RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW

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I. INTRODUCTION

This article discusses noteworthy admiralty and maritime decisions involving seamen, longshoremen, passengers, maritime liens and attachments, oil pollution, salvage, marine insurance, marine contracts, and other issues that arise in the practice of maritime law. The survey period includes opinions issued by federal and state courts in the United States between October 1, 2019, and September 30, 2020.

II. SEAMAN'S CLAIMS

A. *Jones Act Negligence, Unseaworthiness, and Maintenance and Cure*

In *Adriatic Marine, LLC v. Harrington*,[1] the plaintiff-seaman worked as an unlicensed engineer aboard an offshore supply vessel. While on watch, the seaman started to clean the bilge around the port main engine in the vessel's engine room. While performing this task, the seaman claimed that after he finished cleaning inside the bilge, he attempted to step out of the bilge by stepping on some piping, but lost his footing, thereby causing him to hit his lower back on an angle iron. As a result of his alleged incident, the seaman suffered injuries to his lumbar spine, specifically at the L4-5 and L5-S1 levels.[2]

Following the incident, the seaman sent a demand for maintenance and cure to the employer seeking payment for his medical treatment to his lower back. The employer subsequently filed a declaratory judgment action seeking a declaration from the district court that it was not responsible for maintenance and cure payments or, conversely, a determination regarding past and future liability for maintenance and cure generally.[3] In response, the seaman filed an answer and counter-claim asserting Jones Act negligence and unseaworthiness claims, as well as re-asserting his claim for maintenance and cure.[4] After completing discovery and deposing several physicians, the employer filed a motion for partial summary judgment arguing that the seaman's claims for maintenance and cure should be dismissed, because he willfully concealed and/or misrepresented pre-existing injuries to his lumbar spine during his pre-employment application process—in accordance with the well-established *McCorpen* defense.[5]

1. Adriatic Marine, LLC v. Harrington, 442 F. Supp. 3d 929 (E.D. La. 2020).
2. *Id*. at 931–32.
3. *Id*. at 934. The employer had initiated maintenance and cure payments, but reserved its right to investigate the seaman's claim.
4. *Id*.
5. *See* McCorpen v. Central Gulf Steamship Corp., 396 F.2d 547 (5th Cir. 1968); Jauch v. Nautical Servs., 470 F.3d 207, 212 (5th Cir. 2006).

In analyzing the three prongs of *McCorpen*, the district court concluded that the plaintiff failed to disclose medical information to the employer and that this information was material to the employer's decision to hire him.[6] As for the third prong, the district court noted that the employer had also satisfied the causality prong. Specifically, the court noted "[t]he concealed medical information concerned recurring issues involving [plaintiff's] back pain, and included a prior diagnosis of degenerative disc disease and lumbar strain."[7] Despite the fact that the seaman had only suffered minor prior back injuries, the district court concluded that these prior lumbar back injuries were material to the employer's decision to hire him, and, thus the employer was entitled to invoke the *McCorpen* defense. As such, the district court granted the employer's motion for partial summary judgment and dismissed the plaintiff's maintenance and cure claims.

In *Upper Rivers Services, LLC v. Heiderscheid*,[8] Upper Rivers Services, LLC (URS) sought summary judgment on the issues of (1) Jones Act negligence and (2) maintenance and cure against a deckhand who, after he "picked up a piece of steel and turned to throw it in a bin," suffered a herniated disc for which he underwent surgery. The court found that the deckhand failed to show that URS breached a duty owed to him or that URS caused his injury. With respect to duty, it noted that the record was devoid of any evidence from which a jury could infer that URS acted unreasonably in relation to the deckhand's injuries as (a) he stated in a signed statement and confirmed in his deposition that he did not believe URS had done anything wrong to cause the injury, (b) he was aware that URS had equipment available for lifting heavy objects and had used that equipment before, and (c) he testified that he did not use URS' available equipment or ask for help because he did not think he needed help and routinely lifted things heavier than the 35-pound piece of steel. In the face of such evidence, his speculation that the lack of a "stretching routine" or other training might "possibly" have prevented his injury did not raise a dispute as to a genuine issue of material fact. With respect to causation, the court found the lack of expert evidence, including lack of any testimony from any medical professional, proved fatal as it was far from obvious that his injury stemmed from the act of lifting the steel considering his medical records showed that he reported having back pain for over a month before the accident. With respect to maintenance and cure, the deckhand offered no documentation, such as his cost

6. *Harrington*, 442 F. Supp. 3d at 937.
7. *Id*. at 938.
8. Upper Rivers Servs., LLC v. Heiderscheid, No. 19-cv-00242, 2020 WL 5017841 (D. Minn. Aug. 25, 2020).

of lodging, expenses, or medical bills. The court found that his testimony—that he paid $575 a month in rent and that he may be liable for the medical bills already paid—alone, was insufficient to recover maintenance and cure.

In *Brown v. Reinauer Transportation Companies, L.P.*,[9] an injured seaman appealed from the Eastern District of New York's decision granting summary judgment on his Jones Act negligence and unseaworthiness in favor of vessel owner, Reinauer Transportation Companies.

Although the seaman had been unable to explain the cause of his fall in his deposition testimony and failed to present any evidence of the existence of a dangerous condition on the vessel aboard which he was injured, the seaman argued on appeal that his contradictory summary judgment affidavit created a genuine issue of material fact as to the cause of his fall that precluded summary judgment.

The Second Circuit rejected the seaman's argument, holding that the seaman's summary judgment affidavit contradicting his own deposition testimony that he was unaware of the cause of his fall could not be used to create a genuine issue of material fact to defeat summary judgment.

B. *Other Issues Affecting Jones Act Seamen*

In *Saltzman v. Whisper Yacht, Ltd.*[10], the United States District Court for the District of Rhode Island considered a Jones Act action where two defendant-entities associated with the vessel on which the plaintiff was employed filed (amongst related claims for relief) a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) on the basis that they were neither the vessel owners nor employers of the plaintiff. The plaintiff argued that the two defendant entities should not be dismissed because they, as well as another defendant, "all managed, supervised, crewed, and operated" the vessel, and "all were Plaintiff's employer."[11] The court noted that the United States Court of Appeals for the First Circuit had not adopted a rule regarding whether only one employer can be held liable for Jones Act purposes.[12] It analyzed rulings of the United States Court of Appeals for the Ninth and Fifth Circuits, and the United States District Court of Maryland, noting a circuit split wherein the Ninth Circuit has held that "there can be no more than one 'employer' for purposes of the Jones Act" (a holding which was followed by the District of Maryland),

9. Brown v. Reinauer Transp. Cos., 788 F. Appx. 47 (2d Cir. 2019).

10. Saltzman v. Whisper Yacht, Ltd., No. 19-285MSM, 2019 WL 6954223 (D.R.I. Dec. 19, 2019), *report & recommendation adopted by* No. 19-285MSM-PAS, 2020 WL 872599 (D. R.I. Feb. 21, 2020).

11. *Id.* at *4.

12. *Id.*

while the Fifth Circuit has held the opposite.[13] Finally, after stating that the First Circuit would more likely adopt the reasoning of the Ninth Circuit, the court reasoned that the identity of the employer(s) should be an issue of fact for the jury.[14] Therefore, the court denied the defendants' motion.[15]

In *Knudson v. M/V American Spirit*,[16] the plaintiff originally filed an action in 2014 alleging personal injuries sustained while serving as a seaman on M/V *AMERICAN SPIRIT* operating in the Great Lakes region. The case has been slowly progressing in the United States District Court for the Eastern District of Michigan since then. On March 25, 2020, the court ruled on four of plaintiff's and defendants' motions *in limine* in anticipation of a (now continued) 2020 jury trial date. (Plaintiff and defendants each filed motions *in limine* which renewed previously denied motions. The court denied these motions again. The two original motions *in limine* are outlined below.).

Defendants filed a motion *in limine* to exclude evidence, testimony, or argument related to the financial information of Defendant American Steamship company (ASC) as irrelevant to plaintiff's maintenance claim. Defendants argued that maintenance and cure is an obligation of plaintiff's designated employer (ASC). In denying ASC's motion, the court determined that ASC had acted as plaintiff's employer in various ways, had paid maintenance to plaintiff previously, and, crucially, it was ASC's actions that gave rise to plaintiff's request for punitive damages. Thus, the court concluded that ASC's financial condition is relevant to the punitive damage's inquiry.[17]

Further, defendants' motion urged exclusion of any evidence, testimony, or argument to suggest an amount or calculation of punitive damages that would exceed a 1:1 ratio to any compensatory damages. Defendants cited United States Supreme Court precedent of a 1:1 ratio that has been applied in maritime environmental contamination and vessel collision cases. However, the court noted that other courts had not applied the 1:1 ratio to certain maintenance and cure cases, and the motion was premature and not the appropriate subject of a motion *in limine*.[18]

In their second motion *in limine*, defendants sought to exclude the testimony of plaintiff's lay witness following her deposition, which was largely,

13. *Id.* (quoting Glynn v. Roy Al Boat Mgmt. Corp., 57 F.3d 1495, 1497, 1500 (9th Cir. 1995); Guidry v. S. La. Contractors, Inc., 614 F.2d 447, 452 (5th Cir. 1975); Ryan v. United States, 331 F. Supp. 2d 371, 382 (D. Md. 2004)).

14. *Id.* at *4–5.

15. *Id.* at *7.

16. Knudson v. M/V Am. Spirit, No. 14-14854, 2020 WL 145705, (E.D. Mich. Mar. 25, 2020).

17. *Id.* at *1.

18. *Id.*

but not entirely, comprised of hearsay statements inadmissible under Rule 802. The Court ordered that the lay witness' deposition should be purged of testimony not based upon her firsthand knowledge, but, to the extent her testimony was based upon her firsthand knowledge, that testimony would be admissible.[19]

In deciding the case of *Sanchez v. Smart Fabricators of Tex., LLC*,[20] the U.S. Fifth Circuit Court of Appeals will reconsider its test for determining Jones Act seaman status in order to align the Circuit with U.S. Supreme Court precedent. In *Sanchez*, the plaintiff worked as a welder on offshore rigs. He was employed by Smart Fabricators of Texas (SmartFab), but worked upon rigs for Enterprise Offshore Drilling, LLC (Enterprise). The plaintiff worked for SmartFab for a total of sixty-seven (67) days, broken down to: two days in an onshore shop (3% of his employment), four days on a vessel not owned by Enterprise (6% of his employment), forty-eight days on a jack-up rig owned by Enterprise and located near an inland pier (72% of his employment), and thirteen days on a jack-up drilling rig owned by Enterprise and located on the Outer Continental Shelf (OCS) (19% of his employment).[21] For his sixty-seven days of employment, the plaintiff worked day shifts and returned home at the end of each day. While working aboard the rig located on the OCS, the plaintiff tripped on a pipe welded to the deck and suffered injuries. After his incident, the plaintiff sued SmartFab in state court alleging he qualified as a Jones Act seaman. SmartFab subsequently removed the case, but the plaintiff contended that his Jones Act claims precluded removal.[22] The district court denied the plaintiff's motion to remand and granted SmartFab's motion for summary judgment, each for the same reason—the plaintiff did not qualify as a Jones Act seaman.[23] The plaintiff appealed and the sole issue for the Fifth Circuit to consider was the plaintiff's seaman status.

In considering the issue, the Fifth Circuit cited the two-prong test for seaman status as set forth by the U.S. Supreme Court in *Chandris, Inc. v. Latsis*.[24] In analyzing the plaintiff's employment, the Fifth Circuit narrowed its focus on the second prong which requires a substantial connection in terms of quantity (duration) and quality (nature of the work performed). In pertinent part, the Fifth Circuit focused on the "nature" inquiry.

19. *Id.* at *2.
20. Sanchez v. Smart Fabricators of Tex., LLC, 970 F.3d 550 (5th Cir. 2020).
21. *Id.* at 552.
22. *Id.*
23. *Id.*
24. Chandris, Inc. v. Latsis, 515 U.S. 347, 368 (1995). The two-prong test is (1) the employee's duties "must contribute to the function of the vessel or to the accomplishment of its mission," and (2) the employee "must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature." *Id.*

This case and issue have confounded the Fifth Circuit for some time. In March 2020, a panel of the court held that the plaintiff did not qualify as a seaman;[25] however, in April 2020, the court withdrew the panel's decision and granted rehearing. In August 2020,[26] a new panel of the Fifth Circuit determined that the plaintiff qualified as a Jones Act seaman. In its August 2020 decision, the Fifth Circuit focused on whether the plaintiff's employment subjected him to the perils of the sea.[27] Citing earlier precedent of *In re Endeavor Marine*[28] and *Naquin v. Elevating Boats, LLC*,[29] the Fifth Circuit explained that under *Endeavor Marine*, so long as the plaintiff could show he was exposed to the "perils of the sea," even if his duties were on a vessel jacked up next to a dockside pier, he could qualify as a Jones Act seaman.[30] Likewise, under *Naquin*, the plaintiff could establish seaman status if he was "doing [a] ship's work on vessels docked or at anchor in navigable water."[31] Considering this precedent, the plaintiff's employment aboard a drilling rig jacked up above water, and noting that near-shore workers "still remain exposed to the perils of a maritime work environment,"[32] the Fifth Circuit concluded that the plaintiff had shown he had a substantial connection in both nature and duration. The Fifth Circuit thus reversed and remanded.[33]

Following this August 2020 decision, the Fifth Circuit issued an order that it would reconsider *Sanchez* and its corresponding test for determining Jones Act status in the context for an offshore rig worker *en banc*.

