RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW

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I. INTRODUCTION

This article discusses noteworthy and interesting admiralty and maritime decisions issued by U.S. federal and state courts between October 1, 2016, and September 30, 2017. The selection includes multiple cases on seamen's claims, including a state supreme court's approval of punitive damages in a claim for unseaworthiness. Additionally, this article addresses a variety of other areas encompassed in maritime practice, such as longshoremen claims, maritime liens, marine insurance, procedural issues, and the Oil Pollution Act.

Notably, in *Tabingo v. American Triumph LLC*, the Supreme Court of Washington held that a Jones Act seaman can recover punitive damages

for his general maritime law unseaworthiness claim against his employer.[1] Subsequently, in *Rockett v. Belle Chasse Marine Transportation, LLC*, the U.S. District Court for the Eastern District of Louisiana declined to follow *Tabingo* and ruled that punitive damages are not available to seamen.[2]

II. SEAMEN'S CLAIMS

A. *Jones Act*[3] *and Unseaworthiness*[4]

In *Tabingo v. American Triumph LLC*,[5] the Supreme Court of Washington, sitting en banc, held that a seaman could be awarded punitive damages for an unseaworthiness cause of action. Following the U.S. Supreme Court's three-part analysis in *Atlantic Sounding Co. v. Townsend*,[6] the court confirmed that the first two parts of the analysis were satisfied, as punitive damages were historically available at common law and therefore extended to maritime law.[7] Thus, the only remaining question was whether unseaworthiness claims are excluded from this "general admiralty rule."[8] The court found that the U.S. Supreme Court's decision in *Miles v. Apex Marine Corp.* did not disturb claims for unseaworthiness and therefore was not applicable.[9] Since claims for unseaworthiness predated the Jones Act, which did not address the unseaworthiness remedy, no reason existed to believe that unseaworthiness claims were excluded from the "general maritime rule."[10] The court declined to follow the decision of the Fifth Circuit in *McBride v. Estis Well Service, LLC*.[11] The court also noted that

1. 391 P.3d 434 (Wash. 2017).
2. 260 F. Supp. 3d 688, 692 (E.D. La. 2017).
3. The Jones Act, originally passed in 1920, grants seamen who suffered personal injury in the course of their employment the right to seek damages in a jury trial against their employers. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 6-21 (5th ed. 2017 update) (citing Jones Act, formerly codified at 46 U.S.C. § 688; since 2008 the Jones Act is codified in 46 U.S.C. § 30104). The elements of a Jones Act claim are (1) that the claimant is a seaman; (2) that he or she suffered injury or death in the courts of his or her employment; (3) that the seaman's employer was negligent; and (4) that the employer's negligence caused the injury at least in part. *Id.*
4. Unseaworthiness is the concept "that the vessel and her owner are . . . liable . . . for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." SCHOENBAUM, *supra*, § 6-25 (citing *The Osceola*, 189 U.S. 158 (1903)). In order to state a cause of action for unseaworthiness, a plaintiff must allege his or her injury was caused by a defective condition of the ship, its equipment, or appurtenances. *Id.*
5. 391 P.3d 434 (Wash. 2017).
6. *Id.* (citing 557 U.S. 404, 413 (2009)).
7. *Id.* at 438.
8. *Id.* (citing *Townsend*, 557 U.S. at 415).
9. *Id.* at 439 (citing Miles v. Apex Marine Corp., 498 U.S. 19, 29 (1990)).
10. *Id.*
11. *Id.* at 440 (citing McBride v. Estis Well Serv., L.L.C., 768 F.3d 382 (5th Cir. 2014) (holding that a seaman's recovery for unseaworthiness under the Jones Act or the general maritime law is limited to pecuniary losses, which does not include punitive damages)).

jurisprudence from the State of Washington suggested that punitive damages may be available and that the federal policy of providing seamen with special protection as "wards of the admiralty" was furthered by permitting claims for punitive damages.[12]

In *Ghaleb v. American Steamship Co.*, a seaman who worked aboard a tugboat-and-barge combination brought an action under the Jones Act, alleging that he sustained injuries while assisting during the vessel's winter storage process.[13] At trial, a unanimous jury rejected all of the seaman's claims, but the district court judge granted the seaman's motion for judgment as a matter of law with respect to his negligence per se claim. The seaman argued that the vessel owner was in violation of the Jones Act by making the seaman work more than fifteen hours in a twenty-four-hour period, and that this statutory violation resulted in the seaman's injury.[14] The Sixth Circuit disagreed and reversed the district court's decision because "no evidence related to this lowering maneuver would force a reasonable jury to conclude only that [the seaman's] fatigue contributed to his accident."[15] In other words, the mere fact that a Jones Act violation played a role in the accident was not enough to grant judgment as a matter of law and something other than the seaman's fatigue due to working more than fifteen hours in a twenty-four-hour period could have played a role in the accident.

In *Dallas v. United States*, the Fifth Circuit addressed the scope of remedies available to injured crewmembers aboard public (government owned) vessels.[16] Dallas was injured in his employment as a tow boat master for the U.S. Army Corps of Engineers.[17] He received compensation benefits under the Federal Employees Compensation Act (FECA)[18] and he also sued the U.S. Army Corps of Engineers under the Jones Act and general maritime law.[19] The district court dismissed Dallas's suit for lack of subject matter jurisdiction, and Dallas appealed.[20] FECA instructs that the compensation it provides is the exclusive remedy for injured employees.[21] However, FECA also states that the exclusivity provision "does not apply to a master or a member of a crew of a vessel."[22] Despite this exception, the U.S. Supreme Court has long interpreted FECA to be the exclusive remedy

12. *Id.* at 440–41.
13. 684 F. App'x 545, 546 (6th Cir. 2017).
14. *Id.* at 547.
15. *Id.* at 549.
16. 678 F. App'x 212 (5th Cir. 2017).
17. *Id.* at 212.
18. *Id.* (citing 5 U.S.C. § 8102).
19. *Id.*
20. *Id.* at 213.
21. *Id.* (citing 5 U.S.C. § 8116(c)).
22. *Id.*

for civilian seamen on public vessels.[23] The Fifth Circuit explained that it was bound by *Johansen v. United States* and could not consider whether that decision was correctly decided.[24] Thus, the court affirmed the dismissal of Dallas's suit.[25]

Federal courts in Louisiana addressed the availability of non-pecuniary damages in three cases. In *Wade v. Clemco Industries Corp.*, the court addressed this issue for claims brought by a seaman's widow.[26] The non-employer defendants moved for summary judgment against the widow's claims for non-pecuniary damages.[27] After reviewing the applicable jurisprudence, and despite reaching a different conclusion in a prior similar case, the court granted summary judgment.[28] The court reasoned that the Fifth Circuit has now made clear that under the Jones Act and general maritime law, a seaman's damages against employers and non-employers are limited to pecuniary losses.[29] In *Rinehart v. National Oilwell Varco*, the court affirmed its prior holding in *Wade*.[30] The decision concerned an injury to a seaman, which resulted in a claim for punitive damages against a non-employer.[31] The court dismissed the punitive damages claim relying on its previous reasoning in *Wade*.[32] In *Rockett v. Belle Chase Marine Transportation*, an injured seaman sought punitive damages against a non-employer under the general maritime law.[33] The court dismissed the seaman's claim for punitive damages, relying on the clearly established Fifth Circuit precedent previously relied on by both the *Wade* and *Rinehart* courts.[34]

In *Nevor v. Moneypenny Holdings*, a seaman brought claims against his employer, alleging violation of the Jones Act and unseaworthiness for a work-related injury.[35] The employer argued that while prejudgment interest is available for unseaworthiness, the Jones Act claim precluded any award of prejudgment interest.[36] The prevailing view appeared to be that in pure Jones Act suits, recovery of prejudgment interest is precluded, but the First Circuit had not yet squarely addressed the issue.[37] The First

23. *Id.* (citing Johansen v. United States, 343 U.S. 427 (1952)).
24. *Id.*
25. *Id.* at 214.
26. 2017 WL 434425, 2017 AMC 1104 (E.D. La. Feb. 1, 2017).
27. *Id.* at *1.
28. *Id.* at *6.
29. *Id.* at *4–5.
30. 2017 WL 1407699 (E.D. La. Apr. 20, 2017) (Fallon, J.).
31. *Id.* at *1.
32. *Id.* at *4.
33. 2017 WL 2226319, 2017 AMC 1282 (E.D. La. May 22, 2017) (Lemmon, J.).
34. *Id.* at *3–4.
35. 842 F.3d 113 (1st Cir. Nov. 22, 2016).
36. *Id.*
37. *Id.*

Circuit in *Nevor* found the issue settled that prejudgment interest is normally available under general maritime law. However, the court found a split of authority on whether prejudgment interest can be awarded to an injured seaman who prevails on both Jones Act and unseaworthiness claims. The Sixth Circuit held that a seaman is not entitled to prejudgment interest in this type of situation.[38] However, the Second Circuit found that when a seaman prevails on both the Jones Act and unseaworthiness claims and there are no exceptional circumstances militating against an award of prejudgment interest, a seaman is entitled to prejudgment interest on the total amount of the award.[39] Ultimately, the First Circuit found that the rule expressed in the Second Circuit was the preferable option "because it permits the plaintiff 'to be paid under the theory of liability that provides the most complete recovery.'"[40]

Stevens v. Air & Liquid Systems Corp. involved an injury sustained by a boiler technician aboard the USS Allagash in the 1950s.[41] The boilers used "asbestos containing materials" and also "provided additional-containing materials to be used in the boilers."[42] The plaintiff came in contact with the boilers and was exposed to asbestos.[43] Several decades later, he was diagnosed with mesothelioma and brought suit against the boiler manufacturer along with several other parties.[44] The manufacturer filed a motion for summary judgment, in pertinent part, on the basis that maritime law barred the plaintiff's claims for loss of consortium.[45] The court disagreed and found that loss of consortium was available under general maritime law.[46] The court agreed with the analysis of the U.S. District Court for the District of Connecticut, which stated that "defendants who argue 'that general maritime law does not allow recovery for loss of consortium claims . . . conflate the statutory limitations placed on recovery for cases brought under [DOHSA and the Jones Act] with actions brought under common law."[47]

In *Russo v. APL Marine Services, Ltd.*,[48] a female seaman filed suit against the vessel owner and its captain after their romantic relationship ended, claiming harassment, discrimination, retaliation, and wrongful termination under California law.[49] The Ninth Circuit affirmed the district

38. *Id.* (citing Petersen v. Chesapeake, 784 F.2d 732 (6th Cir. 1986)).
39. *Id.* (citing Magee v. U.S. Lines, Inc. 976 F.2d 821, 822 (2d Cir. 1992)).
40. *Id.* at 122.
41. 2017 WL 1025797, at *1 (D.R.I. Mar. 16, 2017).
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at *3.
47. *Id.* (citing Bray v. Ingersoll-Rand Co., 2015 WL 728515, at *7 n.16 (D. Conn. Feb. 19, 2015)).
48. 694 F. App'x 585 (9th Cir. 2017).
49. *Id.* at *1.

court's grant of partial summary judgment on those claims because there was no evidence that California law was intended to apply to employment that occurs predominantly outside California on the high seas.[50] The Ninth Circuit also affirmed dismissal of the seaman's claims that the captain's actions constituted unseaworthiness because no "savage and vicious" physical attack by a crewmember had occurred.[51]

B. *Maintenance and Cure*[52]

Several courts adopted the rule in *Boudreaux v. Transocean Deepwater, Inc.* that "once a shipowner pays maintenance and cure to the injured seaman, the payments can be recovered only by offset against the seaman's damages award—not by an independent suit seeking affirmative recovery."[53] In *Block Island Fishing, Inc. v. Rogers*, the First Circuit ruled that the vessel owners had the right to discount any award to the seaman by the overpayment of maintenance, creating new law for the First Circuit.[54]

In *Williams v. Central Contracting & Marine, Inc.*, the U.S. District Court for the Southern District of Illinois also followed the Fifth Circuit's decision in *Boudreaux v. Transocean Deepwater, Inc.* The *Williams* court held that an employer may investigate claims for maintenance and cure before paying them without incurring punitive damages, but that *McCorpen*[55] does not create a cause of action for maintenance and cure claw-back payments.[56] The court noted that any maintenance and cure payments that *McCorpen* would have precluded may lower a recovery obtained in a Jones Act claim.[57]

As a matter of first impression, the U.S. District Court for the Western District of Washington in *Ward v. Ehw Constructors* granted the defendant's summary judgment motion on the plaintiff's punitive damages

50. *Id.* at *2–3.

