

Admiralty and Maritime Law

Second Edition

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Preface and acknowledgments

The field of admiralty and maritime law covers a broad range of subjects and has its own rules relating to jurisdiction and procedure. Classically, maritime law was a species of commercial law, and in many countries it is still treated as such. Thus, this monograph includes topics such as charter parties, carriage of goods, and marine insurance. The law of collision, towage, pilotage, salvage, limitation of liability, maritime liens, and general average are unique to maritime law. In addition, the United States has developed its own law of maritime personal injury and death.

The organization and much of the content of the 2012 edition remains unchanged from the 2004 edition. However, there have been important changes in some areas, and these have been incorporated into the new edition. All references are to U.S. courts unless noted otherwise.

I would like to thank Judge John G. Koeltl (S.D.N.Y.) for his invaluable assistance in reviewing the draft of this edition. I would also like to acknowledge the contributions of Judge Eldon Fallon (E.D. La.), Chief Judge Sarah S. Vance (E.D. La.), and Judge W. Eugene Davis (5th Cir.) for their review of the draft of the first edition.

1. Jurisdiction and Procedure in Admiralty and Maritime Cases

Introduction

Article III of the U.S. Constitution defines the boundaries of subject-matter jurisdiction for the courts. Specifically, it extends the judicial power of the United States to “all Cases of admiralty and maritime Jurisdiction.” This grant of judicial power has been implemented by Congress in 28 U.S.C. § 1333, which states that “The [United States] district courts shall have original jurisdiction, exclusive of the Courts of the States, of (1) any civil case of admiralty or maritime jurisdiction” In current usage the terms “admiralty jurisdiction” and “maritime jurisdiction” are used interchangeably. The Constitution does not enumerate the types of “matters” or “cases” that fall within the terms “admiralty and maritime jurisdiction.”

The Admiralty Clause in Article III does not disclose or even provide the means for ascertaining whether a particular dispute is an admiralty or maritime case. This task has been performed primarily by the courts and, to a lesser extent, by Congress. Also, the Constitution does not specify the legal rules to apply in resolving admiralty and maritime disputes. It does not even point to the sources of substantive law that judges should consult to derive such rules. This task also has been performed primarily by the courts and, to some extent, by Congress. In this regard, federal courts have not merely created rules to fill gaps or to supplement legislation as they have in other areas; they have played the leading role in creating a body of substantive rules referred to as the “general maritime law.”¹ Thus, as will be discussed later, the power of federal courts to entertain cases that fall within admiralty and maritime jurisdiction has required courts, in the exercise of their jurisdiction, to formulate and apply substantive rules to resolve admiralty and maritime disputes.

1. Robert Force, *An Essay on Federal Common Law and Admiralty*, 43 St. Louis U. L.J. 1367 (1999).

Admiralty and Maritime Law

No federal statute provides general rules for determining admiralty jurisdiction. No statute comprehensively enumerates the various categories of cases that fall within admiralty jurisdiction. With two exceptions, the few instances where Congress has expressly conferred admiralty jurisdiction on federal district courts have always been in connection with the creation of a specific, new statutory right. Notable examples include the Limitation of Vessel Owner's Liability Act,² the Ship Mortgage Act,³ the Death on the High Seas Act,⁴ the Suits in Admiralty Act,⁵ the Public Vessels Act,⁶ the Outer Continental Shelf Lands Act,⁷ and the Oil Pollution Act of 1990.⁸ By contrast, the Carriage of Goods by Sea Act⁹ and the Federal Maritime Lien Act¹⁰ make no reference to admiralty jurisdiction. The Jones Act provides an action on the law side but is silent as to whether an action can be brought in admiralty.¹¹ The tort and indemnity provisions of the Longshore and Harbor Workers' Compensation Act (LHWCA) likewise make no reference to admiralty jurisdiction. Congress has not taken up the issue of jurisdiction over collision cases or cases involving towage, pilotage, or salvage. No statutes confer admiralty jurisdiction over marine insurance disputes. With the exceptions of the Death on the High Seas Act (DOHSA), the Jones Act, and the LHWCA, Congress has not addressed the substantive law of maritime personal injury and death claims, let alone the issue of jurisdiction over such claims.

2. 46 U.S.C. §§ 30501–30512 (2006).

3. *Id.* §§ 31301–31342.

4. *Id.* §§ 30301–30308.

5. *Id.* §§ 30901–30918.

6. *Id.* §§ 31101–31113.

7. 43 U.S.C. § 1331 (2006).

8. 33 U.S.C. § 2701 (2006).

9. 46 U.S.C. § 30701 note (2006).

10. *Id.* §§ 31341–31343.

11. *Id.* §§ 30104–30105. The Jones Act, which provides for recovery for injury to or death of a seaman, is discussed *infra* text accompanying notes 425–79.

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In addition to 28 U.S.C. § 1333, the Admiralty Extension Act¹² and the Great Lakes Act¹³ are the only instances where Congress has enacted admiralty jurisdiction statutes that are not tied to a specific statutorily created right. By and large, it appears that Congress has been content to allow the federal courts to define the limits of their admiralty jurisdiction.

Admiralty Jurisdiction in Tort Cases

Navigable Waters of the United States

There has never been any doubt that admiralty jurisdiction extends to the high seas and the territorial seas.¹⁴ The same may not be said of inland waters. Originally, U.S. courts applied the English rules for determining admiralty jurisdiction. Those rules, however, would exclude from admiralty jurisdiction incidents and transactions involving the Great Lakes and inland waterways. In a series of cases, the U.S. Supreme Court overruled its earlier precedents and abandoned the English rules as unsuited to the inland water transportation system of the United States.

In place of the English rules, the Court equated the scope of admiralty jurisdiction with “navigable waters.”¹⁵ The term “navigable waters of the United States” is a term of art that refers to bodies of water that are navigable in fact. This includes waters used or capable of being used as waterborne highways for commerce, including those presently sustaining or those capable of sustaining the transportation of goods or passengers by watercraft. To qualify as “navigable waters,” bodies of water must “form in their ordinary condition by themselves, or by uniting with other waters, a continued highway

12. 46 U.S.C. § 30101 (2006).

13. Great Lakes Act of Feb. 26, 1845, ch. 20, 5 Stat. 726, 28 U.S.C. § 1873 (2006). *See also* *Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 451 (1851) (“The law, however, contains no regulations of commerce; nor any provision in relation to shipping and navigation on the lakes. It merely confers a new jurisdiction on the district courts; and this is its only object and purpose.”).

14. Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty*, § 1-11 at 31 (2d ed. 1975) [hereinafter *Gilmore & Black*].

15. *Jackson v. The Steamboat Magnolia*, 61 U.S. (20 How.) 296 (1857).

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over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.”¹⁶

A body of water that is completely landlocked within a single state is not navigable for purposes of admiralty jurisdiction. It is important to note, however, that a body of water need not flow between two states or into the sea to be navigable. A body of water may be navigable even if it is located entirely within one state as long as it flows into another body of water that, in turn, flows into another state or the sea. A body of water need only be a link in the chain of interstate or foreign commerce.¹⁷ Thus, if a small river located completely within a state flows into the Mississippi River, it satisfies the navigability requirement, provided its physical characteristics do not preclude it from sustaining commercial activity. Furthermore, commercial activity need not be presently occurring as long as the body of water is “capable” of sustaining commercial activity.¹⁸

A body of water may be nonnavigable because obstructions, whether natural or man-made (e.g., dams), preclude commercial traffic from using the waters as an interstate or international highway or link thereto.¹⁹ Removal of the obstruction may then make the waters navigable. The converse is true. A body of water may at one time have been navigable and have supported interstate or foreign commerce; however, the construction of dams or other obstructions may render certain portions of the waterway impassable to commercial traffic. If the obstruction precludes interstate or foreign commerce, the body of water has become nonnavigable and will not support admiralty jurisdiction.²⁰ The fact that a body of water was historically navigable does not mean that it will remain so in the future.

16. *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1870).

17. *Id.*

18. *LeBlanc v. Cleveland*, 198 F.3d 353 (2d Cir. 1999). *See also Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 412-13 (2d Cir. 2005).

19. *LeBlanc*, 198 F.3d 353.

20. *Id.*

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The term “navigable waters” may have legal relevance on issues other than admiralty jurisdiction and may have different meanings that apply in other contexts. In *Kaiser Aetna v. United States*,²¹ the Supreme Court identified four separate purposes underlying the definitions of “navigability”: to delimit the boundaries of the navigational servitude, to define the scope of Congress’s regulatory authority under the Commerce Clause, to determine the extent of the authority of the Army Corps of Engineers under the Rivers and Harbors Act, and to establish the scope of federal admiralty jurisdiction.²²

Man-made bodies of water, such as canals, may qualify as navigable waters if they are capable of sustaining commerce and may be used in interstate or foreign commerce.²³ A body of water need not be navigable at all times, and some courts have recognized the doctrine of “seasonal navigability.”²⁴ For example, a body of water may be used for interstate and foreign commerce during certain times of the year but may not support such activity during the winter when the water freezes. Events that occur during the period when the waterway is capable of being used may be subject to admiralty jurisdiction.

The Admiralty Locus and Nexus Requirements

In tort cases, the plaintiff must allege that the tort occurred on navigable waters and that the tort bore some relationship to traditional maritime activity.²⁵ The first requirement is referred to as the maritime location or locus criterion, and the second as the maritime nexus criterion.

21. 444 U.S. 164 (1979).

22. *Id.* at 171–72.

23. *In re Boyer*, 109 U.S. 629 (1884).

24. *Wilder v. Placid Oil Co.*, 611 F. Supp. 841 (W.D. La. 1985). *See also* *Missouri v. Craig*, 163 F.3d 482 (8th Cir. 1998); *Gollatte v. Harrell*, 731 F. Supp. 453 (S.D. Ala. 1989).

25. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). *See also* *Hamm v. Island Operating Co.*, 450 F. App’x 365 (5th Cir. 2011).

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Maritime Locus

“Maritime locus” is satisfied by showing that the tort occurred on navigable waters.²⁶ Thus, maritime locus is present where a person on shore discharges a firearm and wounds a person on a vessel in navigable waters.²⁷ Locus is similarly present where a person injured on a vessel in navigable waters subsequently dies following surgery to treat the injury in a hospital on land.²⁸

The Admiralty Extension Act

Congress expanded the maritime location test by enacting the Admiralty Extension Act (AEA),²⁹ which confers on the federal courts admiralty jurisdiction over torts committed by vessels in navigable waters notwithstanding the fact that the injury or damage was sustained on land. The AEA was enacted specifically to remedy situations referred to as allisions, where vessels collide with objects fixed to the land, such as bridges that span navigable waterways.

The language of the AEA, however, is not limited to ship–bridge allisions. In one of the most extreme situations, maritime jurisdiction was found under the AEA in a case where a “booze cruise” passenger, after disembarking the vessel, was injured in an automobile accident caused by the driver of another car who allegedly became drunk while also a passenger on the cruise.³⁰ It is crucial to AEA jurisdiction that the injury emanate from a vessel in navigable waters. The mere fact that a vessel may be involved in an activity is not enough. The party who invokes jurisdiction under the AEA must show vessel negligence. Vessel negligence relates not only to defective appurtenances or negligent navigation but also to any tortious conduct of the crew while on board the vessel that results in injury on land.

26. *The Plymouth*, 70 U.S. 20 (1865). *See also* *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 582 (1995); *Sisson v. Ruby*, 497 U.S. 358, 360 (1990).

27. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974).

28. *Motts v. M/V Green Wave*, 210 F.3d 565 (5th Cir. 2000).

29. 46 U.S.C. § 30101 (2006).

30. *Duluth Superior Excursions, Inc. v. Makela*, 623 F.2d 1251 (8th Cir. 1980).

Maritime Nexus

The maritime nexus criterion is of relatively recent origin, and its meaning is still being developed. It was created by the Supreme Court to restrict the scope of admiralty tort jurisdiction for various policy reasons, not the least of which are considerations of federalism, and a desire to confine the exercise of admiralty jurisdiction to situations that implicate national interests. “Maritime nexus” is satisfied by demonstrating (1) that “the incident has ‘a potentially disruptive impact on maritime commerce’” and (2) that “‘the general character’ of the ‘activity giving rise to the incident’ shows a ‘substantial relationship to traditional maritime activity.’”³¹

The nexus requirement evolved from four Supreme Court cases. The first case, *Executive Jet Aviation, Inc. v. City of Cleveland*,³² held that federal courts lacked admiralty jurisdiction over an aviation tort claim where a plane during a flight wholly within the U.S. crashed in Lake Erie.³³ Although maritime locus was present, the Court excluded admiralty jurisdiction because the incident was “only fortuitously and incidentally connected to navigable waters” and bore “no relationship to traditional maritime activity.”³⁴ The Court supplemented the maritime locus test by adding a nexus requirement that “the wrong bear a significant relationship to traditional maritime activity.”³⁵ In the second case, *Foremost Insurance Co. v. Richardson*,³⁶ the Court made the nexus criterion a general rule of admiralty tort jurisdiction and held that admiralty tort jurisdiction extended to a collision between two pleasure boats. The third case, *Sisson v. Ruby*,³⁷ confirmed that a vessel need not be engaged in commercial activity or

31. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (citing *Sisson v. Ruby*, 497 U.S. 358, 364, n.2, 365 (1990)).

32. 409 U.S. 249 (1972).

33. The Court declined to hold that admiralty jurisdiction could never extend to an aviation tort. *Id.* at 271–72.

34. *Id.* at 273.

35. *Id.* at 268.

36. 457 U.S. 668 (1982).

37. 497 U.S. 358 (1990).

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be in navigation and extended tort jurisdiction to a fire on a pleasure boat berthed at a pier.

The fourth and last case to address tort jurisdiction is *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*³⁸ Workers on a barge in the Chicago River were replacing wooden pilings that protected bridges from being damaged by ships, and the workers undermined a tunnel that ran under the river. Subsequently, the tunnel collapsed, and water flowed from the river into the “Loop” (the Chicago business district), causing extensive property damage and loss of business. Refining the previous three cases, the Court articulated the latest version of the nexus criterion: The plaintiff must show that the tort arose out of a traditional maritime activity.³⁹ This, in turn, requires a showing (1) that the tort have a potentially disruptive effect on maritime commerce and (2) that the activity was substantially related to traditional maritime activity.⁴⁰ The first factor is not applied literally to the facts at hand; rather, the facts are viewed “at an intermediate level of possible generality.”⁴¹ The Court focused only on the “general features” of the incident, which it described as “damage by a vessel in navigable water to an underwater structure.”⁴² Damage to a structure beneath a waterway could disrupt the waterway itself and disrupt the navigational use of the waterway. Such an incident could adversely affect river traffic, and in this case it did. River traffic actually ceased, stranding ferryboats and preventing barges from entering the river system. Applying the second factor, the Court focused on whether the general character of the activity giving rise to the incident reveals a substantial relationship to traditional maritime activity. As the Court said: “We ask whether a tortfeasor’s activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the

38. 513 U.S. 527 (1995).

39. *Id.* at 534.

40. *Id.*

41. *Id.* at 538.

42. *Id.* at 539.

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suit at hand.”⁴³ Observing that the requisite relationship was found in *Foremost* (navigation of vessel) and *Sisson* (docking of vessels), the Court similarly found that repair and maintenance work on a navigable waterway performed from a vessel met the test.

There are several clues as to where the Court may be going with the nexus test, especially in torts involving vessels. The parties in the damage actions who opposed admiralty jurisdiction in *Grubart* had argued that applying the nexus test by looking at “general features” rather than the actual facts would mean that any time a vessel in navigable waters was involved in a tort the two criteria will be met. The majority responded by stating that “this is not fatal criticism,”⁴⁴ and the concurring opinion observed that inasmuch as *Executive Jet* formulated a rule to deal with airplane crashes, no complex nexus test should be required where a tort involves a vessel on navigable waters.⁴⁵ Ultimately, the locus test may once again become the sole criterion in tort cases involving vessels.

It would appear that after *Grubart* it is inappropriate for a court to use any test for nexus other than the criteria approved in that case. In the aftermath of *Executive Jet*, lower federal courts had attempted to fine-tune the nexus requirement; many courts of appeals followed the lead of the Fifth Circuit, which formulated four factors to be applied in determining if the maritime nexus requirement was satisfied.⁴⁶ The Supreme Court, however, indicated its disapproval of these factors,⁴⁷ and ultimately expressly rejected them.⁴⁸

43. *Id.* at 539–40.

44. *Id.* at 542.

45. *Id.* at 550, 551 (Thomas, J., and Scalia, J., concurring).

46. *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1974). Subsequently these four factors were supplemented by several others. *Molett v. Penrod Drilling Co.*, 826 F.2d 1419 (5th Cir. 1987), *cert. denied*, 493 U.S. 1003 (1989).

47. *Sisson v. Ruby*, 497 U.S. 358 (1990).

48. *Grubart*, 513 U.S. at 544.

Admiralty Jurisdiction in Contract Cases

In contract cases, courts have not used the locus and nexus criteria but have focused instead on the subject matter of the contract. One commentator suggests the following approach for determining admiralty contract jurisdiction:

In general, a contract relating to a ship in its use as such, or to commerce or navigation on navigable waters, or to transportation by sea or to maritime employment is subject to maritime law and the case is one of admiralty jurisdiction, whether the contract is to be performed on land or water.

...

A contract is not considered maritime merely because the services to be performed under the contract have reference to a ship or to its business, or because the ship is the object of such services or that it has reference to navigable waters. In order to be considered maritime, there must be a direct and substantial link between the contract and the operation of the ship, its navigation, or its management afloat, taking into account the needs of the shipping industry, for the very basis of the constitutional grant of admiralty jurisdiction was to ensure a national uniformity of approach to world shipping.⁴⁹

However, some contract cases have formulated jurisdictional distinctions that defy logic. Consider the following contracts that have been held to lie within admiralty jurisdiction:

Suits on contracts for the carriage of goods and passengers; for the chartering of ships (charter parties); for repairs, supplies, etc., furnished to vessels, and for services such as towage, pilotage, wharfage; for the services of seamen and officers; for recovery of indemnity or premiums on marine insurance policies.⁵⁰

Compare the foregoing with the following that have been held not to be within admiralty jurisdiction: "Suits on contracts for the building and sale of vessels; for the payment of a fee for procuring a

49. Steven F. Friedell, 1 *Benedict on Admiralty* § 182, at 12-4 to 12-6 (7th rev. ed. 1999).

50. Gilmore & Black, *supra* note 14, § 1-10, at 22.

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charter; for services to a vessel laid up and out of navigation.”⁵¹ A mortgage on a vessel was not deemed by courts to be a maritime contract until Congress so provided.⁵²

Although it is not without dispute, executory contracts may satisfy admiralty jurisdiction, notwithstanding the fact that breaches of such contracts do not give rise to maritime liens.⁵³ However, it appears that so-called “preliminary” contracts are not maritime contracts.⁵⁴ The criterion for determining which contracts are preliminary contracts is not perfectly clear. Generally, when a contract necessitates or contemplates the formation of a subsequent contract that will directly affect the vessel, the first contract is characterized as a preliminary contract. Examples of contracts that have been deemed preliminary include contracts to supply a crew⁵⁵ and to procure insurance.⁵⁶ At one time, “agency” agreements were thought to be preliminary contracts. The Supreme Court, however, has rejected this per se rule that deemed all agency contracts to be nonmaritime contracts.⁵⁷ Thus, it appears that contracts that obligate a person to provide services directly to a vessel may be maritime contracts as distinguished from ones in which a person merely obligates himself or herself to procure another to provide services to a vessel. In any event, the Supreme Court has indicated that the determination as to whether agency contracts are maritime or not should be made on a case-by-case basis.

51. *Id.* at 26.

52. *Id.* at 27.

53. *Terminal Shipping Co. v. Hamberg*, 222 F. 1020 (D. Md. 1915).

54. *Peralta Shipping Corp. v. Smith & Johnson (Shipping) Corp.*, 739 F.2d 798 (2d Cir. 1984), *cert. denied*, 470 U.S. 1031 (1985).

55. *Goumas v. K. Karras & Son*, 51 F. Supp. 145 (S.D.N.Y. 1943), *cert. denied*, 322 U.S. 734 (1944).

56. *F.S. Royster Guano Co. v. W.E. Hodger Co.*, 48 F.2d 86 (2d Cir.), *cert. denied*, 283 U.S. 858 (1931).

57. *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603 (1991), discussed *infra* text accompanying note 925.

Admiralty and Maritime Law

The Supreme Court has reexamined its approach to maritime contract, as it explained in *Norfolk Southern Railway Co. v. Kirby*:⁵⁸

Our cases do not draw clean lines between maritime and non-maritime contracts. We have recognized that “[t]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw.” To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute, as we would in a putative maritime tort case. * * * Instead, the answer “depends upon ... the nature and character of the contract,” and the true criterion is whether it has “reference to maritime service or maritime transactions.”⁵⁹

Mixed Contracts

Some contracts may have aspects that satisfy the maritime requirement for admiralty jurisdiction, and yet there may be aspects of the contract that are clearly nonmaritime. For example, a contract may call for both ocean and overland transport. The old rule was that a mixed contract is not an admiralty contract unless the nonmaritime aspect of the contract is merely incidental to the maritime aspect, or the maritime and nonmaritime aspects are severable and the dispute involves only the maritime aspect.⁶⁰ However, in 2004 the Supreme Court announced a new rule in *Kirby*, extending admiralty jurisdiction to a case involving cargo that had been shipped by sea from Australia to the U.S. and subsequently damaged in a railroad accident. The carriage was pursuant to a “through” bill of lading which covered both the ocean and overland legs. The Court held that the “through” bill was a maritime contract because the bill’s “sea components” were not “insubstantial.”⁶¹ Thus, the test seems to be that a mixed contract is a maritime contract if the sea component is

58. 543 U.S. 14 (2004). The Court’s approach to admiralty contract jurisdiction in *Exxon* and *Norfolk Southern* may signal a modification of the *per se* rule that disqualifies all preliminary contracts from admiralty jurisdiction. See *infra* text accompanying notes 925-27.

59. *Id.* at 23-24 (citations omitted).

60. *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp.*, 109 F.3d 105 (2d Cir. 1997).

61. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 27 (2004).

substantial. The Court reaffirmed this approach in *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*,⁶² another case in which cargo was damaged on land after the completion of an ocean voyage.

Multiple Jurisdictional Bases

Even when the facts of a case satisfy the jurisdictional criteria and would permit the plaintiff to invoke a federal court's admiralty jurisdiction, an alternative basis for bringing suit in federal court may be used. This option occurs most frequently in diversity cases where the plaintiff and defendant are citizens of different states, or where one of the parties is a citizen of the United States and the other party is a citizen or subject of a foreign country.

Rule 9(h) of the Federal Rules of Civil Procedure

When the facts alleged in a complaint satisfy more than one basis for federal jurisdiction, the plaintiff may opt to base the complaint on either ground. However, in order for the case to be heard under the court's admiralty jurisdiction, Rule 9(h) of the Federal Rules of Civil Procedure directs that the plaintiff must designate the claim as one in admiralty;⁶³ otherwise, the court will proceed at law in order to allow for a jury trial. By invoking diversity of citizenship as the basis for jurisdiction instead of admiralty jurisdiction, or by not opting to designate the claim as an admiralty claim, the plaintiff gains the advantage of a jury trial. However, the plaintiff may lose the advantage of certain procedures available only in admiralty cases, including the remedies of arrest and maritime attachment provided for in the Supplemental Rules to the Federal Rules of Civil Procedure. (These remedies are discussed later in this chapter.)