III. LONGSHOREMEN CLAIMS

At issue in *Mays v. Chevron Holding*[34] was whether the Outer Continental Shelf Lands Act (OCSLA) extended to an injury occurring in state waters on a fixed platform. In this case, the decedent worked as a valve technician aboard a fixed platform located within state waters. He was directly employed by a subcontractor, who serviced valves on various platforms on behalf of the platform owner. The decedent was killed in an explosion occurring aboard a platform and his widow and children sued the platform owner for state-law wrongful death claims.[35] The platform owner defended

25. Sanchez v. Smart Fabricators of Tex., LLC, 952 F.3d 620 (5th Cir. 2020).
26. Sanchez v. Smart Fabricators of Tex., LLC, 970 F.3d 550 (5th Cir. 2020).
27. *Id.* at 554–55.
28. *In re* Endeavor Marine, 234 F.3d 287, 289 (5th Cir. 2000) (per curiam).
29. Naquin v. Elevating Boats, LLC, 744 F.3d 927 (5th Cir. 2014).
30. Sanchez, 970 F.3d at 555.
31. Naquin, 744 F.3d at 935.
32. Sanchez, 970 F.3d at 555 (quoting *Naquin*, 744 F.3d at 934).
33. *Id.*
34. Mays v. Chevron Holding, 968 F.3d 442 (5th Cir. 2020).
35. *Id.* at 444.

and claimed immunity under the applicable state workers' compensation scheme. The parties agreed that state immunity did not shield the platform owner *if* the decedent's accident fell under the ambit of the federal Longshore and Harbor Workers' Compensation Act (LHWCA),[36] which extends to injuries "occurring as the result of" natural-resource extraction on the Outer Continental Shelf (OCS).[37]

At the district court level, the issue of LHWCA coverage was submitted to the jury. The evidence submitted showed that: (1) the platform upon which the decedent was working on was located in Louisiana waters, but was connected to the platform owner's OCS platforms; (2) the fatal explosion was caused by gas flowing from those platforms; and (3) those OCS platforms had to be shut down due to the accident.[38] Considering this evidence, the jury found that the plaintiff's death was caused by the platform owner's OCS activities, which, therefore meant that the LHWCA applied and the platform owner could not claim state immunity. The jury then found the platform owner seventy percent (70%) at fault for the decedent's wrongful death and awarded his widow damages. The platform owner appealed.

On appeal, the Fifth Circuit considered under what circumstances OCSLA and, therefore the LHWCA, would extend to platform incidents occurring within state waters. Relying on the plain language of OCSLA, the Fifth Circuit noted that it requires "a link only between the employee's 'injury' and extractive 'operations conducted on the [OCS].'"[39] As such, citing this plain language and *Pacific Operators Offshore, LLC v. Valladolid*[40] in evaluating whether OCSLA would extend to this incident, the Fifth Circuit focused on the nature of operations and whether those operations show a "'substantial nexus between the injury and extractive operations on the shelf.'"[41] The appellate court also noted that this substantial nexus question is "fact-specific" and "depend[s] on the individual circumstances of each case."[42]

Considering the undisputed facts of this case, the Fifth Circuit held that the jury reasonably concluded the decedent's death had a "substantial nexus" with the platform owner's OCS activities.[43] The Fifth Circuit affirmed the

36. 33 U.S.C. §§ 901–950.
37. 43 U.S.C. § 1333(b).
38. *Mays*, 968 F.3d at 444.
39. *Id.* at 449 (citing 43 U.S.C. § 1333(b)).
40. 565 U.S. 207 (2012).
41. *Id.* (quoting Pac. Operators Offshore, LLC v. Valladolid, 565 U.S. 207, 211 (2012)).
42. *Id.* at 451 (quoting Baker v. Dir., OWCP, 834 F.3d 542, 548 (5th Cir. 2016)).
43. *Id.* at 451.

jury's findings and found that OCSLA, and, thus the LHWCA, applied to the decedent's incident.

In *Purvis v. Maersk Line A/S*,[44] a district court ruling for a shipowner was affirmed, finding there was no genuine issue of material fact suggesting Maersk breached its turnover duty.[45] Purvis sued Maersk for negligence under § 905(b) of the Longshore and Harbor Worker's Compensation Act after he was injured by a hatch cover crashing down and striking him in the head as he was climbing a ship's ladder, thus causing him to fall to a lower platform.[46] There were no witnesses to the fall.[47] Purvis alleged Maersk breached its turnover duty to him as a stevedore, arguing either there was a defect in the hatch cover or a Maersk employee must have left the hatch unlatched after opening it.[48] The Eleventh Circuit held the evidence put forth of a possible defect in the hatch door—namely a video of Purvis' attorney manipulating the door until it fell three years after the injury—and maintenance records showing hatch locks not working without accompanying information on whether it was the same hatch and whether those condition(s) had ever been repaired, was speculative and failed to prove a breach of duty.[49] The court also held the condition of an unlatched hatch cover would have been obvious to Purvis as a "reasonably competent" longshoreman, therefore also precluding recovery for a breach of the turnover duty on Purvis' alternative theory.[50]

IV. PASSENGER CLAIMS

In *Brees v. HMS Global Maritime Inc*.[51] a ferry passenger sued a ferry operating company, its general manager, and other company employees alleging a violation of his right to free speech and claimed unlawful searches of his vehicle when he attempted to board a ferry.[52] He asserted violations of the First, Fourth, and Fourteenth Amendments of the United States Constitution and various state laws.[53] Defendants moved for summary judgment.[54]

The district court held that the ferry holding area was a non-public forum for purposes of the right to free speech.[55] Thus, the ferry's policy

44. Purvis v. Maersk Line A/S, 795 F. App'x 756 (11th Cir. 2020).
45. *Id.* at 759.
46. *Id.* at 757.
47. *Id.* at 758.
48. *Id.* at 759.
49. *Id.*
50. *Id.* at 759–60.
51. Brees v. HMS Global Maritime Inc., 431 F. Supp. 3d 1207 (W.D. Wash. 2020).
52. *Id.* at 1212–13.
53. *Id.*
54. *Id.* at 1213.
55. *Id.* at 1215–16.

against "foul, abusive, or disruptive language" in order to "provide a safe and enjoyable experience for all … passengers" was reasonable and viewpoint neutral, and therefore not unconstitutional.[56] The district court held that the claim of a unconstitutional search also failed as a matter of law.[57] The ferry loading area had a conspicuously posted sign providing that failure to consent or submit to screening or inspection would result in revocation of authorization to board.[58] The district court ruled that the alleged searches were consistent with the government's special need to prevent and deter terrorist attacks and to safeguard the nation's maritime and transportation infrastructure. This important and special need dwarfed the plaintiff's privacy interest in avoiding minimally invasive vehicle screenings.[59] The district court also held that the plaintiff inadequately pled that the ferry company and its general manager violated his rights under the Equal Protection Clause of Fourteenth Amendment and that the passenger's allegations against the county and ferry company did not amount to extreme and outrageous conduct.[60] The district court thus issued summary judgment for the defendants.[61]

In *White v. Fincantieri Bay Shipbuilding*,[62] plaintiff allegedly suffered a traumatic brain injury and herniated cervical disc while working as a technician installing and testing the steering equipment aboard a towing vessel, the M/V *MILLVILLE*, as it underwent sea trials on Lake Michigan.[63] Plaintiff was in the galley of the vessel when, without notice, the sea trials began. Plaintiff claims that he was "violently thrown" causing him serious injuries.[64]

In addition to suing his employer (Engine Motor, Inc. (EMI)), plaintiff also sued the company that built the vessel (Fincantieri Bay Shipbuilding, Inc. (FBS) and Fincantieri Marine Group, LLC (collectively Fincantieri)), the owner of the vessel (Wawa, Inc. (Wawa)), and the operator of the vessel (Keystone Shipping, Co. (Keystone)). Plaintiff filed claims under the Longshore and Harbor Workers' Compensation Act (Longshore Act), the Jones Act, and general maritime law. Further, the plaintiff asserted claims for common law negligence, *respondeat superior*, and punitive damages under Wisconsin law.[65]

56. *Id.*
57. *Id.* at 1217.
58. *Id.*
59. *Id.*
60. *Id.* at 1218–19.
61. *Id.* at 1222.
62. White v. Fincantieri Bay Shipbuilding, 429 F. Supp. 3d 582, 584 (E.D. Wis. 2019).
63. *Id.* at 585.
64. *Id.*
65. *Id.* at 584.

Fincantieri filed a 12(b)(6) Motion to Dismiss three of the causes of action (*i.e.*, 1. Claims of unseaworthiness, 2. Common law negligence, and 3. Punitive damages).[66] As to the unseaworthiness cause of action, Fincantieri argued the Plaintiff was a longshoreman and therefore could not bring a claim for unseaworthiness as Plaintiff was not a seaman as only seaman can bring such claims. The Court found the Plaintiff was a longshoreman based off his allegations in his Complaint and therefore, because the warranty of seaworthiness extends only to seaman, Plaintiff could not bring a seaworthiness action.[67]

As to the common law negligence actions under Wisconsin law, Fincantieri argued Plaintiff's claims should be dismissed because they are preempted by federal law. The Court held although courts have allowed plaintiffs to plead tort law claims along with the Longshore Act, it was only where there was some doubt over whether the plaintiff has a claim under the Longshore Act. The Court held that because there seems to be no dispute that Plaintiff had valid claims under the Longshore Act, it would therefore dismiss Plaintiff's common law Wisconsin claims.[68]

Finally, as to the punitive damages claims, Fincantieri argued Plaintiff should be precluded from seeking punitive damages under Wisconsin law because it is also preempted by federal maritime law. However, the Court found that punitive damages are generally available under maritime law and courts in the circuit have held punitive damages may be sought by both seamen and longshoremen.[69]

In *Chessen v. Am. Queen Steamboat Operating Co.*, the plaintiff was a passenger on one of defendant's, American Steamboat Operating Company (American Queen), cruise ships when she caught her foot on an oversized tablecloth and tripped sustaining injuries.[70] The incident occurred on October 17, 2017.[71] Plaintiff filed an Amended Complaint against American Queen to assert a claim under the general maritime law. American Queen, in response, filed a Motion for Summary Judgment, arguing Plaintiff failed to file suit within the one-year limitation period set forth in the Passage Ticket Contract (Contract) that governed her trip and was sent to her on October 5, 2017.[72] Prior to filing suit, American Queen received a letter dated November 15, 2017 from plaintiff's counsel regarding the

66. *Id.* at 586.
67. *Id.* at 587.
68. *Id.* at 588.
69. *Id.* at 588–89.
70. Chessen v. Am. Queen Steamboat Operating Co., 461 F. Supp. 3d 845, 848 (S.D. Ind. 2020).
71. *Id.*
72. *Id.* at 847.

injury and, in response, American Queen advised that any litigation would need to take place in Indiana pursuant to the Contract.