51. *Id.* at *2 (citing Boorus v. W. Coast Trans-Oceanic S.S. Line, 299 F.2d 893, 894–95 (9th Cir. 1962); Boudoin v. Lykes Bros. S.S. Co., 348 U.S. 336, 339–40 (1955)).

52. "Maintenance and cure" is the obligation of a shipowner who employs seamen to care for them if they are injured or become ill while in the service of the ship. SCHOENBAUM, *supra*, § 6-28. "Maintenance" is the right of a seaman to food and lodging if he falls ill or becomes injured while in the service of the ship. *Id.* (citing Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938)). "Cure" is the right to necessary medical services. *Id.*

53. Block Island Fishing, Inc. v. Rogers, 844 F.3d 358, 366 (1st Cir. 2016) (quoting Boudreaux v. Transocean Deepwater, Inc., 721 F.3d 728 (5th Cir. 2013)).

54. *Id.*

55. The "*McCorpen* defense" was created by the Fifth Circuit in *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547, 548 (5th Cir.1968), which held that a seaman who willfully conceals medical facts from an employer when applying for work forfeits his right to maintenance and cure if the misrepresented or undisclosed facts are material to the employer's decision to hire him and there is a connection between the information withheld and the injury sustained.

56. Case No. 15-CV-867-SMY-RJD, 2017 WL 76937, at *2 (S.D. Ill. Jan. 9, 2017) (quoting *Boudreaux*, 721 F.3d at 728).

57. 2017 WL 76937, at *5 (S.D. Ill. Jan. 9, 2017) (citing Am. River Transp. Co. v. Phelps, 189 F. Supp. 2d 835, 853–54 (S.D. Ill. 2001)).

claim for not paying maintenance and cure.[58] The court found that a rational juror could not conclude that the defendant acted in bad faith by contending that the plaintiff was not a seaman, especially since the court had previously held that it could not grant summary judgment in the plaintiff's favor on the issue of seaman status.[59] The court held that it could not conclude whether the plaintiff was a seaman based on the record because questions still remained as to whether his duties were "primarily sea-based activities" and whether he worked on vessels in navigation.[60] The court also denied the plaintiff's motion for summary judgment on the defendant's willful misconduct and *McCorpen*[61] defenses on the basis that if it were proven that the plaintiff concealed his injury, those defenses would be available to the defendant.[62] The court concluded that evidence of a preexisting condition is sufficient to create a reasonable dispute of material fact that must be submitted to a jury.[63]

The U.S. District Court for the Western District of Washington declined to accept the seaman's argument that the duty of maintenance and cure requires that the vessel owner investigate the plaintiff's illness.[64] In some cases, the failure to inquire about a seaman's health may be a breach of the duty to provide cure, but there is no "affirmative duty to investigate in all cases."[65] Here, the court distinguished the U.S. Supreme Court's decision in *Vaughan v. Atkinson*,[66] which held that vessel owner must investigate claims for maintenance and cure as different from requiring the vessel owner to conduct a *medical* investigation into their employees' symptoms.[67]

C. *Seaman Status*

Halle v. Galliano Marine addressed the application of the Fair Labor Standards Act (FLSA) to remotely operated vehicle (ROV) technicians residing on vessels.[68] FLSA requires employers to provide overtime pay to any

58. No. C15-5338, 2016 WL 7407226, at *6 (W.D. Wash. Dec. 22, 2016).
59. *Id.* at *5–6.
60. *Id.* at *7 (citing Scheuring v. Traylor Bros., Inc., 476 F.3d 781, 786 (9th Cir. 2007); Gipson v. Kajima Eng'g & Constr., Inc., 972 F. Supp. 537 (C.D. Cal. 1997), *aff'd*, 173 F.3d 860 (9th Cir. 1999)).
61. *Id.* at *8 (citing McCorpen v. Central Gulf S.S. Corp., 396 F.2d 547, 549 (5th Cir. 1968)). The *McCorpen* defense originated with the case in which the Fifth Circuit held that when a seaman commences employment, "he must have a good faith belief that he is reasonably fit for duty."
62. *Id.*
63. *Id.*
64. Robinson v. F/V LILLI ANN, LLC, 2017 WL 698785, 2017 AMC 1478 (W.D. Wash. Feb. 22, 2017).
65. *Id.* at *4.
66. *Id.* (citing Vaughan v. Atkinson, 369 U.S. 527, 528–29 (1962)).
67. *Id.*
68. 855 F.3d 290 (5th Cir. 2017).

employee who works more than forty hours in a workweek unless an exemption applies.[69] Employees who are "seamen" under the FLSA are exempt from overtime pay. A "seaman" under the FLSA is different than a "seaman" under the Jones Act. Just as the Jones Act interprets seaman broadly to maximize the remedial coverage of that Act, the exemptions under the FLSA are narrowly tailored to minimize those who lose the FLSA's protections.[70] An employee is a seaman under the FLSA if: (1) the employee is subject to the authority, direction, and control of the master; and (2) the employee's service is primarily offered to aid the vessel as a means of transportation, provided that the employee does not perform a substantial amount of different work.[71] Generally, nonseaman work becomes "substantial" if it occupies more than 20 percent of the employee's time.[72]

In finding that the ROV technician was not a seaman under the FLSA, the *Halle* court focused on the second prong.[73] The court reasoned that while the plaintiff resided on the ROV support vessel, he was subject to a separate command structure than the ship's crew and did not assist with the vessel's navigation, other than occasionally providing information to the captain.[74] Therefore, the court concluded that the ROV technician's employment was more akin to "industrial" work performed by dredgemen stationed on a dredge boat to operate machinery used to cut up shells removed from the sea floor.[75]

III. LONGSHOREMEN CLAIMS

Metro Machine Corp. v. Office of Workers' Compensation involved a longshoreman with a work-related lung condition (COPD) that caused such fits of coughing that the claimant fractured his back.[76] Although the employer paid compensation for the longshoreman's lung condition, it declined to pay for the medical treatment related to the back condition.[77] The administrative law judge who heard the claim initially awarded past and future medical benefits only for the claimant's work-related COPD.[78] On a motion for reconsideration, the longshoreman asked that his claim for medical

69. *Id.* at 293.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id* at 294.
74. *Id.* at 295–96.
75. *Id.* at 295.
76. 846 F.3d 680, 684–85 (4th Cir. 2017).
77. *Id.* at 685.
78. *Id.* at 686.

treatment related to his vertebra fracture be considered.[79] The ALJ found the § 20(a) presumption of causation under the Longshore and Harbor Worker's Compensation Act (LHWCA) applied, and the fracture was thus compensable.[80] The Benefits Review Board affirmed the decision, rejecting the employer's argument that the claimant needed to provide medical evidence directly linking his COPD to his work exposure, as well as the argument that the § 20(a) presumption does not apply to a secondary injury, such as the vertebra fracture.[81] The Fourth Circuit quickly dispensed with the employer's argument regarding the absence of medical evidence to link the claimant's work exposure to welding and epoxy fumes and the exacerbation of his COPD.[82] The court also agreed with the longshoreman and the Office of Workers Compensation Programs that the § 20(a) presumption "unambiguously applies to all types of claims."[83]

In *Koch v. United States*, a harbor worker alleged that he sustained a personal injury while descending a dimly lit stairwell aboard a vessel owned by the U.S. Maritime Administration.[84] Koch boarded the vessel to submit bids on areas of the vessel in need of repair.[85] There were six other contractors present, all of whom were taken by the vessel's chief engineer on a "walkthrough" of the vessel. After inspecting various areas on the vessel, the parties arrived at a stairwell, which the fluorescent lights did not fully illuminate. Each contractor had a flashlight, but Koch did not use his flashlight, choosing instead to use both hands to hold handrails on opposite sides of the stairwell. Koch fell backwards and struck the bulkhead or some other piping behind him, immediately complaining of discomfort in his knees, neck, and back. Koch and his wife filed suit under § 905(b) of the LHWCA.[86] The court found that the United States failed to exercise reasonable care to prevent injuries because the lights did not fully illuminate the stairwell.[87] Following a bench trial, the district court entered judgment in favor of the worker and awarded him $2.83 million in damages, which included $150,000 for loss of consortium.[88] The government filed a timely notice of appeal, contending that, prior to his accident, Koch had become disabled by his painful chronic osteoarthritis in both his knees, as well as the degenerative disc disease in his

79. *Id.*
80. *Id.* at 686–87.
81. *Id.* at 687.
82. *Id.* at 688.
83. *Id.*
84. 857 F.3d 267, 270 (5th Cir. 2017).
85. *Id.*
86. *Id.* at 271 (citing 33 U.S.C. § 905(b)).
87. *Id.* at 272.
88. *Id.*

cervical spine and carpal tunnel syndrome.[89] The Fifth Circuit affirmed, holding: (1) the worker was entitled to recover for all of his harm and disability, without any discount or reduction because of his preexisting osteoarthritic knee and degenerative spinal conditions; (2) the district court's factual finding that worker had not been disabled by his conditions prior to his accident was not clearly erroneous; and (3) any error in the district court excluding additional testimony by government's expert about his review of worker's MRI films after had filed his pretrial report was harmless.[90]

In Cruz v. United States,[91] the U.S. District Court for the Southern District of California affirmed summary judgment in favor of a general contractor on the basis that it qualified as the plaintiff's employer under the LHWCA[92] and therefore, the plaintiff's exclusive remedy was under the LHWCA.[93] The defendant contractor not only controlled the plaintiff and directed her to carry out its work, the plaintiff was capable of performing the work only because the contractor had spent six months teaching her how to do so.[94] The plaintiff also argued that the provision in the contract between the general contractor and labor broker that stated that individuals such as the plaintiff were not to be considered employees operated as a waiver of the general contractor's right to claim that it was the plaintiff's employer and that the failure to enforce the provision would be a disincentive for safety and against public policy.[95] The court disagreed, however, because the contact provided for LHWCA insurance so that the plaintiff would be compensated.[96] Applying maritime law, the court also held the subcontractor that had placed scaffolding in a tank onboard an amphibious assault vessel did not owe the plaintiff a duty to protect her from falling into a hole in that tank.[97] The court reasoned that the subcontractor did not owe a duty to protect non-employees from falls,[98] open and obvious conditions,[99] or inherent risks of the work.[100] The court also held that the subcontractor placed the scaffolding in the tank, which was accepted by the general contractor.[101] The plaintiff has appealed the ruling as to the general contractor to the Ninth Circuit.

89. *Id.*
90. *Id.* at 275–78.
91. 247 F. Supp. 3d 1138 (S.D. Cal. 2017).
92. *Id.* at 1141–42 (citing 33 U.S.C. § 905(a)).
93. *Id.* at 1143.
94. *Id.* at 1144.
95. *Id.* at 1145–46.
96. *Id.* at 1146.
97. *Id.*
98. *Id.* at 1146–48.
99. *Id.* at 1150–51.
100. *Id.* at 1151–52.
101. *Id.* at 1148–50.