Multiple Claims

A plaintiff may have multiple claims, some arising under admiralty jurisdiction and some being claims at law. This occurs most often in seamen's personal injury actions where a plaintiff seeks to join a

62. 130 S. Ct. 2433 (2010).

63. Fed. R. Civ. P. 9(h).

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claim at law under the Jones Act with admiralty claims for unseaworthiness and maintenance and cure. Joinder of claims raises several issues.

Absent legislation to the contrary, there is no right to a jury trial in an action brought under admiralty jurisdiction, 28 U.S.C. § 1333.⁶⁴ Where there are multiple bases of jurisdiction, a litigant can obtain the right to a jury trial by, for example, invoking diversity instead of admiralty jurisdiction. However, if the parties are diverse but the plaintiff specifically designates the claims as admiralty claims pursuant to Rule 9(h), the parties would lose the right to a jury trial. Congress has provided for the right to jury trial in Jones Act and Great Lakes Act cases.⁶⁵

The propriety of joinder of admiralty claims with a Jones Act claim at law was addressed in *Romero v. International Terminal Operating Co.*⁶⁶ The plaintiff, a Spanish crewmember injured while the Spanish-owned vessel was docked in New York, filed suit against his employer and other defendants, asserting damages under general maritime law for unseaworthiness and maintenance and cure and under the Jones Act at law for personal injuries. The plaintiff was of diverse citizenship from all defendants except his employer. In order to obtain a jury trial, the plaintiff sought joinder of his claims in one action at law. He asserted that unseaworthiness and maintenance and cure claims could also be brought as claims at law pursuant to 28 U.S.C. § 1331,⁶⁷ that “maritime law” is part of the “laws” of the United States and therefore claims that arose under the rules of substantive admiralty law arose under the laws of the United States. As such, claims based on maritime law could be brought in federal court under general federal question jurisdiction. There were two issues in the case: whether the plaintiff may join his maritime law

64. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847).

65. Great Lakes Act of Feb. 26, 1845, ch. 20, 5 Stat. 726; 28 U.S.C. § 1873 (2006).

66. 358 U.S. 354 (1959).

67. General federal question jurisdiction was first created by the Act of March 3, 1875, 18 Stat. 470 (1875). Although the text had been somewhat modified in the version before the Court as now contained in 28 U.S.C. § 1331, the differences were not relevant to the decision.

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claims against his employer with his claim at law brought under the Jones Act, and whether the plaintiff may join other defendants of diverse citizenship with his claim brought under the Jones Act against his nondiverse employer.

As to the first issue, a majority of the Supreme Court held that in determining the jurisdiction of federal courts, the word “laws” as used in Article III of the Constitution and in 28 U.S.C. § 1331 did not encompass claims within the admiralty and maritime jurisdiction of the federal courts.⁶⁸ Nevertheless, the Court held that the two admiralty claims (unseaworthiness and maintenance and cure) could be “appended” to the Jones Act claim and brought with it on the law side.

As to the second issue, the majority held that the plaintiff’s diversity claims could be joined with the Jones Act claim against his nondiverse employer, notwithstanding the fact that the rule of complete diversity would not be satisfied. This deficiency was cured by the Jones Act, which provided an independent basis for jurisdiction over the nondiverse party. The Court did not address the jury trial issue.

Some courts have extended the holding of *Romero*, permitting joinder of an action arising under the general maritime law against a nondiverse defendant with an action against another party of diverse citizenship.⁶⁹ In other words, the plaintiff, in one action, may assert diversity jurisdiction against one defendant and another basis of federal jurisdiction, such as federal question or admiralty, against another defendant.

Prior to the enactment of the Supplemental Jurisdiction Act,⁷⁰ most federal courts had adopted a liberal approach to joinder of claims and parties under the Federal Rules of Civil Procedure and additionally under various theories of pendent and ancillary

⁶⁸. *Romero*, 358 U.S. at 367.

⁶⁹. *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995). *Contra Powell v. Offshore Navigation, Inc.*, 644 F.2d 1063 (5th Cir. 1981).

⁷⁰. 28 U.S.C. § 1367 (2006).

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jurisdiction.⁷¹ This liberal approach not only applied with respect to multiple claims asserted by a plaintiff against one defendant and to claims asserted against multiple defendants but was also followed in cases involving counterclaims, cross-claims, and impleader.⁷² The Supplemental Jurisdiction Act confirmed the correctness of these decisions and essentially supplanted them. Section 1377(a) of the Act states that

in any civil action of which the district courts have original jurisdiction, the district courts have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the U.S. Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

In *Fitzgerald v. United States Lines Co.*,⁷³ the Supreme Court held that where maintenance and cure and unseaworthiness claims are joined in the same action as a Jones Act claim, all claims should be resolved by the jury. The Court's decision was based on several rationales. Congress had made it clear that the right to jury trial was part of the Jones Act remedy. Allowing the jury to resolve all issues was the most efficient manner of resolving the disputes, and having one decision maker would ensure consistency. The Court emphasized that there is a constitutional right to a jury trial in certain instances, but there is no corresponding constitutional right to a nonjury trial in admiralty cases.

The Supreme Court has not addressed other jury trial issues outside of the context of the seaman's trinity of claims. For example, in cases where a plaintiff sues in admiralty and the defendant files a counterclaim at law, is the defendant entitled to a jury trial?⁷⁴ Where a

⁷¹ See, e.g., *Leather's Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971); *Roco Carriers, Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292 (2d Cir. 1990).

⁷² *In re Oil Spill by the Amoco Cadiz*, 699 F.2d 909 (7th Cir. 1983). See also cases cited *infra* note 75.

⁷³ 374 U.S. 16 (1963).

⁷⁴ See, e.g., *St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc.*, 561 F.3d 1181 (11th Cir. 2009); *Wilmington Trust v. United States Dist. Ct. for the Dist. of Haw.*, 934 F.2d 1026 (9th Cir. 1991). For a discussion of the conflicting rulings on

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plaintiff sues in admiralty and the defendant impleads a third-party defendant based on a claim at law, does either the third-party plaintiff or the third-party defendant have a right to a jury trial?⁷⁵ The situation is particularly difficult where issues of fact in the plaintiff's original admiralty claim are intertwined with those presented in the other claims and where, under the *Fitzgerald* rationale, it makes sense to have all the issues resolved by the same fact finder. Similar problems are presented where the plaintiff originally files an action at law and a counterclaim or third-party action is based on an admiralty claim.

In these various situations there are four possible solutions: (1) Try everything to the jury (the *Fitzgerald* approach); (2) try everything to the court (this could present Seventh Amendment issues in some cases); (3) have the jury resolve the actions at law and the court resolve the admiralty claims, an approach that presents a possibility of inconsistency; and (4) have the jury resolve the claims at law and use the jury as an advisory jury⁷⁶ on the admiralty claims. Some federal courts have concluded that the rationale underlying *Fitzgerald* applies in other contexts and have opted in favor of jury trial of all claims.⁷⁷ The Supplemental Jurisdiction Act, in liberalizing joinder of claims and joinder of parties, is silent on the issue of jury trial.⁷⁸

The Supreme Court has not addressed the availability of admiralty remedies when admiralty claims are joined with claims at law. When a plaintiff joins a claim at law with admiralty claims, some courts have allowed all claims to be resolved by the jury and have allowed the plaintiff to invoke admiralty remedies such as arrest and attachment on the admiralty claims.⁷⁹

whether a party in an admiralty case who asserts a counterclaim at law is entitled to a jury trial, see *Concordia Co. v. Panek*, 115 F.3d 67 (1st Cir. 1997).

^{75.} See, e.g., *Gauthier v. Crosby Marine Serv., Inc.*, 87 F.R.D. 353 (E.D. La. 1980); *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035 (5th Cir. 1982).

^{76.} Fed. R. Civ. P. 39(c).

^{77.} *Zrnceovich v. Blue Haw. Enters., Inc.*, 738 F. Supp. 350 (D. Haw. 1990); *Wilmington Trust*, 934 F.2d 1026.

^{78.} 28 U.S.C. § 1367 (2006).

^{79.} *Haskins v. Point Towing Co.*, 395 F.2d 737 (3d Cir. 1968). See also *Luera v. M/V Alberta*, 635 F.3d 181 (5th Cir. 2011).

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Judges and lawyers often speak of “admiralty cases” and “actions at law,” and yet these labels may be misnomers. Where a person presents a case involving two claims, it is possible that one claim will be resolved according to substantive rules of admiralty and the other claim will be resolved by nonadmiralty rules. Such a “case” is neither an “admiralty case” nor is it a “nonadmiralty case.” In the days before the unification under the Federal Rules of Civil Procedure of the various actions, law, equity, and admiralty, each constituted a separate docket. The merger of law, equity, and admiralty under the Federal Rules, and the emergence of the “civil action” subjecting law, equity, and admiralty claims to a unified set of procedural rules, combined with the consequent liberalization of the rules on the joinder of claims and parties, have set the stage for hybrid actions involving claims at law and admiralty.

Hybrid claims arise in various contexts. On the one hand, it is common for a seaman to file a personal injury claim and seek recovery under the Jones Act and under the general maritime law for unseaworthiness and for maintenance and cure. The seaman may in fact have suffered a single injury but has alleged three different theories for recovery. The legal basis for each claim is different, and it is possible for the seaman to prevail on one theory and lose on another. In these situations each claim stands on its own footing.

On the other hand, a plaintiff may have one claim, such as one based on the general maritime law. If diversity of citizenship exists, the seaman, under Federal Rule of Civil Procedure 9(h), has the option of pleading his or her case in law with a right to trial by jury or as an admiralty claim with trial to the court but with the opportunity to invoke special remedies that are available only in admiralty cases. The Federal Rules do not give this plaintiff a right to plead the case as both a claim at law and a claim in admiralty.⁸⁰

Arguably, the two situations are different because in the latter, the plaintiff only has one claim and one cause of action as to which the

⁸⁰ See, e.g., *T.N.T. Marine Serv., Inc. v. Weaver Shipyards & Dry Docks, Inc.*, 702 F.2d 585 (5th Cir.), *cert. denied*, 464 U.S. 847 (1983). See also *Apache Corp. v. Global Santa Fe Drilling Co.*, 435 F. App'x 322 (5th Cir. 2011). Cf. *Luera v. M/V Alberta*, 635 F.3d 181 (5th Cir. 2011); *Hamilton v. Unicoolship, Ltd.*, No. 99 CIV 8791 (LMM), 2002 WL 44139 (S.D.N.Y. Jan. 11, 2002).

Rule 9(h) option applies. The same substantive rules will be applied regardless if the plaintiff pleads at law or in admiralty. In the first situation, although it may be correct to say that the plaintiff has suffered but one injury and may not receive double or triple recovery, the claims are legally separate and are based on different substantive rules. The plaintiff does not truly have the 9(h) option because, lacking diversity, he or she cannot plead general maritime claims as claims at law. Perhaps these differences explain the apparent disagreement in the lower courts and the difficulty that some courts have had with hybrid claims.⁸¹

The Saving to Suitors Clause

Admiralty Cases in State Courts

Section 1333 of title 28 not only confers admiralty jurisdiction in the federal courts, it also contains a provision characterized as the “saving to suitors” clause. This provision saves to suitors (plaintiffs) whatever nonadmiralty “remedies” might be available to them.⁸² This means that plaintiffs may pursue remedies available under the common law or other laws in state courts. Ordinarily, when plaintiffs seek monetary damages for tort or contract claims that fall within admiralty jurisdiction, they have a choice of bringing a suit in admiralty in federal court or bringing suit in state court.⁸³ One advantage of bringing suit in state court is the availability of a jury trial.

There are some limitations on the remedies that plaintiffs may pursue in state court, the most significant being that admiralty remedies, such as the action *in rem*, may be brought only in an admiralty action in federal court.⁸⁴

81. *Luera*, 635 F.3d 181.

82. 28 U.S.C. § 1333 (2006).

83. *Id.*

84. *The Hine*, 71 U.S. 555 (1866).

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Admiralty Actions at Law in Federal Courts

There is another dimension to the saving to suitors clause. Ordinarily, in diversity of citizenship cases brought in federal court, state law provides the substantive rules for the resolution of the dispute. The saving to suitors clause, however, does not provide that a state remedy is saved or even that a remedy in a state court is saved. As originally worded, the clause saved “the right of a common-law remedy where the common law was competent to give it.”⁸⁵ Today, it simply saves to suitors “all other remedies to which they are entitled.” Thus, the saving to suitors clause has been interpreted to permit a plaintiff to seek a common-law remedy in a federal court where diversity of citizenship is present.⁸⁶ This means that the plaintiff files the action under 28 U.S.C. § 1332. In such cases, both the plaintiff and defendant may demand a jury trial.

Law Applicable

Where a plaintiff invokes the saving to suitors clause to bring an action in a state court or in federal court under diversity jurisdiction, the issues in most cases will be resolved by the application of the substantive rules of admiralty and maritime law, whether enacted by Congress or as part of the general maritime law. The application of federal law in saving to suitors cases is known as the “Reverse *Erie*” doctrine. Pursuant to this doctrine, state courts are required to apply substantive maritime law even if a case is properly brought in state court.⁸⁷ However, federal courts (and state courts for that matter), in

85. Judiciary Act of 1789, ch. XX § 9 (1789).

86. *In re Lockheed Martin Corp.*, 503 F.3d 351 (4th Cir. 2007); *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995).

87. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 545–46 (1995) (stating that “the exercise of admiralty jurisdiction does not result in the automatic displacement of state law”). *See, e.g.*, *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922) (“general rules of maritime law apply whether the proceeding be instituted in an admiralty or common-law court”). *See also* *Garanti Finansal Kiralama A.S. v. Aqua Marine & Trading, Inc.*, 697 F.3d 59, 69 (2d Cir. 2012) (“plaintiffs who have viable admiralty claims may choose to pursue them in state court, either under federal law or under other laws”).

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some circumstances, may apply state substantive law even where the case before them falls under admiralty jurisdiction.⁸⁸

Removal

Generally, it is the plaintiff who has the choice to sue in federal or state court. Under certain circumstances, defendants are given the right to remove a case from state court to federal court.⁸⁹ Once a case is properly removed, it proceeds in federal court as though it had been originally filed there. The most common basis for removing a case from state to federal court is that the case could originally have been filed in federal court—that is, it meets the constitutional and statutory jurisdictional criteria.⁹⁰

In *Romero v. International Terminal Operating Co.*,⁹¹ the Supreme Court, in dictum, recognized an important exception to the right to removal: Where a suit is commenced in a state court, and it could have been brought in federal court under 28 U.S.C. § 1333 (admiralty and maritime jurisdiction), the case may not be removed to federal court if admiralty jurisdiction is the only basis for federal jurisdiction.⁹² This means that plaintiffs who exercise their option under the “saving to suitors” clause and sue in state court can keep their cases in state court unless there is diversity of citizenship or some statutory basis other than § 1333 to support the assertion of federal jurisdiction. The lower federal courts applied *Romero*’s dictum.⁹³ Based on a literal reading of the amended removal statute,

88. *See, e.g.,* *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

89. 28 U.S.C. § 1441 (2006).

90. *Id.*

91. 358 U.S. 354 (1959).

92. *Id.* at 371–72.

93. *See, e.g.,* *Pierpoint v. Barnes*, 94 F.3d 813 (2d Cir. 1996):

Common law maritime cases filed in state court are not removable to federal court, due to 28 U.S.C. § 1333’s “saving to suitors” clause. Dating back to the Judiciary Act of 1789, this clause preserves a plaintiff’s right to a state court forum in cases arising under the common law of the sea.

however, at least one commentator has questioned the viability of the *Romero* dictum.⁹⁴

Sources of Admiralty and Maritime Law

There are several sources of admiralty and maritime law. The Constitution has been interpreted as authorizing both Congress⁹⁵ and the courts⁹⁶ to formulate substantive rules of admiralty law. The United States has ratified numerous international maritime conventions, particularly those that promote safety at sea and the prevention of pollution.⁹⁷ At times, Congress has gone beyond ratification and has actually enacted an international convention as the domestic law of the United States: The Carriage of Goods by Sea Act (COGSA) is an example.⁹⁸ However, with the exceptions of COGSA (discussed *infra* Chapter 2) and the Salvage Convention (discussed *infra* Chapter 8), the United States has not enacted international conventions that deal with liability between private parties or with procedural matters. Conventions aside, as the following discussion elaborates, Congress has enacted statutes creating substantive rules of admiralty and maritime law. Various federal agencies, particularly the U.S. Coast Guard, have promulgated numerous regulations that deal with vessels and their operations.

The General Maritime Law

Like Congress, federal courts have created substantive rules of maritime law. These court-made rules are referred to as “the general maritime law,” which has two dimensions. To some extent, the

Id. at 816 (citing *Romero*, 358 U.S. at 363). *See also* *Nesti v. Rose Barge Lines, Inc.*, 326 F. Supp. 170, 173 (N.D. Ill. 1971); *Commonwealth of P.R. v. Sea-Land Serv., Inc.*, 349 F. Supp. 964, 977 (D.P.R. 1970).

94. *See, e.g.*, Kenneth G. Engerrand, *Removal and Remand of Admiralty Suits*, 21 Tul. Mar. L.J. 383 (1997).

95. *See* *The Thomas Barlum*, 293 U.S. 21 (1934).

96. *See* *The Lottawanna*, 88 U.S. 558 (1874); *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986).

97. *See generally* Frank Wiswall, 6–6F *Benedict on Admiralty* (7th rev. ed. 2001).

98. 46 U.S.C. § 30701 note (2006).

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general maritime law applies rules that are customarily applied by other countries in similar situations. This reflects that certain aspects of the general maritime law are transnational in dimension, and custom is an important source of law in resolving these disputes. The other aspect of the general maritime law is purely domestic. Because Congress has never enacted a comprehensive maritime code, the courts, from the outset, have had to resolve disputes for which there were no congressionally established substantive rules. In the fashion of common-law judges, the courts created substantive rules out of necessity. Occasionally, federal courts have looked to state law to resolve maritime disputes.

Choice of Law: U.S. or Foreign

The shipping industry operates worldwide. Vessels on a single voyage may call at one or more foreign ports. Vessels often are supplied and repaired in foreign ports. Cargo may be damaged or lost while at sea in the course of an international voyage or in a foreign port, and likewise seamen may be injured on the high seas or in the waters of foreign countries. Today, international shipping is a complex business, and its activities are conducted in a manner that often implicates the interests of several countries. Some admiralty cases filed in U.S. courts involve personal injury and wage claims of foreign seamen; others arise out of transactions and occurrences that involve contacts with other countries. Such cases often present jurisdictional, choice-of-law,⁹⁹ and *forum non conveniens* issues.¹⁰⁰

99. Choice-of-law and forum selection clauses are discussed *infra* Chapter 2 (COGSA; Charter Parties), Chapter 3 (Personal Injury and Death), and Chapter 8 (Salvage).

100. The Supreme Court has formulated the rules for determining when an action brought in federal court should be dismissed under the doctrine of *forum non conveniens*. Admiralty cases are subject to those rules. *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994) (holding, however, that states are not bound to apply these rules). The criteria were articulated in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and reaffirmed in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981). Ships are engaged in international and interstate commerce, giving a special importance to the doctrine of *forum non conveniens*.

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In such situations, the jurisdictional issue is usually resolved first. Then, if the court concludes that it has jurisdiction over the claim, it must determine the law to be applied to that claim. Finally, if the court determines that the law of a foreign country should be applied, it may have to rule on a motion to dismiss on grounds of *forum non conveniens*.

The open-ended jurisdictional criteria often compel federal courts to deal with choice-of-law and *forum non conveniens* issues. Because the admiralty jurisdiction of the federal courts is extremely broad, subject-matter jurisdictional issues may not be the most difficult ones to resolve. Consider that an injury aboard or caused by a vessel in navigable waters usually meets the locus and nexus tests, and, if proper service of process can be effected on the defendant or defendant's property, a federal court would have admiralty jurisdiction over the claim. Likewise, contracts to repair vessels and to supply vessels with necessities are maritime contracts, and, if service of process can properly be made, a federal court would have jurisdiction over such claims.

Two leading Supreme Court cases provide the rules for choice-of-law analysis. Although both of these cases involved personal injury claims by foreign seamen, the Court's approach has been used by lower federal courts as a point of departure or as a guideline to resolve choice-of-law issues in many other kinds of admiralty cases. The first case, *Lauritzen v. Larsen*,¹⁰¹ involved a foreign seaman employed by a foreign shipowner on a foreign-flag vessel who brought suit in a U.S. court seeking to recover damages under the Jones Act.¹⁰² The Court enumerated and discussed various criteria that have been commonly resorted to in resolving international choice-of-law issues in the maritime context. These factors include (1) the place of the wrongful act, (2) the law of the flag, (3) the allegiance or domicile of the injured seaman, (4) the allegiance of the defendant shipowner, (5) the place where the contract of employment

101. 345 U.S. 571 (1953).

102. Suit was brought for injuries the foreign seaman had sustained in U.S. waters. The Jones Act provides a remedy for "any seaman" and as such is not limited to U.S. seamen or even to seamen who serve on U.S. vessels.

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was made, (6) the inaccessibility of a foreign forum, and (7) the law of the forum.

In *Hellenic Lines, Ltd. v. Rhoditis*,¹⁰³ the Court added an eighth factor: the shipowner's base of operations. At times, this last factor may be the most crucial, as it was found to be in *Rhoditis*. But the fact that a shipowner has a U.S. base of operations does not automatically trigger the application of U.S. law.¹⁰⁴

The *Lauritzen–Rhoditis* criteria are regarded as the proper criteria to be applied in admiralty cases and, as stated, have been used in cases other than seamen's personal injury cases.¹⁰⁵

Choice of Law: Congressional Preemption and State Law

Legislative preemption in the maritime area is merely a species of the general doctrine of congressional preemption and is exemplified in the case of *United States v. Locke*.¹⁰⁶ In *Locke*, the Supreme Court decided that a complex series of safety requirements for oil tankers imposed by the state of Washington could not coexist with various federal statutes and regulations promulgated thereunder by the U.S. Coast Guard. The Court applied its rules relating to "conflict preemption"¹⁰⁷ and "field preemption,"¹⁰⁸ and also applied the approach it had previously formulated in *Ray v. Atlantic Richfield Co.*,¹⁰⁹ where it had invalidated much of the state of Washington's comprehensive regulation of oil tankers and their operations.

103. 398 U.S. 306 (1970).

104. See, e.g., *Reino de Espana v. American Bureau of Shipping Inc.*, 691 F.3d 461, 466-68 (2d Cir. 2012) (citing *Carbotrade S.p.A. v. Bureau Veritas*, 99 F.3d 86, 89 (2d Cir. 1996)); *Warn v. M/Y Maridome*, 169 F.3d 625, 628 (9th Cir.), cert. denied, 528 U.S. 874 (1999).

105. See, e.g., *Trans-Tec Asia v. M/V Harmony Container*, 518 F.3d 1120 (9th Cir. 2008); *Oil Shipping (Bunkering) B.V. v. Sonmez Denizcilik Ve Ticaret A.S.*, 10 F.3d 1015 (3d Cir. 1993); *Klinghoffer v. S.N.C. Achille Lauro*, 795 F. Supp. 112 (S.D.N.Y. 1992).

106. 529 U.S. 89 (2000).

107. *Id.* at 109.

108. *Id.* at 110–11.

109. 435 U.S. 151 (1978).

