Defendant argued to the district court that the district court could not enter default judgment in favor of Plaintiff because Plaintiff failed to state a breach of contract claim against Defendant because it was not an insurer that could be liable for indemnification under the policy. The district court had to consider whether Plaintiff plausibly stated a claim for breach of contract before entering a default judgment and failed to do so.

The Eleventh Circuit held that the district court did not apply *Twombly* and *Iqbal's* pleading standard to Plaintiff's complaint and that failure to do so was an abuse of discretion. The Eleventh Circuit vacated the district court's order and remanded with instructions to dismiss Plaintiff's complaint for failure to state a claim upon which relief can be granted.

Submitted by SMM

Salvage

Marine Towing & Salvage of SW Fl, Inc. v. One 66' 2019 Sabre Dirigo, 2024 U.S. Dist. LEXIS 225657, M.D. Fla. Dec. 13, 2024)

Plaintiff brought a salvage claim in this matter. To establish a claim for pure salvage, Plaintiff must show by a preponderance of the evidence (1) marine peril, (2) voluntary service not required by an existing duty, and (3) success in whole or in part. *Girard v. M/V "BLACKSHEEP"*, 840 F.3d 1351, 1354 (11th Cir. 2016).

Courts have found marine peril when a boat is hard aground, taking on water, or at the mercy of the sea because of lack of power. *See Fine v. Rockwood*, 895 F. Supp. 306, 309 (S.D. Fla. 1995) (collecting cases). No marine peril exists if the boat "has the situation under control such that there is no reasonable apprehension for her safety in the future if left to her own unaided efforts." *Biscayne Towing & Salvage, Inc. v. M/Y Backstage*, 615 F. App'x 608, 610 (11th Cir. 2015) (cleaned up).

The Court found that the evidence offered at trial showed there was no marine peril or reasonable apprehension of marine peril. This was not a case where the boat was hard aground when Plaintiff arrived to render assistance. Nor was the boat taking on water or at the mercy of the sea. The occupants were on a leisure cruise in a large boat. While the sea was choppy, the weather and sea conditions did not pose a danger to the boat or those on board. Although the boat then ran over a sandbar, it was not moving fast, and those on board felt only a bump. The boat could accelerate and maneuver after running over the sandbar, and no water was entering the boat. The Court found that Plaintiff fail to prove its story of peril (high winds, rough seas, treacherous shoals, a completely disabled boat, frantic occupants, and a nearby, downwind beach).

The Court found that Plaintiff's other claims fared no better. Plaintiff failed to mention *Quantum Meruit* or Maritime Lien during its arguments at trial or anywhere in its post-trial findings of fact and conclusions of law. Thus, the Court found that Plaintiff abandoned those counts. *See, e.g., Elmore v. Ne. Fla. Credit Bureau, Inc.*, No. 3:10-CV-573-J-37JBT, 2011 U.S. Dist. LEXIS 109981, 2011 WL 4480419, at *1 (M.D. Fla. Sept. 27, 2011) (finding abandoned a claim "not raised . . . in either the joint pretrial statement, the proposed findings of law, or during trial").

The Court found that Plaintiff failed to establish marine peril and thus failed to establish entitlement to a salvage award. Plaintiff also abandoned its Maritime Lien and *Quantum Meruit* claims. Defendants established that Plaintiff engaged in bad-faith litigation, entitling them to an award of attorney's fees and costs to be determined by the Court after entry of judgment. Accordingly, the Court found that Defendants were entitled to judgment in their favor on the Second Amended Complaint and the Counterclaims to the extent that they were entitled to recover their attorney's fees and costs.

Submitted by JAP

Ship Repairs

MV Lady B, LLC v. Rolly Marine Serv. Co., 2024 U.S. Dist. LEXIS 184478 (S.D. Fla. Oct. 9, 2024)

Plaintiff MV Lady B, LLC was the owner of M/Y LADY B, a 2008 85' Pacific Mariner (the "Vessel"). Defendant operated a shipyard in Fort Lauderdale, Florida. Plaintiff brought the Vessel to Defendant's shipyard for repairs on August 2, 2022. The parties agreed that the scope of

work included the installation of headliner, wallpaper, flooring, and carpet, as well as electrical, plumbing, and carpentry repairs. Plaintiff asserted that it submitted an approved scope of work on August 4, 2022, two days after the Vessel arrived at Defendant's shipyard, that listed the above items, among others. Defendant disputed that it approved the Repair List and insisted that the scope of work was instead identified in various work orders agreed to by the parties between August 3, 2022, and December 13, 2022.