In *Gibson v. American Construction Co.*, the Washington Court of Appeals held that when a maritime worker's status as a non-seaman is not adjudicated under the LHWCA, and the compensation order does not expressly resolve that issue, the purported seaman's Jones Act claims are not barred and the legal principles of election of remedies, equitable estoppel, and collateral estoppel do not apply.[102] This was an issue of first impression in the State of Washington. In *Gibson*, the plaintiff was injured and filed an LHWCA claim with the Department of Labor (DOL) against his employer American Construction Co.[103] The plaintiff received LHWCA benefits and later entered into a settlement agreement with American, which was submitted to the DOL's district director for approval.[104] The DOL director approved the settlement and entered a final compensation order that made no mention of any potential Jones Act claims.[105] About three months later, the plaintiff filed a complaint against American for negligence and unseaworthiness.[106] Applying the U.S. Supreme Court's decision in *Southwest Marine, Inc. v. Gizoni*,[107] which the Ninth Circuit had previously adopted in *Figueroa v. Campbell Industries*,[108] the court held that the claims were not barred.[109] In particular, the court noted that if the plaintiff succeeded on his claims, American would receive a credit for amounts paid under the LHWCA.[110]

In *Leeward Marine, Inc. v. Director, OWCP*, the Ninth Circuit affirmed the findings of the benefits review board and administrative law judge that held that the estate of a longshoreman who committed suicide one-and-a-half years after his work-related accident had established that the work injury aggravated a pre-existing condition of "weak impulse control," which ultimately led to his suicide attempt and entitled him to benefits under the LHWCA.[111] Therefore, the preclusion of an award of LHWCA benefits when the "injury was occasioned solely by the intoxication of the employee or the willful intention of the employee or by the willful intention of the employee to injure or kill himself or another" did not apply.[112]

The U.S. District Court for the Eastern District of Arkansas addressed a series of motions for summary judgments in *Nieves v. Cooper Marine & Timberlands Corp.*, a case involving a fatal accident to a longshoreman

102. 402 P.3d 928 (2017).
103. *Id.* at 931.
104. *Id.*
105. *Id.* at 933.
106. *Id.* at 934.
107. 502 U.S. 81 (1991).
108. 45 F.3d 311, 315 (9th Cir. 1995).
109. 402 P.3d 928, 932, 936–37 (Wash. Ct. App. 2017).
110. *Id.* at 936 (citing U.S.C. § 903(e)).
111. 694 F. App'x 627 (9th Cir. 2017).
112. *Id.* at 630 (citing 33 U.S.C. § 903(c)).

while unloading a barge for Kinder Morgan Bulk Terminals, Inc., in Arkansas territorial waters in the Mississippi river.[113] In one of the court's decisions, it dismissed his estate's claim for recovery of mental anguish and loss-of-life damages and for claims on behalf of nondependent beneficiaries.[114] The court did not dismiss the estate's claims for loss-of-society damages under general maritime law.[115] The court further dismissed the estate's punitive damages claims on the basis that the evidence viewed in the light most favorable to the estate failed to show the kind of misconduct for which punitive damages may be awarded.[116]

IV. PASSENGER CLAIMS

In *Meadors v. Carnival Corp.*,[117] a cruise passenger suffered a slip-and-fall accident aboard a Carnival cruise ship and sued Carnival under theories of negligence and breach of contract.[118] The breach-of-contract claim alleged that the ticket contract between the plaintiff and Carnival had an express or implied guarantee for safe passage.[119] In granting Carnival's motion to dismiss the breach-of-contract claim, the court ruled the contract did not have express terms for safe passage, and there was no implied guarantee for safe passage under general maritime law.[120]

In *Everett v. Gerhart*, the plaintiff was injured while climbing the ladder onboard a recreational vessel on Lake Erie.[121] The plaintiff brought an action against the vessel owner, arguing that he owed her a heightened standard of care because the circumstances of her accident were peculiar to traditional maritime activity and that the open and obvious doctrine did not apply.[122] The court disagreed, stating that "when the risk is tantamount to one that would exist on shore and raises no hazards peculiar to navigation, then the duty is the same as that owed by a landowner."[123] The court rejected the plaintiff's argument that the defendants had a duty to warn of an open and obvious condition: "It is common knowledge that

113. Nieves v. Cooper Marine & Timberlands Corp., No. 3:15CV00350 JLH, 2017 WL 3574850 (E.D. Ark. Aug. 17, 2017); Nieves v. Cooper Marine & Timberlands Corp., No. 3:15CV00350 JLH, 2017 WL 3473807 (E.D. Ark. Aug. 11, 2017); Nieves v. Cooper Marine & Timberlands Corp., No. 3:15CV00350 JLH, 2017 WL 3261596 (E.D. Ark. July 31, 2017); *In re* Cooper Marine & Timberlands Corp., 2016 WL 7242722 (E.D. Ark. Dec. 14, 2016).
114. *Nieves*, 2017 WL 3473807, at *2.
115. *Id.* at *7.
116. *Id.* at *4.
117. CV No. 16-CIV-24901, 2017 WL 3732123 (S.D. Fla. Aug. 30, 2017).
118. *Id.* at *1.
119. *Id.*
120. *Id.* at *3–5.
121. 2017 WL 3238156, at *2 (N.D. Ohio July 31, 2017).
122. *Id.*
123. *Id.*

climbing ladders is an inherently dangerous activity—that is why people take extreme care when doing so. Failure to take due care when climbing a ladder will often result in losing one's balance. . . . The risk associated with climbing a ladder is open and obvious."[124]

V. SALVAGE

In *Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel*, the Eleventh Circuit reversed a district court's order denying a subcontractor's motion to intervene in the salvage of Spanish treasure off the coast of Florida.[125] In 1979, a company discovered a Spanish shipwreck that included gold, silver, and precious jewels.[126] The company was awarded exclusive salvage rights and in 2010 sold its interest to a company called Queens Jewels, LLC, which in turn subcontracted the salvage work to Gold Hound, LLC.[127] During its work, Gold Hound used proprietary maps, data, and software to salvage specific areas.[128] Later, Gold Hound and Queens Jewels failed to renegotiate the subcontract, but Gold Hound claimed that Queens Jewels improperly used Gold Hound's proprietary data and sought to intervene in the salvage.[129] The district court denied the motion, and Gold Hound appealed the ruling.[130] The Eleventh Circuit focused on the intervention issue, analyzing the intervention against both the Federal Rule of Civil Procedure 24 and Southern District of Florida Local Admiralty Rule E(2).[131] The court held that: (1) Gold Hound's intervention was timely; (2) there was no prejudice to the timing of Gold Hound's intervention; (3) Gold Hound would be disadvantaged; and (4) there was no sale under Rule E(2) that requires the motion to intervene to be filed twenty-one days before the hearing.[132] However, the Eleventh Circuit stated that the district court had discretion to limit the intervention to the claims at issue, and the district court was not required to entertain Gold Hound's state law claims.[133]

124. *Id.* at *3.
125. CV No. 16-11246, 2017 WL 2858770, at *16 (11th Cir. July 5, 2017).
126. *Id.* at *1.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at *3–5.
132. *Id.* at *9.
133. *Id.* at *16.

VI. PROPERTY DAMAGE

In *Dann Marine Towing, LC v. General Ship Repair Corp.*, the plaintiff's tugboat caught fire while being repaired at the defendant's facility.[134] Dann Marine Towing, LC sued for breach of contract, breach of the implied warranty of workmanlike performance, negligence, gross negligence, and breach of bailment.[135] General Ship Repair Corporation (GSR) asserted multiple defenses, including negligence by Dann Marine, and an exculpatory clause in the ship repair contract.[136] The U.S. District Court for the District of Maryland found that while GSR was not liable for breach of the express provision in the contract to provide a fire watch and was not liable for gross negligence or breach of bailment, GSR had breached the implied warranty of workmanlike performance and was liable for negligence.[137] The court explained that because the fire watch failed to cover or remove fire hazards and failed to respond diligently to the first sign of flame, GSR had not performed its contractual duties with the care and diligence so required and therefore breached its implied warranty of workmanlike performance.[138] Furthermore, the court, following Fourth Circuit precedent, refused to apply a comparative fault approach to a finding of liability for the breach of the implied warranty.[139] With respect to the negligence count, however, the court did apply a comparative fault approach and found Dann Marine shared some responsibility for the spread of the fire, which increased the amount of damage to the vessel.[140] The court closely scrutinized damages, with a lengthy discussion as to whether a damages award should be based on the repair cost method or a constructive total loss method.[141] Ultimately, damages were awarded by the court in the amount of the pre-fire value of the vessel and an amount slightly lower than the cost of repairs.[142] Nonetheless, Dann Marine's damages award was not reduced by a percentage of comparative fault because the court awarded damages along with prejudgment interest for the breach of the implied warranty of workmanlike performance count first and therefore had no need to award damages for negligence.[143] In addition, the district court expressly held that

134. No. MJG-12-1610, 2017 WL 3916992, at *1 (D. Md. Sept. 7, 2017) (appeal filed on Oct. 6, 2017).
135. *Id.* at *9.
136. *Id.* at *9, *27–29.
137. *Id.* at *29.
138. *Id.* at *10–13.
139. *Id.* at *11 (citing *In re* Robbins Marine, Inc., 906 F. Supp. 309, 316 (E.D. Va. 1995)).
140. *Id.* at *14–17.
141. *Id.* at *16–23.
142. *Id.* at *23.
143. *Id.* at *29.

the exculpatory clause at issue was not enforceable because it provided for a total absolution of liability.[144]

In *Namoh, Ltd. v. Boston Waterboat Marina, Inc.*, the M/Y NAMOH, owned by Namoh Ltd., struck a wooden piling while backing into a berth provided by the defendant, Boston Waterboat Marina, Inc. (BMW).[145] At issue was whether Namoh should be held comparatively at fault as a result of the allision[146] and to establish the damages, if any, for which BMW was responsible.[147] Following a bench trial, the court found that Namoh was not comparatively at fault. The court awarded Namoh repair damages and incidental costs, but denied its claim for detention damages. The court also declined to award prejudgment interest based on the 12 percent rate allowed under Massachusetts law.[148] The court instead used the average annual rate for Treasury bills (0.35 percent) because it is a methodology that "has been found not unreasonable as an acceptable average for a prejudgment period."[149]

VII. OIL POLLUTION ACTION (OPA)

In *Ironshore Specialty Insurance Co. v. United States*, the First Circuit affirmed in part and reversed in part a district court order dismissing claims brought by Ironshore Specialty Insurance Company, the insurer that paid the cleanup costs after a large military vessel spilled over 11,000 gallons of fuel next to Boston Harbor, against American Overseas Marine Company, LLC (AMSEA) and the United States.[150] Ironshore sought cleanup costs and damages under the Oil Pollution Act (OPA) of 1990, a declaratory judgment finding AMSEA and the United States to be strictly liable under OPA, and damages sounding in general admiralty and maritime law as a result of AMSEA's and the United States' alleged negligence.[151] The district court dismissed all claims. The First Circuit (1) affirmed the dismissal of all of Ironshore's OPA claims against AMSEA and the United States "because the OPA indisputably exempts public vessels from liability" but (2) reversed and remanded the district court's dismissal of Ironshore's general admiralty and maritime negligence claims brought against the United States under the Suits in Admiralty Act because the claims were not foreclosed by OPA.[152]

144. *Id.* at *27–29.
145. 2017 WL 3913938, at *1 (D. Mass. Sept. 7, 2017).
146. An "allision" is when a moving vessel strikes a fixed structure.
147. *Id.*
148. *Id.* at *12.
149. *Id.*
150. 871 F.3d 131(1st Cir. 2017).
151. *Id.* at 134.
152. *Id.* at 139–40.