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In some cases, however, the Court has allowed states substantial leeway. For example, in *Huron Portland Cement Co. v. City of Detroit*,¹¹⁰ a case involving the validity of a city smoke-abatement ordinance, the majority stated that “[e]venhanded local regulation to effectuate a legitimate local public purpose is valid unless preempted by federal action.”¹¹¹ The Court held that there was no statutory preemption and concluded that, in the absence of legislation, “[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand.”¹¹² After referring to numerous cases where state and local regulations had been upheld,¹¹³ the Court found no impermissible burden on commerce. Likewise, *Kelly v. Washington*¹¹⁴ upheld a state hull and machinery inspection statute, rejecting an argument that it conflicted with federal statutory standards and an alternative argument that the subject matter required uniformity that only federal legislation can provide: “When the state is seeking to protect a vital interest, we have always been slow to find that the inaction of Congress has shorn the state of the power which it would otherwise possess.”¹¹⁵

The issue of statutory preemption has presented itself in various contexts, including the preemption of state remedies for personal injury and death for seamen and for certain maritime workers under the Jones Act¹¹⁶ and the Longshore and Harbor Workers’ Compensation Act,¹¹⁷ the preemption of state remedies under the Death on the High Seas Act,¹¹⁸ the preemption of certain liens under

110. 362 U.S. 440 (1960).

111. *Id.* at 443.

112. *Id.* at 448.

113. *Id.* and authorities cited therein.

114. 302 U.S. 1 (1937).

115. *Id.* at 14.

116. *See, e.g.,* Lindgren v. United States, 281 U.S. 38 (1930).

117. *See, e.g.,* Davis v. Dep’t of Labor & Indus. of Wash., 317 U.S. 249 (1942).

118. *See, e.g.,* Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207 (1986).

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the Federal Maritime Lien Act,¹¹⁹ the preemption under the Carriage of Goods by Sea Act,¹²⁰ and the nonpreemption of a state's remedies for damage to its environment whether caused by the discharge of smoke¹²¹ or oil.¹²² In such cases, the issue is not whether the federal legislation is valid but whether or not state legislation can be applied to supplement federal law.

Maritime law, in one way or another, has accommodated the application of state law under certain circumstances.¹²³

In *Southern Pacific v. Jensen*,¹²⁴ the Supreme Court articulated an approach for delineating impermissible state encroachment on federal maritime law. There, the Court held that the family of a longshoreman killed aboard a vessel in navigable waters was not entitled to recover an award under the New York workers' compensation statute. There are three situations in which state law may not be applied: (1) where state law conflicts with an act of Congress, (2) where it "works material prejudice to the characteristic features of the general maritime law," or (3) where it "interferes with the proper harmony and uniformity" of the general maritime law "in its international or interstate relations."¹²⁵ Subsequent decisions, however, have not developed a coherent body of law that describes the "characteristic features of the general maritime law" or explains what types of state

119. See, e.g., *In re Mission Marine Assocs., Inc.*, 633 F.2d 678 (3d Cir. 1980).

120. See, e.g., *Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co.*, 215 F.3d 1217 (11th Cir. 2000).

121. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960). See also *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189 (9th Cir. 2007).

122. 33 U.S.C. § 2718(a)(1) (2006) (providing express nonpreemption of state remedies in cases of oil pollution damage). See also *Askew v. Am. Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Bouchard Transp. Co. v. Updegraff*, 147 F.3d 1344 (11th Cir. 1998), *cert. denied*, 525 U.S. 1140 and 525 U.S. 1171 (1999).

123. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 546 (1995); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373-75 (1959). See also Steven F. Friedell, 1 *Benedict on Admiralty* § 105 (7th rev. ed. 1999); Robert Force, *Deconstructing Jensen: Admiralty and Federalism in the Twenty-First Century*, 32 *J. Mar. L. & Com.* 517 (2001).

124. 244 U.S. 205 (1917).

125. *Id.* at 216.

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law might “work[] material prejudice” to those features.¹²⁶ Likewise, subsequent decisions have not clarified the meaning of the “proper harmony and uniformity” of the general maritime law “in its *international and interstate relations*.”¹²⁷ The Court has not routinely used the *Jensen* criteria as the point of departure and has not applied *Jensen* in a consistent manner.¹²⁸ Also, it created exceptions, such as the “maritime but local”¹²⁹ and the “twilight zone”¹³⁰ rules.

Of all the post-*Jensen* cases, the most helpful one from a methodological perspective is *American Dredging Co. v. Miller*.¹³¹ The case involved the validity of a Louisiana statute that precluded the application of the doctrine of *forum non conveniens* in admiralty cases. The majority opinion begins, “The issue before us here is whether the doctrine of *forum non conveniens* is either a ‘characteristic feature’ of admiralty or a doctrine whose uniform application is necessary to maintain the ‘proper harmony’ of maritime law.”¹³² A characteristic feature is one that either “originated in admiralty” or “has exclusive application there.”¹³³ The Court concluded that the *forum non conveniens* rule does not satisfy either criterion.

The Court went on to consider the impact of the *forum non conveniens* rule on the proper harmony and uniformity of maritime law. The federal rule of *forum non conveniens* “is procedural rather than substantive, and it is most unlikely to produce uniform results.”¹³⁴ Furthermore, “[t]he discretionary nature of the doctrine

126. *Id.*

127. *Id.* (emphasis added).

128. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 452 (1994). *See generally* David W. Robertson, *The Applicability of State Law in Maritime Cases After Yamaha Motor Corp. v. Calhoun*, 21 Tul. Mar. L.J. 81, 95–96 (1996); Robert Force, *Choice of Law in Admiralty Cases: “National Interests” and the Admiralty Clause*, 75 Tul. L. Rev. 1421, 1439–64 (2001).

129. *W. Fuel Co. v. Garcia*, 257 U.S. 233 (1921).

130. *Davis v. Dep’t of Labor & Indus.*, 317 U.S. 249 (1942).

131. 510 U.S. 443 (1994).

132. *Id.* at 447 (Scalia, J.).

133. *Id.* at 450.

134. *Id.* at 453.

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[*forum non conveniens*], combined with the multifariousness of the factors relevant to its application, . . . make uniformity and predictability of outcome almost impossible.”¹³⁵

The dissent does not merely assume that *forum non conveniens* is important to maritime law but rather engages in an analysis absent in virtually all other discussions of choice of law in prior decisions of the Supreme Court. In this respect, the dissent explains why a uniform application of the maritime *forum non conveniens* rule is important to the national interests of the United States. The dissent’s approach is innovative and instructive in three respects. First, it remarks on the fact that no state interest seems to be promoted by not applying *forum non conveniens* in admiralty cases, and no state interest would seem to be undermined if the general maritime rule were followed. Second, it faults the majority for making a mistake in formulating the test to be applied. It is not where the admiralty rule originated or whether it has unique application in admiralty that is critical—the issue is whether *forum non conveniens* is an “important feature of the uniformity and harmony to which admiralty aspires.”¹³⁶ Third, the dissent concludes that it is important for the *forum non conveniens* rule to be uniformly applied and links it to the Admiralty Clause of the Constitution by pointing out that a uniform rule of *forum non conveniens*

serves objectives that go to the vital center of the admiralty preemption doctrine. Comity among nations and among States was a primary aim of the Constitution. At the time of the framing, it was essential that our prospective trading partners know that the United States would uphold its treaties, respect the general maritime law, and refrain from erecting barriers to commerce. The individual States needed similar assurances from each other.¹³⁷

135. *Id.* at 455 (citations omitted).

136. *Miller*, 510 U.S. at 463 (Kennedy, J., dissenting).

137. *Id.* at 466.

Procedure in Admiralty Cases

Prior to 1966, a separate set of rules of procedure was applied in cases filed on the federal courts' admiralty docket. In 1966, the Federal Rules of Civil Procedure eliminated the separate admiralty docket and the admiralty rules of procedure. The Federal Rules merged the actions at law, equity, and admiralty into a single "civil action" and with a few exceptions made the rules applicable to all civil actions, including those that fell within admiralty jurisdiction.

Generally, admiralty actions commenced in federal district courts are subject to the rules that apply to all civil actions, both maritime and nonmaritime.¹³⁸ Thus, the rules that relate to pleadings, joinder of parties and claims, and discovery, for example, are uniformly applied in both admiralty and nonadmiralty cases. However, there are special procedural rules that apply to admiralty cases.

Special Admiralty Rules

There are some differences between admiralty cases and other civil actions, as well as special rules that apply only in admiralty cases.

The greatest difference in admiralty cases is that there is no right to a jury trial.¹³⁹ When a plaintiff has multiple bases, including admiralty, for invoking federal court jurisdiction,¹⁴⁰ he or she must specifically designate the claim as an admiralty claim; otherwise, it will be treated as a nonadmiralty claim.¹⁴¹ This is referred to as the Rule 9(h) designation.

Types of Actions: In Personam, In Rem, Quasi In Rem

A person who seeks to bring an action to vindicate a claim that lies within admiralty jurisdiction may, depending on the circumstances, have several options. If the claim is based on the personal liability of the other party, as is usually the case in an ordinary tort or breach of

138. *See generally* Fed. R. Civ. P. 1.

139. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847). *See also* *St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc.*, 561 F.3d 1181 (11th Cir. 2009).

140. The implications of cases where there are alternative or multiple bases of jurisdiction are discussed *supra* text accompanying notes 63–81.

141. Fed. R. Civ. P. 9(h). *See supra* text accompanying note 63.

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contract situation, the plaintiff may file an *in personam* action against that person in a federal district court.

A second possibility for vindicating a maritime claim is for the plaintiff to bring an action *in rem* directly against the property—typically a vessel—that relates to the claim. In such cases, the vessel—not the vessel’s owner—is the defendant. Under the fiction of “personification,” the vessel is deemed to have a legal personality and, as such, is subject to suit directly whereby it can be held liable for the torts it has committed and for the contracts it has breached. An action *in rem* based on an admiralty claim may be brought only in a federal court and is initiated by “arresting” (seizing) the property. The property must be subject to the jurisdiction of the court. Furthermore, an *in rem* action is not available in all admiralty disputes because the arrest procedure is authorized only to enforce a maritime lien or as otherwise permitted by statute.

Finally, the plaintiff may bring an action that partakes of some of the characteristics of both the *in personam* and the *in rem* actions. This action is referred to as an action *quasi in rem*. It partakes of the *in rem* action in that it is commenced by attachment (seizure) of the property, that is, by subjecting the defendant’s property to the jurisdiction of the court. Yet it partakes of the *in personam* action because it is based on the personal liability of the owner of the property. When a defendant fails to submit to the personal jurisdiction of the court, judgment is limited to the value of the property. An objective of the *quasi in rem* proceeding of attachment is to compel the defendant to personally appear to defend against the claim.

Federal Rules of Civil Procedure Supplemental Rules

There are special rules that apply in admiralty cases under the Supplemental Rules to the Federal Rules of Civil Procedure (hereinafter Supplemental Rules). The Supplemental Rules provide for the commencement of actions by arrest or attachment. With an exception not relevant here, Supplemental Rule C applies only to arrest proceedings in admiralty, and Supplemental Rule B applies only to attachment proceedings in admiralty. Supplemental Rule E¹⁴²

142. Discussed *infra* text accompanying notes 151-61.

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provides additional procedures for actions brought under both Rules B and C.

In Rem Actions: Arrest

An action *in rem* is commenced by arresting property, typically a vessel, under Supplemental Rules C and E of the Federal Rules of Civil Procedure. An *in rem* action in the United States is an action against the named property itself. It need not be based on the personal liability of the property owner, and it is not merely a means for obtaining *in personam* jurisdiction over a nonresident or creating security over an asset of the owner. The law of the United States differentiates between seizures of property by means of a judicial process called an “arrest” and those initiated by a process called an “attachment.” Arrest is a process for asserting *in rem* liability.

An *in rem* action may be brought to enforce maritime liens under the Federal Maritime Lien Act¹⁴³ to enforce other maritime liens created under the general maritime law, and as authorized by statutes such as the Federal Ship Mortgage Act.

Arrest Procedures

To commence an *in rem* action, a plaintiff must file a complaint describing the property subject to the action and stating that such property is in or will be in the court’s judicial district during the pendency of the action. If the property is not within the district where the action is commenced and there is no immediate prospect of its entering the district, the complaint will be dismissed.

The complaint and supporting documentation must be reviewed by a court, and, if the conditions for an action *in rem* appear to exist, the court shall issue an order authorizing a warrant for the arrest of the property. No notice other than execution is required. However, if the property is not released within ten days, the plaintiff must give public notice of the action and the arrest in a newspaper of general circulation. This notice must specify the time within which an answer is required to be filed.

¹⁴³ 46 U.S.C. §§ 31301–31343 (2006).

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A person who asserts a right of possession or ownership of the property, such as the owner of a vessel subject to an action *in rem*, must file a statement of right or interest within ten days after process has been executed, unless the court allows additional time. The claimant must file an answer within twenty days after filing its statement of right or interest. Additional procedural rules pertaining to actions *in rem* are contained in Supplemental Rule E.

An action *in rem* commences when the property subject to arrest is physically seized within the jurisdiction of the court. Subject to the qualifications discussed below, seizure of the property is essential to give the court jurisdiction over the property. It is not enough for the property to be present in the judicial district where the court is located. Likewise, the presence of the owner within the district is insufficient. A court officer (the U.S. marshal) must physically seize the property, actually or constructively, and take it into custody if possible. In the case of an arrest of a vessel, service of the arrest papers on the master and the placing of a “keeper” on the vessel will suffice. In an *in rem* action, jurisdiction over the property is required to give the court jurisdiction over the action, but this requirement, as will be explained, has been relaxed to some extent.

In Personam Actions: Attachment and Garnishment

An alternative method for obtaining *in personam* jurisdiction is sometimes referred to as *quasi in rem* jurisdiction and is accomplished by an attachment of the defendant’s property. The presence of the defendant’s property within a state may be sufficient to constitute the “minimum contacts” required under the Due Process Clause, and the seizure of the property may be sufficient to satisfy the service of process requirement.

Supplemental Rule B of the Federal Rules of Civil Procedure provides for commencing an *in personam* maritime action in federal court by seizing property of the defendant. It authorizes the attachment or garnishment of the defendant’s property.

A plaintiff who has asserted an admiralty or maritime claim *in personam* may include in the verified complaint a request for process to attach the defendant’s goods and chattels, or credits and effects, in the hands of garnishees named in the process for up to the amount

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sued. Rule B is available only where the plaintiff has asserted a maritime or admiralty claim. The property that the plaintiff seeks to attach or garnish must be within the geographic boundaries of the federal judicial district wherein the action is brought.¹⁴⁴

Attachment and garnishment are permissible under Rule B only “if the defendant shall not be found within the *district*.”¹⁴⁵ The plaintiff must submit an affidavit to the effect that the defendant cannot be found within the district where the suit is brought. Usually, the plaintiff will set forth the steps taken supporting the allegation that the defendant is not present within the district.

An allegation that the defendant cannot be found within the district has two dimensions: The defendant is not present for jurisdictional purposes; and the defendant is not present for service of process.¹⁴⁶ To defeat an attachment and secure the release of property, the defendant must show that he or she is present in the district in the jurisdictional sense (minimum contacts) *and* is amenable to service of process personally or through an agent authorized to accept service of process.¹⁴⁷ The fact that the defendant is present within the state is insufficient to bar a Rule B action if the defendant is not present within the geographic area comprising the federal judicial district in which the action has been commenced.¹⁴⁸ When suit is commenced in one district within a state, the defendant cannot defeat an attachment

144. See *Winter Storm Shipping, Ltd. v. TPI*, 310 F.3d 263, 278 (2d Cir. 2002) (holding momentary passage of EFT sufficient to vest jurisdiction in U.S. District Court, S.D.N.Y.), *overruled by* *Shipping Corp. of India v. Jaldhi Overseas PTE Ltd.*, 585 F.3d 58 (2d Cir. 2009) (holding EFT’s temporarily in hands of intermediary bank not attachable property of originator or beneficiary under New York law and, accordingly, not subject to attachment under Rule B). See also *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 91 (2009) (“the rule announced in [*Jaldhi*] has retroactive effect to all cases open on direct review”); *China Nat’l Chartering Corp. v. Pactrans Air & Sea, Inc.*, No. 06 Civ. 13107, 2012 WL 3101274, at *2 n.26 (S.D.N.Y. July 31, 2012) (providing brief history of law of EFT’s and Rule B).

145. Fed. R. Civ. P. Supp. R. B(1) (emphasis added).

146. *Seawind Compania, S.A. v. Crescent Line, Inc.*, 320 F.2d 580 (2d Cir. 1963).

147. *Id.*

148. *LaBanca v. Ostermunchner*, 664 F.2d 65 (5th Cir. 1981).

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merely by showing that state law authorizes service of process on the defendant by serving process on the secretary of state who is located in another federal judicial district in the state.¹⁴⁹

The procedures under Supplemental Rule B are similar in many respects to the procedures required by Rule C. A court must review the complaint and affidavit, and if it appears that the plaintiff is entitled to have process issued, the court will so order. Notice is given to the garnishee or person in possession of the property when process of attachment is served on that person in order to secure physical control of the property by the court. Rule B provides, however, that no default shall be taken unless there is proof that the plaintiff or the garnishee gave notice to the defendant. Notice is not required if the plaintiff or garnishee has been unable to give notice despite diligent efforts to do so.

The garnishee has twenty days from service of process to file an answer. The defendant has thirty days after process has been executed to file its answer.

Attachment and Arrest Distinguished

Supplemental Rule C attachment differs from Supplemental Rule B arrest in several respects. First, Rule C arrest may be used even when the defendant can be found within the district.

Second, to invoke Rule C, the property arrested must be related to the plaintiff's claim. *In rem* actions must be based on a maritime lien or authorized by statute. Such liens arise when a vessel commits a tort or breaches a contract. Thus, the underlying tort or contract that gave rise to the maritime lien serves as the basis for the plaintiff's claim. By contrast, Rule B attachment applies to *any* property of the defendant that is present within the district, even if it is totally unrelated to the events giving rise to the claim and even if it has no maritime character. Attachment may be useful in aid of foreign litigation and arbitration.¹⁵⁰

149. *Id.*

150. *See, e.g.,* Denak Depoculuk ve Nakliyecilik A.S. v. IHX (HK) Ltd., No. 08 Civ. 9746, 2009 WL 497357 (S.D.N.Y. Feb. 26, 2009); *Sea Transport Contractors, Ltd. v. Industries Chimiques du Senegal*, 411 F. Supp. 2d 386, 395

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Third, in a Supplemental Rule C *in rem* proceeding, the plaintiff's claim is predicated on the liability of the property itself. In a Rule B attachment, liability is always predicated on the personal liability of the defendant. If, under the applicable substantive rules, a defendant is not personally liable, his or her property may not be attached. In an *in rem* proceeding, judgment may be entered against the property itself, which would be sold to satisfy the judgment against it. In such a judicial sale, the purchaser takes the property free and clear of all maritime liens. The sale of property to satisfy a judgment *in rem* scrapes all liens from the vessel. To the extent that others had liens against the vessel, those liens attach to the fund generated from the sale of the property. In attachment proceedings, judgment is entered against the owner of the property. The property may be sold to satisfy the judgment against the owner, but this does not necessarily affect the rights of other persons, such as those holding maritime liens or a preferred ship mortgage on the property.

Additional Provisions Applicable to Arrest and Attachment

Supplemental Rule E contains additional procedural provisions that are applicable to both maritime arrest and attachment proceedings.

The Complaint

A complaint filed by a plaintiff under Supplemental Rules B and C must state the circumstances under which the claim arose with such particularity that the defendant or claimant, without requesting additional information, will be able to begin investigating the facts and prepare a responsive pleading. The Federal Rules of Civil Procedure generally are not very demanding with regard to the facts pleaded as the basis for a complaint because they authorize parties to engage in extensive pretrial discovery practices. Supplemental Rule E's requirement that the facts be stated with sufficient particularity for the defendant to begin investigation of the incident on which the

(S.D.N.Y. 2006) (explicitly adopting Ninth Circuit's holding in *Polar Shipping* and allowing Rule B attachment in aid of foreign litigation and arbitration).

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arrest or attachment is based is a more demanding standard.¹⁵¹ Arrest warrants and writs of attachment are issued *ex parte* after the court has reviewed only the documents presented by the plaintiff; the plaintiff's documents must adequately inform the court that process should be issued.

Security for Costs

Supplemental Rule E also authorizes the court to require any party to post security for costs and expenses that may be awarded against it.

Property Not Within the District

Even where the property that is to be seized is not within the geographic bounds of the federal district court, the plaintiff may still apply for the issuance of process for its seizure. The plaintiff may then request that execution of process be delayed until the property is brought within the court's territorial jurisdiction or until some arrangement by way of stipulation may be agreed on by the parties. Property may not be seized under Supplemental Rules B, C, and E unless it is within the district, because the process authorizing its seizure can only be served within the district.

Necessity for Seizure and Retention—Exceptions

Under certain circumstances an action may proceed *in rem* or *quasi in rem* without an actual physical seizure or retention of the property in question. Supplemental Rule E states that where process of arrest or attachment has issued, "such process shall be stayed, or the property released, on the giving of security, to be approved by the court or clerk, or by stipulation of the parties, conditioned to answer the judgment of the court."¹⁵²

Under that provision, if property is seized it may be released upon posting of a sufficient bond. With regard to the arrested property, the plaintiff's maritime lien is transferred from that property to the bond

151. *Riverwayown Co. v. Spivey Marine & Harbor Serv. Co.*, 598 F. Supp. 909 (S.D. Ill. 1984).

152. Fed. R. Civ. P. Supp. R. E(5)(a).

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that has been provided as security. Consequently, the plaintiff no longer has a maritime lien on the property.

Rule E provides that even where the property has not been seized, the parties (plaintiff and defendant) may enter into a stipulation that

(1) the property will not be seized; (2) the matter may proceed *in rem* or *quasi in rem*, as the case may be; (3) the defendant will undertake to honor any judgment; [and] (4) the defendant will consent to the court's jurisdiction over the action.

In reality, this means that the parties may confer *in rem* or *quasi in rem* jurisdiction upon the court by express agreement.¹⁵³ *In rem* or *quasi in rem* jurisdiction may be conferred by waiver as well.¹⁵⁴ Even where no property has been seized, a defendant who makes a general appearance and responds to the substance of the plaintiff's complaint or who asks for affirmative relief without clearly reserving an objection to the court's jurisdiction will be considered to have waived the jurisdictional defect.¹⁵⁵ At the extreme, this means that an action may proceed *in rem* notwithstanding the fact that the property was never seized within the court's jurisdiction, the parties never agreed to the court's jurisdiction, such as by stipulation, and the defendant never expressly waived the right to object to the court's jurisdiction by failing to promptly and properly make an objection.

The expenses of seizing and keeping property are provided for by federal statute.¹⁵⁶

Post-Arrest/Post-Attachment Hearing

Supplemental Rule E(4)(f) confers upon a person whose property has been arrested or attached the right to a prompt judicial hearing. At the hearing, the plaintiff has the burden of proving that the arrest or attachment was authorized and lawful.

153. *Id.*

154. *Cactus Pipe & Supply Co. v. M/V Montmartre*, 756 F.2d 1103, 1107–11 (5th Cir. 1985).

155. Fed. R. Civ. P. Supp. R. E(8).

156. 28 U.S.C. § 1921 (2006).