The district court followed the "reasonable communicativeness" test set out in *Thompson v. Ulysses Cruises, Inc.*[73] The reasonable communicativeness test has two factors that courts consider: (1) the manner in which the crucial language is presented in the ticket, and (2) extrinsic factors surrounding the purchase and subsequent retention of the ticket. The district court held that the one-year limitation period in the contract was reasonably communicated and, thus, enforceable against plaintiff. Therefore, the Court granted American Queen's Motion for Summary Judgment.[74]

In *Higgs v. Costa Crociere S.P.A. Co.*,[75] the Eleventh Circuit reversed the district court's ruling which reduced a jury's award for past medical expenses from the amount the jury found to be reasonable (approximately the amount billed by the Plaintiff's healthcare providers) to the amount actually paid to satisfy the bills by the Plaintiff and her insurance company.[76] The question was one of first impression before the Eleventh Circuit: "how to calculate past medical damages in a maritime tort action," when there is a dramatic difference between the amount billed for treatment and the amount actually paid by the insurance company.[77] Finding the collateral source rule to be applicable both substantively and as an evidentiary rule, the appeals court held the appropriate measure of medical damages in a maritime tort case is the reasonable value determined by the jury upon consideration of any relevant evidence, including the amount billed, the amount paid, and any expert testimony and other relevant evidence the parties may offer.[78] In so ruling, the court declined to apply a bright-line rule that would categorically limit medical damages to the amount actually paid by an insurer in maritime tort claims, thus reversing the district court ruling and remanding for entry of judgment in the amount the jury found to be reasonable.[79]

The court also held in *Higgs* that the cruise line's notice of the danger posed from a mop bucket was inferable because the one-foot-tall bucket filled with dirty water was placed around a blind corner by a crewmember in a high traffic area.[80] The Eleventh Circuit found the danger posed by the placement would be obvious to anyone, including the crewmember who knowingly placed it there.[81] Although there were additional facts put

73. Thompson v. Ulysses Cruises, Inc., 812 F. Supp. 900 (S.D. Ind. 1993).
74. *Id.* at 850.
75. Higgs v. Costa Crociere S.P.A. Co., 969 F.3d 1295 (11th Cir. 2020).
76. *Id.* at 1299.
77. *Id.* at 1308.
78. *Id.* at 1310–18.
79. *Id.* at 1299–1300.
80. *Id.* at 1303.
81. *Id.*

forth on the issue, the court stated this was "more than enough" evidence to establish Costa's actual notice of the hazard.[82]

In *Tesoriero v. Carnival Corp.*,[83] the Eleventh Circuit rejected an appellant's argument that Carnival had constructive notice of a dangerous condition involving a vanity chair that broke while the passenger was sitting in her cabin—attributable on old, dried glue—because the repair efforts would only have been visible after the chair broke and daily inspection by the cruise line's housekeeping staff did not reveal a visible defect in the chair.[84] In doing so, the court declined to impose an "implicit legal requirement that all furniture on a cruise ship be either disassembled or subjected to daily stress testing."[85] The court also resolved uncertainty in the circuit regarding the doctrine of *res ipsa loquitor*—ruling that a plaintiff who relies on *res ipsa loquitur* to show a breach of duty still bears the burden of proving that a duty existed in the first place.[86] Appellant could not rely on the theory of *res ipsa* because she had failed to prove notice, which is a prerequisite to imposing liability for a maritime negligence tort.[87]

In *Broberg v. Carnival Corp.*,[88] judgment for the cruise line was affirmed on a claim for negligent over-service of alcohol relating to a passenger who fell overboard and died. The evidence showed the cruise line served the passenger at least sixteen drinks during an approximate twelve hour time period.[89] Eye witnesses testified that the passenger appeared intoxicated, but was still able to sit on a chair, walk normally, and did not appear in danger or at risk.[90] Based on multiple eye witnesses testifying that the passenger did not appear to be so intoxicated that would cause concern for her safety, the district court concluded that the cruise line was not on notice that the passenger was intoxicated to the point of being in serious danger.[91] The Eleventh Circuit was not left with a "definite and firm conviction" that the district court erred in concluding the cruise line did not have notice of the danger and affirmed judgment in favor of Carnival.[92]

82. *Id.*
83. Tesoriero v. Carnival Corp., 965 F.3d 1170 (11th Cir. 2020).
84. *Id.* at 1179–80.
85. *Id.*
86. *Id.* at 1181–82.
87. *Id.* at 1183.
88. Broberg v. Carnival Corp., 798 F. App'x 586 (11th Cir. 2020).
89. *Id.* at 587–88.
90. *Id.* at 588.
91. *Id.* at 590.
92. *Id.*

V. CONTRACT

In *Rocque v. Zetty*, the United States District Court for the District of Maine addressed the "total loss rule," which limits the amount of damages to the vessel's value when the vessel is adjudged a complete loss, under an oral ship repair contract.[93] In this case, a 37-foot Egg Harbor Deluxe Cruiser sank after it had been repaired by a boatyard pursuant to an oral contract.[94] The boat owner sued the boatyard for breach of contract, breach of duty of good faith and fair dealing, fraudulent and negligent misrepresentation, and sought punitive damages.[95] The boatyard moved for summary judgment.[96] The court held that the "total loss rule" did not limit the boat owner's damages where the oral ship repair contract did not limit recovery to contractually specified damages or exclude consequential damages, and that the boat owner could not claim breach of duty of good faith and fair dealing separately from the breach of contract cause of action.[97]

Following *In re Doiron*,[98] the Fifth Circuit in the 2019 case of *Barrios v. Centaur, LLC*, expanded the *Doiron* test to apply to all mixed-services contracts, not only those arising in an oil and gas context.[99] In *Barrios*, while offloading a generator from a crew boat to a barge, the plaintiff suffered injuries. The plaintiff's employer had previously executed a master service contract with the owner of a dock for repair work to be performed at a dock facility, including the installation of a concrete containment rail.[100] To complete the construction of the concrete containment rail, the plaintiff's employer chartered a barge to serve as a work platform and to hold equipment. The barge was moved up and down the river using a tugboat and winch, as the construction progressed.[101]

The plaintiff sued both the barge owner and his employer for his injuries. The barge owner cross-claimed against the employer, seeking contractual indemnity and additional insured status under the master service

93. Rocque v. Zetty, 456 F. Supp. 3d 257 (D. Me. 2020).
94. *Id.* at 259–60.
95. *Id.* at 261–64, 267.
96. *Id.* at 259.
97. *Id.* at 262–63.
98. In *In re Larry Doiron, Inc.*,879 F.3d 568 (5th Cir.) (*en banc*), *cert. denied*, 138 S. Ct. 2033 (2018), the Fifth Circuit set forth a new test to determine whether an oil and gas services contract is maritime in nature. The two-part test queried (1) whether the contract provides services to facilitate the drilling or production of oil and gas on navigable waters; and (2) whether the parties expect that a vessel will play a substantial role in the completion of the contract. Nonetheless, the *Doiron* test only considered maritime or non-maritime nature of contracts relating to the exploration, drilling, and production of oil and gas. The Fifth Circuit noted that the test *could* apply to a non-oil and gas services contract if the activity "involves maritime commerce and work from a vessel."
99. Barrios v. Centaur, LLC, 942 F.3d 670 (5th Cir. 2019).
100. *Id.* at 673–74.
101. *Id.*

agreement. At issue was whether the master service contract should be considered a maritime contract or a non-maritime contract.[102] If maritime in nature, the indemnity provision contained in the master service contract would be enforceable under general maritime law; however, on the other hand, if state law applied, the indemnity provision would be invalidated. At the district court level, the court held that the contract was a "land-based construction contract," and, therefore governed by state law.[103] The barge owner appealed.

The sole issue on appeal was whether the dock contract should be considered maritime in nature. In considering the issue and citing to *Doiron* and *Norfolk Southern Railway Co. v. Kirby*,[104] the Fifth Circuit noted that in determining whether a contract is maritime in nature courts should focus on the primary objective of the contract.[105] The Fifth Circuit determined that a broader test should apply in order to evaluate whether a dock construction contract was maritime in nature. The *Barrios* court announced the following test: "[t]o be maritime, a contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract."[106] Applying this test to the facts at hand, the Fifth Circuit concluded that the master service contract satisfied the first prong because the construction of a concrete containment rail would facilitate activities on navigable waters. Specifically, the containment rail was designed to prevent materials from spilling into the river. With respect to the second prong, the court likewise concluded that the parties contemplated the substantial use of a vessel—namely the barge that would be shifted throughout the pendency of the project and used as a work platform.[107] Accordingly, applying this broader test, the Fifth Circuit concluded that the master service contract was maritime in nature, and, thus reversed the district court.[108]

In *Dunn v. Hatch*,[109] a deckhand on a fishing vessel sued the operators of a salmon fishing boat seeking to recover wages due to him under an oral employment agreement.[110] At the bench trial, the district court found that the vessel operator forged a written employment contract and failed to fully comply with its discovery obligations, but the district court ruled that the deckhand was entitled to $1,905.45 in wages. Additionally, the trial court awarded the deckhand costs and attorney fees as a sanction against

102. *Id*. at 674–75.
103. *Id*. at 674.
104. Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004).
105. *Barrios*, 942 F.3d at 679-80.
106. *Id*. at 680.
107. *Id*. at 681–82.
108. *Id*. at 682.
109. Dunn v. Hatch, 792 F. App'x 449 (9th Cir. 2019).
110. *Id.* at 451.

the boat operators, but the District Court denied the plaintiff's request for punitive damages. The deckhand appealed, and the vessel operators cross-appealed.[111]

On appeal, the deckhand alleged that the district court erred in dying punitive damages for the operator's litigation misconduct. The Ninth Circuit held that because there is no historical basis for allowing punitive damages in these circumstances, punitive damages were not available.[112] The Ninth Circuit further held that the award of attorneys' fees to as sanction against the vessel operator for discovery abuses was not an abuse of the District Court's discretion.[113]

VI. MARINE INSURANCE

In *Atlantic Specialty Ins. Co. v. Karl's Boat Shop, Inc.*, a marine insurer filed a declaratory judgment action alleging that the assured misrepresented material facts and violated the doctrine of *uberrimae fidei* during negotiations for the policy, and requesting avoidance of the policy.[114] The policy required the assured to demand that owners of vessels stored at its facility sign waivers indemnifying the assured (and thereby the marine insurer).[115] The marine insurer filed a motion for summary judgment on its declaratory judgment action.[116] It argued that the assured "routinely failed to require vessel owners to sign the waivers," that thereby the policy could be avoided, and that it was entitled to deny coverage of third-party claims stemming from a fire at the assured's facility.[117]

The district court granted the marine insurer's motion for summary judgment.[118] That court held it had jurisdiction pursuant to 28 U.S.C. § 1333 because the dispute involved a contract for marine insurance, even though the insurance was for a storage facility located inland.[119] After comparing the jurisdictional approaches for "determining when an insurance contract's 'primary objective' is maritime" in the Sixth and Second Circuits, the court adopted the Sixth Circuit's test.[120] In regard to misrepresentation, the court found that Massachusetts law does not materially differ from federal law and, therefore, applied Massachusetts law.[121] The court reasoned

111. *Id.*
112. *Id.* at 451–52.
113. *Id.* at 452.
114. Atl. Specialty Ins. Co. v. Karl's Boat Shop, Inc., No. 19-11219-WGY, 2020 WL 4904932 at *1 (D. Mass. Aug. 20, 2020).
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at *4.
120. *Id.* at *5–6.
121. *Id.* at *10 (quoting Com. Union Ins. Co. v. Pesante, 459 F.3d 34, 37 (1st Cir. 2006)).

there was a misrepresentation because there was no evidence that would allow for a reasonable inference that the assured ever complied with the policy's waiver requirement.[122] In regard to the doctrine of *uberrimae fidei*, the assured argued that the doctrine "is now obsolete because English law no longer recognizes" it, and that the Supreme Court of the United States has instructed admiralty courts to keep in harmony with English law.[123] The court rejected this argument due to First Circuit precedent adopting the doctrine.[124] Therefore, the court held that the policy was voidable.[125]

A panel of the Third Circuit was presented with "a simple question of federal maritime law: Who bears the burden of proving a fortuitous loss?" in *Chartis Prop. Cas. Co. v. Inganamort.*[126] In *Inganamort*, the insureds sought coverage under their all-risk insurance policy after learning their 65-foot fishing vessel had partially submerged.[127] Upon investigation, the insurance company learned that there were several potential sources of water ingress, rusted-out electrical breakers, and a nonfunctioning battery charger, all of which led to the ceasing function of the bilge pumps.[128] The insurance company sought a declaratory judgment confirming that the source of the loss was not "fortuitous," but was instead the result of disrepair and neglect.[129] After the insured failed to establish any evidence about how the loss actually happened, the trial court entered judgment in the insurance company's favor.[130]

On appeal, the insureds argued they bore no burden of demonstrating fortuity and the trial court erred in holding that it did.[131] The panel disagreed, holding the other Circuits were in harmony in that the policyholder bears the burden of proving a loss was fortuitous for establishing coverage under an all-risk policy.[132] "That burden is not heavy, but it is more than negligible."[133] At best, the insureds established that their vessel had negligently fallen into disrepair, which the Third Circuit noted may "create perverse incentives if such damage resulting from failure to maintain a vessel" and was considered fortuitous.

122. *Id.* at *11.
123. *Id.* at *14.
124. *Id.*
125. *Id.* at *15.
126. Chartis Prop. Cas. Co. v. Inganamort, 953 F.3d 231, 234 (3d Cir. 2020).
127. *Id.* at 232–33.
128. *Id.* at 233.
129. *Id.*
130. *Id.*
131. *Id.* at 235.
132. *Id.* at 234–35 (citing Banco Nacional de Nicaragua v. Argonaut Ins. Co., 681 F.2d 1337, 1340 (11th Cir. 1982); Morrison Grain Co., Inc. v. Utica Mut. Ins. Co., 632 F.2d 424, 429 (5th Cir. 1980); Atl. Lines Ltd. v. Am. Motorists Ins. Co., 547 F.2d 11, 12 (2d Cir. 1976); and *Boston Ins. Co. v. Dehydrating Process Co.*, 204 F.2d 441, 443 (1st Cir. 1953)).
133. *Id.* at 235 (citations omitted).