The Fifth Circuit held in *In re Settoon*[153] that OPA grants a responsible party a right to contribution for the recovery of purely economic damages from a partially liable third party. A barge owned by Settoon Towing collided with another barge owned by Marquette Transportation Company on the Mississippi River, causing an oil spill that closed part of the river for two days.[154] The Coast Guard charged Settoon with the cleanup and remediation expenses, holding it strictly liable for the damage.[155] Settoon brought suit, seeking contribution from Marquette for the cost of cleanup.[156] The lower court found both barge owners were negligent.[157] Marquette Transportation was found to be 65 percent at fault for the collision, while Settoon Towing was 35 percent at fault.[158] Marquette appealed to the Fifth Circuit, claiming that OPA does not permit contribution actions for purely economic damages.[159] The Fifth Circuit affirmed the lower court's decision, holding that Settoon may recover damages under OPA, including purely economic losses from Marquette, because it is jointly liable, and reasoning that the plain meaning of the language in OPA reflected Congress's intent to include contribution claims under the statute.[160]

In *Water Quality Insurance Syndicate v. United States*, a marine pollution insurance carrier brought suit against the United States challenging decisions by National Pollution Funds Center (NPFC) of the U.S. Coast Guard (USCG), denying the insurer's OPA claim for reimbursement for costs of cleaning up oil spill in Cook Inlet, Alaska.[161] The USCG's denial decision turned on a finding that the oil discharge was proximately caused by the offending vessel's captain's gross negligence, which is a statutory ground for denial of reimbursement.[162] The U.S. Circuit Court for the District of Columbia found that two key factual findings underlying the NPFC's denial decision were alternately incorrect or speculative and therefore flawed and owed no deference.[163] Following a detailed analysis, the court further found that NPFC's definition of "gross negligence" was not the appropriate standard under OPA, particularly in the face of a statutory definition for this term in a sister statute that was more stringent in its requirement of wrongdoing.[164] The court further held that the

153. 859 F.3d 340 (5th Cir. 2017).
154. *Id.* at 343.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 343–44.
160. *Id.* at 352.
161. 225 F. Supp. 3d 41 (D.D.C. 2017).
162. *Id.* at 48.
163. *Id.* at 70.
164. *Id.* at 74–75.

NPFC's conclusion of gross negligence, after summary dismissal of the USCG's finding of simple negligence, appeared to be an anomalous application of the administrative definition of "gross negligence" that was inconsistent with prior administrative decisions.[165] Thus, the court remanded the matter for further agency determinations.[166]

VIII. CONTRACT

International Marine v. Integrity Fisheries addressed the issue of whether contractual indemnity was owed following a marine casualty.[167] Tesla Offshore, LLC was hired to conduct a sonar survey in the Gulf of Mexico.[168] Tesla contracted with International Marine and Integrity Fisheries to provide and operate the vessels needed.[169] While conducting the survey, one vessel pulled the other into a mooring line of a Shell mobile offshore drilling unit.[170] Shell sued Tesla and International Marine for negligence, and the defendants were found 75 percent and 25 percent at fault, respectively.[171] Tesla and International Marine then sued Integrity Fisheries under an indemnification clause in the Tesla-Integrity Fisheries contract that held Integrity Fisheries liable to Tesla and its contractors for damage to third party property "arising out of or related in any way to the operation of any vessel owned . . . by [Integrity] . . . to perform work under this agreement . . . [,] regardless of cause including who may be at fault or otherwise responsible . . ."[172]

The Fifth Circuit noted that indemnity agreements containing clauses such as "arising out of" will be read broadly.[173] However, when the alleged indemnitor's contractual performance is independent of another party's negligent act that caused the damage, indemnity is not available unless the clear intent of the parties shows otherwise.[174] The Tesla-Integrity Fisheries contract provided that the damage must arise out of the operation of the Integrity vessel for an indemnity obligation to be triggered.[175] Because the evidence supported the conclusion that the Integrity boat's successful operation made no contribution to Tesla's and International Marine's neg-

165. *Id.* at 78–79.
166. *Id.* at 79.
167. 860 F.3d 754 (5th Cir. 2017).
168. *Id.* at 757.
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 758.
173. *Id.* at 761.
174. *Id.* at 760.
175. *Id.*

ligent acts, which caused the damages, the Fifth Circuit held that Integrity Fisheries did not owe indemnity.[176]

In *Richard v. Anadarko Petroleum Corp*., the Fifth Circuit affirmed the district court's decision to reform a master services contract (MSC) between Offshore Energy Services (OES) and Anadarko Petroleum Corporation.[177] The original MSC required both parties to indemnify each other's "indemnitees."[178] The contract's definition of indemnitees included subcontractors, but it was silent as to contractors.[179] An OES employee sued Anadarko and two of its contractors for personal injuries, and OES concluded that it was contractually obligated to indemnify all three entities. However, OES's insurer denied its claim for reimbursement on the basis that the contract only required OES to indemnify Anadarko's subcontractors. OES and Anadarko sought reformation to reflect their mutually intended "knock for knock" indemnity scheme that would require OES and its insurer to indemnify Anadarko and its contractors. The Fifth Circuit articulated that in maritime cases where there has been a mutual mistake, equity reforms an instrument to reflect the true intent of the parties.[180] After analyzing the evidence and applicable jurisprudence, the Fifth Circuit concluded that OES and Anadarko met the clear-and-convincing evidentiary standard required to reform the contract to include contractors within the indemnity agreement.[181]

In the realm of maritime contribution and indemnity claims, the U.S. District Court for the Eastern District of Virginia recently confirmed that tort indemnification is appropriate only in instances of strict or vicarious liability.[182] In *In re Jackson Creek Marine*, a tugboat mate stepped onto a large concrete mooring caisson at a grain facility, and the mooring caisson immediately collapsed beneath him—sending the mate into the Elizabeth River and causing serious injuries.[183] The mate brought several claims in state court against Perdue, the terminal operator, and a claim against his employer, Jackson Creek Marine, LLC.[184] Thereafter, Jackson Creek filed a limitation action to defend the mate's claims, and Perdue filed a cross claim for indemnity, asserting implied contractual indemnity, tort indemnity, and contribution.[185] After Jackson Creek settled with the mate, it sought

176. *Id.* at 761.
177. 850 F.3d 701 (5th Cir. 2017).
178. *Id.* at 705.
179. *Id.*
180. *Id.* at 710.
181. *Id.* at 711–12.
182. Civil Action No. 2:16cv98, 2017 WL 3585515 (E.D. Va. Apr. 21, 2017), *adopted by, summary judgment granted by* 2017 WL 3585523, at *1 (E.D. Va. Aug. 16, 2017).
183. *Id.* at *1–2.
184. *Id.* at *2.
185. *Id.* at *1, *3.

summary judgment against Perdue's cross claims.[186] Perdue agreed its claims for contribution were barred by the U.S. Supreme Court's *McDermott* rule, but argued that disputes of material fact prohibited summary judgment on its claims for indemnity.[187] The court confirmed that the *McDermott* rule barred the contribution claim, but was unpersuaded by Perdue's invocation of *Boykin v. China Steel Corp.*,[188] in which the Fourth Circuit created a small exception to the *McDermott* rule in instances where a defendant is facing strict liability.[189] The claims made by the mate against Perdue were based in negligence and therefore the *Boykin* exception could not apply. The district court found that all claims could be fairly litigated under the proportionate fault rule of *Reliable Transfer* and the contribution bar of *McDermott*.[190] The court further concluded that there was no material issue on the counts of implied contractual indemnity or tort indemnity.[191] Because there was no indemnity clause in the towage contract between Jackson Creek and Perdue, Perdue's theory relied solely on the implied warranty of workmanlike performance.[192] The court explained, in the context of towage, the warranty ordinarily protects the owner of a towed vessel and not the terminal where the vessel was delivered.[193] Therefore, any claim by Perdue against Jackson Creek was outside the scope of the warranty.[194] Finally, the court concluded that Perdue failed to establish the four elements of tort indemnity as required by the Fourth Circuit in *Vaughn v. Farrell Lines, Inc.*[195] The court found that the "prototypical fact pattern" for implied tort indemnity involved strict liability claims. Summary judgment for Jackson Creek was recommended and subsequently adopted by the district judge.[196]

IX. MARINE INSURANCE

In *Travelers Property Casualty Co. of America v. Barkley*, the court held that a diver's death was not covered under a commercial marine insurance policy.[197] The diver's estate asserted a wrongful death action against the dive

186. *Id.* at *1.
187. *Id.* at *3–4 (citing McDermott, Inc. v. AmClyde, 511 U.S. 202, 207–09 (1994)). The *McDermott* case stands for the proposition that a non-settling defendant pays only its percentage or proportionate share of responsibility for a plaintiff's loss as assessed at trial.
188. *Id.* (citing Boykin v. China Steel Corp., 73 F.3d 539 (4th Cir. 1996)).
189. *Id.* at *5–7.
190. *Id.* at *7.
191. *Id.*
192. *Id.*
193. *Id.* at *7–8.
194. *Id.*
195. *Id.* at *9 (citing 937 F.2d 953 (4th Cir. 1991)).
196. *Id.*; *see also In re* Jackson Creek Marine, 2017 WL 3585523 (E.D. Va. Aug. 16, 2017).
197. CV No. 16-61768, 2017 WL 3593953 (S.D. Fla. Cir. 2017) (appeal filed on Sept. 21, 2017).

company, the captain, and the mate, alleging that they breached their duty of care to the diver when they permitted him to re-descend without a dive partner.[198] The captain was insured and defended under a Lloyd's professional liability insurance matter policy.[199] Travelers insured the diving company through a commercial marine insurance policy, and the captain and mate were listed as "additional insureds."[200] The Travelers' policy had a diveboat limitation endorsement that excluded coverage from "bodily injury, loss of life, or illness of any person while in the water or arising as a consequence of being in the water."[201] On a motion for summary judgment, Lloyd's argued that Travelers failed to participate in the shared defense and the court should require Travelers to pay 50 percent of costs.[202] In response, Travelers moved for summary judgment, arguing that the policy's limitation precluded sharing in the costs.[203] The court focused on the diveboat limitation and held that the policy was clear that the diver's death was excluded from coverage because his loss of life occurred "while in the water or arising as a consequence of being in the water."[204]

In *Atlantic Specialty Insurance Co. v. AC Chicago, LLC*, AC Chicago purchased two America's Cup Class sailboats and applied for coverage, advising that it intended to confine each vessel's operation to ten miles north and five miles east of Chicago's 31st Street Harbor.[205] These limits were included in the policy, which under a "Navigation Condition" excluded coverage for losses that occurred outside the boundaries.[206] One day, one of the vessels began traveling at a high rate of speed south below the boundary, where the wind slowed it down and allowed it to maneuver back to the 31st Street Harbor.[207] On its return, the vessel grounded on a well-known shoal outside the limits.[208] The insurer sought to avoid coverage because the loss occurred outside the boundary. The insured argued that the term "boundary" as used in the policy was ambiguous and covers "the area needed to safely maneuver the vessels in and out of the 31st Street Harbor."[209] The court found that the language meant

198. *Id.* at *2.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at *3.
203. *Id.*
204. *Id.* at *9.
205. Case No. 15-cv-10972, 2017 WL 3531490, at *1 (N.D. Ill. Aug. 17, 2017).
206. *Id.* at *1–2.
207. *Id.* at *3.
208. *Id.*
209. *Id.* at *4.

what it said and that the insured's proposed interpretation of the southern boundary would be meaningless because it would be unclear where that boundary would cease.[210] Furthermore, the policy's "held covered clause" did not extend coverage because the navigation of the vessel and the breach of the condition were intentional.[211] The court refused to apply the hold covered clause because the two-month delay in notifying the carrier was attributed to the insured's assumption that the towing and salvage bill would be well beneath the deductible, and that the insured only contacted the carrier after the receipt of the salvage invoice.[212] Based on the foregoing, the court found that the insurer owed the insured no coverage.[213]

In *Tilcon N.Y., Inc. v. Indemnity Insurance Co. of North America*, an insurer denied coverage on the basis that the injury did not fall within an insured risk under the policy and the insured provided late notice of the claim.[214] The court found that the injury at issue fell under the covered policy, whether by applying common contract law constructions, the Fifth Circuit's "causal operational relation" test in *Lanasse v. Travelers Insurance Co.*, or Second Circuit decisions that contained an "eclectic historical" viewpoint.[215] The court also denied the parties' cross-motions for summary judgment as to whether the insurer had been prejudiced by late notice of the claim, stating that there were unresolved questions of material facts.