Release of Property—Security

The nature and amount of security required to release property that has been seized or to stay execution of process prior to seizure may be fixed by agreement of the parties. If the parties fail to agree, the court will fix the security at an amount sufficient to cover “the plaintiff’s claim fairly stated with accrued interest and costs.”¹⁵⁷ This amount of security may not exceed twice the amount of the plaintiff’s claim or the value of the property as determined by appraisal.

When security such as a surety bond is provided to obtain the release of property that has been arrested, it is usually claim- and party-specific. This means that the surety has undertaken to pay a specified claim asserted by a specified plaintiff. The bond does not secure other claims.¹⁵⁸ When property is released, the plaintiff’s lien is transferred to the security. The plaintiff no longer has a lien on the res. The security in the court’s possession is sufficient to support *in rem* jurisdiction over the plaintiff’s claim and also provides security to pay the plaintiff’s claim if the plaintiff is successful. That security, however, does not support *in rem* jurisdiction over any claim asserted by other parties, and other parties cannot look to the surety for the satisfaction of their claims.¹⁵⁹ Plaintiffs who seek to intervene, or other defendants who seek to assert cross-claims against the ship, must establish *in rem* jurisdiction independent of the original plaintiff’s action either prior to the release of the res or subsequent thereto. In other words, each party intending to assert an *in rem* action against the property must arrest the vessel unless the vessel owner stipulates to the *in rem* jurisdiction of the court.

A shipowner who anticipates multiple claims against its vessel may file a general bond or stipulation, with sufficient surety, which undertakes to satisfy any judgment of that court in all actions that may be subsequently brought in the court in which the vessel is attached or arrested.¹⁶⁰ Where such a bond is filed, execution of

157. Fed. R. Civ. P. Supp. R. E(5)(a).

158. *Id.*

159. *Transorient Navigators Co., S.A. v. M/S Southwind*, 788 F.2d 288 (5th Cir. 1986).

160. Fed. R. Civ. P. Supp. R. E(5)(b).

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process shall be stayed as long as the amount secured by the bond or stipulation is at least double the aggregate amount claimed by all plaintiffs in actions begun and pending in which arrest or attachment process against the vessel has been issued.

Property attached, garnished, or arrested shall be released by the U.S. marshal upon acceptance and approval of a stipulation, bond, or other security, signed by the party in whose behalf the property is detained or its attorney, that expressly authorizes the property's release. However, all costs and charges of the court and its officers, including the marshal, must first be paid. The marshal may not release the property in any other circumstance except by court order. However, the clerk of the court, upon receipt of approved security as provided by law and the Supplemental Rules, may enter an order "as of course" releasing the property. Likewise, where an action is dismissed or discontinued, the clerk may enter an order as of course releasing the property. Notwithstanding that Federal Rule of Civil Procedure 62 provides for an automatic stay in situations where a court has dismissed an action, it has been held that this does not override the provision of Supplemental Rule E, which authorizes the clerk to release property as of course when an action has been dismissed.¹⁶¹ If the plaintiff seeks to contest a dismissal by the district court, the plaintiff should specifically request that the court or an appellate court order a stay of the release of the detained property.

If the initial seizure vested the court with jurisdiction over the property, subsequent release of the property does not divest a court of first instance or an appellate court of jurisdiction over the matter.¹⁶² (At one time, it was thought that the release of property seized pursuant to an arrest or an attachment without security or other stipulation deprived the court of jurisdiction to proceed further unless the release was procured by fraud or resulted from a mistake.) A court may decide, however, that the circumstances do not warrant proceeding further if there is no res to satisfy a judgment.¹⁶³

161. *Alyeska Pipeline Serv. Co. v. The Vessel Bay Ridge*, 703 F.2d 381 (9th Cir. 1983), *cert. dismissed*, 467 U.S. 1247 (1984).

162. *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80 (1992).

163. *Id.* at 85, 88.

Increase or Decrease of Security; Countersecurity

Supplemental Rule E provides for certain practical contingencies. Thus, the court may order either a reduction of or an increase in security where appropriate. Furthermore, where a counterclaim, including a claim for wrongful seizure arising out of the same transaction or occurrence, is asserted by a defendant who has provided security on the original claim, the court may order the plaintiff to give security on the counterclaim.

Restricted Appearance

Sometimes a party whose property has been attached or arrested faces a dilemma because it may want to defend against that claim without submitting to the jurisdiction of the court in respect to other claims for which arrest, attachment, and garnishment are not available. Supplemental Rule E specifically authorizes a restricted appearance; the restrictive nature of the appearance must be expressly stated.

Sale of Property

All sales of property shall be made by the U.S. marshal and the proceeds paid into the registry of the court, where they will be dispersed according to law.

2. Commercial Law

Introduction

The heart of maritime law, in its international context, lies in the transportation of goods and passengers for compensation. Ships today are larger, faster, and, with the advent of “containerization,”¹⁶⁴ can carry cargo more safely than vessels of 100 years ago.

Contracts to transport cargo from one place to another are called “contracts of carriage” or “contracts of affreightment.” The two terms are used interchangeably. The “players” in waterborne transport include the following: owners, the persons who own commercial vessels; charterers, persons who contract to use the carrying capacity of a vessel owned by another; shippers, persons who want their goods transported from one place to another; consignees, persons who are entitled to receive the goods after they have been discharged from the carrying vessel; freight forwarders (sometimes called ocean freight forwarders), transportation specialists who assist shippers by arranging for the transport of their goods; and nonvessel operating common carriers (NVOCCs), persons who undertake to transport goods of shippers as though they had their own vessels but who, in reality, contract with owners or charterers of vessels to actually perform the transportation function.

164. The term “container” may be used in two ways. First, it may be used generically to refer to any packaging of cargo, whether made of cardboard, plastic wrapping, or wooden crates. Second, and more commonly, it is used as a term of art to refer to a large metal box either twenty or forty feet long and abbreviated as either a TEU (twenty-foot equivalent) or an FEU (forty-foot equivalent). Various cargoes are placed in these containers and can be carried more safely because they have the metal box to protect them. Containerization also allows the consolidation of smaller lots of cargo and provides those lots with the same protection as cargo shipped in container lots.

Charter Parties

Definition and Types

A charter party is a highly standardized written document¹⁶⁵ that provides the contractual arrangements for one party (the charterer) to hire the carrying capacity of a vessel, either in whole or in part, owned by another party. Generally, charter parties are subject to the rules and requirements of contract law. Charter party forms¹⁶⁶ are used worldwide. Many have been drafted to take into consideration the specific needs of particular trades; others are more general in form and are not adapted to a specific trade. There are three basic types of charter parties: a voyage charter, a time charter, and a demise charter.

Under a voyage charter, the owner of the vessel agrees to carry cargo from one port to another on a particular voyage or voyages. The vessel is manned and navigated by the owner's crew. A voyage charter may be and usually is used as a contract of affreightment—that is, for the shipper's purpose of sending its goods from the port of origin to a port of destination. To the extent that a voyage charterer obtains only the carrying capacity of a particular vessel, the charterer is not responsible for maintenance, repairs to the vessel, or injuries to third parties arising from the crew's operational negligence. A voyage charterer usually is not liable for expenses such as bunkers (fuel).

A time charter is a contract for the use of the carrying capacity of a particular vessel for a specified period of time (months, years, or a period of time between specified dates). As with a voyage charter, the vessel owner under a time charter is responsible for the navigation and management of the vessel, subject to conditions set out in the charter party. The vessel's carrying capacity is leased to the charterer for the time period fixed by the charter party, allowing for unlimited voyages within the charter period. Therefore, the vessel is under the charterer's orders as to ports of call, cargo carried, and other matters related to the charterer's business. The master and crew remain employees of the owner and are subject to the owner's orders with

165. A charter party entered into orally is enforceable. *Union Fish Co. v. Erickson*, 248 U.S. 308 (1919).

166. Most of the charter party forms are reproduced in John C. Koster, 2B-E *Benedict on Admiralty* (7th rev. ed. 2000).

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regard to the navigation and management of the vessel. Because a time charterer obtains only the carrying capacity of a particular vessel, the charterer is not responsible for maintenance, repairs to the vessel, or injuries to third parties arising from the crew's operational negligence. Time charterers usually are responsible for expenses of operating the vessel.

In a demise charter, the charterer not only leases the carrying capacity of the vessel but, unlike a time or voyage charter, also obtains a degree of control over the management and navigation of the vessel. The charterer becomes, in effect, the owner of the vessel *pro hac vice* for the duration of the charter.¹⁶⁷ The test for whether a charter party is a demise charter is whether the owner has turned over to the charterer “the possession, command, and navigation” of the vessel during the period it is in effect. When a vessel with a preexisting master and crew is under a demise charter, the master and crew may remain on the vessel and operate the vessel for the charterer as a provision of such agreement. The master and crew are subject to the orders of the charterer and its agents, and they are considered its employees. Under a demise charter, an owner may also turn over the vessel to the charterer without a master and crew. A demise charter of this type is also referred to as a bareboat charter.¹⁶⁸

Under a demise charter, the legal relationship between the owner and the charterer is significantly different from that created by a time or voyage charter. Because a demise charter transfers the possession and control of the vessel to the charterer, one who takes a vessel on demise is responsible for maintenance, repairs, or damages caused to third parties by the crew's negligent navigation of the vessel. Thus, the owner who has demised its vessel will generally not be liable *in personam* for the fault or negligence of the crew—the charterer will be primarily liable. Demise charterers usually are responsible for the vessel's operating expenses.

167. *United States v. Shea*, 152 U.S. 178 (1894).

168. *Forrester v. Ocean Marine Indem. Co.*, 11 F.3d 1213 (5th Cir. 1993). For a broad overview of charter parties, see generally Gilmore & Black, *supra* note 14, §§ 4-1 to 4-24.

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In addition to these three types of charter parties, a number of variations have been created to accommodate containerization and the changing nature of the shipping industry.¹⁶⁹

The Contract

Most charter party transactions use standardized printed forms. Some of the clauses contain blank spaces that require the parties to supply information. Typically, the parties must specify the names of the owner and of the charterer and the amount of payment, referred to as “hire” or “charter hire.” Obviously, a voyage charter must specify the voyage to be undertaken, and a time charter must specify the length of time. In addition, a time charter requires information about the physical characteristics of the vessel and any restrictions on the use of the vessel. The charter form also sets out standard terms and conditions that apply under the contract. Charter parties typically are negotiated contracts and, in contrast to transport pursuant to bills of lading, are often marked up—that is, provisions are added, deleted, or modified. These changes reflect the market and the relative financial strength of the owner and the charterer.

Typical Areas of Dispute

Freedom of contract is the touchstone to the resolution of charter party disputes between owner and charterer. The rules applicable to charter party disputes derive from the terms of the charter party itself and generally do not implicate public policy concerns. These are contracts between businesspersons, negotiated at arm’s length, often through intermediaries (i.e., brokers who are experts in the field). It is often assumed that the contracting parties are sophisticated and that considerations of consumer protection are absent. Confirmation of this view is the fact that key terms, such as rate of charter hire and length of charter term, are often subject to hard bargaining. This does not mean that the parties negotiate from equal positions of strength.

¹⁶⁹. Commonplace variations of charter parties include slot, space, and cross charters. See Carroll S. Connard, 2A *Benedict on Admiralty*, ch. XX (7th rev. ed. 2001). For example, the English Court of Appeal characterized the widely used slot charter as a “[voyage] charter of part of a ship.” *The Tychy*, [1999] 2 *Lloyd’s Rep.* 11 (U.K.).

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Like other areas of commercial transactions, supply and demand may strengthen an owner's hand when vessels are in short supply or may put charterers in a better position when there is a surplus of tonnage available in the charter market. The advantages that inhere in these circumstances are not the equivalent of overreaching.

Most terms used in standard charter parties are terms of art that have well-established and well-understood meaning within the industry. Old-fashioned as some may seem, the terms (including those described below) ought to be interpreted and applied in litigation as they are understood in the industry.

Misrepresentation

The term "misrepresentation" includes not only fraud or intentional misrepresentation but also any situation where a vessel does not conform to factual representations as stated by the owner in the charter party. Courts take a pragmatic approach, and resolution of a dispute may hinge both on the materiality of the representation or undertaking and whether the charterer seeks damages or termination of the contract.¹⁷⁰ The following has been said in regard to termination:

Under the American precedents, it is more important to distinguish between cases involving a misdescription determined prior to delivery of the vessel and one occurring after delivery. In the former a refusal to accept the vessel has been held justified even where the deviation from the represented characteristic is relatively small.

Once delivery of the vessel has been accepted, however, the charterer is entitled to refuse to perform the charter only if there is a material breach on the part of the owner.¹⁷¹

Warranties

Size and Speed. A breach of an express warranty as to size and speed may entitle a charterer to recover damages.¹⁷² At the election of the

170. *Aaby v. States Marine Corp.*, 181 F.2d 383 (2d Cir.), *cert. denied*, 340 U.S. 829 (1950).

171. Michael Wilford, Terence Coghlin, John D. Kimball, *Time Charters* 87 (6th ed. 1995).

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charterer, the breach of such an express warranty may provide a basis for rescission. Rescission of the charter party is available only under circumstances where the breach is material or where it is discovered before the vessel has been accepted by the charterer.¹⁷³

Seaworthiness. In general, a shipowner has a duty to ensure that the vessel is seaworthy and capable of transporting the cargo for which it has been chartered.¹⁷⁴ A charter party that describes the vessel as “with hull, machinery, and equipment in a thoroughly efficient state” or “that on delivery the ship be tight, staunch, strong and in every way fitted for the service” gives rise to a warranty of seaworthiness. In the absence of an express and unambiguous stipulation or a controlling statute to the contrary, a warranty of seaworthiness will be implied by law.¹⁷⁵

The parties may stipulate that there is no warranty of seaworthiness, but such agreements are not favored¹⁷⁶ and will be enforced only if they “clearly communicate that a particular risk falls on the [charterer].”¹⁷⁷

Breach of the warranty of seaworthiness does not by itself confer upon the charterer the right to repudiate. Repudiation by a charterer is permissible only where the breach of the owner’s undertaking of seaworthiness is so substantial as to defeat or frustrate the commercial purpose of the charter.¹⁷⁸ This view is consistent with the modern approach that the undertaking of seaworthiness is to be treated like any other contractual undertaking. Thus, an insubstantial breach that does not defeat the object of the contract will not justify repudiation

172. *Romano v. W. India Fruit & S.S. Co.*, 151 F.2d 727 (5th Cir. 1945); *The Atlanta*, 82 F. Supp. 218 (S.D. Ga. 1948).

173. *Romano*, 151 F.2d 727.

174. *The Caledonia*, 157 U.S. 124 (1895).

175. For a discussion of cases, see Raoul P. Colinviaux, *Carver on the Carriage of Goods by Sea* 245 (7th ed. 1952). See also Richard A. Lord, 12 *Williston on Contracts*, § 34.3 (4th ed. 1999).

176. *The Carib Prince*, 170 U.S. 655 (1898).

177. *A. Kemp Fisheries, Inc. v. Castle & Cooke, Inc.*, 852 F.2d 493 (9th Cir. 1988); *Hauter v. Zogarts*, 14 Cal. 3d 104 (Cal. 1975).

178. *S.S. Knutsford Co. v. Barber & Co.*, 261 F. 866 (2d Cir. 1919), *cert. denied*, 252 U.S. 586 (1920).

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unless expressly made a condition precedent to a party's performance of its obligations.¹⁷⁹

Likewise, the terms of the charter party must be examined carefully because the parties may have agreed to a lesser undertaking with respect to seaworthiness. For example, an owner may have expressly undertaken only to exercise "due diligence" to provide a seaworthy vessel.

Temporary Interference with Charterer's Use of the Vessel

Charter parties commonly provide for contingencies, short of frustration, that result from the inability of the charterer to use the ship as intended. This may occur in the case of a mechanical malfunction or illness of the crew or some other factor that renders a vessel temporarily unusable. A common provision in charter parties is an "off hire" or "breakdown" clause. Under an off hire clause, a charterer's duty to pay hire ceases in the event that it is deprived of the use of the vessel, either in whole or in part, as a result of some deficiency of the vessel, its equipment, or the crew.¹⁸⁰ There are many variations in the wording of an off hire clause, and sometimes there are disputes as to the applicability of the particular clause in question.¹⁸¹

Sometimes the inability to use a vessel is unrelated to the physical condition of the vessel itself or its crew, such as where a strike by longshoremen or government intervention prevents a vessel from sailing or from loading or discharging cargo. Other clauses in the charter party may determine who bears the risk of such events. Under a "mutual exceptions" clause, for example, if a party is prevented from fulfilling its obligations because of the occurrence of a circumstance enumerated in the mutual exceptions clause, such nonperformance is not considered to be a breach of the charter party contract. "Restraint of princes" (an embargo) is usually one of the

179. *Aaby v. States Marine Corp.*, 181 F.2d 383 (2d Cir.), *cert. denied*, 340 U.S. 829 (1950).

180. *The Yaye Maru*, 274 F. 195 (4th Cir.), *cert. denied*, 257 U.S. 638 (1921).

181. *See, e.g., S.S. Knutsford*, 261 F. 866 (2d Cir. 1919), *cert. denied*, 252 U.S. 586 (1920).

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circumstances enumerated in a standard mutual exceptions clause. Thus, the action of a government that prevents an owner from fulfilling its obligation to the charterer—for example, by placing the vessel in quarantine—will excuse the nonperformance of the owner.¹⁸² Other circumstances commonly excepted are acts of God or of public enemies.

Safe Port and Safe Berth Provisions

In time and voyage charters there are express or implied obligations that the charterer will not require the vessel to call at an unsafe port or enter an unsafe berth to load, discharge, or take on bunkers. Time and voyage charter parties usually contain a provision referred to as a “safe port/safe berth” clause that purports to place on the charterer the risks to the vessel posed by the particular ports at which the vessel will call and the berths where the vessel will lie. Under U.S. law, it is not clear whether this clause in a charter party obliges the charterer to “warrant” the safety of ports and berths entered. The Fifth Circuit has held that a safe berth clause does not impose strict liability upon a voyage charterer, and the charterer is not liable for damages arising from an unsafe berth where the charterer has exercised due diligence in the selection of the berth.¹⁸³ On the other hand, the Second Circuit has held that where a time charter party includes a safe port/berth clause, the charterer warrants the safety of the berth it selects.¹⁸⁴

In any event, under a safe port/berth clause the master of a vessel may refuse to proceed to an unsafe port/berth nominated by the charterer without placing the owner in breach of the charter.¹⁸⁵

182. *Clyde Commercial S.S. Co. v. W. India S.S. Co.*, 169 F. 275 (2d Cir. 1909).

183. *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990).

184. *Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469, 472–73 (2d Cir.), *cert. denied*, 419 U.S. 998 (1974); *Ore Carriers of Liberia, Inc. v. Navigen Co.*, 435 F.2d 549 (2d Cir. 1970); *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169 (2d Cir. 1962), *cert. denied*, 372 U.S. 967 (1963). *But see* *Hastorf v. O’Brien*, 173 F. 346, 347 (2d Cir. 1909) (holding charterer to reasonable man standard); *The Terne*, 64 F.2d 502 (2d Cir.) (holding charterer immune from damages when ship caught in ice and damaged), *cert. denied*, 290 U.S. 635 (1933).

185. *In re The E. Eagle*, 1971 AMC 236 (N.Y. Arb. 1970).

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Notwithstanding a safe port/berth provision, negligence on the part of the master may relieve a charterer of its liability to the extent that such negligence permits the fact finder to conclude either that the port was safe because the peril could have been avoided by prudent seamanship or that, in the case of an unsafe port, the master's conduct was an intervening, superseding cause of the resulting damages. Obviously, not every risk taken by a master will be considered a superseding cause.¹⁸⁶ If the casualty results from the combined negligence of the charterer and the vessel's master or other agent of the owner, damages are to be apportioned according to the respective fault of the parties.¹⁸⁷

Demurrage and Detention

In a time charter, the charterer has the vessel's carrying capacity at its disposal for a specified period of time. As such, it makes no difference to the owner whether the charterer makes efficient use of the time-chartered vessel. By contrast, in voyage charters, the time during which the voyage charterer may use the vessel is measured by the length of time it takes to complete the voyage. Obviously, it is to the owner's advantage to have the voyage completed as quickly as possible: The sooner an owner has the vessel at his or her disposal, the sooner it can be used for the owner's purposes or chartered to another person. Consequently, a frequent issue in voyage charter party disputes is the shipowner's claim for "demurrage."

Voyage charter parties provide a time frame for loading and unloading the vessel. Under such a provision, the charterer is allowed "laytime"—a specified period (hours or days) during which it can perform its loading and unloading operations without incurring charges in excess of the agreed rate of charter hire. These clauses vary greatly. If a charterer takes longer to load or discharge cargo than is provided in the charter party (i.e., it exceeds its laytime), it will be charged an additional amount called "demurrage." Thus, demurrage

186. *Am. President Lines, Ltd. v. United States*, 208 F. Supp. 573, 577-78 (N.D. Cal. 1961).

187. *Bd. of Comm'rs of Port of New Orleans v. M/V Space King*, 1978 AMC 856 (E.D. La. 1978).

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refers to the sum that a charterer agrees to pay for detaining the chartered vessel for that period of time that exceeds the laytime. It should be noted that where a charterer completes loading or unloading in a period of time less than that specified as laytime, the charterer has conferred a benefit on the owner and may be entitled to financial allowance referred to as “dispatch.”

A typical demurrage clause in a charter party specifies the amount of demurrage that must be paid and the maximum amount of time allowed for demurrage. In this respect, demurrage should be distinguished from detention. Whereas demurrage is a contractual charge imposed on the charterer for exceeding laytime, detention is a legal remedy, in the form of damages, available to the shipowner after the period during which demurrage has expired.¹⁸⁸ Nonetheless, detention is recoverable only where the owner can demonstrate that it has sustained damages, such as an opportunity cost.¹⁸⁹

Withdrawal

A charter party may include a clause permitting the owner to withdraw the vessel where hire payments are not made in accordance with the requirements set out in the written agreement. A shipowner may insist on strict compliance with these requirements, and where these requirements are not complied with, courts are likely to uphold the owner’s right to withdraw its vessel. Owners may not withdraw a vessel while cargo is on board.¹⁹⁰

Subcharters

The right of a charterer to sublet or subcharter a vessel depends on the wording of the charter party. Charter parties often expressly authorize a charterer to subcharter the vessel and usually specify that a subcharter arrangement does not relieve the principal charterer of its

188. *See, e.g.,* Gloria S.S. Co. v. India Supply Mission, 288 F. Supp. 674 (S.D.N.Y. 1968).

189. *Trans-Asiatic Oil Ltd., S.A. v. Apex Oil Co.*, 626 F. Supp. 718 (D.P.R. 1985) (refusing to award demurrage where there was a delay but owner had no other charters for the vessel and subsequently sold it).

190. *Luckenbach v. Pierson*, 229 F. 130 (2d Cir. 1915).

obligations to the owner under the head or primary charter party. The owner is not in privity of contract with subcharterers who may not rely on the terms either expressed or implied in the head charter party. The head charter party may, in order to protect the owner's right to hire, contain a provision giving the owner a lien on sub-freights whereby the owner steps into the shoes of the charterer with respect to freight due the charterer from cargo interests.