In *United States Fire Insurance Company v. Hawaiian Canoe Racing Associations*,[134] the marine insurer for a canoe club brought an action against insured and an escort boat owner seeking declaratory judgment that the marine insurance policy did not provide coverage for an injury to a canoe paddler. The litigation arose from serious injuries suffered when a woman was struck by the propeller of an outboard engine while attempting to reboard an escort vessel involved in the insured's recreational activities.[135] The marine insurer moved for summary judgment asking the district court to declare that it did not owe defense and indemnity for the personal injury claims brought against the insured canoe club.[136]

The district court held, as a preliminary matter, that Hawaii state law applied because Hawaii had a "materially greater interest" in seeing its laws applied to this insurance dispute than federal admiralty law.[137] The district court then analyzed the terms of the policy, rejected parole evidence, and ruled that the underlying injury arose out of a boat's operation rented by the insured within the meaning of the policy's watercraft exclusions to coverage.[138] The district court found that the policy's protection and indemnity (P&I) endorsement did not provide coverage because the vessel giving rise to the injury was not listed on the P&I vessel schedule. Finally, because the injured party was a "passenger" within the meaning of the exclusion to coverage under the policy's charterer endorsement, it likewise provided no coverage to the insured. Judgment was entered for the insurer.

In *Dakota Minnesota. & Eastern Railroad Corp. v. Ingram Barge Co.*,[139] the court previously ruled that Ingram Barge Co. (Ingram) was negligent in causing the damage to Dakota, Minnesota & Eastern Railroad Corporation's (DME) Sabula Bridge and then awarded damages and prejudgment interest. On appeal, the Eighth Circuit remanded the case to address whether Ingram's negligence was the sole cause of the allision. On remand, the court found that the *Carroll Towing* test provided support that the bridge's current configuration was reasonable because the cost of precautions to prevent allisions (replacing the bridge) outweighed the benefit obtained by that precaution (preventing allusion-related losses). In reaching this conclusion, the court granted heavy weight to the infrequency of reported allisions with the bridge when compared to the number of vessels that passed through the bridge's channel and minimized the potential number of future allisions to six per year. Further, it found that

134. U.S. Fire Ins. Co. v. Haw. Canoe Racing Assn's, 424 F. Supp. 3d 1061 (D. Haw. 2019).
135. *Id.* at 1064–65.
136. *Id.* at 1068.
137. *Id.* at 1071.
138. *Id.* at 1071–74.
139. Dakota, Minn. & E. R.R. Corp. v. Ingram Barge Co., 429 F. Supp. 3d 615 (N.D. Iowa 2019).

although the bridge was narrower than almost all other Mississippi River bridges, it remained a lawful bridge and met all current federal laws and regulations. As such, the court found that a reasonable person in DME's place would not find replacing the bridge was warranted, assessed no comparative negligence against DME based on the bridge's configuration, and again awarded DME the same amount of damages ($276,860.85) and prejudgment interest ($26,868.50) as its original ruling.

DME then argued it should get a supplemental award of prejudgment interest to the date of the judgment on remand.[140] As explained by the court, at issue was who should bear the burden when a district court commits a reversible error that does not change the ultimate outcome of the case. The court reasoned that since the purpose of awarding prejudgment interest is to ensure the injured party is fully compensated and awarding prejudgment interest in maritime cases is the rule rather than the exception, there was no compelling reason it should be denied during the period of delay between a vacated original judgment and the judgment on remand. Furthermore, such a ruling was consistent with the fact that if the original judgment was for the defendant, but a successful appeal by the plaintiff led to a judgment for the plaintiff on remand, the plaintiff would have received prejudgment interest until the ruling on remand date. The court found no reason a plaintiff who received the same favorable judgment originally and on remand should be denied the accrual of interest simply because there was a successful appeal by the defendant in the interim.

The Eleventh Circuit reversed and remanded a district court's bench trial ruling in *Geico Marine Ins. Co. v. Shackleford*,[141] based on Geico Marine's "navigational limit" included in its marine insurance policy requiring the insured vessel to be north of Cape Hatteras, North Carolina, during hurricane season (June 1 to November 1).[142] The court held the navigational limit was dispositive in barring coverage for damage to the 65-foot sailboat because the plain language of the policy was unambiguously contained within the insurance contract included the navigational limit, and maritime law requires absolute enforcement of express navigational limits.[143] The court further held Geico Marine did not waive its right to enforce the navigational limit knowing the insured would sail the vessel out of the navigational limit just days before hurricane season.[144] This is because the limit only applied to the vessel when it was "afloat," and Geico was told the

140. Dakota, Minn. & E. R.R. Corp. v. Ingram Barge Co., No. C15-1038-LTS, 2020 WL 1663413 (N.D. Iowa Apr. 3, 2020).
141. Marine Ins. Co. v. Shackleford, 945 F.3d 1135 (11th Cir. 2019).
142. *Id.* at 1140.
143. *Id.* at 1140–43.
144. *Id.* at 1142.

vessel was sailing to Ft. Lauderdale for "extensive repairs" which would reasonably lead one to expect the vessel would be hauled for such repairs.[145]

Insurer, XL Specialty, brought action in diversity seeking declaratory judgment that the successive marine cargo insurance policies it issued to the insured were void *ab initio* based on the maritime doctrine of *uberrimae fidei* under federal admiralty law.[146] The insured disputed the applicability of the maritime doctrine of *uberrimae fidei* based on its contention that the marine cargo insurance policies in question were not maritime contracts.

The Southern District of New York ruled that, since the principal objective of marine cargo insurance policies is maritime commerce and the policies in question were replete with the terminology of maritime commerce, they were, therefore, maritime contracts to which the doctrine of *uberrimae fidei* could apply to rescind them on the basis of the insured's alleged misrepresentations.

VII. CARGO

In *Siemens Energy, Inc., et al. v. CSX Trans., Inc.*,[147] Siemens Energy, Inc. and Progressive Rail, Inc. filed a lawsuit against CSX transportation, Inc. for damages to two electrical transformers allegedly sustained during the Baltimore, Maryland to Ghent, Kentucky rail portion of a multimodal transportation. Siemens Energy's parent company, Siemens AG, manufactured the transformers and selected German freight forwarder Kuehne + Nagel AG & Co. to make the arrangements to transport the transformers from Germany to Kentucky. Blue Anchor Line, and arm of K+N AG, issued bills of lading identifying Siemens AG as the shipper and Siemens Energy as the consignee and containing three limitation of liability provisions: (1) a "Clause Paramount" noting that the Carriage of Goods by Sea Act, 46 U.S.C. Sec. 30701, would apply to the entire journey; (2) a "Himalaya Clause" extending the bill of lading's limitation of liability to provisions to subcontracting parties ultimately providing services; and, (3) a "Covenant Not to Sue" which provided that the Siemens entities (termed "Merchants") agreed that "no claim or allegation could be made against any subcontractor whatsoever" providing transportation.[148]

The ocean leg of the transportation was uneventful, so the Plaintiffs filed suit against CSX, the inland rail carrier. During the course of the transportation, Progressive Rail had prepared a bill of lading covering the rail shipment designating itself as the shipper and Gallatin Steel as the consignee.

145. *Id.*

146. XL Specialty Ins. Co. v. Prestige Fragrances, Inc., 420 F. Supp. 3d 172 (S.D.N.Y. 2019).

147. Siemens Energy, Inc., et al. v. CSX Trans., Inc., 446 F. Supp. 3d 184 (E.D. Ky. 2020).

148. *Id.* at 186-87.

CSX argued that the Blue Anchor Line bill of lading issued as part of the initial arrangements for transportation originating in Germany was a "through bill of lading" and, as a result, it was entitled to the limitations of liability contained in the "through bill of lading." Siemens and Progressive Rail argued that the Blue Anchor Line bill of lading was not a 'through bill of lading' and CSX was not entitled to the limitation of liability provisions. Relying upon the Supreme Court's decision in *Norfolk S. Ry. Co v. Kirby*[149] and *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*[150], the district court held that the Blue Anchor Line bill of lading was a "through bill of lading", and that the unnecessary issuance of the Progressive Rail bill of lading did not change the terms or impact of the 'through bill'. Consequently, the district court granted summary judgment to CSX. Siemens filed a notice of appeal of the grant of summary judgment to the Sixth Circuit, who affirmed the district court's judgment following the same precedent and factual predicates set forth by the lower court.[151]

VIII. MARITIME LIENS, ATTACHMENT, AND SHIP MORTGAGE ACT

A. *Maritime Liens*

In *Martin Energy Services, LLC v. Bourbon Petrel M/V*,[152] the Fifth Circuit held that a fuel supplier could not assert a maritime lien on a vessel owner's three support vessels because the support vessels only carried the fuel in their cargo tanks to refuel *other* seismic vessels. The Fifth Circuit explained that the fuel transported by the support vessels was not "necessary" to those support vessels, and, thus no lien attached.[153] The decision clarifies the scope of "necessaries" under the Commercial Instruments and Maritime Liens Act (CIMLA), 46 U.S.C. §§ 31301–31343 and provides clarity to suppliers.

B. *Attachment*

In *Tango Marine, S.A. v. Elephant Grp. Ltd.* and *E.N. Bisso & Son, Inc. v. Bouchard Transportation Co., Inc.*, the issue before the Eastern District of Virginia and the District of Maryland, respectively, was what level of specificity a plaintiff's verified complaint and accompanying affidavit needed to meet with respect to a Supplemental Admiralty Rule B(1) attachment and garnishment of assets.[154] The district courts in both cases noted that

149. Norfolk S. Ry. Co v. Kirby, 543 U.S. 14 (2006).
150. Kawasaki Kisen Kaisha Ltd. v. Regal- Beloit Corp., 561 U.S. 89 (2010).
151. See Progressive Rail Inc. v. CSX Transp., Inc., 981 F.3d 529 (6th Cir. 2020).
152. Martin Energy Servs., LLC v. Bourbon Petrel M/V, 962 F.3d 827 (5th Cir. 2020).
153. *Id.*
154. Tango Marine, S.A. v. Elephant Grp. Ltd., 431 F. Supp. 3d 726, 729 (E.D. Va. 2020); E.N. Bisso & Son, Inc. v. Bouchard Transp. Co., Inc., No. CV SAG-19-3629, 2019 WL 7185555, at *1 (D. Md. Dec. 26, 2019).

the Fourth Circuit had not answered this question, but the Second Circuit had in *DS-Rendite Fonds Nr. 108 VLCC Ashna GmbH & Co. Tankschiff KG v. Essar Capital Ams., Inc.*[155] In both cases, the Second Circuit's reasoning in *DS-Rendite* was persuasively discussed.

Accordingly, in *Tango*, the Eastern District of Virginia found that the verified complaint, which contained allegations incorporating "on information and belief" phraseology to allege that the garnishee held "property" in which the defendant held an interest, was insufficient to sustain attachment under Rule B despite the plaintiff's memorandums clarifying the business relationship between the garnishee and the defendant.[156] In *E.N Bisso*, the District of Maryland similarly found that broad allegations that did not allege whether each garnishee had a resident agent appointed for service of process within the District of Maryland combined with the verified complaint's single allegation concerning the garnishees' possession of assets was insufficient to sustain attachment under Rule B.[157]

C. *Ship Mortgage Act*

In *TMF Trustee Limited v. M/T MEGACORE PHILOMENA*,[158] the holder of a preferred vessel mortgage brought an *in rem* foreclosure action against a borrower in default on payments. The lender arrested the vessel, then six months passed without the owner posting a bond to secure the ship's release.[159] The mortgage holder moved for an interlocutory order for sale of the ship and for summary judgment. The borrower claimed that the mortgage lender engaged in wrongful acceleration and arrest of the vessel, breaching the mortgage agreement.[160] The district court ruled in favor of the mortgage holder, finding that that wrongful acceleration of the mortgage did not absolve the lender of its obligation to make the final balloon payment on the loan.[161] The district court ordered the sale of the ship and granted summary judgment for the lender, then the borrower appealed.

The Ninth Circuit held that borrower's six-month delay in securing the ship's release from arrest by the borrower was unreasonable.[162] As a result, the District Court's order for the sale of the vessel by the mortgagor was permissible. The Ninth Circuit's decision stated that the borrower's failure to make payments constituted a breach of the mortgage contract and that

155. DS-Rendite Fonds Nr. 108 VLCC Ashna GmbH & Co. Tankschiff KG v. Essar Capital Ams., Inc., 882 F.3d 44, 47 (2d Cir. 2018); *accord* Submersible Sys., Inc. v. Perforadora Cent., S.A. de C.V., 249 F.3d 413, 421 (5th Cir. 2001).