In a case involving a barge sinking, *St. Paul Fire & Marine Insurance Co. v. Abbe & Svoboda, Inc.*, the U.S. District Court for the District of Minnesota addressed whether an express warranty of seaworthiness provision in a hull policy could be applied to a P&I policy issued from the same carrier so as to bar coverage.[216] The court acknowledged that hull insurance contains an implied warranty of seaworthiness, while P&I insurance does not.[217] Therefore, the carrier argued that the express warranty in the insurance agreement must apply to the P&I policy because the hull policy already contained an implied warranty.[218] The court disagreed, holding that when the carrier wanted to carry over conditions from the hull policy to the P&I policy, it explicitly incorporated those provisions. However, the carrier did not carry over and expressly incorporate the warranty of

210. *Id.* at *5.
211. *Id.* at *6–7.
212. *Id.* at *7.
213. *Id.*
214. No. 3:14-cv-1296 (JBA), 2017 WL 1948420, at *15–16 (D. Conn. May 10, 2017).
215. *Id.* at *8–9, *14.
216. C.A. 12-1482, 2017 WL 2274956, at *1 (D. Minn. May 24, 2017).
217. *Id.* at *3 (citing L & L Marine Serv., Inc. v. Ins. Co. of N. Am., 796 F.2d 1032, 1035 (8th Cir. 1986)).
218. *Id.*

seaworthiness into the P&I policy. Thus, the exclusion was inapplicable and the carrier owed coverage for the sinking.[219]

X. CARGO

In *Mediterranean Shipping Co. v. Best Tire Recycling, Inc.*, the First Circuit addressed whether the district court erred in designating a scrap tire dealer as the shipper and thus liable for charges and fees to the carrier, pursuant to the bill of lading.[220] The tire dealer argued that the ultimate purchaser of the tires was the true "shipper," and that it had not assented to being named the shipper in the bill of lading.[221] The shipment accrued demurrage charges, port storage charges, and related administrative fees, apparently because it arrived late on its voyage from Puerto Rico to Vietnam. The carrier sought to recover these charges under the bill of lading.[222] The First Circuit affirmed the district court's ruling that the tire dealer was a party to the contract, explaining that typically the party identified as the "shipper" on bills of lading is the party that bears liability, although this presumption can be overcome by statute, contract, or the parties' course of conduct.[223] The court rejected the tire dealer's argument that the parties' course of conduct overcame the presumption.[224] The court further noted that the dealer had notice that it was named as the shipper prior to the voyage and did not object until a year later when the carrier invoiced it for the demurrage and other charges.[225] While the court acknowledged that the ultimate purchaser may also be liable, jointly and severally with the tire dealer, that would not preclude the dealer from being liable to carrier in the first instance.[226]

In re Vehicle Carrier Services Antitrust Litigation involved allegations that certain ocean common carriers entered into secret agreements whereby they agreed to fix prices and reduce capacity by means of agreed-upon fleet reductions in violation of federal antitrust laws and state laws.[227] The defendants argued that ocean carriers are immune from antitrust liability and that the plaintiffs' state law claims were preempted.[228] The Third Circuit agreed and affirmed the district court's dismissal of the complaints pursuant to Rule 12(b)(6), concluding that the Shipping Act

219. *Id.* at *4.
220. 848 F.3d 50, 51 (1st Cir. 2017).
221. *Id.* at 52–53.
222. *Id.* at 53.
223. *Id.* (citing EIMSKIP v. Atl. Fish Mkt., Inc., 417 F.3d 72, 77 (1st Cir.2005)).
224. *Id.* at 53.
225. *Id.* at 54.
226. *Id.*
227. 846 F.3d 71, 77 (3d Cir. 2017).
228. *Id.* at 78.

of 1984 preempts state law-based consumer protection and unjust enrichment claims. The court reasoned that international maritime commerce is uniquely federal in domain and enforcing state law remedies would "thwart Congress's goal of ensuring uniform regulation of ocean common carriers' business practices."[229]

In *D/S Norden A/S v. CHS de Paraguay, SRL*, the U.S. District Court for the Southern District of New York addressed whether an alleged undisclosed principal was bound by an arbitration clause in a voyage charter.[230] CHS Inc. contracted with the plaintiff to voyage charter a vessel delivering soy beans from Uruguay to Taiwan.[231] The cargo was arranged for by CHS Europe (CHSE), and CHS de Paraguay (CHSP) was identified as "shipper" on the bill of lading.[232] CHSP is a subsidiary of CHS Singapore and CHS Holdings, which are wholly owned subsidiaries of CHS Inc. CHS Inc. also wholly owns CHSE.[233] The Taiwanese government found the soy beans were not "fit for consumption," causing various claims to be filed.[234] The plaintiff filed in the Southern District of New York to compel CHSP to arbitrate a shipping dispute, arguing that the charter's arbitration clause bound CHSP because CHSP was the undisclosed principal of CHS Inc.[235] CHSP moved to dismiss the claim for lack of personal jurisdiction and failure to state a claim. The court granted the motions, finding that the plaintiff failed to establish that CHSP was an "owner" or "charterer" under the charter party.[236] Furthermore, the plaintiff failed to allege sufficient facts to establish that the signatory to the voyage charter for the shipper was an agent for an undisclosed principal.[237]

The Southern District of New York addressed a forum non conveniens issue in the context of a forum selection clause contained within a bill of landing in *Thyssenkrupp Materials NA, Inc. v. M/V Kacey*.[238] The plaintiff brought this *in rem* action against the vessel and *in personam* action against the vessel's owner and manager, seeking to recover for loss and damage to cargo.[239] The bill of lading contained a forum-selection clause, providing that any dispute would be decided in the country where the "carrier" (the vessel owner) had its principal place of business (here,

229. *Id.* at 85–86.
230. 2017 WL 473913, 2017 AMC 1735 (S.D.N.Y. Feb. 3, 2017).
231. *Id.* at *1.
232. *Id.*
233. *Id.*
234. *Id.* at *2.
235. *Id.*
236. *Id.*
237. *Id.* at *3.
238. 236 F. Supp. 3d 835 (S.D.N.Y. 2017).
239. *Id.* at 838.

Greece), and the law of that country would apply.[240] The defendant-vessel owner moved to dismiss the claim on the basis of forum non conveniens, arguing that the matter should be heard in Greece and that Greek law applied under the bill of lading.[241] The court agreed, finding that (1) the plaintiffs would not be prevented from bringing in rem claims to the detriment of its statutory rights under the Carrier of Goods by Sea Act (COGSA);[242] and (2) the applicable bill of lading already prevented the plaintiff from bringing an action against the vessel manager (directing all claims to be against the owner).[243] The court held that the plaintiff had not met its burden of establishing that enforcement of the forum selection clause would be unreasonable or unjust.[244] Accordingly, the motion to dismiss on forum non conveniens ground was granted and the court declined to retain jurisdiction.[245]

XI. MARITIME LIENS, ATTACHMENT, AND SHIP MORTGAGE ACT

A. *Maritime Liens*

As a result of the ongoing litigation arising out of the O.W. Bunker group bankruptcy, the U.S. District Court for the Southern District of New York addressed competing claims for maritime liens in *Clearlake Shipping PTE Ltd. v. O.W. Bunker (Switzerland) SA*, a decision involving several "test cases" out of numerous interpleader actions filed by vessel owners seeking to avoid double payment.[246] O.W. Bunker and the physical suppliers of the bunkers each contended that they were entitled to summary judgment on their *in rem* claims to maritime liens against the several vessels for non-payment of bunker supplies.[247] The court applied the Commercial Instruments and Maritime Lien Act (CIMLA), interpreting it narrowly under the doctrine of *stricti juris*.[248] Under CIMLA, the three elements that a party must prove to establish possession of a maritime lien are: (1) the goods or services at issue were "necessaries," (2) the party "provided" the necessaries "to a vessel," and (3) the party did so "upon the order of the owner of such vessel or a person authorized by the owner."[249] The court held that the physical suppliers did not have maritime liens against

240. *Id.*
241. *Id.* at 839–40.
242. *Id.* at 841.
243. *Id.*
244. *Id.* at 842.
245. *Id.*
246. 239 F. Supp. 3d 674 (S.D.N.Y. 2017) (currently on appeal to the Second Circuit).
247. *Id.* at 683.
248. *Id.*
249. *Id.* (citing 46 U.S.C. § 31342).

the vessels because a direct contractual or agency nexus between the supplier and the vessel or its agents was lacking.[250] Rather, based on the fact that there were "back-to-back" contracts between the physical supplier and O.W., and then O.W. and the vessel, the physical suppliers were akin to sub-contractors that did not possess liens in the Fifth Circuit's decision in *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV*, and the Southern District of New York's decision in *Integral Control System Corp. v. Consolidated Edison Co.*[251] Meanwhile, the O.W. entities had proved their entitlement to a maritime lien under CIMLA. The court reasoned that a supplier "may 'provide' necessaries to a vessel indirectly through a subcontractor."[252]

There have been several recent decisions addressing application and interpretation of "no-lien" clauses contained in charter parties. In *American Overseas Marine Co., LLC v. M/V Seattle*,[253] the plaintiff arrested a vessel, asserting maritime liens for necessaries and crew wages.[254] The vessel sought to vacate the arrest by arguing that the plaintiff was the vessel's agent or that the applicable contract contained a "no lien" clause prohibiting maritime liens.[255] The U.S. District Court for the Middle District of Florida held a show-cause hearing and found that the plaintiff showed, by a preponderance of the evidence, that it was entitled to the maritime lien.[256] Importantly, at the show-cause stage of the proceedings, the court refused to hear evidence on whether the plaintiff acted as the vessel agent or whether the plaintiff had knowledge of the "no lien" clause in the contract.[257]

The U.S. District Court for the Northern District of New York addressed an application of a no-lien clause to a contract for the supply of bunker (marine) fuel in *Bomin Greece S.A. v. M/V Genco Success*.[258] The court held that oral communications of a no-lien clause in a charter party made post-agreement (post-issuance of bunker order confirmation), but pre-delivery, were sufficient to alter the supplier's lien rights. Here, the master and chief engineer of the receiving vessel notified the captain of the bunker-supply barge of the no-lien clause.[259] The bunker delivery

250. *Id.* at 684.
251. *Id.* at 685 (citing Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV, 199 F.3d 220 (5th Cir. 1999); Integral Control Sys. Corp. v. Consol. Edison Co., 990 F. Supp. 295 (S.D.N.Y. 1999)).
252. *Id.* at 691.
253. CV No. 16-CV-1435, 2016 WL 8607581, 2017 AMC 102 (M.D. Fla. Dec. 20, 2016).
254. *Id.* at *1.
255. *Id.* at *2.
256. *Id.* at *3
257. *Id.* at *3–4.
258. 2017 WL 2345709, 2017 AMC 1716 (N.D.N.Y. May 30, 2017).
259. *Id.* at *5.