Liability of the Owner for Damage or Loss of Goods

Charter parties, per se, are excluded from the terms of the Carriage of Goods by Sea Act (COGSA).¹⁹¹ Any disputes between the owner and charterer must be resolved according to the terms of the charter party.¹⁹² Courts generally apply the rule of freedom of contract in the interpretation and enforcement of charter parties. This approach enables the parties to bargain freely and to include in the contract any stipulation allowed by law. As such, the parties are free to incorporate the terms of COGSA by reference into the charter party, and they frequently do. Thus, various provisions of COGSA often become terms of a charter party through contractual stipulation. The parties are, of course, free to modify, or even exclude, COGSA provisions in the contract. Such modifications are permissible as long as COGSA does not apply by operation of law.

Even where a carrying vessel is under charter, however, there are circumstances in which COGSA is applicable as a matter of law. This occurs where the owner has issued a bill of lading to the charterer, who in turn has transferred the bill of lading to a third party, such as a consignee. These situations are discussed in the following section.

Arbitration Clauses

Most charter parties contain a clause whereby the parties agree to resolve by arbitration disputes that arise under the charter party.

191. 46 U.S.C. § 30701 note (2006).

192. See cases discussed in Gilmore & Black, *supra* note 14, § 4-2, at 175.

These provisions are enforceable and, under certain circumstances, may bind others, such as a consignee.¹⁹³

Transport under Bills of Lading

Introduction

Shippers often entrust their goods to a carrier pursuant to a straightforward contract of carriage, which, in essence, simply states: “I, as carrier, agree to carry your goods from port ‘A’ to port ‘B,’ and you, as shipper, agree to pay me a specified amount as compensation.” In its basic form, these contracts to carry goods by water are no different from those that cover the overland transport of goods. In carriage by water, the contract of carriage is often embodied in a negotiable bill of lading and, although today there are other forms of shipping documents used in particular trades, many shipments are still made pursuant to negotiable bills of lading.¹⁹⁴ A “bill of lading” is a multifunctional document: It embodies a contract of carriage and also serves as a receipt by the carrier that it has received the goods. The bill of lading is a document of title as well as a document of delivery.

Prior to the enactment of federal legislation, a “common carrier” was analogized to an insurer of the goods in its custody. It was held liable for loss or damage to goods regardless of fault on its part and could avail itself only of a limited number of defenses, such as an act of God or public enemy. In the nineteenth century, carriers began to insert in their bills of lading clauses of nonresponsibility that purported, as a matter of contract, to exculpate the carriers from liability for loss or damage resulting from specified causes. Some of the typical grounds for exculpation included circumstances over which the carrier had no control, such as acts of God or public enemy, and some over which the shipper had primary responsibility, such as

193. See, e.g., *Salim Oleochemicals, Inc. v. M/V Shropshire*, 169 F. Supp. 2d 194 (S.D.N.Y. 2001); *Kanematsu Corp. v. M/V Gretchen W*, 897 F. Supp. 1314 (D. Or. 1995); *Midland Tar Distillers, Inc. v. M/T Lotos*, 362 F. Supp. 1311 (S.D.N.Y. 1973).

194. For carriage of goods pursuant to bills of lading, see generally William Tetley, *Marine Cargo Claims* (3d ed. 1988).

deficiency of packing or inherent vice of the goods. Use of these exculpatory clauses was not unique to marine transportation. However, carriers sometimes went beyond exculpating themselves for nonfault-based causes. For example, some ocean carriers inserted clauses exculpating themselves for loss or damage caused by errors in navigation and management of the crew. Some clauses even placed the risk of all loss and damage on the shipper, thereby making the shipper an insurer of its own cargo. In other words, by these exculpatory clauses, carriers opted out of liability even where losses were occasioned through their own negligence. The courts in the United States refused to enforce clauses that purported to exempt a carrier from liability based on its negligence. In England, however, the rule of freedom of contract applied whereby carriers were permitted to contractually opt out of liability even when it was fault-based. Great uncertainty prevailed because liability might well depend on where a case was litigated, whether U.S. or U.K. law applied, and whether the carrier was a U.S. or foreign vessel.

Because of the various interpretations of exculpatory clauses, organizations representing shippers, carriers, banks, and insurance companies began discussions to achieve uniformity in the rules of liability to be applied in international shipping. Before agreement was reached, the United States enacted the Harter Act of 1893.¹⁹⁵ Thereafter, the various groups negotiating for a uniform approach reached an agreement commonly referred to as the “Hague Rules,”¹⁹⁶ which are more comprehensive than the provisions contained in the Harter Act. The United States adopted the Hague Rules when it enacted COGSA in 1936.¹⁹⁷ Many other countries, including most

195. 46 U.S.C. §§ 30701-30707 (2006).

196. International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (the Hague Rules), 51 Stat. 233; T.S. No. 9331; 120 U.N.T.S. 155 entered into force for the United States, Dec. 29, 1937.

197. 46 U.S.C. § 30701 note, Introductory Para., §§ 1-16 (2006). In 2006 Congress re-codified Title 46 that deals with Shipping. In doing so, it omitted the Carriage of Goods by Sea Act. The solution was to include COGSA as a Note to § 30701 which is the first section of the Harter Act. Thus, a reference to former 46 U.S.C. § 1301 will be cited hereinafter to the individual sections of COGSA within the note, e.g., COGSA § 1.

U.S. trading partners, likewise adopted the Hague Rules. Subsequently, the international community recommended amendments to the Hague Rules known as the Visby Amendments.¹⁹⁸ They have not been adopted by the United States, although many of our trading partners have adopted them. Another legal regime, the Hamburg Rules,¹⁹⁹ was promulgated by the United Nations. The Hamburg Rules have not been adopted by the United States or any major maritime or industrial nation. A new carriage of goods regime known as the Rotterdam Rules was approved by the United Nations in December 2008.²⁰⁰ It is too early to predict whether the Convention will come into force or whether the U.S. will ratify it.

Legislation

In the United States, carriage of goods by sea is governed primarily by three statutory regimes: the Harter Act,²⁰¹ COGSA,²⁰² and the Federal Bills of Lading Act, commonly referred to as the Pomerene Act.²⁰³ These statutes apply to contracts of carriage either by force of law or by express incorporation into a bill of lading, charter party, or other contract of carriage.

Bills of Lading under the Pomerene Act

Applicability

The Pomerene Act applies to bills of lading covering interstate transport and shipments departing from U.S. ports in the foreign

198. Protocol to Amend the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Visby Amendments), Brussels, February 1968; (U.N.) Register of Texts, ch. 2 (Visby Amendments to Hague Rules are also referred to as Hague-Visby Rules).

199. United Nations Convention on the Carriage of Goods by Sea Act (Hamburg Rules), Hamburg, Mar. 1978, U.N. doc. A, conf. 89/14 (1978), *reprinted in* 17 ILM 608 (1978).

²⁰⁰ United States Conventions on Contracts for International Carriage of Goods Wholly or Partly by Sea, UN A/Res./122.

201. 46 U.S.C. §§ 30701-30707 (2006).

202. COGSA Introductory Para., §§ 1-16.

203. 49 U.S.C. §§ 80101-80116 (2000).

trade.²⁰⁴ It applies not only to water transport but to overland transport as well. Bills of lading issued for shipments inbound to the United States are not subject to the Pomerene Act.

Negotiable and Nonnegotiable Bills of Lading

The Pomerene Act defines two kinds of bills of lading: negotiable bills of lading and nonnegotiable bills of lading, otherwise referred to as straight bills of lading. A negotiable bill of lading must state “that the goods are to be delivered to the order of a consignee; and must *not* contain on its face an agreement with the shipper that the bill is not negotiable.”²⁰⁵ One of the important characteristics of a negotiable bill is that a person to whom the bill is negotiated acquires title to the goods, and the carrier who issued the bill becomes obligated to the person to whom the bill has been negotiated to hold the goods under the terms of the bill as if the carrier had issued the bill directly to that person.²⁰⁶ A bill of lading is nonnegotiable if it “states that the goods are to be delivered to a consignee.”²⁰⁷ The term “nonnegotiable” or “not negotiable” must be stated on the bill.²⁰⁸

Carrier Obligation and Liability

The Pomerene Act obligates a carrier to deliver the goods covered by a nonnegotiable bill of lading on demand of the consignee named in the bill. With respect to a negotiable bill, the Act provides that the goods should be delivered to the person in possession of the bill of lading.²⁰⁹

A common carrier is liable for misdelivery if it delivers the goods to a person not entitled to possession. A common carrier may also be liable for issuing a bill of lading for goods it has not received or for misdescriptions contained in the bill of lading.²¹⁰ However, a carrier

204. *Id.* § 80102.

205. *Id.* § 80103(a)(1).

206. *Id.* § 80105(a).

207. *Id.* § 80103(b)(1).

208. *Id.* § 80103(b)(2).

209. *Id.* § 80110(b).

210. *Id.* § 80113(a).

is not liable under this provision when the goods are loaded by the shipper and the bill describes the goods in terms of marks or labels, or in a statement about kind, quantity, or condition, or the bill is qualified by words “said to contain” or “shipper’s weight, load, and count,” or other words that indicate that the carrier is relying on the shipper’s representations to the extent that the carrier has no independent knowledge of the goods.²¹¹ Likewise, a carrier is not liable for improper loading if the shipper loads the goods and the bill of lading so indicates.²¹²

Where goods shipped in bulk are loaded by a shipper who makes available to a common carrier the means for weighing the goods, a request by the shipper for the carrier to make a determination of the kind and quantity of the goods precludes a carrier from subsequently qualifying the bill of lading by the insertion of such terms as “shipper’s weight.”²¹³ In cases where goods are loaded by a common carrier, the carrier is obligated to count the packages or determine the kind and quantity of bulk cargo. In these situations, the insertion by the carrier of some qualification, such as “shipper’s weight, load, and count,” has no legal effect except for goods concealed in packages.²¹⁴

The Harter Act

Applicability and Duration

The Harter Act of 1893²¹⁵ expressly applies to transportation of goods by water between U.S. ports and between U.S. and foreign ports.²¹⁶ The statute is applicable from the time a carrier receives cargo into its custody until proper delivery has been made. Proper delivery is made when the carrier or its agent discharges the cargo onto a fit wharf, gives notification to the consignee, makes the cargo accessible to the consignee, and allows the consignee a reasonable opportunity to take

211. *Id.* § 80113(b)(2).

212. *Id.* § 80113(b)(1).

213. *Id.* § 80113(d)(1).

214. *Id.* § 80113(d)(2).

215. 46 U.S.C. §§ 30701-30707 (2006).

216. *Id.* § 30702.

possession of the cargo.²¹⁷ Proper delivery also occurs when cargo is turned over to a designated authority pursuant to a regulation or custom of the port.²¹⁸ The Harter Act does not apply to contracts for the carriage of live animals.²¹⁹

The Harter Act has three major components: (1) it prohibits carriers from incorporating certain exculpatory clauses into contracts of carriage; (2) it provides certain defenses to the carrier; and (3) it requires the carrier to issue a bill of lading to the shipper upon request.

Prohibition of Exculpatory Clauses under the Harter Act

A carrier, which includes the vessel, manager, agent, master, and the owner of the vessel, is prohibited from inserting any provision into a bill of lading or shipping document whereby it is completely relieved from liability for loss or damage to cargo “arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery.”²²⁰ However, a carrier may insert into a contract of carriage a clause that provides that it is liable only for damage caused by its fault, or that it is not liable for any damage or loss that was not caused by its fault.²²¹ Furthermore, the Harter Act has been interpreted as permitting a carrier to insert a clause into the contract of carriage that limits its liability for loss or damage to cargo caused by its negligence or fault to a specified amount, if such provision is reasonable.²²²

The Harter Act prohibits carriers from incorporating into a bill of lading or shipping document any provision that limits or repudiates the vessel owner’s obligation “to exercise due diligence [to] properly equip, man, provision and outfit” the vessel and to exercise due diligence “to make the vessel seaworthy and capable of performing

217. *David Crystal, Inc. v. Cunard S.S. Co.*, 339 F.2d 295 (2d Cir. 1964), *cert. denied*, 380 U.S. 976 (1965).

218. *Tapco Nigeria, Ltd. v. M/V Westwind*, 702 F.2d 1252 (5th Cir. 1983).

219. 46 U.S.C. § 30702 (2006).

220. *Id.* § 30704.

221. *Cunard S.S. Co. v. Kelley*, 115 F. 678 (1st Cir. 1902); *The Monte Iciar*, 167 F.2d 334 (3d Cir. 1948).

222. *Antilles Ins. Co. v. Transconex, Inc.*, 862 F.2d 391 (1st Cir. 1988).

her intended voyage.”²²³ Likewise, a carrier may not limit its vicarious liability vis-à-vis “the obligations of the master, officers, agents, or servants to carefully handle,” stow, care for, and properly deliver the cargo.²²⁴ These provisions do not impose the strict liability of an insurer of the cargo but merely prohibit the carrier from arbitrarily relieving itself of its duty of due care.²²⁵

Although the Harter Act does not provide for limitation of liability, courts have held that limited liability in exchange for a reduced freight rate, where reasonable, is valid under the Act. Where a bill of lading has stipulated the value of the cargo, providing the shipper with an opportunity to declare a higher value for a higher freight rate, and no such declaration is made, the stipulated value is generally accepted by the courts.²²⁶

Carrier’s Defenses under the Harter Act

If a carrier exercises due diligence prior to the voyage to make the vessel seaworthy and to properly man, equip, and supply it, then the carrier will not be liable for loss or damage to cargo resulting from the following: (1) errors of navigation or management of the vessel; (2) perils of the sea; (3) acts of God (*vis majeure*); (4) acts of public enemies; (5) inherent defects, qualities, or vices of the cargo; (6) insufficient packaging; (7) seizure under process of law; (8) loss resulting from any act or omission of the shipper or owner of the cargo; or (9) the saving or attempt to save life or property at sea, or from any subsequent delays encountered in rendering such service.²²⁷ The burden of showing due diligence is on the carrier, and if due diligence was not exercised prior to the voyage, the carrier may not rely on these defenses.²²⁸

223. 46 U.S.C. § 30705 (2006).

224. *Id.*

225. *Id.*

226. *Antilles Ins.*, 862 F.2d 391.

227. 46 U.S.C. § 30706 (2006).

228. *United States v. Ultramar Shipping Co.*, 685 F. Supp. 887 (S.D.N.Y. 1987), *aff’d*, 854 F.2d 1315 (2d Cir. 1988).

Unseaworthiness

Seaworthiness is a relative term and means that a vessel is reasonably fit to carry the cargo that she has undertaken to transport on the particular voyage. “Fitness” is measured by the sufficiency of the vessel to carry its designated cargo in terms of materials, construction, equipment, officers, and crew for the trade or service for which the vessel was employed. Seaworthiness is determined by factual, concrete considerations and not in the abstract. Consideration is given not only to the particular cargo to be transported but also to the route to be traveled and the weather likely to be encountered.²²⁹

Carriage of Goods by Sea Act (COGSA)

Scope and Application

COGSA,²³⁰ which adopted Articles I through VIII of the Hague Rules, with some minor variation, applies by force of law (*ex proprio vigore*) to contracts for the carriage of goods by sea, to or from foreign ports and U.S. ports.²³¹ COGSA expressly preempts the Harter Act with respect to all contracts of carriage pertaining to foreign trade.²³² However, unlike the Harter Act, COGSA does not apply by force of law to voyages between U.S. ports, such as those made for intercoastal and coastal trade, or to voyages on inland waters.²³³ In those situations, the Harter Act continues to govern.

COGSA provides that the parties may incorporate its provisions into their contract of carriage for voyages between U.S. ports; this is frequently done.²³⁴ In such circumstances, it is generally accepted that COGSA applies.²³⁵ Courts have held that the incorporation of COGSA as a contract term does not give the provision superior rank,

229. *The Silvia*, 171 U.S. 462 (1898).

230. COGSA § 30701 note.

231. *Id.* § 1.

232. *Id.* § 12.

233. *Id.*

234. *Id.*

235. *Pan Am. World Airways, Inc. v. Cal. Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir. 1977).

but rather it is to be regarded simply as another term in the contract.²³⁶ In situations where COGSA does not apply *ex proprio vigore*, the parties may, by agreement, incorporate by reference all of COGSA or selected provisions. Likewise, the parties may modify the provisions of COGSA—for example, by inserting a limitation of liability amount that is lower than the amount provided in COGSA.

Even where COGSA is applicable by force of law, it may not apply to the entire time period during which the carrier has possession of (or is by contract responsible for) the goods. It is not uncommon for a carrier to insert in its bill of lading a provision that COGSA applies during the entire period of time that the carrier is responsible for the goods. Why would a carrier want to include such a provision in its bill of lading? Even though COGSA imposes certain duties on carriers, it also provides them with a wide range of defenses, and most importantly—even where liability exists—it provides for limited liability. Thus, to a considerable extent COGSA is favorable to carriers, and it is to their advantage to be able to invoke its terms.

The provisions of COGSA apply as a matter of statutory mandate to “[e]very bill of lading or similar document of title which is evidence of a contract of carriage of goods by sea to or from ports of the United States, in foreign trade.”²³⁷ Although a negotiable bill of lading is a common form of documentation used to evidence a contract of carriage, it is not the only form. “Ocean waybills” are employed frequently. The straight (or nonnegotiable) bill of lading is a form of waybill. By definition, a straight bill of lading under the Pomerene Act is a “bill of lading,” and COGSA applies “to contracts of carriage covered by a bill of lading,” so that literally a bill of lading, negotiable or nonnegotiable (straight), would seem to be subject to COGSA under U.S. law.²³⁸ The matter is not free from doubt. As a practical matter, problems as to whether COGSA applies by force of law seldom arise because it is common practice for parties

236. *Commonwealth Petrochemicals Inc. v. S.S. Puerto Rico*, 607 F.2d 322 (4th Cir. 1979). *Cf.* *PPG Indus., Inc. v. Ashland Oil Co.-Thomas Petroleum Transit Div.*, 527 F.2d 502 (3d Cir. 1975).

237. COGSA Introductory Para.

238. *Id.*

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using straight bills of lading in ocean transport to incorporate specifically the provisions of COGSA.²³⁹

Charter parties are not statutorily subject to COGSA.²⁴⁰ A bill of lading issued to the charterer by the owner of a vessel is regarded as a mere receipt while in the charterer's possession. As such, this bill of lading is not a contract of carriage²⁴¹ and is not subject to COGSA. However, where such a bill of lading is transferred to a third party, such as the consignee of the goods, under circumstances that confer rights in the third party with respect to delivery of the goods, the bill of lading is then subject to COGSA, as it has become a contract of carriage vis-à-vis that third party and the issuer of the bill of lading (the carrier).²⁴² In such situations, the charter party controls the legal relations between owner and charterer, and the bill of lading, subject to COGSA, controls the legal relations between the carrier and consignee.

A charter party may incorporate the terms of COGSA in whole or in part. In the latter situation, the COGSA provisions that are incorporated are treated as ordinary contract provisions that must be harmonized with or subordinated to conflicting contract terms.²⁴³ Likewise, a bill of lading may incorporate the terms of the charter party as to which the consignee will be bound, provided the terms are not inconsistent with the provisions of COGSA. Where a charter party is incorporated into the bill of lading, a consignee may be liable to pay charter hire or demurrage, or be subject to an arbitration clause depending on the terms of incorporation.²⁴⁴ An incorporation clause

239. *See, e.g.,* Swift Textiles, Inc. v. Watkins Motor Lines, Inc., 799 F.2d 697 (11th Cir. 1986), *cert. denied*, 480 U.S. 935 (1987).

240. COGSA § 5.

241. *Unterweser Reederei Aktiengesellschaft v. Potash Importing Corp. of Am.*, 36 F.2d 869 (5th Cir. 1930); *Ministry of Commerce, State Purchase Directorate of Athens, Greece v. Marine Tankers Corp.*, 194 F. Supp. 161 (S.D.N.Y. 1960); *Albert E. Reed & Co. v. M/S Thackeray*, 232 F. Supp. 748 (N.D. Fla. 1964).

242. COGSA § 1(b). *See also* *Chilean Nitrate Sales Corp. v. The Nortuna*, 128 F. Supp. 938 (S.D.N.Y. 1955).

243. *United States v. M/V Marilena P*, 433 F.2d 164 (4th Cir. 1969).

244. *Yone Suzuki v. Cent. Argentine Ry.*, 27 F.2d 795 (2d Cir. 1928), *cert. denied*, 278 U.S. 652 (1929).

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will be given effect so long as the charter party is adequately identified in the bill of lading.²⁴⁵

COGSA applies to the carriage of all goods, wares, merchandise, articles, or cargo other than live animals and goods carried on deck pursuant to the agreement of the parties.²⁴⁶ It is unlikely that the “on deck” exclusion applies to containerized cargo carried on a vessel that has been constructed or adapted to carry containers.²⁴⁷

Parties to the Contract of Carriage: The COGSA Carrier

Owner and Charterer

The parties to a contract of carriage are designated as the “carrier” and the “shipper.” The carrier generally is the owner of the vessel, the charterer of the vessel, or the vessel itself (invoking *in rem* liability).²⁴⁸ If the owner enters into a contract of carriage and issues its bill of lading, it is the “COGSA carrier.” Likewise, where the charterer of the vessel (such as a time charterer) enters into a contract to carry a shipper’s goods, it is the COGSA carrier. It is possible for both the vessel owner and the charterer of the vessel to be held liable as COGSA carriers with respect to the same transaction. For example, where a charterer issues its bill of lading signed by the master, or signed by the charterer “for the master” as authorized in the charter party, courts permit a shipper whose cargo has been damaged or lost to sue both the charterer and the vessel owner.²⁴⁹ In these situations, the rules of agency control. When authorized by the owner to do so, the signature of the master or of someone authorized to sign “for the master” on the bill of lading may be sufficient to bind that

245. See, e.g., *Lucky Metals Corp. v. M/V Ave*, 1996 AMC 265 (E.D.N.Y. 1995).

246. COGSA § 1(c).

247. See generally *English Elec. Valve Co. v. M/V Hoegh Mallard*, 814 F.2d 84 (2d Cir. 1987).

248. *Mente & Co. v. Isthmian S.S. Co.*, 36 F. Supp. 278 (S.D.N.Y. 1940), *aff’d*, 122 F.2d 266 (2d Cir. 1941); *Gans S.S. Line v. Wilhelmsen*, 275 F. 254 (2d Cir.), *cert. denied*, 257 U.S. 655 (1921); *Joo Seng Hong Kong Co. v. S.S. Unibulkfir*, 483 F. Supp. 43 (S.D.N.Y. 1979).

249. *Pac. Employers Ins. Co. v. M/V Gloria*, 767 F.2d 229 (5th Cir. 1985).

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individual's employer, the owner, because in signing the bill of lading the master will be viewed as the agent of the owner.

Intermediaries

Some courts have extended the definition of "carrier" to incorporate intermediaries who enter into contracts of carriage on their own behalf, such as a "nonvessel operating common carrier" (NVOCC),²⁵⁰ or a freight forwarder,²⁵¹ if such a party issues a bill of lading and undertakes to deliver goods covered by the contract of carriage.

Duration

COGSA applies only from the time goods are loaded on board the vessel to the time when they are discharged from it,²⁵² that is, "from tackle to tackle." However, COGSA may be extended to other stages of the transaction by agreement of the parties,²⁵³ and it is common practice to do so. COGSA specifically authorizes the parties to enter into an agreement with respect to the period of time prior to the goods being loaded on the vessel and after they are discharged from the vessel. The Supreme Court has held that the parties may agree to apply COGSA terms such as the limitation of liability provision during the entire period of a "house-to-house" transaction.²⁵⁴ This

250. *Fireman's Fund Am. Ins. Co. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974). If an NVOCC issues a bill of lading to a shipper whereby the NVOCC undertakes to transport the shipper's goods, the NVOCC may be found to be a COGSA carrier, notwithstanding the fact that the goods are carried on a vessel owned or operated by someone else.