156. *Tango*, 431 F. Supp. 3d at 731–32.

157. *E.N. Bisso & Son, Inc.*, 2019 WL 7185555, at *3.

158. TMF Trustee Ltd. v. M/T Megacore Philomena, 792 F. App'x 472 (9th Cir. 2019).

159. *Id.*

160. *Id.* at 475.

161. *Id.* at 474.

162. *Id.* at 475.

the borrower's allegation of the mortgage holder's unclean hands did not prevent the sale of the vessel. The trial court's judgment was affirmed.[163]

IX. CRIMINAL

In *United States v. Van Der End* and related proceedings *United States v. Suarez*, the Second Circuit held that the Due Process Clause does not require Maritime Drug Law Enforcement Act (MDLEA) crimes committed on board stateless vessels to have a nexus to the United States in order for those crimes to be prosecuted by the United States.[164]

In another case before the Second Circuit involving the prosecution of Maritime Drug Law Enforcement Act (MDLEA) crimes, *United States v. Alarcon Sanchez*,[165] Defendants operating the speed boat *El Vacan* were stopped by the U.S. Navy and the U.S. Coast Guard 135 nautical miles off the coast of Costa Rica after a Navy helicopter observed crewmembers throwing large bales from the vessel's deck overboard.

The *El Vacan* was determined to be stateless due to its lack of visible registration markings, subjecting it to the jurisdiction of the United States pursuant to the MDLEA. The vessel had been carrying around 550 kilograms of cocaine and arrested the vessels crew. The United States also charged two land-based Columbian conspirators, Alarcon Sanchez and Salinas Diaz, with violating and conspiring to violate the narcotics trafficking provisions of the MDLEA and extradited them from Columbia to face those charges.

Sanchez and Diaz argued that charging foreign land-based conspirators who were not on the high seas exceeded the scope of the MDLEA and lacked a sufficient nexus to the United States. They further argued that extending the MDLEA to reach these foreign land-based conspirators exceeded Congressional legislative authority under the Define and Punish Clause of the Constitution.

The Second Circuit rejected these arguments, opining that prosecuting foreign land-based conspirators is a means that rationally relates to the legitimate end of prosecuting MDLEA conspirators who are on the high seas. Thus, Congress did not exceed its authority in extending MDLEA to cover conduct of land-based conspirators under the Necessary and Proper Clause. The Second Circuit reasoned that the conspirators most likely to control, direct, finance, and profit from drug trafficking were more apt to remain on land than to venture on the seas, making it necessary to confer

163. *Id.*

164. United States v. Van Der End, 943 F.3d 98 (2d Cir. 2019), *cert. denied*, 141 S. Ct. 619 (2020); United States v. Suarez, 786 F. App'x 317, 318 (2d Cir. 2019).

165. United States v. Alarcon Sanchez, 972 F.3d 156 (2d Cir. 2020).

federal jurisdiction over land-based conspirators to reasonably address the serious problem of drug trafficking on the high seas.

X. LIMITATION OF LIABILITY

In response to a single-claimant Limitation action in the U.S. District Court for the Western District of Pennsylvania, the claimant sought to lift the stay to proceed with certain claims in state court upon approval of certain stipulations.[166] The court recognized it was bound to lift the stay to permit the single claimant to proceed with his personal injury claims in state court under prevailing Third Circuit law so long as the claimant waives "any claim of res judicata regarding this issue of limited liability based on the state court judgment[, and] Claimant must concede the shipowner's right to litigate all of the issues regarding limitation of liability in the federal court."[167] The claimant set forth a stipulation that the vessel owner was "entitled to litigate all issues regarding limitation of liability in federal court **except** issues concerning his claim for general maritime maintenance and cure."[168] He also set forth a stipulation that he "waives any claim of *res judicata* relevant to the issue of limitation of liability pursuant to the provisions of the Act based on any jury or non-jury trial decision or judgment he may obtain against MHA in state court."[169]

The court required amendment of both stipulations. Regarding the stipulation of litigating all limitation of liability issue in federal court, the court recommended deletion of the language concerning reserving the maintenance and cure issue for the federal court, as there was a potential of double recovery, which was inconsistent with case law indicating that a defendant need not pay twice for the same medical expenses a seaman claims.[170] The court further noted that no party had presented case law indicating whether claims for maintenance and cure were outside the scope of the Limitation of Liability Act.[171] Regarding the stipulation of waiver of *res judicata*, the court noted that the careful drafting of the stipulation appeared to have exempted the claimant's parallel administrative claim under the Longshore and Harbor Workers Compensation Act from its scope.[172] The court

166. Marion Hill Assocs. v. Pushak, No. 20-379, 2020 WL 4719661, at *1 (W.D. Pa. July 23, 2020).

167. *Id.* at *2 (citing Gorman v. Cerasia, 2 F.3d 519, 524 (3d Cir. 1993)).

168. *Id.*

169. *Id.* at *3.

170. *Id.* at *2–3 (citing Brister v. A.W.I., Inc., 946 F.2d 350, 361 (5th Cir. 1991)).

171. *Id.* at *3; *cf. In re* Oskar Tiedemann & Co., 367 F.2d 498, 1966 A.M.C. 1934 (3d Cir. 1966) (holding that final limitation of liability decree indicating vessel owner is exonerated from all further liability and which no maintenance and cure claims were asserted at the time, that the post-limitation claims of maintenance and cure were barred by the limitation order).

172. *Id.* at *3–4 (citing 46 U.S.C. § 30511(c)).

recommended revising the stipulation to include waiver of *res judicata* to include a decision or judgment in any proceeding or forum.

The U.S. District Court for the District of New Jersey considered two challenges to a limitation petition arising out of a pleasure craft accident.[173] The claimants contended that an individual owner-operator of a vessel may not proceed with a limitation petition and disclaim privity or knowledge,[174] and also that the limitation actions are only meant to be available for "capital investors, and not individual operators of pleasure-craft who operate their own vessels."[175] In denying the motion to dismiss, the *Garb* court rejected the *Fecht* approach, joining a chorus of other Circuits and Districts within the Third Circuit[176] by noting that "'a denial of an owner's petition for exoneration from liability cannot be based solely on a finding that the owner was the operator of the vessel at the time the collision occurred,' because doing so on a motion to dismiss would effectively excuse the claimant from carrying the initial burden" of demonstrating what caused the accident.[177] Declining to "turn the burden-shifting analysis on its head," the district court denied the motion to dismiss on this basis.[178] The *Garb* court also dispensed with the argument that the Limitation of Liability Act of 1851 did not apply in this case, noting that the Supreme Court had discussed limitation of liability proceedings brought by owners of pleasure boats.[179]

The U.S. District Court for the District of New Jersey determined whether to increase the limitation fund of a vessel to include fishing permits on the basis that they were appurtenances to the vessel.[180] The court had set the limitation fund of $60,967.85, which included the scrap value of the vessel ($40,000) and the value of the scallop catch for that voyage.[181] A few months after the collision, the vessel owner sold the fishing permit issued to the vessel for $1,475,000 to a third party.[182] The claimants moved to increase the value of the limitation fund to account for the fishing

173. Garb v. Garb, No. 18-11769, 2019 WL 6907495, at *1 (D.N.J. Dec. 19, 2019).

174. *Id*. at *3 (citing Fecht v. Makowski, 406 F.2d 721, 722, 1969 A.M.C. 144 (5th Cir. 1969)).

175. *Id*. at *5.

176. *Id*. at *4 (citing Estate of Muer v. Karbel, 146 F.3d 410, 416 (6th Cir. 1998); *In re* M/V Sunshine, *II*, 808 F.2d 762, 764 (11th Cir. 1987); *In re* Farrell Lines, 530 F.2d 7, 10 (5th Cir. 1976); *In re* Complaint of Cirigliano, 708 F. Supp. 101, 104 (D.N.J. 1989); *In re* Tourtellotte, No. 09-2787, 2010 WL 5140000 (D.N.J. Dec. 9, 2010)).

177. *Id*. at *5 (quoting *Cirigliano*, 708 F. Supp. at 103).

178. *Id*.

179. *Id.* (citing Levinson v. Deupree, 345 U.S. 648, 1953 A.M.C. 972 (1953); Coryell v. Phipps, 317 U.S. 406 (1943); *Just v. Chambers*, 312 U.S. 383 (1941)).

180. *In re* Complaint of B&C Seafood, LLC, 426 F. Supp. 3d 82, 83–84 (D.N.J. 2019).

181. *Id*. at 84.

182. *Id*.

permit, which they contended had a value of $1,370,000 at the time of the incident.[183]

The court denied the motion to increase the limitation fund. While the court noted that case law existed recognizing that fishing permits are appurtenances for the purposes of maritime liens,[184] the limitation fund could only extend to all appurtenances comprising whatever was "on board" for the object of the voyage.[185] "Even though a copy of the fishing permit may have been on the vessel at the time of the collision, the value of the permit rests with the intangible right to fish which comes with it."[186]

In *In re Complaint of J.F. Brennan Co.*,[187] J.F. Brennan Company, Inc. (Brennan) filed a complaint seeking exoneration from, or limitation of, liability under the Limitation of Shipowners' Liability Act. Brennan is the owner and operator of a John Deere 470G excavator and a floating work platform comprised of 11 sectional Flexi float barges. Brennan filed the limitation action due to claims arising out of an incident that occurred on the Fox River on March 25, 2019.[188]

Jeffrey Helser (Hesler) filed a claim alleging he was severely injured during the incident on March 25, 2019. Shortly thereafter, Brennan filed its initial third-party complaint against Brooks Tractor Incorporated (Brooks) claiming it is liable to Helser and Brennan for damages. Subsequently, Brooks filed an answer to Brennan's complaint and filed a crossclaim against Brennan. Further, Helser filed two motions to dismiss, a stipulation supporting his motion to dissolve the injunction invoked under the Act, and a motion to strike information provided by Brennan that identifies Brooks as a claimant.[189]

Additionally, Pierce Pacific Manufacturing, Inc. (Pierce) made an initial appearance in the action and sought leave to file a claim and an answer in the limitation proceeding. Pierce's motion was unopposed by Brennan, but contested by Helser. Thereafter, Brennan sought leave to amend its third-party complaint and its initial complaint in the proceeding. *Id.* at 4.

In addressing all of the above filings, the trial court first addressed Brennan's request for leave to file an amended complaint and an amended third-party complaint. The court found Brennan's amended complaints were not

183. *Id.*

184. *Id.* at 85 (citing Gowen, Inc. v. F/V Quality One, 244 F.3d 64, 2001 A.M.C. 1478 (1st Cir. 2001); PNC Bank Del. v. F/V Miss Laura, 381 F.3d 183, 2004 A.M.C. 2314 (3d Cir. 2004)).

185. *Id.* at 86–87 (citing *In re* Waterman S.S. Corp., 794 F. Supp. 601, 608, 1992 A.M.C. 2658 (E.D. La. 1992); *The Buffalo*, 154 F. 815, 816 (2d Cir. 1907)).

186. *Id.* at 87.

187. *In re* Complaint of J.F. Brennan Co., No. 19-C-1402, 2020 U.S. Dist. LEXIS 128873, at *2 (E.D. Wis. July 22, 2020).

188. *Id.* at 2.

189. *Id.* at 3.

futile as they relate to each party identified as a claimant in the action, but, because the proceeding remained in its early stages, the Court granted the motion for leave to amend.[190] Second, the court addressed the motions to dismiss wherein it found the pending motions to dismiss moot because due to the filing of an amended complaint.[191] Third, the court addressed Hesler's motion to strike directed at Hesler's claims that counsel received by mail "Plaintiff's Information to Claimant's Pursuant to Rule F(6)", which identified Brooks as a claimant. Helser not only asked the court to strike the correspondence sent by Brennan's counsel pursuant to this rule, but also asked the court to designate Helser as the single claimant in the proceeding. The court found this tactic was not an appropriate method to designate Helser as the single claimant or object to Brooks' entry into this action by asking the court to strike documentation identifying Brooks as a claimant. Therefore, the court denied Hesler's Motion to Strike.[192] Lastly, the court held that Hesler's and Brooks's "stipulations" to dissolve the injunction and request to stay the proceeding were rendered moot by the amended complaint and Pierce's entry into the suit.