barge at issue was owned and operated by a fully owned subsidiary of the supplier.[260] Thus, the court held that communications to the captain of the delivery barge were essentially communications to an employee of the supplier, so as to potentially affect the bunker supply agreement.[261]

B. *Attachment*

In *Zambrano v. Vivir Seguros, CA*,[262] the U.S. District Court for the Southern District of Florida vacated a maritime attachment against the defendant insurer, which had denied coverage to a sunken Venezuelan vessel, owned and operated by Venezuelans.[263] The dispute arose when the Venezuelan vessel sank offshore, and the owners sought to recover insurance proceeds for the vessel loss.[264] The owners had paid their insurance premiums to the Venezuelan insurance company via wire transfer to the insurance company's Florida bank.[265] After the insurer twice denied the claim, the owners sought a writ of maritime attachment on the insurer's bank account.[266] In its analysis, the court agreed that the owners had shown a prima facie admiralty claim, but nonetheless vacated the attachment because the writ sought attachment to a bank account, versus a transitory vessel, and the defendant was located within the district of the bank, thus negating the plaintiff's ability to seek attachment.[267]

Armada (Singapore) PTE Ltd. v. Amcol International Corp. involved a decision on a Rule 12(c) motion involving alleged breaches of two contracts of affreightment (for the shipment of cargo) in which an Indian shipper failed to pay Armada for carriage to various ports.[268] The litigation involved previous Rule B attachment proceedings and foreign arbitration.[269] The U.S. District Court for the Northern District of Illinois addressed several of the plaintiff's claims, including the claim for "maritime fraudulent transfer," in which the plaintiff sought to set aside transfers that the defendants allegedly made to avoid garnishment in the prior attachment proceedings.[270] The court held that maritime jurisdiction may be invoked to set aside fraudulent transfers in the case of transactions made for the purpose of thwarting the court's maritime jurisdiction.[271] Furthermore, in the absence of any substantive cause of action for fraudulent transfer

260. *Id.* at *3–4.
261. *Id.* at *4.
262. CV No. 16-22707, 2017 WL 347078 (S.D. Fla. Jan. 24, 2017).
263. *Id.* at *5.
264. *Id.* at *1.
265. *Id.*
266. *Id.*
267. *Id.* at *3–5.
268. 244 F. Supp. 3d 750, 752 (N.D. Ill. 2017).
269. *Id.*
270. *Id.* at 761.
271. *Id.*

under admiralty law, Illinois law would supply the rule of decision.[272] The motion to dismiss was denied as to the maritime fraudulent transfer claim.

C. *Ship Mortgage Act*

In *South Lafourche Bank & Trust Co.*,[273] the U.S. District Court for the Eastern District of Louisiana held that the Ship Mortgage Act does not require that a mortgage be valid under the law of a particular state for it to be considered a preferred ship mortgage.[274] Rather, the court held that a mortgage is a valid preferred ship mortgage under the Ship Mortgage Act if it meets all of the Act's requirements, regardless of whether it is valid under state law.[275]

XII. CRIMINAL

Courts continue to show resistance to broad application of the Seaman's Manslaughter Statute, which does not require a showing of mens rea. In *United States v. Egan Marine Corp.*, following an explosion on a barge resulting in a deckhand's death, the United States initiated a criminal proceeding against the defendant and his corporation under the Seaman's Manslaughter Statute.[276] The criminal trial occurred after a civil trial brought by the United States to recover damages from the oil cleanup in which the United States had failed to sustain its burden of proof.[277] Nonetheless, in the criminal trial both defendants were convicted. On appeal, the Seventh Circuit reversed the convictions against the defendants, holding that the outcome in the civil matter precluded a criminal prosecution of the same facts, where both cases involved the same oil spill and where the United States was both the plaintiff in the civil matter and the sovereign prosecuting the criminal matter.[278]

In *State v. Pettijohn*, the Supreme Court of Iowa reversed and remanded the lower court's denial of a motion to suppress evidence, including the results of a breath test, obtained after a water patrol officer stopped a vessel that the defendant was operating.[279] The district court convicted the defendant of operating a motorboat while under the influence following a bench trial on the minutes.[280] The Supreme Court of Iowa first deter-

272. *Id.*
273. 2017 WL 2634204, 2017 AMC 1554 (E.D. La. June 19, 2017).
274. *Id.* at *6.
275. *Id.*
276. 843 F.3d 674, 675 (7th Cir. 2016) (citing 18 U.S.C. § 1115).
277. *Id.* at 675–76.
278. *Id.* at 677–79.
279. 899 N.W.2d 1 (Iowa 2017).
280. *Id.* at 11.

mined that the seizure of the boat violated neither the Fourth Amendment to the U.S. Constitution nor the Iowa Constitution.[281] The court next found the Fourth Amendment permitted the administration of a warrantless breath test of an individual lawfully arrested on suspicion of boating while intoxicated.[282] The court concluded, however, that the warrantless administration of the breath test violated the Iowa constitution because the state failed to prove that the defendant voluntarily consented to the warrantless breath test and also failed to prove the breath test was justified by an exception to the warrant requirement.[283]

XIII. LIMITATION OF LIABILITY

In re Complaint of Ingram Barge Co. involved a vessel owner filing a petition for limitation under the Limitation of Liability Act of 1851,[284] in connection with an incident where its fourteen-barge tow broke apart, careening into other vessels and through the earthen dike and into the City of Marseilles.[285] After a trial on the issue of exoneration, the U.S. District Court for the Northern District of Illinois concluded that the record revealed sufficient facts to render the *Oregon* rule inapplicable[286] because there was no "factual vacuum" in the record.[287] Moreover, the court refused to apply the *Pennsylvania* rule to presume causation because the plaintiff had failed to prove any violation of Rules 2, 5, and 7 of the Inland Rules of Navigation.[288] The court determined that sole fault for the incident laid with the U.S. Army Corps of Engineers' lockmaster, due to his "blind obedience to an unexplained order from a crane operator supervisor who was outside of his chain-of-command and who did not have any responsibility for raising and lowering the gates."[289] The lockmaster's actions caused an "extremely powerful outdraft which, in turn, caused

281. *Id.* at 16.
282. *Id.* at 19.
283. *Id.* at 38–39.
284. The Limitation of Liability Act of 1851, 46 U.S.C. §§ 30501–30512, allows a vessel owner to limit is liability to the post-incident value of the vessel at issue, where any negligence or fault has occurred without the privity or knowledge of the owner.
285. 219 F. Supp. 3d 749, 751–52 (N.D. Ill. 2016).
286. The *Oregon* rule creates a presumption of liability when a moving vessel allides with a stationary vessel. The Oregon, 158 U.S. 186 (1895).
287. *Ingram Barge Co.*, 219 F. Supp. 3d at 802–03.
288. *Id.* at 804. The *Pennsylvania* rule provides that a violator of a statutory rule intended to prevent collisions has the burden of proving not only that its violation was not a contributing cause of the allision, but that it could not have been a cause. *The Pennsylvania*, 86 U.S. 125 (1873).
289. *Ingram Barge Co.*, 219 F. Supp. 3d at 822.

the allision at the Marseilles Dam."[290] Accordingly, the court granted Ingram Barge's petition for exoneration.[291]

In re Spirit Cruises, LLC involved a Limitation of Liability action, following a 119-foot long passenger vessel's allision with a floating pier.[292] Twenty-eight individuals filed claims. Combined, their claims exceeded the limitation fund. Seventeen of the claimants demanded a jury trial.[293] The vessel owner filed a motion to strike the claimants' jury demands.[294] After a thorough discussion of the Limitation of Liability Act's origins and procedure and the tension between the Act and the "savings to suitors clause," the court struck the claimants' jury demands.[295] In so doing, the court explained that this case did not fall within the two exceptions to a federal court's exclusive admiralty jurisdiction under the Limitation Act: (1) where there is a singular claimant; and (2) where the claims do not exceed the limitation fund.[296] The court was not persuaded by the claimants' assertions that it was premature to dismiss the requests for a jury trial because diversity jurisdiction was also present, or because the requests for a jury trial could be preserved through stipulations.[297] After an additional discussion of the Fourth Circuit's decision in *Pickle v. Char Lee Seafood*, the court concluded that the claimants did not have a right to a jury trial as to the applicability of the Limitation Act.[298] In the event the claimants could bring their claims within the two exceptions, or if the claimants prevailed on the limitation action, they would be entitled to proceed in either state or federal court.[299] Accordingly, the court granted the motion, but without prejudice to the claimants' rights to renew their requests for a jury trial in the event that future proceedings would allow a jury trial.[300]

In re Viking Sport Cruisers, Inc. involved a Limitation of Liability action brought in the U.S. District Court for the District Court of New Jersey, arising from a collision between two vessels in the navigable waters of Rhode Island.[301] The collision resulted in the death of an individual who was the only person aboard one of the vessels.[302] The claimant, the decedent's wife, moved to transfer the limitation action to the U.S.

290. *Id.*
291. *Id.*
292. Civil Action No. ELH-16-4097, 2017 WL 2276834, at *1 (D. Md. May 25, 2017).
293. *Id.* at *1.
294. *Id.*
295. *Id.* at *2–4.
296. *Id.* at *4 (internal citations omitted).
297. *Id.* at *4–5.
298. *Id.* at *5–6 (citing Pickle v. Char Lee Seafood, 174 F.3d 444 (4th Cir. 1999)).
299. *Id.* at *6.
300. *Id.*
301. 2017 WL 729691, 2017 AMC 795 ((D.N.J. Feb. 24, 2017).
302. *Id.* at 796.

District Court for the District of Rhode Island, arguing it was the proper venue because Rhode Island authorities investigated the collision, first responders were based in Rhode Island, two fishermen witnesses resided in Rhode Island, and related litigation was pending in Rhode Island.[303] The limitation petitioner countered that the two individuals operating the second vessel were New Jersey residents and non-parties to the limitation proceeding, insofar as they were allegedly independent contractors. Therefore, "transferring this action from New Jersey to Rhode Island . . . would sacrifice two . . . material witnesses."[304] The court disagreed and granted the claimant's motion to transfer the limitation action to Rhode Island, reasoning that the collision's location, the ability to subpoena non-party witnesses, and the pending Rhode Island investigations outweighed the New Jersey presence of the limitation plaintiff and vessel operators who were "likely" subject to jurisdiction in Rhode Island.[305]

In *Holzhauer v. Golden Gate Bridge Highway & Transportation District*,[306] a commuter ferry and speedboat collided in San Francisco Bay, killing one person and seriously injuring another.[307] The evidence demonstrated that the ferry's captain had been using his cell phone immediately before the collision.[308] The U.S. District Court for the District of Northern District of California held that since the ferry owner did not have a policy regarding captains' use of cell phones, when it had knowledge that the captains carried cell phones while operating ferries, the ferry owner could not demonstrate that it lacked privity and knowledge so as to entitle it to limit liability under the Limitation of Liability Act.[309] The lack of a safety policy regarding cell phone use essentially rendered the owner in privity or knowledge of the negligent act.