When the parties agreed to additional work was important because Plaintiff removed the Vessel from Defendant's shipyard on December 23, 2022. Defendant claimed that this was less than two weeks after Plaintiff had approved the most recent Work Order. According to Defendant, Plaintiff's premature removal of the Vessel deprived Defendant of an adequate opportunity to complete certain work and to conduct a quality control check on the work that had been completed.

Plaintiff paid at least $917,330.00 to Defendant for materials and services provided for the Vessel. Plaintiff further contended that it was "forced to engage alternative contractors to repair the defective repairs at a cost of $428,228.96." Based on the foregoing, Plaintiff brought claims for breach of maritime contract and breach of the implied warranty of workmanlike performance. Defendant filed a Motion for Summary Judgment arguing that: (1) Plaintiff's claims were barred due to Plaintiff's failure to provide Defendant an opportunity to complete its unfinished work or cure any alleged defects; and (2) Plaintiff was prohibited from recovering damages for lost charter income and diminution of value.

The Court applied the general common law principles of contract law that counsel reading implied terms into a contract only under limited circumstances and found that there was nothing in the Agreement that gave rise to an inference that it was absolutely necessary to introduce a right to cure provision to effectuate the intention of the parties.

Based on the testimony, the Court found that Plaintiff failed to show that post-repair loss of value was recoverable and granted Defendant's Motion as it related to that issue.

Plaintiff "is entitled to receive loss of use damages only if able to prove, with reasonable certainty, that profits had actually been, or may reasonably be supposed to have been, lost." *Cent. State Transit & Leasing Corp. v. Jones Boat Yard, Inc*., 206 F.3d 1373, 1376 (11th Cir. 2000). The Court found that Plaintiff clearly adduced sufficient evidence to present the fact-intensive question of lost charter income to the Court at trial.

The Court granted in part and denied in part Defendant Rolly Marine Service Company's Motion for Summary Judgment. The Court declined to find that Plaintiff's claims were barred due to its failure to provide an opportunity to cure; and precluded Plaintiff from claiming damages for diminution of value but not damages for lost charter income.

Submitted by JAP

S/Y Palidor, LLC v. Platypus Marine, Inc., 2024 U.S. Dist. LEXIS 172634 (W.D.Wash, Sept. 24, 2024)

The United States District Court for the Western District of Washington granted in part a defendant shipyard's motion for summary judgment. When the vessel owner decided that it needed maintenance work, it reached out to the shipyard which provided an estimate indicating that the work would be done pursuant to its standard terms and conditions. *Id* at **2. The day after the parties agreed to the work to be performed, the shipyard sent its terms and conditions to the vessel owner, and the estimate and terms and conditions were subsequently signed. *Id* at **2-3. The vessel was damaged shortly after the vessel arrived at the shipyard, and the shipyard agreed to take care of those issues. The vessel owner again returned the terms and agreement.

The court found that terms incorporated by reference were valid as long as the parties had knowledge of and assented to the incorporated terms. *Id*. at **22-23. That the vessel owner decided not to read deep into the terms and conditions was a reason not to enforce their terms. *Id*. at **25-26. The court granted summary judgment in favor of the shipyard that any remedies were limited to the repair, replacement or cure, but not to exceed the lesser of $100,000 or the value of work performed. *Id*. at *30. The court also found that the vessel owner could not pursue a negligence claim due to the exculpatory cause in the contract. *Id*. at *33.

However, the court denied summary judgment in favor of the shipyard on the basis that a dispute as to a material fact existed as to whether the shipyard breached its obligation to repair, replace or cure as required by the contract since the parties had conflicting views as to whether the color of the paint applied to the vessel following the shipyard's initial damage to it was appropriate. *Id*. at **32-33.

The claims for conversion, fraud and negligence and violations of consumer protections laws of Washington were also dismissed for the failure to allege facts supporting the requisite elements. *Id*. at **34-43.

Submitted by PS

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