At issue in *In re Prosper Operators, Inc.*[193] was whether a vessel owner timely provided proper notice to potential claimants in an action under the Limitation of Liability Act (Limitation Act).[194] Finding that the vessel owner failed to publish notice in a newspaper as required by Supplemental Rule F(4), the Fifth Circuit affirmed the dismissal of the limitation action.[195] The plaintiff suffered injuries when he attempted to jump from a well platform onto a vessel. The plaintiff filed suit against the vessel owner in state court alleging an unseaworthy condition of the vessel caused his injuries.[196] Thereafter, on September 26, 2016, the vessel owner initiated a limitation action in federal court seeking exoneration and/or limitation of liability in accordance with the Limitation Act. Upon filing, the district court issued an order approving the vessel owner's action and directing the vessel owner, in accordance with Supplemental Rule F(4), to send direct notice of its action to known claimants and to publish notice of its action in a local newspaper for four weeks prior to April 14, 2017.[197]

The vessel owner sent notice of the limitation action via two letters from the vessel owner's counsel dated January 18 and January 25, 2017.[198] Two years later, on February 20, 2019, the vessel owner filed a motion seeking

190. *Id.* at 4, 5.
191. *Id.* at 5, 6.
192. *Id.* at 7, 8.
193. 813 F. App'x 955 (5th Cir. 2020).
194. 46 U.S.C. §§ 30501–30512.
195. *In re* Prosper Operators, Inc., 813 F. App'x 955, 956 (5th Cir. 2020).
196. *Id.*
197. *Id.*
198. *Id.*

an extension of time to publish notice in the newspaper. The injury claimant opposed the motion and filed a second motion to dismiss arguing that the vessel owner had failed to fulfill its notice obligations under Supplemental Rule F(4).[199] The district court denied the vessel owner's motion to extend and granted the injury claimant's motion to dismiss.

On appeal, the Fifth Circuit clarified that the notice and publication requirements of the rule "are not excusable 'technicalities.'"[200] Because the notice and publication requirements "are designed to warn potential claimants that they must file their claims within the monition period or lose them",[201] the Fifth Circuit found the vessel owner's failure to timely publish notice of the limitation action to be sufficient grounds for dismissal.

In re New Canyonlands by Night, LLC[202] involved an action for exoneration or limitation of liability, which arose from a September 8, 2017 boat accident on the Colorado River. The claimants (14 passengers on the vessel at the time of the accident) sought entry of summary judgment against the vessel owners (New Canyonlands by Night, LLC and Canyonlands River Tours, LLC—collectively referred to as "Canyonlands").[203] The claimants asserted that Canyonlands were not entitled to exoneration or limitation of liability because Canyonlands' negligent acts, of which Canyonlands had privity or knowledge, caused the accident.[204]

The claimants specifically argued that Canyonlands breached their duty by, (1) improperly installing the vessel's steering system; (2) failing to have a coherent protocol or policy in place for inspecting the vessel; and (3) by failing to have the vessel and the steering system inspected after Canyonlands purchased the vessel.[205] The district court explained that the claimants' identification of "undisputed facts" were characterizations of, or inferences drawn from, the record evidence, acceptance of which would be contrary to the standard of review on summary judgment—*i.e.* in the light most favorable to the party opposing the motion, Canyonlands.[206] The court concluded that the evidence was insufficient to establish that the steering ram was not suitable for the vessel and genuine issues of material fact existed as to whether Canyonlands breached their duty of reasonable care by improperly installing the vessel's steering system.[207]

199. *Id.* at 957.
200. *Id.* at 958.
201. *Id.*
202. *In re* New Canyonlands by Night, LLC, No. 2:17-CV-01293-DN, 2019 WL 5684455, *1 (D. Utah Nov. 1, 2019).
203. *Id.* at *1.
204. *Id.*
205. *Id.* at *2.
206. *Id.* at *3.
207. *Id.*

The court further explained that the claimants did not cite sufficient evidence or legal authorities to prove the appropriate standard of care for implementing inspection protocols or having the vessel inspected.[208] Therefore, because the claimants did not establish a baseline from which the reasonableness of Canyonlands conduct could be determined, the court held that genuine issues of material fact existed as to whether Canyonlands breached their duty of reasonable care by failing to have protocols for inspecting the vessels and failing to have the vessel and its steering system inspected.[209] Accordingly, the court denied the claimants' motion for summary judgment.[210]

In re Complaint of the United States,[211] involved a motion to transfer venue to the District of Arizona by Claimants, D.D. and G.D., by and through Paul Theut, Guardian ad Litem, and Tara Gagliardi. The United States, Limitation Plaintiff, and Claimant (Aramak Sports and Entertainment Services, LLC (Aramark)), opposed the case's transfer.[212] The court explained that because the public vessels subject of the case were found in Utah when the United States initiated the case, the District of Utah constituted the only proper venue for this case under the Public Vessels Act (PVA), 46 U.S.C. § 31101–31113.[213] In addition, the court determined that the competing interests and assertions of convenience among the parties did not favor transfer of venue, particularly given that the government's convenience was a concern of venue provisions in legislative enactments.[214] Furthermore, the court concluded that even if the District of Arizona may be more convenient to some material witnesses, the convenience of those witnesses did not sufficiently outweigh the convenience of other material witnesses who would be available to testify at a Utah trial.[215]

Additionally, the availability of process to compel the presence of witnesses did not favor transfer to the District of Arizona.[216] Moreover, the court found that the relative ease of access to sources of proof did not favor transfer to the District of Arizona nor did congestion of the court's calendar.[217] The court further determined that the location of the subject incident and the interests of justice did not favor transfer to the District

208. *Id.*
209. *Id.*
210. *Id.* at *4.
211. *In re* Complaint of the United States, No. 4:18-CV-00065-DN-PK, 2020 WL 5775863, *1 (D. Utah Sept. 28, 2020).
212. *Id.* at *1.
213. *Id.* at *3.
214. *Id.*
215. *Id.* at *5.
216. *Id.* at *6.
217. *Id.*

of Arizona.[218] Therefore, the court concluded that a transfer was not in the interest of justice for the convenience of the parties and witnesses and the motion to transfer venue was denied.[219]

XI. ADMIRALTY JURISDICTION

After obtaining a multimillion dollar judgment from a London court based upon the breach of an option to purchase a vessel, the judgment creditor initiated suit in a Pennsylvania state court seeking to enforce the judgment.[220] The judgment debtors removed the case to the U.S. District Court for the Eastern District of Pennsylvania and the creditors promptly moved to remand arguing that the underlying breach of contract is based upon a sale of a vessel, which does not supply the court with jurisdiction under 28 U.S.C. § 1333(1).[221]

The district court remanded the case to state court, holding that the breach of the sale of a vessel did not constitute a breach of a maritime contract.[222] However, the court declined to grant the creditor its costs associated in compelling remand under 28 U.S.C. § 1447(c).[223] The removing parties caught a significant break, as the district court believed that the issue as to whether a contract for the sale of a vessel was a maritime contract constituted a colorable basis for the removal, even though the court cited no case law supporting the contention that the breach of a contract for the sale of a vessel supplied admiralty jurisdiction.[224] While the court correctly noted that discerning whether a contract was maritime in nature is often difficult to discern, it failed to note that it is hornbook law that a

218. *Id.* at *7.

219. *Id.* at *1, *8.

220. Eclipse Liquidity, Inc. v. Geden Holdings, Ltd., No. 20-1847, 2020 WL 3574540, at *1–2 (E.D. Pa. July 1, 2020).

221. *Id.* at *3.

222. *Id.* (citing Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802, 804 (9th Cir. 2001); Vrita Marine Co. v. Seagulf Trading LLC, 572 F. Supp. 2d 411, 412 (S.D.N.Y. 2008); Gerard Constr., Inc. v. Motor Vessel Va., 480 F. Supp. 488, 489 (W.D. Pa. 1979)).

223. 28 U.S.C.§ 1447(c) states, in pertinent part, "An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." Recent case law declining to impose attorney's fees and costs have typically involved the removal of cases from state court in contravention of the Saving to Suitors clause of 28 U.S.C. § 1333(1) and its interplay with the 2011 amendment to 28 U.S.C. § 1441; *see also* Riverside Constr. Co., Inc. v. Entergy Miss., Inc., 626 F. Appx. 443, 447 (5th Cir. 2015).

224. *Eclipse Liquidity*, 2020 WL 3574540, at *4–5; *cf.* Renegade Swish, LLC v. Wright, 857 F.3d 692, 700–01 (5th Cir. 2017) (noting that removal is "objectively reasonable when case law from other Circuits arguable support removal and this Circuit had not yet decided the precise question"); League of Women Voters of Pa. v. Commonwealth of Pa., 921 F.3d 378, 384 (3d Cir. 2019) (noting "that a colorable removal claim in an area of unsettled law does not merit a § 1447(c) award") (quotations and citations omitted).

contracts for the sale of vessels are not maritime contracts,[225] and that there is no Circuit split as to whether such contracts are maritime in nature.[226]

At issue in *In re Branson Duck Vehicles, LLC*[227] was whether admiralty jurisdiction existed and whether Ride the Ducks International (RDI) had standing to invoke the Limitation of Liability Act (LLA). With respect to the LLA, the court easily found RDI lacked standing because it was not the owner or charterer of the vessel at the time of the disaster. While RDI cited an unidentified opinion from the Northern District of California in support of its argument that admiralty jurisdiction should apply to it as a previous owner—because of the time and money it invested into the vessel prior to its sale to the current owner—the court found that such an expansion of the LLA's application was not supported by the statute's plain language. Furthermore, the court found that admiralty jurisdiction did not apply to Table Rock Lake because it lacked contemporary navigability in fact. While the court acknowledged (a) an extensive record regarding the current recreational and tourist activity on the lake and (b) its shores touched two different states, there was no meaningful evidence of trade or transportation activity such as to make the lake a "highway for commerce."

In *Davis v. Blue Aircraft LLC*,[228] passengers on a seaplane that crashed into a mountainside brought claims of negligence, negligent misrepresentation, vicarious liability, and negligent selection and retention against a seaplane operator. Poor visibility and weather conditions encountered by the seaplane while it was over navigable waters were the alleged cause of the crash.[229] The plaintiffs asserted that the court had admiralty and maritime jurisdiction over their claims pursuant to the Admiralty Extension Act, which provides admiralty jurisdiction when a tort occurs on navigable waters and is caused by a vessel on navigable water.[230] Defendant moved to dismiss the plaintiffs' maritime claims on the grounds that the court lacked admiralty jurisdiction.

225. *See* Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 1-10, at 26 (2d ed. 1975).

226. Gulf Coast Shell & Aggregate LP v. Newlin, 623 F.3d 235, 240 (5th Cir. 2010); *Teddy Bear*, 254 F.3d at 804; Magallanes Inv., Inc. v. Circuit Sys., Inc., 994 F.2d 1214, 1217 (7th Cir. 1993); Chase Manhattan Fin. Servs., Inc. v. McMillian, 896 F.2d 452, 460 (10th Cir. 1990); Cary Marine, Inc. v. M/V Papillon, 872 F.2d 751 (6th Cir. 1989); Hatteras of Lauderdale, Inc. v. Gemini Lady, 853 F.2d 848, 850 (11th Cir. 1988); Natasha, Inc. v. Evita Marine Charters, Inc., 763 F.2d 468, 470 (1st Cir. 1985) (Breyer, J.); Twin City Barge & Towing Co. v. Aiple, 709 F.2d 507, 507 (8th Cir. 1983); Flota Maritima Browning de Cuba, Coviadad Anonima v. Snobl, 363 F.2d 733 (4th Cir. 1966); The Ada, 250 F. 194, 198 (2d Cir. 1918) (Rogers, J., concurring).

227. *In re* Branson Duck Vehicles, LLC, No. 6:18-cv-03339-MDH, 2019 WL 6352654 (W.D. Mo. Nov. 27, 2019).

228. Davis v. Blue Aircraft LLC, No. 20-cv-80, 2020 WL 4233032 (D. Alaska July 23, 2020).

229. *Id.*

230. *Id.* at *2.

As a preliminary matter, the District of Alaska ruled that the seaplane was not a vessel within the meaning of the Admiralty Extension Act.[231] The district court further found that the alleged negligence was of the operator, not the vessel, such that the plaintiffs did not meet the standard for admiralty jurisdiction under the Admiralty Extension Act.[232] The maritime law claims were therefore dismissed for lack of admiralty jurisdiction.[233]

XII. PRACTICE, PROCEDURE, AND UNIFORMITY

In *Curtis v. Galakatos*, the United States District Court for the District of Massachusetts considered a personal injury suit by non-seafarers (both residents of New York) against the owner of a vessel that plaintiffs became injured on while vacationing in Greece.[234] The defendant, a Massachusetts resident, filed a motion to dismiss for forum *non conveniens* with a declaration that he would submit to the jurisdiction of a Greek court.[235] The court reasoned that Greece was "available" as an adequate alternative forum because of the defendant's jurisdictional stipulation in his declaration.[236] It further reasoned that Greece was an adequate forum because "the Court may set conditions on its dismissal of this action."[237] The court weighed private interest and public interest factors, and found that both weighed in favor of prosecution of the action in Greece.[238] Therefore, the court granted the defendant's motion for forum *non conveniens*.[239] An appeal of this ruling has recently followed.