XIV. ADMIRALTY JURISDICTION

The U.S. District Court for the Southern District of Florida addressed whether an incident involving a grounded vessel on the beach met the requirements for admiralty tort jurisdiction.[310] In *Blue Water Enterprises, Inc. v. Town of Palm Beach*, the vessel operator experienced engine failure while navigating his vessel from the Bahamas to Palm Beach, Florida. Before help arrived the vessel was pushed bow first onto the beach, just south

303. *Id.*
304. *Id.* at 799.
305. *Id.* at 799–800.
306. 2016 WL 7242108 (N.D. Cal. Dec. 15, 2016).
307. *Id.* at *1.
308. *Id.*
309. *Id.*
310. CV No. 16-81771, 2017 WL 3895592 (S.D. Fla. Sept. 6, 2017).

of the Palm Beach inlet jetty.[311] Police arrived and arrested the vessel operator for boating under the influence.[312] The vessel was left on the beach, and eventually the rough weather caused it to take on water and sand rendering it impossible to tow the vessel.[313] The vessel owner brought suit against the Town of Palm Beach based on admiralty jurisdiction, alleging that it failed to protect the vessel after the operator was arrested.[314] In response, the town moved to dismiss the suit under Rule 12(b)(6), arguing that admiralty jurisdiction did not exist because the vessel was on the beach and not in navigable waters. Thus, the locality element for admiralty jurisdiction did not exist. Furthermore, the town argued that the incident did not have a potentially disruptive impact on maritime commerce.[315] The court rejected the town's argument and found that the vessel ran aground in shallow water and had the potential to interfere with vessel traffic in and out of the nearby port. Therefore, the court denied the town's motion to dismiss, finding that admiralty tort jurisdiction was proper.[316]

The Third Circuit addressed admiralty tort jurisdiction in two matters. *In re Complaint of Christopher Columbus, LLC* involved a brawl between patrons on board a night cruise on the Delaware River.[317] As a result of the incident, a patron filed a claim in state court alleging he was assaulted on both the vessel and in a parking lot near the dock.[318] The vessel's owner subsequently filed a Limitation of Liability action, which[319] the district court dismissed for lack of admiralty jurisdiction, determining that cases involving fights between patrons on board vessels that are in the process of docking present concerns that are "too remote" from those underlying the primary purpose of admiralty jurisdiction.[320] On appeal, the Third Circuit vacated the district court's dismissal and concluded that the location aspect of the court's jurisdictional test was satisfied because the alleged tort occurred on the Delaware River, and carrying passengers for hire on navigable waters is substantially related to traditional maritime activity and has the potential to disrupt maritime commerce.[321]

311. *Id.*
312. *Id.*
313. *Id.*
314. *Id.* at *2.
315. *Id.*
316. *Id.* at *6.
317. 872 F.3d 130 (3d Cir. 2017).
318. *Id.* at 131–32.
319. *Id.* at 132.
320. *In re* Complaint of Christopher Columbus, LLC, 2016 WL 1241844, at *12 (E.D. Pa. 2016), *vacated*, 872 F.3d 130 (3d Cir. 2017).
321. *Id.* at 136–37.

Meanwhile, the Third Circuit reached the opposite conclusion in *Hargus v. Ferocious and Impetuous, LLC*, a case that involved a passenger's personal injury action arising from a captain throwing a plastic coffee cup from land to the passenger aboard an anchored recreational vessel, striking him in the head.[322] After a bench trial, the district court determined that it had admiralty jurisdiction over the passenger's action because claims for personal injury to passengers of a vessel caused by the captain of the vessel meet the situs and nexus requirements for admiralty tort jurisdiction.[323] On appeal, the Third Circuit vacated the district court ruling, holding that, "even assuming the location test is satisfied . . . admiralty jurisdiction is lacking because the first prong of the connection test is not met."[324] The court reasoned that "throwing a small inert object from land at an individual onboard an anchored vessel" does not invoke admiralty jurisdiction because the captain's act did not have the potential to disrupt maritime commerce.[325] The fact that the tort emanated from land appears to have dissuaded the Third Circuit from invoking admiralty jurisdiction.

There were also two decisions addressing admiralty contract jurisdiction. In *Hosea Project Movers, LLC v. Waterfront Associates, Inc.*, the U.S. District Court for the Southern District of Ohio addressed whether a contract to remove and transport personal property from a barge, broker the barge for sale, and potentially demolish and sell the barge if no buyer were found was a maritime contract giving rise to admiralty jurisdiction.[326] Both the Supreme Court and the Sixth Circuit have applied the following analysis to determine whether admiralty jurisdiction exists over a contract. "Admiralty jurisdiction over contracts 'depends upon the nature and character of the contract, and the true criterion is whether [the contract] has reference to maritime service or maritime transactions."[327] The district court found that the "primary objective" of the contract was not a maritime contract because none of the tasks listed was of a maritime nature nor did the contract have anything to do with the repair or service of the barge.[328]

The U.S. District of New Jersey recently addressed whether a contract for the transportation of ocean containers exclusively on land constitutes a maritime contract, invoking admiralty jurisdiction.[329] In *Interpool, Inc. v.*

322. 840 F.3d 133, 134–35 (3d Cir. 2016).
323. *Id.* at 135.
324. *Id.* at 136.
325. *Id.* at 137.
326. 2017 WL 3034643, at *4 (S.D. Ohio July 14, 2017).
327. *Id.* (citing Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004); New Hampshire Ins. Co. v. Home Sav. & Loan Co. of Youngstown, 581 F.3d 420 (6th Cir. 2009)).
328. *Id.* at *4–5.
329. 2017 WL 522161, 2017 AMC 862 (D.N.J. Feb. 8, 2017).

Four Horsemen, Inc., the plaintiff entered into a contract, agreeing to lease a chassis to the defendants for the transportation of ocean containers from a railhead to a consignee pursuant to a maritime "through" bill of lading.[330] In determining maritime contract jurisdiction, the court analyzed the nature and character of the contract and whether it had reference to maritime service or maritime transactions.[331] The court held that it did not have admiralty jurisdiction over the matter, because the presence of a maritime bill of lading in the contract between the defendants and the consignee did not change the nature or character of the defendant's separate and distinct contract with the plaintiff chassis owner.[332]

XV. PRACTICE, PROCEDURE, AND UNIFORMITY

Last year's survey article addressed the Montana Supreme Court's decision in *BNSF Railway Co. v. Tyrell*, a case that held that BNSF was amenable to personal jurisdiction in Montana for torts occurring outside of the state under the Federal Employers' Liability Act (FELA).[333] The U.S. Supreme Court recently reversed the Montana Supreme Court[334] in a decision that will have ramifications for personal jurisdiction over operators and vessel owners in the maritime industry. Suits were brought against BNSF in Montana state court under FELA, despite the fact that the torts did not occur in Montana and the plaintiffs did not reside in Montana.[335] BNSF is incorporated in Delaware and has its principal place of business in Texas.[336] It operates railroad lines in twenty-eight states, has 2,061 miles of railroad track in Montana (about 6 percent of its total track mileage), employs some 2,100 workers there (less than 5 percent of its total work force), and generates less than 10 percent of its total revenue in the state.

The U.S. Supreme Court first found that the Montana Supreme Court misapplied FELA's venue provision, holding that it did not confer personal jurisdiction on a defendant.[337] Second, applying the holdings in *Goodyear* and *Daimler*, the Supreme Court reasoned that "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render

330. *Id.* at *1.
331. *Id.* at *2.
332. I*d.* at *3.
333. 373 P.3d 1 (Mont. 2016).
334. BNSF Ry. Co. v. Tyrell, 137 S. Ct. 1549 (2017).
335. *Id.* at 1553.
336. *Id.* at 1554.
337. *Id.* at 1557–58.

them essentially at home in the forum State."[338] The Court held that because BNSF was not incorporated in Montana, did not maintain its principal place of business in the state, and was not so heavily engaged in activity in Montana "as to render [it] essentially at home" in that state, BNSF was not subject to general personal jurisdiction in Montana.[339] The *BNSF* decision will have particular importance for vessel owners that operate in several states.

In *JTR Enterprises, LLC v. Colombian Emeralds*, the Eleventh Circuit affirmed the district court's ruling that the defendant was not entitled to sanctions against the plaintiff and its agents for fraud upon the court.[340] The plaintiff claimed to have discovered emeralds from a Spanish shipwreck and brought an admiralty action.[341] As the matter progressed, it was revealed that the emeralds were coated with epoxy and that the plaintiffs surreptitiously planted them in order to defraud investors.[342] The defendant, who claimed the emeralds came from another wreck, sought sanctions against the plaintiff's counsel for failing to detect the fraud.[343] After a thirteen-day trial, the court found that the defendant failed to show by clear and convincing evidence that counsel acted in bad faith.[344]

The Ninth Circuit affirmed a jury verdict in favor of a longshoreman who pursued a claim against a vessel under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b) in *Murray v. Southern Route Maritime S.A.*[345] The longshoreman, who had received an electrical shock when a piece of rebar he was holding came into contact with a floodlight, alleged that the floodlight was faulty.[346] He was ultimately awarded $3.3 million in damages.[347] On appeal, the vessel owner argued that the jury instructions pertaining to the vessel owner's duties were flawed because the instruction improperly expanded the vessel's owner's obligation to inspect the ship and equipment.[348] The Ninth Circuit disagreed, however, holding that the instruction properly advised the jury that the vessel owner's turnover duty "necessarily requires the vessel owner to take reasonable steps to inspect the ship and equipment before turnover."[349]

338. *Id.* at 1558 (citing Daimler AG v. Bauman, 134 S. Ct. 746, 754 (2014) (quoting Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011)).
339. *Id.* at 1559.
340. 697 F. App'x 976, 978 (11th Cir. June 23, 2017).
341. *Id.*
342. *Id.* at 978–79.
343. *Id.* at 979.
344. *Id.* at 985–86.
345. 870 F.3d 915 (9th Cir. 2017).
346. *Id.* at 918.
347. *Id.*
348. *Id.* at 920–21.
349. *Id.* at 918.

In *Castro v. Pullmanture, S.A.*, the Florida District Court of Appeals addressed whether a seaman was subject to a forum-selection clause in his employment contract with a foreign owner, arising out of a personal injury sustained on a foreign-flagged vessel.[350] The plaintiff was a cabin steward onboard the defendant's cruise ship, which sailed in the Mediterranean and South American waters. The defendant was a Maltese corporation, the vessel was Maltese flagged, and its home port was in Spain.[351] The plaintiff claimed personal injuries and brought a Jones Act claim in Miami-Dade County circuit court.[352] The defendant sought to invoke a forum-selection clause in its employment contract that required the plaintiff to bring his claim in Malta. The court agreed that the forum-selection clause was enforceable, holding that the plaintiff could not meet his burden to show that Malta was an unreasonable or unfair forum.[353] Furthermore, the court rejected the plaintiff's arguments that the clause was voided by the Jones Act's reference to the Federal Employer's Liability Act, which prohibits forum selection clauses.[354]

In *Tindle v. Hunter Marine Transport, Inc.*, the administrator of her late husband's estate brought a wrongful death action under the Jones Act and general maritime law, alleging unreasonable delay in evacuating the decedent from the vessel after he complained of difficulty breathing.[355] The plaintiff argued that the defendant had failed to provide prompt medical attention.[356] The jury concluded that the defendant was negligent and awarded $1 million for the decedent's pre-death pain and suffering and $777,214 for loss of support and other financial family benefits.[357] The defendant moved to remit the $1 million award and moved for a new trial under Rule 59(a), limited to the issue of damages for pain and suffering, arguing that jury's award was "so excessive as to shock the conscience" because the deceased's suffering lasted for only twelve minutes.[358] The court denied the motions, reasoning that "no one except [the deceased] can ever really know the extent of the physical and mental pain and suffering he experienced over the hours leading up to his death."[359] The fact that the deceased had suffered, even if only for a short period of time, was sufficient to deny the defendant's motion to remit the portion of the verdict