251. *J.C. Penney v. Am. Exp. Co.*, 102 F. Supp. 742 (S.D.N.Y. 1951), *aff'd*, 201 F.2d 846 (2d Cir. 1953). A freight forwarder is a transportation expert who assists shippers in arranging to have their goods transported from one place to another. As such, the freight forwarder is an agent of the shipper. If a freight forwarder actually undertakes to transport the goods, it may be regarded as a COGSA carrier, despite the fact that the goods are carried on a vessel owned or operated by a third party.

252. COGSA § 1(e).

253. *Id.* § 7.

254. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010); *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004).

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means that COGSA will apply even if the damage occurs during an overland leg.²⁵⁵ If the parties do not agree that COGSA will govern the entire period the goods are in the custody of the carrier, the Harter Act applies to the preloading (receipt) and post-discharge (delivery) periods of carriage, even in respect to foreign shipments.

Carrier's Duty to Issue Bills of Lading

After a carrier receives goods, and upon demand of the shipper, COGSA provides that a carrier must issue a bill of lading.²⁵⁶ The bills of lading must show the quantity, weight, or number of packages or pieces, furnished in writing by the shipper, and the apparent condition of the goods, provided that the carrier is not bound to show or state markings, numbers, quantity, or weight reasonably believed to be inaccurate or of which it has no reasonable means of checking.²⁵⁷

A carrier may also protect itself by inserting a clause into a bill of lading stating that it has not been able to verify certain particulars regarding the cargo, such as the condition of goods loaded by the shipper and delivered to the carrier in a sealed container. Here the carrier may use terms such as "said to contain" or "shippers weight, load and count" to indicate that it has had no opportunity to ascertain the contents of the container and cannot vouch for the particulars provided by the shipper.²⁵⁸ The same applies where goods are contained in packages, the contents of which are concealed from the carrier.²⁵⁹ Carriers also use special clauses relating to specific goods, such as the "rust clause," when goods are inherently susceptible to degradation.²⁶⁰

"House-to-house" refers to a transport from the seller's warehouse to the buyer's or consigned's warehouse.

255. *Id.*

256. COGSA § 3(3).

257. *Id.*

258. *See, e.g.,* *Plastique Tags, Inc. v. Asia Trans Line, Inc.*, 83 F.3d 1367 (11th Cir. 1996).

259. *See, e.g.,* *Caemint Food, Inc. v. Brasileiro*, 647 F.2d 347 (2d Cir. 1981).

260. *Tokio Marine & Fire Ins. Co. v. Retla S.S. Co.*, 426 F.2d 1372 (9th Cir. 1970).

Carrier's Duties Relating to Vessel and Cargo

Unlike the Harter Act, COGSA prescribes specific duties and rights of carriers, shippers, and consignees.²⁶¹ Section 3(1) imposes an express duty on the carrier, before and at the commencement of the voyage, to exercise due diligence:

- (a) to provide a seaworthy ship;
- (b) to properly equip, man, and supply the ship; and
- (c) to make the holds, refrigeration and cooling chambers, and all other areas of the vessel where goods are carried, fit and safe for their reception, preservation, and carriage.²⁶²

Section 3(2) requires that the carrier “properly and carefully load, handle, stow, care for, and discharge the goods carried.”²⁶³ After receiving the goods, and upon demand of the shipper, the carrier is required to issue a bill of lading.²⁶⁴

Exculpatory Clauses Prohibited

A carrier may not use exculpatory clauses to avoid the duties and obligations set out in §§ 3(1) and (2) of COGSA.²⁶⁵ COGSA specifically provides that a “benefit of insurance” clause, whereby the carrier seeks to impose on the shipper a duty to obtain insurance for the benefit of the carrier, is unenforceable.²⁶⁶

Immunities of Carrier

Under COGSA, carriers are not insurers of cargo. COGSA does not impose strict liability. The liability of a carrier is based on fault and thus is predicated on negligence, not mere loss or damage to cargo. COGSA requires only that the carrier exercise due care. Carrier immunities (defenses) can be grouped into five categories. First, some immunities excuse a carrier notwithstanding the loss or damage to

261. COGSA § 3.

262. *Id.* § 3(1).

263. *Id.* § 3(2).

264. *Id.* § 3(3).

265. *Id.* § 3(8).

266. *Id.*

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cargo resulting from the negligence of its employees. The defense based on errors in navigation of the vessel,²⁶⁷ the defense based on errors in the management of the vessel,²⁶⁸ and the fire defense fall into this category.²⁶⁹ Second, there are defenses based on overwhelming outside forces, such as acts of war,²⁷⁰ acts of public enemies,²⁷¹ arrest or restraint of princes (governments),²⁷² quarantines,²⁷³ strikes or lockouts,²⁷⁴ and riots or civil commotions.²⁷⁵ The third category includes loss or damage caused by overwhelming natural forces, including perils of the sea²⁷⁶ and acts of God.²⁷⁷ The fourth group deals with loss or damage attributable to faults of the shipper, which include acts or omissions of the shipper or its agents,²⁷⁸ wastage in bulk or weight,²⁷⁹ losses resulting from inherent vice,²⁸⁰ and insufficiency of packaging or marking.²⁸¹ Finally, the fifth category includes loss or damage that occurs despite a carrier's exercise of due care. This includes loss or damage resulting from an unseaworthy condition not discoverable through the exercise of due care,²⁸² from latent defects,²⁸³ and from situations where a carrier can establish that it and its servants and agents exercised due care and that loss or

- 267. *Id.* § 4(2)(a).
- 268. *Id.*
- 269. *Id.* § 4(2)(b).
- 270. *Id.* § 4(2)(e).
- 271. *Id.* § 4(2)(f).
- 272. *Id.* § 4(2)(g).
- 273. *Id.* § 4(2)(h).
- 274. *Id.* § 4(2)(i).
- 275. *Id.* § 4(2)(k).
- 276. *Id.* § 4(2)(c).
- 277. *Id.* § 4(2)(d).
- 278. *Id.* § 4(2)(i).
- 279. *Id.* § 4(2)(m).
- 280. *Id.*
- 281. *Id.* § 4(2)(n)–(o).
- 282. *Id.* § 4(2)(p).
- 283. *Id.*

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damage was occasioned through the conduct of others or circumstances for which it is not responsible.²⁸⁴

Seaworthiness

Section 4(1) of COGSA expressly states that neither the carrier nor the vessel owner shall be liable for loss or damage arising from unseaworthiness unless it is caused by a lack of due diligence to make the ship seaworthy—i.e., to see that the ship is properly manned, equipped, and supplied, and to make the holds, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation in accordance with § 3(1). Thus, a carrier is not liable for loss or damage where loss is caused by the unseaworthiness of the vessel, its equipment, personnel, or cargo facilities unless the carrier was negligent in failing to discover the defective condition responsible for the damage or, if discovered, in failing to remedy it. The duty to exercise due care is imposed before and at the commencement of the voyage. If the defective condition was not reasonably discoverable, or if it arose after the voyage commenced, the carrier will not be liable for damage to cargo resulting from that unseaworthy condition of the vessel.²⁸⁵ Under COGSA, unlike the Harter Act, even where a carrier fails to exercise due diligence before and at the beginning of the voyage, it will not be liable for damage to goods unless caused by an unseaworthy condition. Proof of the exercise of due diligence is not a prerequisite to asserting a COGSA defense. If it is proven that loss or damage to cargo was the result of unseaworthiness, the carrier has the burden of proving due diligence.

Unseaworthiness and Carrier's Duty to Care for Cargo

Notwithstanding its limited duty with respect to unseaworthiness, a carrier is under a continuing duty throughout the voyage to properly

284. *Id.* § 4(2)(q).

285. *Balfour, Guthrie & Co. v. Am.-W. African Line, Inc.*, 136 F.2d 320 (2d Cir. 1943), *cert. denied*, 320 U.S. 804 (1944); *The Quarrington Court*, 122 F.2d 266 (2d Cir. 1941); *Holsatia Shipping Corp. v. Fid. & Cas. Co. of N.Y.*, 535 F. Supp. 139 (S.D.N.Y. 1982).

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care for the cargo.²⁸⁶ If the carrier is negligent in performing this duty, it will be held accountable unless absolved from liability under § 1304(2).

Errors in Navigation and Management

Under COGSA, the carrier is not responsible for cargo loss or damage that results from the “[a]ct, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.”²⁸⁷ For example, if a vessel is involved in a collision caused by faulty seamanship or the exercise of poor judgment by the master or crew, resulting in damaged or lost cargo, the carrier will not be held liable.²⁸⁸ This provision does not absolve the carrier for damage caused by its own personal fault, but rather it exempts a carrier from liability for the fault of its employees. Personal fault in the context of corporations refers to management fault.

If a shipowner knew, or in the exercise of due care should have known, that the master or a member of the crew was incompetent or that there were insufficient personnel to properly navigate the vessel and this incompetence or deficiency was a cause of a collision, the shipowner will be held liable because it breached its duty to exercise due diligence to properly man the vessel.²⁸⁹ If the collision was caused by a fault in the navigational equipment that existed at the

286. COGSA § 3(2).

287. *Id.* § 4(2)(a).

288. *In re Grace Line, Inc.*, 397 F. Supp. 1258 (S.D.N.Y. 1973), *aff'd*, 517 F.2d 404 (2d Cir. 1975); *Wilbur-Ellis Co. v. M/V Captayannis “S,”* 451 F.2d 973 (9th Cir. 1971), *cert. denied*, 405 U.S. 923 (1972). *Cf. Potomac Transp., Inc. v. Ogden Marine, Inc.*, 909 F.2d 42 (2d Cir. 1990).

289. *See, e.g., In re Ta Chi Navigation (Panama) Corp., S.A.*, 513 F. Supp. 148 (E.D. La. 1981), *aff'd*, 728 F.2d 699 (5th Cir. 1984); *In re Seiriki Kisen Kaisha*, 629 F. Supp. 1374 (S.D.N.Y. 1986). *See also Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967) (holding owner has duty to properly man vessel; otherwise vessel deemed unseaworthy).

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beginning of the voyage, and if this condition was detectable through the exercise of due care, the carrier will likewise be liable.²⁹⁰

A distinction must be made between those situations where the actions of the master or crew are simply errors in the navigation or management of the vessel and those that constitute a breach of the duty to properly care for the cargo. In a sense, any decision or action that places a vessel at risk also places its cargo at risk. Master or crew negligence that places the vessel at risk of sustaining damage will usually fall within the defense because that risk was caused by poor navigation or poor management. In such situations, the risk to the cargo is secondary in that it was derived from the risk to the vessel.²⁹¹

Conversely, an error that primarily puts the cargo at risk constitutes a failure to properly care for the cargo, notwithstanding that the error involves a decision relating to the management of the vessel.²⁹² It also appears that if a negligent management decision and its implementation imperil cargo operations, such as loading or discharge of cargo, the error will not be within the “error of management” defense.²⁹³

Damage or Loss Caused by Fire

The carrier is also insulated from liability for damage arising from fire, unless the fire was caused by its actual fault or privity.²⁹⁴ COGSA’s fire defense parallels that provided in its predecessor, the Fire Statute.²⁹⁵ Once a carrier demonstrates that the damage to cargo was caused by fire, the carrier is exculpated from liability unless the shipper proves that the fire or the failure to properly deal with the fire was caused by actual fault or privity of the carrier. Proof of actual fault or privity requires the cargo plaintiff to show that the carrier was

290. *In re Thebes Shipping Inc.*, 486 F. Supp. 436 (S.D.N.Y. 1980); *In re Texaco, Inc.*, 570 F. Supp. 1272 (E.D. La. 1983). *See also* Complaint of Armatur, S.A., 710 F. Supp. 390 (D. P.R. 1988).

291. *Knott v. Botany Worsted Mills*, 179 U.S. 69 (1900).

292. *The Germanic*, 196 U.S. 589 (1905).

293. *Id.*

294. COGSA § 4(2)(b).

295. 46 U.S.C. § 30504.

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negligent. In the case of a corporate owner, this requires showing negligence of an officer or person who is part of management, or at least an employee at a high supervisory level of the corporation.²⁹⁶ The majority of U.S. courts have held that this rule applies even where the cause of the fire was an unseaworthy situation.²⁹⁷

Perils of the Sea

Section 4(2)(c) of COGSA provides carriers with a defense when cargo is damaged or lost as a result of “perils, dangers, and accidents of the sea or other navigable water.” As one court has stated, although the term “perils of the sea” is a term of art not uniformly defined, the generally accepted definition is ‘a fortuitous action of the elements at sea, of such force as to overcome the strength of a well-found ship or the usual precautions of good seamanship.’”²⁹⁸ The mere fact that a vessel encounters a storm that causes cargo damage does not necessarily give rise to a “perils of the sea” defense. If a vessel is traversing a route in which such storms are routine, a court will inquire as to whether the vessel had taken adequate precautions to be seaworthy for that voyage and whether it had taken reasonable precautions with regard to the stowage of the cargo.²⁹⁹

There is no magic formula for classifying conditions into those that constitute perils of the sea and those that do not. Courts look at factors such as the extent of structural damage to the vessel, reduction in speed, the presence of cross-seas, how far the vessel was blown off course, and the extent to which vessels similarly situated suffered cargo damage. Perhaps the most important factors are strength of the winds and seas.³⁰⁰ The classification of the force of wind velocity of a storm, as measured on the Beaufort scale, is important. In this regard,

296. *See, e.g., Westinghouse Elec. Corp. v. M/V Leslie Lykes*, 734 F.2d 199 (5th Cir.), *cert. denied*, 469 U.S. 1077 (1984).

297. *See, e.g., Westinghouse*, 734 F.2d 199. *Contra Nissan Fire & Marine Ins. Co. v. M/V Hyundai Explorer*, 93 F.3d 641 (9th Cir. 1996).

298. *Taisho Marine & Fire Ins. Co., Ltd. v. M/V Sea-Land Endurance*, 815 F.2d 1270, 1272 (9th Cir. 1987).

299. *Edmond Weil, Inc. v. Am. W. African Line, Inc.*, 147 F.2d 363 (2d Cir. 1945).

300. *J. Gerber & Co. v. S.S. Sabine Howaldt*, 437 F.2d 580 (2d Cir. 1971).

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courts invariably find a peril of the sea where the force is 11 or greater and only occasionally where it is 9 or less.³⁰¹

Negligence of the carrier may be a factor in evaluating a “perils of the sea” defense. Carriers must anticipate a range of expectable weather conditions and take adequate precautions. Failure to do so may lead to a conclusion that although stormy weather was the immediate cause of the cargo loss or damage, the proximate cause was really the failure of the carrier to take proper steps to deal with the storm.

Inherent Vice

Section 4(2)(m) of COGSA provides a defense to a carrier where the damage to cargo results from “wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods.” Thus, a carrier is not liable where the goods have sustained damage or loss that is attributable to the characteristics of the goods themselves without the intervention or fault of the carrier. Various foodstuffs—e.g., fruit, vegetables, meat, fish, and poultry—will spoil through the mere passage of time unless specially treated or handled. Some metals will rust spontaneously, and some chemicals may lose their potency or clarity through the passage of time. All things being equal, a shipper bears the risks inherent in its goods.

Where goods have a natural tendency to degrade in quality or quantity unless special precautions are taken by the shipper or the carrier, the burden is on the shipper to ensure that these precautions are taken. For example, if cargo requires special preparation for transport, the shipper must take these necessary steps—e.g., freezing fish or meat or adding inhibitors to chemical cargoes.³⁰² If it fails to do so, and the goods deteriorate in transit because of a lack of proper preparation, the loss falls on the shipper. Likewise, if goods require special handling by the carrier, such as maintaining climate control (e.g., refrigeration), it is the shipper’s responsibility to make the carrier aware of this special need and to secure the carrier’s

301. *Id.* at 596; *Taisho Marine*, 815 F.2d at 1273.

302. *Aunt Mid, Inc. v. Fjell-Oranje Lines*, 458 F.2d 712 (7th Cir. 1972); *Jefferson Chem. Co. v. M/T Grena*, 413 F.2d 864 (5th Cir. 1969).

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agreement that the goods will be carried in refrigerated cargo storage areas. If a shipper fails to make the carrier aware of the special needs of the cargo or to secure the appropriate agreement from the carrier, any loss resulting from “inherent vice” falls on the shipper. Conversely, if the carrier undertakes to carry the goods at a specified temperature, for example, and fails to do so, it will be liable if the temperature variation causes damage to the goods.

Nevertheless, a carrier has a duty to properly care for the cargo. If it knows or should know that a particular cargo requires ventilation to prevent degradation, and, if it is customary for carriers to properly ventilate these cargoes, a carrier that negligently fails to do so will be liable for damage proximately caused by improper ventilation.³⁰³

In terms of the burden of proof, there is some interplay between a shipper’s burden of showing that it delivered the cargo to the carrier in good condition and that damage occurred while in the custody of the carrier, and the carrier’s defense based on inherent vice. Some courts have taken the view that as part of the shipper’s prima facie case, it must negate inherent vice as the cause of the loss in circumstances where the goods are inherently susceptible to degradation.³⁰⁴ Other courts treat the “inherent vice” immunity like any other defense and place on the carrier the burden to show that the damage resulted from inherent vice.³⁰⁵

The “Q Clause”

In addition, there is a general exemption from liability where a carrier can show that the loss or damage to cargo was not caused by its negligence or that of its agents or servants. This defense, contained in § 4(2)(q), is referred to as the “Q Clause.” It provides the carrier with an exemption from liability for loss or damage resulting from

303. *TradeArbed, Inc. v. W. Bulk Carriers K/S*, 374 F. App’x 464 (5th Cir. 2010); *Siderius, Inc. v. M.V. Amilla*, 880 F.2d 662 (2d Cir. 1989).

304. *See U.S. Steel Int’l, Inc. v. Granheim*, 540 F. Supp. 1326, 1332 (S.D.N.Y. 1982), and cases cited therein.

305. *Quaker Oats Co. v. M/V Torvanger*, 734 F.2d 238 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

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[a]ny other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.³⁰⁶

Some courts require the carrier also to show the actual cause of the loss or damage.³⁰⁷

Concurrent Causes of Cargo Damage

Where two factors are present in a cargo damage or loss situation – one factor being within the exculpatory factors listed in COGSA and the other not – the burden of proof is on the carrier to show that the loss or damage (or portion thereof) resulted from the cause for which the carrier is exculpated.³⁰⁸ As this burden is practically impossible to meet, the carrier will usually be held fully liable in these situations.

For example, if a collision is caused by negligent navigation, and the cargo was improperly stowed, the carrier must show that all or some of the cargo would have been damaged by the collision even if it had been properly stowed (i.e., that the damage was caused by the collision and not by the manner of stowage).³⁰⁹

Carrier Surrender of Immunities

Under § 1305 of COGSA, the carrier may agree to surrender any or all of the rights and immunities so provided. A carrier may also undertake to increase its responsibilities and liabilities in the contract of carriage.³¹⁰

306. COGSA § 4(2)(q).

307. *See, e.g., Quaker Oats*, 734 F.2d 238.

308. *The Vallescura*, 293 U.S. 296 (1934). *See also* *Commercial Molasses Corp. v. New York Tank Barge Corp.*, 314 U.S. 104 (1941); *PPG Indus., Inc. v. Ashland Oil Co.-Thomas Petroleum Transit Div.*, 592 F.2d 138 (3d Cir. 1978).

309. *Blasser Bros., Inc. v. N. Pan-Am. Line*, 628 F.2d 376 (5th Cir. 1980).

310. COGSA § 5.

Deviation

“Deviation” is “an intentional and unreasonable change in the geographic route of the voyage as contracted for.”³¹¹ It is implicit in § 4(4) of COGSA that different consequences ensue depending on whether a deviation is reasonable or unreasonable. COGSA provides that deviations intended to save life or property at sea and all other “reasonable” deviations do not create a breach under either COGSA or the contract of carriage.³¹² Hence, the carrier is not liable for loss or damage resulting therefrom.

In the United States, the term *deviation* has also been applied to overcarriage, misdelivery, and unauthorized carriage of cargo on deck.³¹³ Some courts have held that every fundamental and intentional breach of a contract of carriage or act of gross negligence committed by the carrier is a legal deviation.³¹⁴ These nongeographic deviations are referred to as “quasi-deviations,” and courts tend to restrict the doctrine of quasi-deviation to situations of unauthorized stowage of cargo on deck.³¹⁵

COGSA expressly provides that a deviation for the purpose of loading or unloading cargo or passengers shall be regarded as presumptively unreasonable.³¹⁶ However, it does not specify the consequences of cargo damage or loss that occurs during an unreasonable deviation.

The majority view among the courts of appeals is that deviation deprives the carrier of both the immunities and right to limit its liability provided in COGSA.³¹⁷ For a deviation to result in the loss of

311. Tetley, *supra* note 194, at 737.

312. COGSA § 4(4).

313. Tetley, *supra* note 194, at 737–38.

314. These cases are discussed in *Sedco, Inc. v. S.S. Strathewe*, 800 F.2d 27, 32 (2d Cir. 1986).

315. *See, e.g.,* *Vision Air Flight Serv., Inc. v. M/V Nat'l Pride*, 155 F.3d 1165 (9th Cir. 1998).

316. COGSA § 4(4).

317. *Berisford Metals Corp. v. S.S. Salvador*, 779 F.2d 841 (2d Cir. 1985), *cert. denied*, 476 U.S. 118 (1986). The Seventh Circuit denies defenses but allows the limitation of liability. *See Atl. Mut. Ins. Co. v. Poseidon Schiffahrt G.m.b.H.*, 313 F.2d 872 (7th Cir.), *cert. denied*, 375 U.S. 819 (1963).

a carrier's immunities and its limitation of liability, there must be a causal connection between the deviation and the damage or loss of cargo.³¹⁸ A change in route that exposes the cargo to new or additional risks may result in a finding of the required causal nexus.³¹⁹

Bills of lading often include a general "liberties" clause, which purports to confer virtually *carte blanche* on a carrier in making changes to the advertised or customary route, to the vessels that will carry the cargo, or even to the modes of transport. However, the majority of courts have held that liberties clauses do not authorize the carrier to engage in conduct that would otherwise be considered an unreasonable deviation.³²⁰

Damages and Limitation of Carrier's Liability

Generally

One of the major features of COGSA is the provision that limits the amount of the carrier's liability according to a stated formula. Thus, not only does COGSA provide carriers with a "laundry list" of complete defenses enumerated in §§ 4(1) and 4(2), § 4(5) limits the amount for which a carrier may be held liable.

Generally, under COGSA, when cargo is damaged or lost under circumstances that do not fall within the carrier's immunities, the shipper is entitled to recover damages from the carrier. Such damages are based on the market value of the goods at the port of destination. "In the event goods are damaged rather than lost entirely, the measure would be the difference between sound market value at the port of destination and the market value of the goods in the damaged condition."³²¹ However, COGSA limits carrier liability for cargo loss or damage to \$500 per package.³²² Where the carrier is liable for

318. Tetley, *supra* note 194, at 750–51.

319. *Gen. Elec. Co. v. S.S. Nancy Lykes*, 536 F. Supp. 687 (S.D.N.Y. 1982), *aff'd*, 706 F.2d 80 (2d Cir.), *cert. denied*, 464 U.S. 849 (1983). *See also* *Nat'l Starch & Chem. Co. v. M/V Monchegorsk*, No. 97 Civ. 1448 (KTD), 2000 WL 1132043 (S.D.N.Y. 2000).