The issue before the Eastern District of Virginia in *Glover v. Hryniewich*[240] was whether the doctrine of qualified immunity applied to a City of Norfolk (City) police officer who capsized a Norfolk Police Department harbor patrol boat during a sea trial exercise in the navigable waters of the United States. In addition, the district court was tasked with deciding whether the City could be held vicariously liable for its police officer's acts if its officer was entitled to qualified immunity, or, alternatively, whether the City was entitled to sovereign immunity.[241]

The district court held that the grant of qualified immunity was appropriate where the police officer committed a maritime tort while

231. *Id.* at *3.
232. *Id.* at *3–4.
233. *Id.* at *5.
234. Curtis v. Galakatos, No. 19-10786-GAO, 2020 WL 4593179 (D. Mass. Aug. 11, 2020)..
235. *Id.* at *1–2.
236. *Id.* at *2.
237. *Id.* (citing Ahmed v. Boeing Co., 720 F.2d 224, 225 (1st Cir. 1983)).
238. *Id.* at *3.
239. *Id.* at *4.
240. Glover v. Hryniewich, 438 F. Supp. 3d 625, 634–38 (E.D. Va. 2020).
241. *Id.* at 637–38.

performing a discretionary function in the scope of his employment.[242] As a result, the court granted qualified immunity to the police officer under the Discretionary-Ministerial Test, specifically declining to apply the conventional qualified immunity test applicable to constitutional torts under 42 U.S.C. § 1983. The district court also held that the City could not avoid *respondeat superior* liability even if its police officer was entitled to qualified immunity.[243] Finally, the district court held that the City was not an "arm of the state" under the applicable six-factor test, which would have allowed the City to assert sovereign immunity under the Eleventh Amendment, namely because Virginia's treasury would not be obligated to cover the City's potential losses and debts in this instance.[244]

On appeal,[245] the Fourth Circuit dismissed the City's appeal of the district court's decision finding that the City could be held vicariously liable, even if its police officer was entitled to qualified immunity.[246] The Fourth Circuit found that it lacked jurisdiction to review this issue because the district court's ruling on the City's vicarious liability was not a final order, nor did the district court's ruling qualify for review under the collateral order doctrine. As a result, the Fourth Circuit found that it could not review this issue until after a final judgment. The Fourth Circuit, however, affirmed the district court's holding the City was not entitled to sovereign immunity, noting it was bound by the same precedent as the district court. As to the City's compelling maritime security argument, the Fourth Circuit concluded that this argument did not outweigh the fact that Virginia's treasury would not have to pay a judgment in the case.

In *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*,[247] the issue before the Eastern District of Virginia was whether the court should amend a 20-year old Order issued by the same court, which absolutely prohibited the salvor of the *TITANIC* (R.M.S. Titanic, Inc.) from cutting into the *TITANIC*'s wreck or detaching any part of it. The salvor-movant sought to alter that Order so that it may be allowed to cut into some sections of the *TITANIC*'s Marconi Suite and detach artifacts as a part of "Expedition 2020."[248] The United States of America, on behalf of NOAA as amicus, filed a Report and Recommendation which expressed NOAA's approval of some aspects of the proposed plan while opposing others.[249]

242. *Id.* at 634–36.
243. *Id.* at 639–40.
244. *Id.* at 640–41.
245. Glover v. City of Norfolk, Va., 836 F. App'x 139 (4th Cir. 2020).
246. *Id.* at 140.
247. R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel, 461 F. Supp. 3d 336, 337, *amended on denial of reconsideration*, 475 F. Supp. 3d 507 (E.D. Va. 2020).
248. *Id.* at 337–39.
249. *Id.*

The district court granted the movant's request for amendment of the July 28, 2000 Order on the condition that, on or before June 18, 2020, the salvor submit a funding plan that detailed the anticipated costs of sources of funding for the Expedition 2020, which could be filed under seal.[250] If that condition was met, according to the district court, the salvor would be permitted to "minimally … cut into the wreck, as necessary to access the Marconi Suite, and to detach from the wreck the Marconi wireless device and associated artifacts …"[251] The court's opinion was amended due to COVID-19 to allow the salvor additional time to comply with the court's condition.[252] The United States of America has filed an appeal to the district court's opinion.

In *Farhat v. United States*,[253] the United States Government moved to dismiss for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted a case that arose as a result of a boating accident in the McClellan-Kerr Arkansas River Navigational System.[254] The decedents' boat's motor failed, would not restart, and the boat drifted toward the W.D. Mayo Lock and Dam No. 14 gates, eventually striking Gate 1 and being pulled under water with all of the passengers.[255] Three people/passengers died as a result of the accident and one other passenger sustained injuries.[256]

The plaintiffs filed suit in the Eastern District of Oklahoma alleging wrongful death and personal injury claims against the United States under the Federal Tort Claims Act (FTCA) for negligence in operating the W.D. Mayo Lock and Dam No. 14.[257] The United States filed a motion to dismiss asserting that the plaintiffs' claims were not governed by the FTCA but rather by the Suits in Admiralty Act (SAA), 46 U.S.C. §§ 30901–30918. The SAA requires that a civil action be brought within two years after the cause of action arose.[258] The United States argued that because the plaintiffs filed their complaint approximately two years and seven months after the accident, the action was untimely and barred by the statute of limitations.[259] In the alternative, the United States claimed that the district court lacked subject matter jurisdiction because the plaintiffs filed their complaint outside the SAA's two-year statute of limitations, or that Plaintiffs

250. *Id.* at 341.
251. *Id.* at 342.
252. *R.M.S. Titanic*, 475 F. Supp. 3d at 511.
253. Farhat v. United States, No. CIV-19-401-SPS, 2020 WL 5751618 (E.D. Okla. Sept. 25, 2020).
254. *Id.* at *1.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

failed to state a claim because equitable tolling could not save their claim.[260] The district court explained that the plaintiffs conceded that their claims arose exclusively under the SAA.[261]

The court concluded that the limitations period in the SAA was not jurisdictional and the case should not be dismissed for lack of subject matter jurisdiction.[262] The court reasoned that the SAA's statute of limitations, like the FTCA, only addresses the timeliness of a claim but does not refer to the jurisdiction of the district courts or the courts' authority to hear untimely suits.[263] In addition, Congress separated the statute of limitations in the SAA from the jurisdiction grant, which generally indicates that the deadline is not jurisdiction.[264]

The court then turned the question of whether the two-year limitations period should be equitably tolled in this case and explained that equitable tolling is granted sparingly in cases in which the litigant had been pursuing his rights diligently and that some extraordinary circumstances stood in his way.[265] The court here held that the plaintiffs' complaint failed to allege their own diligence or the existence of any extraordinary circumstances.[266] Therefore, the Court granted the United States' motion to dismiss for failure to state a claim upon which relief can be granted.

Lebedinsky v. MSC Cruises, S.A.[267] involved a cruise passenger's personal injury action for improper venue. The passenger filed her personal injury claim in the U.S. District Court for the Southern District of Florida.[268] However, there was a forum selection clause contained in the cruise's terms and conditions which required her to bring her lawsuit in Italy.[269] The district court dismissed the action for improper venue, and an appeal to the Eleventh Circuit followed.[270] The court upheld the dismissal, first finding the "reasonable communicativeness test" was satisfied and the clause's formation was not induced by fraud or overreaching; the forum selection language was set out in identical type as the rest of the conditions but under clear, plain-English headings, the clause's language was clear and unambiguous, and Lebedinsky had the time and opportunity to become meaningfully informed of the clause.[271] The court also found the forum

260. *Id.*
261. *Id.*
262. *Id.* at *4.
263. *Id.*
264. *Id.*
265. *Id.*
266. *Id.*
267. Lebedinsky v. MSC Cruises, S.A., 789 F. App'x 196 (11th Cir. 2019).
268. *Id.* at 199.
269. *Id.*
270. *Id.*
271. *Id.* at 200–01.

selection clause did not deprive her of a day in court because of inconvenience or unfairness since the cruise began and ended in Italy and made no U.S. stops—so Italy was the forum where a dispute relevant to that voyage would most likely arise.[272] Potential for decreased recovery in an Italian court did not deprive the passenger of a remedy because it was not "so inadequate that enforcement would be fundamentally unfair."[273]

XIII. REGULATIONS UPDATE

A. *Vessel Incidental Discharge National Standards of Performance (October 2020)*

On October 26, 2020, the U.S. Environmental Protection Agency (EPA) issued the 329-page "Vessel Incidental Discharge National Standards of Performance,"[274] which aims to set a new framework for regulating discharges "incidental to the normal operation of vessels." The change is aimed at bringing consistency and certainty to the oversight of such discharges from approximately 82,000 U.S.- and foreign-flagged commercial vessels operating in U.S. waters, including tankers, bulk carriers, container ships and cruise ships. This new regime will be rolled out in two parts, with the October 26, 2020, proposed rule being part one and the proposed rule will be opened to the public for comments.

B. *No Sail Orders and Suspension of Further Embarkation; Notice of Modification and Extension and Other Measures Related to Operations*[275]

Robert R. Redfield, the current director of the Centers for Disease Control and Prevention (CDC), issued the original No Sail Order for cruise ships that became effective on Saturday, March 14, 2020. Redfield had reason to believe that cruise ship travel may continue to introduce, transmit, or spread the 2019 Novel Coronavirus. Effective April 15, 2020, the CDC announced a modification and extension of the No Sail Order and Other Measures Related to Operations that was previously issued on March 14, 2020—subject to the modifications and additional stipulated conditions set forth in the Order. The Order was supposed to continue in operation until the earliest of the expiration of the Secretary of Health and Human Services' declaration that COVID-19 constitutes a public health emergency; the CDC Director rescinds or modifies the order based on specific public health or other considerations; or 100 days from the date of publication in the Federal Register. The Order was renewed on Thursday, April 9, 2020

272. *Id*. at 202.
273. *Id*. at 202–03.
274. U.S. EPA, Vessel Incidental Discharge National Standards of Performance (2020), https://public-inspection.federalregister.gov/2020-22385.pdf.
275. 85 Fed. Reg. 21004

and extended again on Thursday, July 16, 2020.[276] In doing so, the CDC supported the June 19th decision by the Cruise Lines International Association (CLIA) to extend voluntarily the suspension of operations for passenger cruise ship travel until September 15, 2020.[277] CLIA also submitted a response to the CDC's request for public comment[278] including its elements and answers to 28 questions the CDC posed to the public about the resumption of cruising. The "Healthy Sail Panel" also submitted a 65-page response to the CDC's request, including 74 recommendations as to how to approach the return to cruising.

In line with CLIA's announcement of voluntary suspension of operation by its member companies, CDC has extended its No Sail Order to ensure that passenger operations on cruise ships did not resume prematurely.

C. *Coronavirus Disease Guidance for Ships*

On September 17, 2020, the Coronavirus Disease 2019 Guidance for Ships was updated to clarify CDC's recommendation for non-cruise ships upon entry into a U.S. port after one or more confirmed cases of COVID-19 is identified.

The update specified that this Order would remain in effect until the earliest of either (1) The expiration of the Secretary of Health and Human Services' declaration that COVID-19 constitutes a public health emergency; (2) the CDC Director rescinds or modifies the order based on specific public health or other considerations; or (3) September 30, 2020.[279]

D. *National Defense Authorization Act for Fiscal Year 2020*[280]

1. Sealift Programs

Congress passed a compromise National Defense Authorization Act for fiscal year 2020 (NDAA). The NDAA reauthorizes the Maritime Security Program (MSP) through the year 2035, providing a stipend to 60 militarily useful US-flag vessels in exchange for their participation in an Emergency Preparedness Agreement with the Department of Defense (DOD) ensuring availability to the Government for sealift purposes in times of war and national emergency.[281] Eligible vessels must be commercially viable, operated in the US international trade, and not older than fifteen years. The

276. Center for Disease Control & Prevention, Cruise Ship No Sail Order Extended Through September 2020 (July 16, 2020), https://www.cdc.gov/media/releases/2020/s0716-cruise-ship-no-sail-order.html [hereinafter CDC].

277. Cruise Lines Int'l Assoc., CLIA Announces Voluntary Suspension of Cruise Port Operations (June 19, 2020), https://cruising.org/en/news-and-research/press-room/2020/june/clia-announces-voluntary-suspension-of-cruise-operations-from-us-ports.

278. 85 Fed. Reg. 44,083.