350. 220 So. 3d 531, 533 (Fla. Dist. Ct. App. 2017).
351. *Id.*
352. *Id.*
353. *Id.* at 536–37.
354. *Id.* at 537–38.
355. 2017 WL 126133, at *1 (W.D. Ky. Jan. 12, 2017).
356. *Id.*
357. *Id.*
358. *Id.* at *2.
359. *Id.* at *3.

providing $1 million in damages for deceased's pre-death pain and suffering and/or new trial.[360]

The U.S. District Court for the District of South Carolina recently considered a choice-of-law question in a work order contract for repairs to a sailboat.[361] In *McGowan v. Pierside Boatworks, Inc.*, the district court denied a motion to dismiss a counterclaim on the ground that the counterclaim was time barred.[362] The parties entered into a ship repair contract made under the general maritime law of the United States. The contract also contained a venue provision requiring disputes be heard in South Carolina and construed under the laws of South Carolina.[363] The parties disputed whether the choice of law was general maritime law or South Carolina law.[364] The district court confirmed the parties' vessel repair contract invoked the admiralty jurisdiction of the court and concluded the parties intended for general maritime law to be supplemented by South Carolina law in the absence of a conflict of law.[365] The court denied the motion to dismiss and found that, while there was a presumption that the claim was untimely because of the state statute of limitations, there was insufficient evidence to allow the court to consider the laches factors required by the Fourth Circuit.[366]

XVI. ARBITRATION

The U.S. District Court for the Eastern District of Michigan addressed the application of an arbitration agreement executed by a seaman in *MacRury v. American Steamship Co.*[367] The plaintiff brought claims under the Jones Act and general maritime law arising out of personal injuries he allegedly sustained on the defendant's vessel.[368] In turn, the defendant filed a motion to stay litigation in favor of arbitration.[369] The plaintiff had previously injured his right shoulder in 2013 and, in resolving that claim, signed an arbitration agreement with the defendant.[370] The defendant argued that the plaintiff's current injury arose out of the

360. *Id.*
361. McGowan v. Pierside Boatworks, Inc., No. 2:16-cv-3529-PMD, 2017 WL 698370, at *1 (D.S.C. Feb. 22, 2017).
362. *Id.*
363. *Id.*
364. *Id.*
365. *Id.* at *3.
366. *Id.* at *2 (citing Am. S.S. Owners Mut. Prot. & Indem. Ass'n v. Dann Ocean Towing, Inc., 756 F.3d 314, 316 (4th Cir. 2014)).
367. 2017 WL 2953045 (E.D. Mich. July 11, 2017).
368. *Id.* at *1.
369. *Id.*
370. *Id.* at *2.

2013 injury and was subject to arbitration.[371] While the plaintiff acknowledged that the arbitration agreement existed, he argued that the current injury to *both* of his shoulders was outside of its scope.[372] The court stressed that because the Federal Arbitration Act as interpreted favors arbitration and a broad construction of the scope of arbitration agreements, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[373] Furthermore, because the arbitration agreement was not a blanket agreement to arbitrate all claims in any context, but rather pertained to "all claims arising out of the incident," the court found that the plaintiff's claim was within the scope of the arbitration agreement. Therefore, the defendant's motion to stay and compel arbitration was granted.[374]

The Washington Court of Appeals affirmed the lower court's confirmation of an arbitration award in favor of a seaman's former employer in *OSG Ship Management, Inc. v. Andrew*.[375] On the eve of a Jones Act personal injury trial and while represented by counsel, the seaman and his former employer entered into a settlement agreement pursuant to which the former employer offered to pay a higher settlement if the seaman agreed to a "no sail" provision that required him to surrender his credentials to the Coast Guard and relinquish his right to work at sea in the United States for twenty-five years.[376] Months later, the plaintiff disavowed the agreement, claiming he had been "tricked" into signing it.[377] The employer initiated arbitration pursuant to the terms of the settlement agreement, claiming that the seaman had materially breached the agreement.[378] In the arbitration, the seaman claimed that he could not return the settlement funds, making restitution and damages unavailable remedies. Therefore, the arbitrator required the seaman to relinquish his credentials to authorities.[379] The seaman moved in the superior court to vacate the award, but the superior court confirmed the award.[380] The seaman appealed, arguing that the arbitrator exceeded his powers and that the relief violated public policy concerning the merchant marine and unlawful restraints on trade.[381] The court dis-

371. *Id.* at *4.
372. *Id.* at *3.
373. *Id.* at *5 (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (U.S. 1983)).
374. *Id.* at *14–15.
375. No.75477-7-I, 2017 WL 2840300 (Wash. Ct. App. July 3, 2017).
376. *Id.* at *1.
377. *Id.*
378. *Id.*
379. *Id.* at *1–3.
380. *Id.* at *2.
381. *Id.*

agreed with all of the seaman's arguments and awarded attorney fees and costs of appeal to the employer.[382]

XVII. REGULATIONS UPDATE

A. *FMC Recently Amended Service Contract and NVOCC Service Agreement Rules*

Effective May 5, 2017, the Federal Maritime Commission (FMC) amended its rules relating to service contracts between ocean liner companies and shippers and non-vessel operating common carrier (NVOCC) service arrangements between NVOCCs and shippers.[383] The previous rules required that if there was any amendment to a service contract, such as a change in rate or location of delivery, a filing would be required with the FMC before freight could be moved under the amendment. With the rule change, now once there is an agreement between the two parties to amend a service contract, the amendment can be immediately implemented, and freight can be moved under the amended contract without a prior filing with the FMC.[384] Instead, the contract amendments need to be filed no later than thirty days after the amendments are scheduled to become effective between the parties.[385]

B. *2014 Amendments to the Maritime Labour Convention 2006 Came into Force on January 18, 2017*

The amendments to the Maritime Labour Convention (MLC) 2006 adopted in 2014, and currently ratified by eighty-four countries, came into force on January 18, 2017.[386] The 2014 amendments require every ratifying member of the MLC to effectuate laws or regulations requiring shipowners registered in the ratifying country to have a financial security system that will compensate seafarers and their families in the event of the abandonment of a seafarer, as well for a seafarers' claims for death or long-term disability due to an occupational injury, illness, or hazard.[387] A certificate or other documentary evidence of financial security issued by the insuring financial security company or entity must be carried onboard and placed in a conspicuous place available to seafarers. By implementing this system, shipowners are required to ensure that their workers or their families are protected and provided expeditious

382. *Id.* at *5–6.

383. Federal Maritime Commission Final Rule Docket No. 16-05, Amendments to Regulations Governing Service Contracts and NVOCC Service Arrangements.

384. 46 C.F.R. Parts 530 and 531.

385. *Id.*

386. Amendments of 2014 to the Maritime Labour Convention, 2006, Amendments to the Code Implementing Regulations 2.5 and 4.2 and appendices of the MLC, 2006.

387. *Id.* at A2.5.2—Financial Security.

and effective compensation for harms due to occupational injuries, illnesses, and hazards.

C. *International Convention for the Control and Management of Ships' Ballast Water and Sediments (BWM) Entered into Force on September 8, 2017*

The Ballast Water Management Convention (BWM), adopted in 2004 and coming into force September 8, 2017, seeks to stop the spread of invasive aquatic species that have been linked to significant damage in local ecosystems affecting biodiversity and causing economic loss.[388] As of October 2017, there were sixty-five contracting nations to the BWM, representing over 73 percent of the world's tonnage (according to the International Maritime Organization). The BWM requires ships to manage their ballast water and sediments to a certain level and to maintain documentation on board, such as a ballast water record book and an international ballast water management certificate. Under the BWM, ships must be surveyed and certified and are subject to inspection by port state control officers.

D. *FMC Allowed the Ocean Alliance to Become Effective*

The Federal Maritime Commission allowed the Ocean Alliance to become effective and begin operating in U.S. trade on April 1, 2017.[389] The Ocean Alliance is a business agreement among COSCO Shipping, CMA CGM, Evergreen Marine, and Orient Overseas Container Line Limited. Under its terms, members will share their vessels, exchange cargo space on each other's ships, and enter into arrangements for travel in international trade lanes between the United States and many international ports. The Ocean Alliance is expected to have a dominant capacity position with close to 35 percent of market share of the Asia-North American trade and approximately 41 percent of market share transpacific trade lane and 35 percent of the Asia-Europe trade lanes.

E. *International Maritime Solid Bulk Cargo Code*

Chapter VI of the International Convention for the Safety of Life at Sea, 1974 (SOLAS Convention, 1974), currently ratified by 163 contracting nations, contains mandatory provisions for the carriage of solid bulk cargoes.[390] Those provisions were extended in the International Maritime Solid Bulk Cargoes Code (IMSBC Code), which was entered into force on January 1, 2011.[391] The International Maritime Organization adopted

388. International Convention for the Control and Management of Ships' Ballast Water and Sediments (2004).

389. Federal Maritime Commission Newsroom, NR 16-24 (Oct. 21, 2016).

390. International Convention for the Safety of Life at Sea, Chapter VI (1974).

391. International Convention for the Safety of Life at Sea, Chapter VI (1974), International Maritime Solid Bulk Cargoes Code (2008).

amendments (03-15) to the IMSBC Code, which became mandatory on January 1, 2017.[392] Prior to that date, compliance was voluntary. The newly effective amendments include updates to existing individual schedules for solid bulk cargoes and create eighteen new cargo schedules, in addition to creating a new section focused on preventing pollution by cargo residues from ships. Finally, the amendments introduce a new notational reference system for chemical materials that are hazardous only in bulk. The new reference system is implemented in order to quickly identify the specific type of hazardous material being carried, e.g., solids that evolve toxic gas when wet and corrosive solids.

F. *International Code of Safety for Ships Using Gases or Other Low-Flashpoint Fuels (IGF Code)*

A new mandatory code for ships using gases or other low-flashpoint fuels came into force January 1, 2017 (the International Code of Safety for Ships Using Gases or Other Low-Flashpoint Fuels) (IFG Code).[393] The IGF Code, which makes changes to the SOLAS Convention, 1974, as amended, Chapter II-1, contains mandatory provisions for the arrangement, installation, control, and monitoring of machinery, equipment, and systems using low-flashpoint fuels (such as Liquefied Natural Gas) and requires most ships constructed after January 1, 2017, to comply. The purpose of these provisions is to ensure that those seafarers maintaining ships utilizing these fuels are aware of the risks involved and are capable of ensuring the safety of not only the crew onboard the ship, but also the waterways. Thus, the International Maritime Organization's Maritime Safety Committee adopted related amendments to the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers (STWC) and the STWC Code to include new training requirements for seafarers working on the ships subject to the IGF Code.[394]

G. *Amendments to Annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL)*

Amendments to Annex I of the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78), currently ratified by 155 member states, came into force January 1, 2017.[395] The amendments modify Regulation 12 of Annex I – Tanks for oil residues (sludge). The amend-

392. *Id.* The cited amendments were adopted per IMO Maritime Safety Committee Resolution MSC 393(95).

393. International Convention for the Safety of Life at Sea, Chapter II (1974), International Code of Safety for Ships Using Gases or Other Low-Flashpoint Fuels Code (2015).

394. International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (1978). The cited changes were adopted per IMO Maritime Safety Committee Resolution MSC 397(95).

395. MARPOL 73/78, Annex 1 (2015).

ments require that all sludge tanks cannot have any discharge connections to the bilge system, tank top, or oily water separators. However, tanks may have a drain into the oily bilge water holding tank if: (1) that drain has a manually operated self-closing value and there are arrangements in place for visual monitoring of the settled water; or (2) there is an alternative arrangement that does not directly connect to the bilge discharge piping system. Additionally, the amendments require that sludge tanks be designed and constructed to facilitate cleaning and discharge of residues.[396]

396. *Id.* at Annex I, Regulation 12.