320. *Id.* *See also* Tetley, *supra* note 194, at 752–54.

321. *Santiago v. Sea-Land Serv., Inc.*, 366 F. Supp. 1309, 1314 (D.P.R. 1973).

322. COGSA § 4(5).

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cargo loss or damage to goods that are not shipped in packages, its liability is limited to \$500 per “customary freight unit.”³²³ The customary freight unit is derived from the method used in calculating the freight in the contract of carriage, such as weight, size, or cost per unit.

Where goods are shipped in packages, and the bill of lading states the number of packages, a carrier’s liability is based on that number, even where freight was calculated by weight or some other basis.³²⁴

Limitation Issues: The COGSA Package

Determining whether or not cargo has been shipped in a package is occasionally problematic. If cargo is completely enclosed to facilitate its transportation, it is definitively a package. Boxes and crates are typically packages, as are goods fully wrapped in burlap or a tarpaulin, but cargo shipped without any packaging, such as a vehicle or a large piece of equipment, is not considered a package under COGSA.³²⁵ Difficulties most often arise when cargo is only partially enclosed or where it is attached to something as a means of facilitating its safe transport.³²⁶

In determining whether a container is a package, the intent of the parties, as evidenced in the bill of lading, is crucial. A container will not be treated as a COGSA package unless it is clearly apparent that

323. *Id.*

324. *Leather’s Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971); *Mitsui & Co. v. Am. Export Lines, Inc.*, 636 F.2d 807 (2d Cir. 1981).

325. *See generally* Jerome C. Scowcroft, *Recent Developments Concerning the Package Limitation*, 20 J. Mar. L. & Com. 403 (1989).

326. *Compare* *Aluminios Pozuelo Ltd. v. S.S. Navigator*, 407 F.2d 152 (2d Cir. 1968) (three-ton toggle press, bolted to skid and described in bill of lading as “one skid,” constituted single package), *and* *Mediterranean Marine Lines, Inc. v. John T. Clark & Son of Md., Inc.*, 485 F. Supp. 1330 (D. Md. 1980) (45,000-pound metal shear mounted on skid and completely covered by tarp held to be single package), *with* *Hartford Fire Ins. Co. v. Pac. Far E. Line, Inc.*, 491 F.2d 960 (9th Cir.), *cert. denied*, 419 U.S. 873 (1974) (electrical transformer attached to skid, without any other wrapping, held not to be package).

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the parties so intended.³²⁷ In this respect, the wording of the bill of lading is particularly important. If a bill enumerates a container's contents (e.g., "ten crates of electrical equipment"), the container will not be considered a COGSA package, notwithstanding a "boilerplate" printed clause that purports to make the container the package.³²⁸ Rather, each crate inside the container will be regarded as a package for COGSA limitation purposes. Likewise, even if the number "1" (designating that the goods are carried in one container) is inserted in the "Number of Packages" box in the bill of lading, that provision will be overridden by other provisions in the bill of lading (e.g., "10 crates of electrical equipment" inserted in the "Description of Cargo" box). Conversely, if the bill of lading describes the cargo as "one container of electrical equipment," the container will be considered as one COGSA package.³²⁹

Maximum Liability

Under COGSA, a carrier's maximum liability of up to \$500 per package is imposed as a matter of law. A provision in a bill of lading that sets a lower limit is void. Nevertheless, a shipper is never entitled to recover more than its actual damages.³³⁰ If the damage to cargo is \$300, the shipper may only recover \$300. If a bill of lading reveals that two packages were shipped, and the cargo in one is damaged to the extent of \$700 and the other is damaged to the extent of \$100, the shipper may not aggregate its loss. It may recover \$500 on the first package and \$100 on the second for a total of \$600. COGSA does, however, permit a carrier to assume greater liability by contract.³³¹ For example, a carrier may agree to compensate a shipper for its actual loss, even if it exceeds the \$500 COGSA limitation. For this

327. *Monica Textile Corp. v. S.S. Tana*, 952 F.2d 636 (2d Cir. 1991); *Allstate Ins. Co. v. Inparca Lines*, 646 F.2d 166 (5th Cir. 1981); *Mitsui & Co. v. Am. Export Lines, Inc.*, 636 F.2d 807 (2d Cir. 1981).

328. *Mitsui*, 636 F.2d 807.

329. *Monica Textile*, 952 F.2d 636; *Hayes-Leger Assocs., Inc. v. M/V Oriental Knight*, 765 F.2d 1076 (11th Cir. 1985).

330. COGSA § 4(5).

331. *Id.* §§ 4(5), 5.

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reason some courts have enforced provisions incorporating the higher liability limits of the Hague-Visby Rules.³³²

Opportunity to Declare Higher Value

COGSA provides that the \$500 limit is applicable “unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.”³³³ If the shipper declares a package value that is higher than the COGSA limitation amount, it will be charged a higher freight rate, such as an *ad valorem* rate. Although courts generally agree that the shipper is entitled to an “opportunity” to declare a higher value, they do not completely agree as to which circumstances adequately provide such an opportunity.³³⁴ A carrier who fails to provide the shipper with the opportunity to declare a higher value will be denied the right to limit its liability under COGSA. Thus, carriers must notify shippers that liability is limited to \$500 per package and provide shippers with an opportunity to declare a higher value.³³⁵

Damages for Delay

Neither COGSA nor the Harter Act provides a remedy for delay in delivery. Where a shipper makes a claim based on delay, courts look to the general maritime law, which is based on common-law rules relating to delay by common carriers.

A carrier may enter into an express agreement that goods will be delivered by a specific date or within a particular time frame. This type of agreement takes on the characteristics of a warranty. If the carrier fails to deliver the goods as it has undertaken to do, it may be

332. *Francosteel Corp. v. M/V Pal Marinos*, 885 F. Supp. 86 (S.D.N.Y. 1995). See also *supra* text and accompanying note 198.

333. COGSA § 4(5).

334. Compare *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806 (9th Cir. 1982) (holding “opportunity” must be on face of bill of lading), with *Couthino, Caro & Co. v. M/V Sava*, 849 F.2d 166 (5th Cir. 1988) (holding there is no fair opportunity to declare higher value without indication that choice of shipping rates existed or that shipper knew a particular rate was tied to a limited value).

335. *Nippon Fire & Marine Ins. Co. v. M/V Tourcoing*, 167 F.3d 99 (2d Cir. 1999).

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liable for economic losses sustained by the shipper.³³⁶ Of course, a carrier may qualify its undertaking by exempting itself from delays that are beyond its control.³³⁷

More often, bills of lading expressly negate any undertaking with respect to a specific date or time frame within which delivery will be made.³³⁸ Under these circumstances the carrier need only deliver the goods with reasonable promptitude, taking into account its advertised routes and custom.

If delay is attributable to the carrier, and the delay is considered unreasonable, the carrier may be liable to the shipper.³³⁹ Furthermore, where a carrier has specific knowledge of the shipper's need to have the goods delivered within a specific time frame for a particular purpose and does not transport the goods expeditiously, the carrier's action may be regarded as an unreasonable delay.³⁴⁰

Burden of Proof

Under § 3(6), a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as described in § 3(3). In practice, if a shipper introduces into evidence a clean bill of lading, and the goods are subsequently delivered in a damaged condition (or nondelivery of goods has otherwise resulted), the shipper has established a prima facie case. The burden then shifts to the carrier to prove that the damage or loss resulted from a cause exempted by § 4.

The circumstances surrounding a transaction must be consistent with an evidentiary presumption of a bill of lading. For example, if goods are concealed by their packaging, a clean bill evidences only the condition of the packaging, not of the goods themselves.³⁴¹ Likewise, if a container (or other package) packed by the shipper is

336. *Int'l Drilling Co., N.V. v. M/V Doriefs*, 291 F. Supp. 479 (S.D. Tex. 1968) (holding carrier liable for additional expenses incurred by shipper because of delay despite fact that there was no loss or damage to cargo).

337. *Id.*

338. *See, e.g., Anyagwe v. Nedlloyd Lines*, 909 F. Supp. 315 (D. Md. 1995).

339. *Wayne v. Inland Waterways Corp.*, 92 F. Supp. 276 (S.D. Ill. 1950).

340. *Hellenic Lines, Ltd. v. United States*, 512 F.2d 1196 (2d Cir. 1975) (affirming award to shipper of expenses of transshipment).

341. *Caemint Food, Inc. v. Brasileiro*, 647 F.2d 347 (2d Cir. 1981).

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found to contain damaged goods, a clean bill of lading alone is clearly not sufficient to sustain the shipper's burden of proof.³⁴² The shipper must offer extrinsic evidence to establish that goods were undamaged (i.e., in good condition) when they were delivered to the carrier.³⁴³ However, the very nature of the damage to the container or package may itself demonstrate that the goods were damaged in transit.³⁴⁴ The same may be said of the cause of the damage (e.g., seawater).³⁴⁵

The burden of proof in COGSA cases has sometimes been described as a “ping-pong” effect.³⁴⁶ It is likely to operate as follows: (1) the cargo interest makes its prima facie case by producing a clean bill of lading and by showing that the goods were delivered to the consignee in a damaged condition (or that they were not delivered at all); (2) the carrier responds by showing that the cargo loss or damage was either (a) caused by unseaworthiness despite its exercise of due diligence,³⁴⁷ or (b) attributable to circumstances that fall within at least one of the immunities provided by § 4(2) of COGSA,³⁴⁸ (3) the shipper tries to rebut the carrier's defense by showing facts that establish (a) a lack of due diligence, (b) the inapplicability of the immunities claimed, or (c) negligence on the part of the carrier, unless statutorily exempted.

Ultimately, the “cargo interest,” as plaintiff, has the burden of proving that the carrier is liable for damage or loss.

342. *Plastique Tags, Inc. v. Asia Trans Line, Inc.*, 83 F.3d 1367 (11th Cir. 1996).

343. *Caemint Food*, 647 F.2d 347.

344. *Transatlantic Marine Claims Agency, Inc. v. M/V OOCL Inspiration*, 137 F.3d 94 (2d Cir. 1998).

345. *Am. Marine Corp. v. Barge Am. Gulf III*, 100 F. Supp. 2d 393 (E.D. La. 2000); *J. Gerber & Co. v. M/V Galini*, No. 90-4913, 1993 U.S. Dist. LEXIS 8446 (E.D. La. May 26, 1993).

346. *Quaker Oats Co. v. M/V Torvanger*, 734 F.2d 238 (5th Cir. 1984), *cert. denied*, 469 U.S. 1189 (1985).

347. COGSA § 4(1). *See also Fireman's Fund Ins. Cos. v. M/V Vignes*, 794 F.2d 1552 (11th Cir. 1986).

348. *Blasser Bros., Inc. v. N. Pan-Am. Line*, 628 F.2d 376 (5th Cir. 1980).

Notice of Loss or Damage

Section 3(6) provides that the person entitled to take delivery of the goods shall give the carrier written notice of loss or damage, including a description of the damage's general nature before the goods are removed. Failure to give such notice constitutes prima facie evidence that the carrier delivered the goods as described in the bill of lading.³⁴⁹ Where loss or damage is not apparent, notice must be given within three days of delivery.³⁵⁰ Failure to give notice of loss or damage does not preclude a shipper from bringing suit.³⁵¹

Time Bar

COGSA provides that a suit for damages must be brought within twelve months of the date of delivery of the goods.³⁵² It bears noting that COGSA does not define the term "delivery." Under the general maritime law, a carrier effects delivery when it unloads the cargo onto a dock, segregates it by bill of lading and count, puts it in a place of rest on the pier so that it is accessible to the consignee, and affords the consignee a reasonable opportunity to come and get it.³⁵³ Proper delivery is also made where the goods are turned over to a proper authority according to the law or custom of the port.³⁵⁴ When goods are lost (i.e., never delivered), the twelve-month period begins to run from the time when they should have been delivered.

The Harter Act does not provide a statutory limitation on the filing of suit but, where applicable, the doctrine of laches may be used.

Extending the Application of COGSA

COGSA does not, of its own accord, supersede the Harter Act in regard to the preloading/receipt and post-discharge/delivery stages.

349. COGSA § 3(6).

350. *Id.*

351. *Id.*

352. *Id.*

353. *Servicios-Expoarma, C.A. v. Indus. Mar. Carriers, Inc.*, 135 F.3d 984 (5th Cir. 1998).

354. *Lithotip, C.A. v. S.S. Guarico*, 569 F. Supp. 837 (S.D.N.Y. 1983).

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Nevertheless, COGSA allows parties to contractually extend its coverage to these periods. Section 7 provides that COGSA shall not prevent

a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier ... for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship.³⁵⁵

This provision has been held to allow a carrier to make the provisions of COGSA applicable to the preloading/receipt and post-discharge/delivery stages.³⁵⁶ However, because courts are somewhat strict in applying COGSA when goods are not on a vessel, “errors in navigation and management”³⁵⁷ and “fire”³⁵⁸ defenses are not available where goods are damaged on land.

By clear and express stipulation in a bill of lading, the parties to a contract of carriage may also extend the benefits of COGSA to other parties involved in the transaction,³⁵⁹ such as stevedores and terminal operators. Stevedores and terminal operators are not parties to the contract of carriage and, unless they are employees of the carrier, owe no direct contractual duty to a shipper or consignee. Although stevedores and terminal operators may be under a contractual obligation to a carrier to render services involving goods, this obligation does not give rise to a contractual claim against them by a shipper.³⁶⁰ However, as a bailee of goods, a stevedore or terminal operator must exercise due care in the handling of goods and is liable

355. COGSA § 7.

356. *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415 (5th Cir. 1981).

357. *Vistar, S.A. v. M/V Sea Land Express*, 792 F.2d 469 (5th Cir. 1986).

358. *R.L. Pritchard & Co. v. S.S. Hellenic Laurel*, 342 F. Supp. 388 (S.D.N.Y. 1972).

359. *Leather’s Best, Inc. v. S.S. Mormaclynx*, 451 F.2d 800 (2d Cir. 1971).

360. See Thomas R. Denniston et al., *Liabilities of Multimodal Operators and Parties Other Than Carriers and Shippers*, 64 Tul. L. Rev. 517 (1989).

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to a shipper or consignee for damage resulting from his or her negligence.³⁶¹

To protect these “agents” or “contractors,” as well as the carrier as principal, bills of lading almost always include a “Himalaya clause.”³⁶² A typical Himalaya clause provides that all of the immunities and limitations to which the carrier is entitled under COGSA are equally applicable to all of its servants, agents, and independent contractors (including, for example, stevedores and terminal operators). Under this clause, servants, agents, and independent contractors may invoke the benefits of COGSA. These benefits include not only the time limit for bringing suit and burden of proof,³⁶³ but the \$500 package-unit limitation of liability as well.³⁶⁴ The Supreme Court has held that a properly worded Himalaya clause in an “ocean through” bill of lading extended the \$500 package limitation to a railroad for damage that occurred while it was transporting the cargo overland.³⁶⁵ Himalaya clauses are subject to the ordinary rules of contract construction. However, certain exemptions are available only to the carrier, such as those that relate to unseaworthiness or to errors in the navigation and management of the vessel.³⁶⁶

Jurisdiction and Choice-of-Law Clauses

In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*,³⁶⁷ the Supreme Court upheld the enforcement of a foreign arbitration clause

361. *Robert C. Herd & Co. v. Krawill Mach. Corp.*, 359 U.S. 297 (1959).

362. The Himalaya clause arose as the result of a decision of the English Court of Appeal in the case of *Adler v. Dickson (The Himalaya)*, [1954] 2 Lloyd’s Rep. 267, [1955] 1 Q.B. 158.

363. *B. Elliott (Canada) Ltd. v. John T. Clark & Son of Md., Inc.*, 704 F.2d 1305 (4th Cir. 1983).

364. *Koppers Co. v. S.S. Defiance*, 704 F.2d 1309 (4th Cir. 1983).

365. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14 (2004). *See also* *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433 (2010).

A “through” bill of lading is one that covers that entire transport, even though more than one means of transport is used.

366. *Vistar, S.A. v. M/V Sea Land Express*, 792 F.2d 469 (5th Cir. 1986).

367. 515 U.S. 528 (1995).

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in a dispute to which COGSA was applicable. The Court overruled previous lower court decisions that had held that choice-of-forum clauses designating a foreign forum undermined the protections COGSA extended to cargo interests and, as such, were unenforceable. Since *Sky Reefer*, lower courts have routinely enforced choice-of-forum clauses, regardless of whether the forum was a foreign arbitral tribunal or a foreign court.³⁶⁸

The provisions of COGSA and the Harter Act are mandatory and may not be contractually ousted by mere agreement of the parties. However, courts have tended to uphold clear and express clauses in bills of lading invoking foreign law—but only insofar as the stipulated law increases the carrier’s liability.³⁶⁹

368. *See, e.g.*, *Mitsui & Co. (USA) Inc. v. Mira M/V*, 111 F.3d 33 (5th Cir. 1997).

369. *Francosteel Corp. v. M/V Pal Marinos*, 885 F. Supp. 86 (S.D.N.Y. 1995).

3. Personal Injury and Death

Introduction

There is a body of law applicable to personal injury and death claims that is part of the maritime law of the United States. Some of it is statutory and some is contained in the rules of the general maritime law. Maritime personal injury and death actions are governed by a set of rules that are separate and distinct from the general body of tort law applicable in nonmaritime situations.³⁷⁰

In resolving maritime personal injury and death claims that stem from maritime employment or employment in a maritime environment, the status of the parties, both plaintiff and defendant, is of primary importance. Some rules are of a general character and may be invoked by any claimant, but other rules are status dependent, creating both rights and remedies that may be invoked only by a specified plaintiff class against an equally well-defined defendant class.³⁷¹ With respect to maritime personal injury and death law in the United States, three classes of employee claimants are likely to be encountered: (1) seamen, (2) maritime workers who are not seamen, and (3) offshore oil and gas workers. Additionally, suits are brought by passengers, and in recent years litigation involving recreational boating accidents resulting from the operation of small pleasure boats or personal watercraft such as jet skis has increased. Typical defendants in these various actions include employers, vessel owners and operators, and third-party tortfeasors, such as product manufacturers.

There are some rules that apply more or less across the board to personal injury and death actions regardless of the status of the parties.

³⁷⁰. The subjects of maritime personal injury and death law, including seamen and maritime workers, are examined in considerable detail in Robert Force & Martin J. Norris, *The Law of Seamen* (5th ed. 2003), and Robert Force & Martin J. Norris, *The Law of Maritime Personal Injuries* (5th ed. 2004).

³⁷¹. See Robert Force, *Post-Calhoun Remedies for Death and Injury in Maritime Cases: Uniformity Whither Goest Thou*, 21 Tul. Mar. L.J. 7 (1996).

Damages

Damages that may be recovered in maritime personal injury cases include the following: (1) loss of past and future wages; (2) loss of future earning capacity; (3) pain, suffering, and mental anguish; and (4) past and future medical expenses, as well as any other condition-related expenses.³⁷² Prejudgment interest may be recovered if an action is brought in admiralty.³⁷³ At an earlier time, some Circuits permitted recovery under the general maritime law for loss of consortium or loss of society and punitive damages in appropriate circumstances.³⁷⁴ Subsequently, in *Miles v. Apex Marine Corp.*,³⁷⁵ the Supreme Court held that the surviving (nondependent) mother of a seaman could recover only for pecuniary loss, even though the action was brought under the general maritime law, reasoning that the damages recoverable under the general maritime law could not exceed those available under the Jones Act.

In the wake of *Miles*, some lower federal courts held that recoverable damages under the general maritime law are restricted to pecuniary losses only.³⁷⁶ The Supreme Court, however, has cast some doubt on giving *Miles* an overly expansive application. In *Atlantic Sounding Co. v. Townsend*,³⁷⁷ it distinguished *Miles* and held that, in an appropriate case, punitive damages may be awarded upon a finding of willful and wanton refusal to pay maintenance and cure to an

372. *Downie v. United States Lines, Co.*, 359 F.2d 344, 347 (3d Cir.), *cert. denied*, 385 U.S. 897 (1966).

373. *Magee v. United States Lines*, 976 F.2d 821 (2d Cir. 1992) (award for unseaworthiness under general maritime law may include prejudgment interest).

374. *See* cases discussed in Force, *supra* note 371, at 36.

375. 498 U.S. 19 (1990).

376. *See, e.g.*, *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, 510 U.S. 915 (1993).

377. 557 U.S. 404 (2009).

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injured seaman. Some courts have refused to extend *Miles* to other situations.³⁷⁸

Statute of Limitations

By statute, the time for bringing actions to recover damages for personal injury or death is within three years.³⁷⁹

Federal and State Courts

If the criteria for maritime tort jurisdiction are present, suit may be filed in federal court under 28 U.S.C. § 1333. There is no right to a jury trial.³⁸⁰ However, under the “saving to suitors” clause, where diversity of citizenship is present, suit may be brought under § 1332, and a jury trial is available. Furthermore, the Jones Act specifically provides seamen with the right to bring suit in an action at law with a right to jury trial,³⁸¹ and the right to jury trial is not lost by the joinder of general maritime law claims with the Jones Act action.³⁸² Finally, under the “saving to suitors” doctrine, maritime personal injury and death claims may be filed in state court, and ordinarily a jury trial will be available as provided by state law. The Jones Act has been construed to permit suit in a state court.³⁸³

378. *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995); *Gerdes v. G & H Towing Co.*, 967 F. Supp. 943 (S.D. Tex. 1997); *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75 (E.D. La. 1991)

379. 46 U.S.C. § 30106 (2006) (“Except as otherwise provided by law, a civil action for damages for personal injury or death arising out of a maritime tort must be brought within 3 years after the cause of action arose.”); *see also* 45 U.S.C. § 56 (2006).

380. Nonjury and jury trials are discussed *supra* Chapter 1.

381. 46 U.S.C. § 30104 (2006).

382. 28 U.S.C. § 1331 (2006). *See also* *Fitzgerald v. United States Lines, Co.*, 374 U.S. 16 (1963).

383. 46 U.S.C. § 30104 (2006). *See also* *O’Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943).

Removal

If the plaintiff exercises his or her right to file suit in state court, and the only basis for invoking federal jurisdiction is 28 U.S.C. § 1333, the defendant may not remove the action to federal court because this would defeat the objective of the saving to suitors clause.³⁸⁴ However, if another basis for federal jurisdiction exists, such as diversity of citizenship or federal question, the action may be removed in conformity with the terms of the removal statute.³⁸⁵ Suits under the Jones Act filed in state courts by seamen may not be removed even if there is another basis for federal jurisdiction, such as diversity.³⁸⁶

In Personam and In Rem Actions

If the plaintiff's injury or death was caused by a vessel, suit may be brought *in personam* against the vessel owner or operator, against the vessel itself *in rem*, or both *in personam* and *in rem*.³⁸⁷ An action under the Jones Act may not be brought *in rem*.³⁸⁸

Seamen's Remedies

Introduction

Seamen³⁸⁹ have three primary remedies available under both the general maritime law and statute. Seamen may have actions for

384. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959).

385. *Hufnagel v. Omega Serv. Indus. Inc.*, 182 F.3d 340 (5th Cir. 1999); *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150 (5th Cir. 1996); *Scurlock v. Am. President Lines*, 162 F. Supp. 78 (N.D. Cal. 1958).

386. 28 U.S.C. § 1445(a) (2006). *See also* *Lackey v. Atl. Richfield Co.*, 983 F.2d 620 (5th Cir. 1993); *Pate v. Standard Dredging Corp.*, 193 F.2d 498 (5th Cir. 1952).