279. CDC, *supra* note 276.

280. Pub. L. No. 116-92, 133 Stat. 1190 (2019).

281. Nat'l Def. Auth. Act, § 3502 (2020).

reauthorization provides an annual stipend of $5.3 million for FY 2022–2025, $5.8 million for FY 2026–2028, $6.3 million for FY 2028–2032, and $6.8 million for FY 2032–2035 for each enrolled vessel. Under existing provisions of law, the Navy has a limited exception to buy-American rules to procure up to two foreign-built vessels for sealift purposes if such vessels previously participated in the MSP.[282]

Under existing provisions of law, the Navy has a limited exception to "Buy American" rules to procure up to two foreign-built vessels for sealift purposes if such vessels previously participated in the MSP. A new provision in the NDAA directs that the Navy "shall" enter into a contract for the procurement of two used vessels under that authority using amounts authorized for Operation and Maintenance, Navy, for fiscal year 2020.

2. Cable Security Fleet

The NDAA establishes a Cable Security Fleet aimed at ensuring reliable US-flag cable laying vessel capability.[283] Like the MSP, the Cable Security Fleet vessels are commercially operated by US citizens and commercially viable, but also must be made available to the U.S. Government when necessary under pre-negotiated contingency contracts.

Currently, there are two vessel contracts authorized, each providing a $5 million annual stipend through 2035. Vessels must be operated in the "cable services" defined as "installation, maintenance, or repair of submarine cable and related equipment, and related cable vessel operations," and be less than 40 years of age. Applications will be awarded to those vessels determined by the Department of Defense, in its sole discretion, to best meet national security requirements, after which priority shall be granted to "Section 2" citizens under the Shipping Act.[284]

3. Tanker Security Fleet

Section 3511 of the NDAA amends the Tanker Security Fleet by making the annual stipend fixed at $6 million per year for a maximum program of ten vessels commencing in fiscal year 2021 (October 1, 2020). Unlike the Maritime Security Program, the tank vessel contracts would be renewable annually and subject to a seven-year limit and the stipend would not be reduced when the vessel is under charter to the U.S. Government (except for a narrow exception for the carriage of international food aid). Also, as with the MSP, the Tanker Security Fleet would be subject to annual appropriations and vessels can be built outside the United States and reflagged under the U.S. registry.

282. 10 U.S.C. § 1032(f)(3).
283. *Id.* § 3521. The provision originated in the House bill, H.R. 2500, § 3521.
284. 46 U.S.C § 50501.

4. Ports Initiatives

Within the NDAA is there is a Ports Improvements Act, which codifies a competitive grants program for improving the safety, efficiency, or reliability of the movement of goods through ports and intermodal connections to ports.[285] Applicants may be states and local governments, public agencies established by one or more states, special purpose districts with transportation functions, Indian tribes, or groups of the foregoing. Projects may be within ports, or outside the ports but directly related to intermodal connections and used to improvement the movement of goods into and out of the port. The Act authorizes up to $500 million for such projects, provided that no funds may be used to grant awards to purchase fully automated cargo handling equipment that is remotely operated or monitored if such equipment would result in a net loss of jobs within a port.[286]

5. Maritime Safe Act

The NDAA contains the Maritime Security and Fisheries Enforcement Act (Maritime SAFE Act), which was originally reintroduced in May of 2019 by Senators Roger Wicker (R-MS) and Chris Coons (D-DE) to promote a whole-of-government strategy to combat illegal, unreported, and unregulated (IUU) fishing globally.[287] The Maritime SAFE Act establishes improved processes among the US and its allies aimed at combatting IUU. It directs the Secretary of State to coordinate with regional intergovernmental fisheries management organizations and to engage in diplomatic missions with priority regions suffering from IUU and with priority flag states known to have vessels engaging in IUU activities, in an attempt to curtain IUU.[288] The law also establishes an interagency working group and directs US Federal agencies, including the Coast Guard, Navy, and Department of Commerce, to improve law enforcement activities within such priority regions and flag states, through expanded training, increased stakeholder outreach, and assessment of existing resources available to combat IUU and other illegal trade including weapons, drugs, and human trafficking.

The Maritime SAFE Act also pursues increased transparency among consumers and seafood suppliers regarding the ethical and legal sourcing of seafood products, improved information sharing and transparency, and better traceability systems to strengthen fisheries management, enhance domain awareness, and deter IUU fishing. The law requires the

285. *Id.* § 3514.
286. *Id.* § 3501(a)(9).
287. Press Release, Wicker, Coons Reintroduce SAFE Act, (May 1, 2019), https://www.wicker.senate.gov/public/index.cfm/press-releases.
288. NDAA §§ 3531–3572.

development of an overall IUU strategy, and various reports on the progress being made to combat IUU, including specifically human trafficking in the seafood supply chain.

6. Personnel and Training

Section 2504 of the NDAA codifies into law the "Military to Mariner" executive order, requiring the Coast Guard and other relevant agencies to identify all training and experience within their service that may qualify for merchant mariner credentialing and submit a list of such training to the Coast Guard National Maritime Center to determine whether it will count toward maritime credentials.[289] The United States Coast Guard Commandant shall make a determination of whether training and experience counts for credentialing purposes no later than 6 months after the date on which the United States Coast Guard National Maritime Center receives a submission under subsection identifying a training or experience and requesting such a determination.

The law also includes several provisions related to the United States Merchant Marine Academy at King's Point (Academy). In addition to the 50 slots the Secretary of Transportation can use to appoint candidates of value to the Academy, the Secretary will have 40 new slots available to individuals sponsored by the Academy to attend preparatory school during the academic year prior to entrance in the Academy.[290] Another provision directs the Secretary of Transportation to enter into an agreement with NAPA to evaluate the US Merchant Marine Academy to help it "keep pace with more modern Campuses."[291] Finally, Congress requires an update on the Academy's implementation of sexual assault prevention and response program measures mandated under prior provisions of law.[292]

7. Offshore Wind and Coastwise Laws

Section 3518 of the NDAA pursues clarity in directing the Government Accountability Office to prepare a report within six months that examines the inventory of coastwise qualified vessels for emerging offshore energy needs, projected vessel needs for the offshore wind industry over the next decade, actions taken or proposed by offshore wind developers to ensure sufficient capacity in compliance with US coastwise laws, and the potential benefits to the US maritime and shipbuilding industries and the US economy associated with the use of US coastwise qualified vessels to support offshore energy development and production.

289. *Id.* § 3511.
290. *Id.* § 3504.
291. *Id.* § 3513.
292. *Id.* § 3517.

E. *IMO Cyber Security Deadline*

The International Maritime Organization (IMO) has set a January 2021 deadline for shipping interests to incorporate cyber risk management into their existing Safety Management Systems.[293] Several of these systems should be considered at high risk, including bridge systems, cargo-handling and management systems, propulsion and machinery management and power control systems, access control systems, passenger-servicing and management systems, passenger-facing public networks, administrative and crew welfare systems, and communication systems. Cyber response plans need to detail tasks to be undertaken when a cyber incident occurs.

Insurers will play a key role in the management of risk and development of the subject plans. In addition, the US Coast Guard (USCG) has guidance available on cyber security exposure that maritime interests may use as guidance.[294]

F. *International Response to Take Action to Protect Seafarers from COVID-19 Related Disruptions*

IMO, along with thirteen countries, have come together to issue a statement acknowledging the growing humanitarian crisis involving displaced crewmembers and committing to provide relief.[295] The COVID-19 pandemic has disrupted international trade and travel, leaving an estimated 200,000 seafarers stranded on ships worldwide. The extended period of time on ships has led to worries of crew fatigue and mental health issues, which could result in serious maritime accidents if seafarers are not relieved and replaced.

The IMO and the 13 signatory countries seek to designate seafarers as essential workers, which would allow them to travel home by providing waivers to travel restrictions and increasing the availability of commercial flights to their countries of origin. The joint statement was signed by representatives of Denmark, France, Germany, Greece, Indonesia, the Netherlands, Norway, the Philippines, Saudi Arabia, Singapore, United Arab Emirates, the United Kingdom, and the United States.

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293. Int'l Maritime Org., Annex 1 (draft), https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/5ps/Design%20and%20Engineering%20Standards/docs/msc.428(98)_Maritime_Cyber_Risk.pdf.

294. U.S. Dep't Homeland Sec., Cybersecurity, U.S. Coast Guard, https://homeport.uscg.mil/missions/cybersecurity.

295. Int'l Maritime Org., Governments Pledge Action for Seafarers at Crucial Crew Change Summit (July 9, 2020), https://www.imo.org/en/MediaCentre/PressBriefings/Pages/22-crew-change-summit.aspx.

G. *Docket No. 19-05, Interpretive Rule on Demurrage and Detention Under the Shipping Act*

Effective May 18, 2020, the Federal Maritime Commission's (FMC) published its final rule "Docket No. 19-05, Interpretive Rule on Demurrage and Detention Under the Shipping Act" (Final Rule).[296] This final rule is the most recent iteration of the FMC's regulatory focus on demurrage and detention practices at U.S. ports and the FMC reported that over 100 comments were received in response to its request for public comment. The FMC responded favorably to select comments by revising and clarifying certain provisions, but largely stuck to the language of the Proposed Rule issued in September 2019 — including the FMC's view and application of the "Incentive Principle." In response to jurisdictional and procedural comments about the binding nature of the Final Rule, the FMC reiterated that as an "interpretative" rule, the Final Rule does not mandate conduct but rather gives guidance on how conduct may be interpreted in future adjudications. Although the Final Rule is not retroactive, it is unclear how policies and practices in effect prior to the effective date of May 18, 2020, will be evaluated in a future adjudication.

H. *Modification and Revocation of Ruling Letters Relating to CBP's Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points*

On December 19, 2019, U.S. Customs and Border Protection (CBP) issued its decision in its Customs Bulletin, "Modification and Revocation of Ruling Letters Relating to CBP's Application of the Jones Act to the Transportation of Certain Merchandise and Equipment Between Coastwise Points" (Decision), which became effective on February 17, 2020.

The Decision makes key changes to three main categories: (1) Vessel Equipment; (2) Lifting Operations; and (3) Pipelaying, Drilling-Related Operations, and Offshore Wind Energy Facilities.

1. Vessel Equipment

CBP has historically used the "Mission of the Vessel" concept to justify certain subsea installation, repair, and maintenance work but there was ambiguity, and often misapplication, with regard to the Jones Act. Notwithstanding that these transportations should have been reserved to the Jones Act fleet, the application of this concept allowed foreign-flag vessels to undertake transportation of certain items. The Decision specifically revoked the application of "Mission of the Vessel" and established a

296. 85 Fed. Reg. 29,638.

new definition of vessel equipment. Under this interpretation, the Decision narrowed the scope of vessel equipment to include only items that are "necessary and appropriate for the navigation, operation, or maintenance of a vessel and for the comfort and safety of the persons on board."

2. Lifting Operations

CBP clarified in its Decision that lifting operations are distinct from transportation within the meaning of the Jones Act. Accordingly, offshore "lifting operations" now include the lifting by cranes, winches, or lifting beams, or other similar activities or operations, from the time that the lifting activity begins when unlading from a vessel or removing offshore facilities or subsea infrastructure until the time that the lifting activities can be safely terminated in relation to the unlading, installation, or removal of offshore facilities or subsea infrastructure.

3. Pipelaying, Drilling-Related Operations, and Offshore Wind Energy Facilities

CBP confirmed in its Decision that its existing rulings on pipelaying and cable laying remain valid and are unaffected by its Decision. In addition, while not providing a similar statement with regard to drilling, it noted that drilling ruling letters previously identified for revocation pertaining to cement, chemicals, and other consumable materials remain in force. CBP also addressed offshore winding, stating that any future interpretations by CBP on the application of the Jones Act to wind energy facilities or other activities will be in response to ruling requests based on specific transactions.

I. *OFAC Sanctions Advisory Targeted at the Maritime, Energy and Metals Sectors and Related Communities*

On May 14, 2020, the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC), together with the Department of State and the United States Coast Guard, published the long-awaited Sanctions Advisory regarding the maritime industry, energy and metals sectors, and related communities that was originally due in early April.[297] The Advisory reflects the U.S. government's ongoing commitment to prevent sanctions evasion, smuggling, criminal activity, facilitation of terrorist activity, and proliferation of weapons of mass destruction, particularly related to Iran, North Korea, and Syria. It further expands on multiple previous shipping

297. U.S. Dep't of Treasury, Sanctions Programs and Country Information (2021), https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information.

advisories issued in 2018 and 2019.[298] The Advisory reflects OFAC's May 2, 2019 Framework for Compliance and calls for all parties addressed to develop risk-based compliance to engage in information sharing, to the extent permissible under local law. Key aspects of the advisory include: (1) Deceptive Practices; (2) General Practices for Identification of Sanctions Evasion; and (3) Guidance Specific to Role in the Maritime Industry.

298. *Id.*