387. *Guzman v. Pichirilo*, 369 U.S. 698 (1962).

388. *Plamals v. The Pinar del Rio*, 277 U.S. 151 (1928), *overruled on other grounds*, *Mahnich v. S. S.S. Co.*, 321 U.S. 96 (1944); *Zouras v. Menelaus Shipping Co.*, 336 F.2d 209 (1st Cir. 1964).

389. A seaman is one (1) who has an employment-related connection to a vessel (or identifiable fleet of vessels) in navigation that is substantial in both duration and nature; and (2) whose duties contribute to the function of the vessel or to

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maintenance and cure, for negligence,³⁹⁰ and for unseaworthiness of a vessel. Where more than one of these claims grows out of the same incident, the claims usually are asserted in a single action.

Maintenance and Cure

Seamen who suffer injuries or become ill while in the service of the ship³⁹¹ are entitled to the remedy of maintenance and cure.³⁹² The doctrine of maintenance and cure is part of the general maritime law and encompasses three distinct remedies: (1) maintenance, (2) cure, and (3) wages.³⁹³

The obligation to provide maintenance and cure payments is imposed on a seaman's employer—the employer is usually the owner of the vessel on which the seaman is employed.³⁹⁴ However, a demise charterer assumes both full control of the vessel and the owner's responsibility for maintenance and cure.³⁹⁵ In addition, where a seaman is employed by one who provides contract services to a vessel owner, the vessel owner also may be liable for maintenance and cure payments under traditional principles of agency law.³⁹⁶ The vessel itself is liable *in rem*.³⁹⁷

Maintenance and cure is not a fault-based remedy. An employer's liability is based on the employment relationship, and the seaman

the accomplishment of its mission. *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995). Seaman status is discussed more fully *infra* text accompanying notes 430–56.

390. 46 U.S.C. § 30104 (2006).

391. Service to the ship begins when the employer exerts some control over the seaman, and the seaman is answerable to the ship's call. *Archer v. Trans/Am. Servs., Ltd.*, 834 F.2d 1570 (11th Cir. 1988). Periods of recreation, such as shore leave, are customarily viewed as service to the vessel. *Warren v. United States*, 340 U.S. 523 (1951).

392. *Warren*, 340 U.S. 523.

393. *The Osceola*, 189 U.S. 158 (1903).

394. *Warren*, 340 U.S. 523.

395. *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231 (3d Cir.), *cert. denied*, 502 U.S. 919 (1991).

396. *Archer*, 834 F.2d 1570.

397. *Solet v. M/V Captain H.V. Dufrene*, 303 F. Supp. 980 (E.D. La. 1969).

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need not prove employer negligence.³⁹⁸ Further, a seaman's own fault or contributory negligence is irrelevant, and the award will not be diminished under the comparative fault rule.³⁹⁹ The right to maintenance and cure is forfeited only by a seaman's willful misbehavior or deliberate act of indiscretion.⁴⁰⁰ Some courts have held that a seaman who misrepresents or conceals a prior injury and suffers a subsequent injury to the same body part may be denied maintenance and cure.⁴⁰¹

The right to maintenance and cure exists when a seaman is injured or falls ill, whether on board the vessel or on land.⁴⁰²

Maintenance is an amount of money to which a seaman is entitled for daily living expenses associated with recovery (i.e., room and board).⁴⁰³ It is designed to provide the seaman with food and lodging comparable to that received aboard ship—therefore, the obligation to provide maintenance payments does not arise until the seaman actually leaves the vessel.⁴⁰⁴ Maintenance includes only those

398. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938).

399. *Stanislawski v. Upper River Serv. Inc.*, 6 F.3d 537 (8th Cir. 1993).

400. *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724 (1943).

401. *See, e.g., Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166 (5th Cir. 2005) (applying so-called Mcorpen defense formulated in *McCorpen v. Cent. Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968)).

402. *Warren v. United States*, 340 U.S. 523 (1951) (involving injury on land during shore leave). Although the Court in *Warren* held that shore leave was an elemental necessity for the well-being of bluewater seamen and concomitant to service aboard ship, injury or illness during periods of extended vacation do not fall within the purview of the doctrine of maintenance and cure. *See Haskell v. Socony Mobil Oil Co.*, 237 F.2d 707 (1st Cir. 1956). Further, commuter seamen—i.e., those who serve on board a vessel for a fixed period of time and are then on shore for a fixed period with the ability to maintain the lifestyle of an ordinary shore dweller—may not be entitled to maintenance and cure for injuries or illness suffered during their time on shore. In such situations, where the seaman is not subject to the call of the ship, maintenance and cure will be denied. *See, e.g., Liner v. J. B. Talley & Co.*, 618 F.2d 327 (5th Cir. 1980); *Baker v. Ocean Sys., Inc.*, 454 F.2d 379 (5th Cir. 1972); *Sellers v. Dixilyn Corp.*, 433 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971).

403. *McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir. 1986).

404. *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987).

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expenses attributable to the seaman and does not encompass expenses of family members.⁴⁰⁵

A seaman makes a prima facie case for an award of maintenance by offering testimony as to the cost of obtaining reasonable accommodations with respect to room and board in the community in which he or she lives.⁴⁰⁶ The amount of maintenance must be reasonable, and the seaman's employer may offer rebuttal evidence that the proffered maintenance costs are excessive.⁴⁰⁷ Most courts have enforced an amount fixed by a collective bargaining agreement,⁴⁰⁸ but some courts, especially where the stipulated rate was unrealistically low, have held such provisions to be invalid.⁴⁰⁹

"Cure" refers to the reasonable medical expenses incurred in the treatment of the seaman's condition.⁴¹⁰ A seaman has the duty to mitigate the costs associated with cure,⁴¹¹ and an employer will only be obligated to pay those expenses associated with the seaman's treatment that are reasonable and legitimate. Although a seaman is free to see any physician for treatment, the employer will not be required to pay for treatments that are unnecessary or unreasonably expensive.⁴¹²

An employer-established health insurance program that pays its employees' medical expenses satisfies the employer's obligation to

405. *Macedo v. F/V Paul & Michelle*, 868 F.2d 519 (1st Cir. 1989); *Ritchie v. Grimm*, 724 F. Supp. 59 (E.D.N.Y. 1989).

406. *Yelverton v. Mobile Lab., Inc.*, 782 F.2d 555 (5th Cir. 1986).

407. *Incandela v. Am. Dredging Co.*, 659 F.2d 11 (2d Cir. 1981).

408. *See, e.g., Ammar v. United States*, 342 F.3d 133 (2d Cir. 2003); *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277 (11th Cir. 2000); *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986).

409. *See, e.g., Barnes v. Andover Co. L.P.*, 900 F.2d 630 (3d Cir. 1990).

410. *Vella v. Ford Motor Co.*, 421 U.S. 1 (1975).

411. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961).

412. *Rodriguez-Alvarez v. Bahama Cruise Line, Inc.*, 898 F.2d 312 (2d Cir. 1990). The burden is on the defendant-employer to prove that the treatment provided was unnecessary or unreasonably expensive. *See Caulfield v. AC & D Marine, Inc.*, 633 F.2d 1129 (5th Cir. 1981).

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pay cure.⁴¹³ In addition, the availability of free medical treatment under a government-sponsored health insurance program, such as Medicare or Medicaid, has been held to satisfy the employer's obligation to pay cure.⁴¹⁴

The obligation to provide maintenance and cure payments does not furnish the seaman with a source of lifetime or long-term disability income. The employer's duty to provide maintenance and cure payments ends when the seaman reaches the point of maximum medical cure⁴¹⁵ (i.e., when the condition is cured or declared to be incurable or of a permanent character).⁴¹⁶ Further, the obligation to provide cure exists only to improve the seaman's condition rather than to alleviate the condition. Therefore, courts have held that an employer has no obligation to provide maintenance and cure payments for palliative treatments that arrest further progress of the condition or relieve pain once the seaman has reached the point where there can be no further improvement in condition.⁴¹⁷ However, if a seaman has reached the point of maximum medical cure, and maintenance and cure payments have been discontinued, the seaman may nonetheless reinstitute a demand for maintenance and cure where subsequent new curative medical treatments become available.⁴¹⁸

413. *Al-Zawkari v. Am. S.S. Co.*, 871 F.2d 585 (6th Cir. 1989); *Gosnell v. Sea-Land Serv., Inc.*, 782 F.2d 464 (4th Cir. 1986); *Baum v. Transworld Drilling Co.*, 612 F. Supp. 1555 (W.D. La. 1985).

414. *Moran Towing & Transp. Co. v. Lombas*, 58 F.3d 24 (2d Cir. 1995). *Cf.* *Del. River & Bay Auth. v. Kopacz*, 584 F.3d 622 (3d Cir. 2009) (Social Security Disability payments not equivalence of maintenance).

415. Maximum cure contemplates that point at which the seaman's condition will not improve despite further medical treatments. *Vella v. Ford Motor Co.*, 421 U.S. 1 (1975); *Farrell v. United States*, 336 U.S. 511 (1949); *Morales v. Garijak, Inc.*, 829 F.2d 1355 (5th Cir. 1987).

416. *Vella*, 421 U.S. 1. In the case of permanent injury, the employer's obligation to provide maintenance and cure payments continues until the condition is diagnosed as permanent. *See Farrell*, 336 U.S. 511.

417. *Farrell*, 336 U.S. 511; *Cox v. Dravo Corp.*, 517 F.2d 620 (3d Cir.), *cert. denied*, 423 U.S. 1020 (1975).

418. *Farrell*, 336 U.S. 511; *Cox*, 517 F.2d 620.

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Wages

An employer must pay to the seaman wages that would have been earned during the remainder of the voyage.⁴¹⁹ Where a contract of employment fixes a specific term of employment, the employer must pay wages for that specific term.⁴²⁰

By statute, a penalty of “double wages” applies where an employer, without sufficient cause, fails to pay a seaman’s wages that are due,⁴²¹ and imposition of the penalty is mandatory for each day payment is withheld in violation of the statute.⁴²² The wage penalty statute is applicable to all wages due a seaman, not merely those triggered by a claim for maintenance and cure.

There is a split among courts of appeals over whether the three-year statute of limitations⁴²³ applicable in cases of personal injury and death actions based on maritime torts is also applicable in maintenance and cure actions or whether the doctrine of laches applies.⁴²⁴

Negligence: The Jones Act

Statutory Provisions

The Jones Act⁴²⁵ of 1920 provides a seaman with a negligence-based cause of action against an employer with the right to trial by jury. The Jones Act incorporates the provisions of the Federal Employers’

419. *Farrell*, 336 U.S. 511; *Cox*, 517 F.2d 620.

420. *Archer v. Trans/Am. Servs., Ltd.*, 834 F.2d 1570 (11th Cir. 1988). *See also* *Gheorghita v. Royal Caribbean Cruises, Ltd.*, 93 F. Supp. 2d 1237 (S.D. Fla. 2000).

421. 46 U.S.C. § 10504(c) (2000). *See also* *Lipscomb v. Foss Mar. Co.*, 83 F.3d 1106 (9th Cir. 1996).

422. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

423. 46 U.S.C. § 30106 (2006).

424. *Compare* *Hughes v. Roosevelt*, 107 F.2d 901 (2d Cir. 1939), *with* *Cooper v. Diamond M Co.*, 799 F.2d 176 (5th Cir. 1986). *See also* *Reed v. Am. S.S. Co.*, 682 F. Supp. 333 (E.D. Mich. 1988) (applying doctrine of laches); *Chacon-Gordon v. M/V Eugenio “C.”*, 1987 AMC 1886 (S.D. Fla. 1987) (applying maritime tort statute of limitations).

425. 46 U.S.C. § 30104 (2006).

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Liability Act,⁴²⁶ which provides a right of action for injured railroad workers as well as wrongful death and survival actions.

Prior to enactment of the Jones Act, a seaman injured in the service of a ship because of the negligence of the vessel's owner, master, or fellow employees was not entitled to compensation for injuries other than the remedy of maintenance and cure, unless the injuries resulted directly from an unseaworthy condition of the vessel.⁴²⁷ The defenses of contributory negligence, assumption of risk, and the fellow servant doctrine were available to the vessel owner, thereby precluding recovery of damages in a negligence action.⁴²⁸ In response to this situation, Congress enacted the Jones Act, which is remedial in nature and liberally construed in favor of injured seamen.⁴²⁹

Seaman Status

By its own language, the Jones Act remedy is available to "any seaman." The term "seaman," however, is not defined in the statute. In *Chandris, Inc. v. Latsis*,⁴³⁰ the Supreme Court definitively articulated the requirements for seaman status, holding that an employee claiming such status (1) must have a connection to a vessel in navigation (or identifiable fleet of vessels) that is substantial in both duration and nature and (2) must contribute to the function of the vessel or to the accomplishment of its mission.⁴³¹

An employee need not "reef and steer" or otherwise contribute to the navigation or transportation functions of a vessel to be considered a seaman for purposes of the Jones Act; the employee simply "must be doing the ship's work."⁴³² The second element of the *Chandris* test for seaman status broadly encompasses many individuals who would

426. 45 U.S.C. §§ 51–60 (2006).

427. *Cal. Home Brands, Inc. v. Ferriera*, 871 F.2d 830 (9th Cir. 1989) (discussing remedial effect of Jones Act).

428. *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372 (1918); *The Osceola*, 189 U.S. 158 (1903).

429. *Fisher v. Nichols*, 81 F.3d 319 (2d Cir. 1996).

430. 515 U.S. 347 (1995).

431. *Id.* at 368.

432. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355 (1991).

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not ordinarily be thought of as seamen. In fact, individuals as varied as a hairdresser aboard a cruise ship,⁴³³ a roustabout aboard an oil rig,⁴³⁴ and a paint foreman aboard a vessel used in painting offshore oil platforms⁴³⁵ have been held to satisfy that requirement for seaman status. The more difficult prong of the test is the first requirement that the employee have a “substantial connection to a vessel.”

Under *Chandris*, a seaman’s connection to a vessel must be substantial both in duration and nature.⁴³⁶ Rejecting a “snapshot” approach to seaman status, the Court concluded that it would not look merely at what the seaman was doing at the time of injury or during the particular voyage during which the injury occurred; rather, the proper frame of reference is the employee’s entire employment history with the employer.⁴³⁷

As to the temporal or durational requirement of the test for seaman status, the Supreme Court approved of the Fifth Circuit’s “rule of thumb” that an employee who spent less than 30% of his or her time in the service of a vessel in navigation does not qualify as a seaman.⁴³⁸ The Court warned, however, that the 30% rule of thumb serves only as a guideline and that departure from it is appropriate, for instance, when an employee’s basic assignment changes—e.g., the employee is reassigned from land-based duties to those of a crewmember of a vessel and is injured shortly after the assignment begins.⁴³⁹

Under the “fleet doctrine,” a worker’s employment-related connection need not be limited to a single vessel in order to attain

433. *Mahramas v. Am. Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973).

434. *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

435. *McDermott*, 498 U.S. 337.

436. *Chandris*, 515 U.S. at 368.

437. *Id.* at 371.

438. *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986). As a result, transitory workers (e.g., pilots) may not be able to satisfy the substantiality prong of the test for seaman status. *See Bach v. Trident S.S. Co.*, 947 F.2d 1290 (5th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992). *But see Foulk v. Donjon Marine Co.*, 144 F.3d 252 (3d Cir. 1998).

439. *Chandris*, 515 U.S. at 371.

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seaman status but may also be satisfied by assignment to an “identifiable fleet of vessels.” This could occur where an employer owns several vessels and the seaman is assigned to work on various ones at different times.⁴⁴⁰ The doctrine requires that the fleet be “an ‘identifiable fleet’ of vessels, a finite group of vessels under common ownership or control.”⁴⁴¹

Vessel in Navigation. To qualify as a seaman one must have an employment-related connection to a “vessel in navigation.” A claim under the Jones Act is dependent on the existence of a vessel. “Vessel” has been defined broadly by Congress as “every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water.”⁴⁴² The Supreme Court, in *Stewart v. Dutra Constr. Co.*,⁴⁴³ held that the statutory definition should be applied in both Jones Act and Longshore and Harbor Workers Compensation Act cases. Under the definition, a structure may qualify as a vessel even though its primary purpose is not navigation. Likewise, a structure need not be in transit to qualify for vessel status. As the Court stated, however, structures that have become fixed structures, that is, attached to land under circumstances that rendered them “not practically capable of being used as a means of transportation” do not satisfy the “vessel” requirement. Thus, the emphasis is on whether, as a practical matter, the structure is capable of being used as a means of transportation.

Prior to *Stewart*, many courts had followed Congress’s lead and held a number of otherwise nontraditional or “special purpose” structures used as a means of transportation to be vessels, notwithstanding the fact that “transportation” was not their sole function.⁴⁴⁴ However, structures that are permanently moored⁴⁴⁵ or

440. Harbor Tug & Barge v. Papai, 520 U.S. 548 (1997).

441. *Id.* at 555.

442. 1 U.S.C. § 3 (2006).

443. 543 U.S. 481 (2005).

444. See, e.g., Manuel v. P.A.W. Drilling & Well Serv., Inc., 135 F.3d 344 (5th Cir. 1998) (workover rig); Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa, 761 F.2d 229 (5th Cir. 1985) (jack-up oil drilling rig); Producers Drilling Co. v. Gray, 361 F.2d 432 (5th Cir. 1966) (submersible oil drilling rig).

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permanently affixed⁴⁴⁶ to the seafloor are not vessels as a matter of law. Similarly, seaman status will not be accorded to employees working aboard “dead ships,”⁴⁴⁷ vessels that are in navigation seasonally but then laid up,⁴⁴⁸ vessels plying nonnavigable waters,⁴⁴⁹ or vessels withdrawn from⁴⁵⁰ or not yet in navigation. Neither ships undergoing sea trials with additional construction work or outfitting remaining to be performed⁴⁵¹ nor ships withdrawn from navigation for extensive repairs or conversion are vessels in navigation.⁴⁵² Conversely, vessels that are temporarily in dry dock for repairs do not lose their vessel status.⁴⁵³

In *Lozman v. City of Riviera Beach*,⁴⁵⁴ the Supreme Court provided further guidance on the part of the statutory definition of the term “vessel” that includes any “artificial contrivance . . . capable of being used . . . as a means of transportation on water.” It held that a

445. See, e.g., *Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995).

446. See, e.g., *Johnson v. Odeco Oil & Gas Co.*, 864 F.2d 40 (5th Cir. 1989).

447. A “dead ship” is one in which the crew is not present to operate the vessel and the Coast Guard has not granted the vessel a certificate of operation. See *Harris v. Whiteman*, 243 F.2d 563 (5th Cir. 1957), *rev’d on other grounds*, 356 U.S. 271 (1958).

448. In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187 (1952), the Supreme Court denied seaman status to an individual employed as a “boat operator” but who, at the time of his death, had been performing shore-based seasonal repairs to a fleet of sightseeing boats in expectation of their launch one month later. The Court noted that the Jones Act “does not cover probable or expectant seamen but seamen in being.” *Id.* at 191.

449. *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521 (9th Cir. 1989).

450. *Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995).

451. *Caruso v. Sterling Yacht & Shipbuilders, Inc.*, 828 F.2d 14 (11th Cir. 1987).

452. *West v. United States*, 361 U.S. 118 (1959).

453. “[V]essels undergoing repairs or spending a relatively short period of time in drydock are still considered to be ‘in navigation’ whereas ships being transformed through ‘major’ overhauls or renovations are not.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 374 (1995).

454. 133 S. Ct. 735 (2013).

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structure “does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home’s physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.”⁴⁵⁵ Under this test, Lozman’s house-like plywood structure was not a “vessel” despite the fact that it floated.

As to the “in navigation” requirement, the Court in *Stewart* makes it clear that this is not a separate requirement but is part of the definition of “vessel.”

It is relevant to whether the craft is “used, or capable of being used” for maritime transportation. A ship long lodged in a dry dock or shipyard can be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. The question remains in all cases whether the watercraft’s use “as a means of transportation on water” is a practical possibility or merely a theoretical one.⁴⁵⁶

Situs of Injury

Plaintiffs who meet the test for seaman status need only show that they were in the course of their employment at the moment of the accident, regardless of whether the injury occurs on territorial waters, the high seas, or on land.⁴⁵⁷

The Jones Act Employer

The Jones Act gives seamen a right only against their “employers.”⁴⁵⁸ The burden of proof as to whether there was an employment relationship is on the person claiming seaman status.⁴⁵⁹ Various factors are considered in determining whether there is an employment

455. *Id.* at 741. The Court made it clear that the test was objective and not based on the owners’ subjective intent. *Id.* at 744-45.

456. *Stewart*, 543 U.S. at 496 (citations omitted).

457. *Braen v. Pfeifer Oil Transp. Co.*, 361 U.S. 129 (1959) (seaman boarding raft to perform repair work on barge); *Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966) (seamen being driven to consul’s office to be discharged); *Mounteer v. Marine Transp. Lines, Inc.*, 463 F. Supp. 715 (S.D.N.Y. 1979) (seaman being transported to vessel).

458. *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953).

459. *Wheatley v. Gladden*, 660 F.2d 1024 (4th Cir. 1981).

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relationship, the most important being the right of control.⁴⁶⁰ Vessel ownership, however, is not a prerequisite for employer status under the Jones Act.⁴⁶¹

Under the “borrowed servant doctrine,” an individual may be a crewmember aboard a vessel, and thereby a Jones Act seaman, even though he or she is employed by an independent contractor rather than the vessel’s owner.⁴⁶² The doctrine places liability for the seaman’s injuries on the actual rather than the nominal employer, with the key element in the determination being “control,” which a court will resolve as a matter of law.⁴⁶³ Where the worker is employed by a charterer or concessionaire, however, the vessel owner generally will not be the worker’s employer for purposes of the Jones Act.⁴⁶⁴

Standard of Care and Causation

A cause of action under the Jones Act is predicated upon a showing of employer negligence.⁴⁶⁵ The duty of care owed by the Jones Act employer to the seaman is relatively straightforward. Most courts impose on an employer the duty to exercise reasonable care under the circumstances;⁴⁶⁶ they also use a reasonable care standard in evaluating contributory negligence.⁴⁶⁷ Some courts, however, have said a seaman need only prove “slight negligence” on the part of the employer, or that a seaman need only exercise “slight care” in

460. *Id.* at 1026.

461. *Glynn v. Roy Al Boat Mgmt. Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996).

462. *Minnkota Power Coop., Inc. v. Manitowoc Co.*, 669 F.2d 525 (8th Cir. 1982).

463. *Ruiz v. Shell Oil Co.*, 413 F.2d 310, 312–13 (5th Cir. 1969), lists the factors considered by some courts in making the “borrowed servant” analysis. *See also* *Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116 (11th Cir. 2011).

464. *See, e.g., Mahramas v. Am. Export Isbrandtsen Lines, Inc.*, 475 F.2d 165 (2d Cir. 1973).

465. *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997).

466. *Gautreaux*, 107 F.3d 331. For additional cases, *see* Robert Force, *Allocation of Risk and Standard of Care under the Jones Act: “Slight Negligence,”* 25 J. Mar. L. & Com. 1 (1994).

467. *Gautreaux*, 107 F.3d 331.

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carrying out duties.⁴⁶⁸ The confusion on the issue of “ordinary” versus “slight” care stems from three factors: the right to jury trial, the nature of maritime employment, and the reduced burden on causation. On the first point, it seems clear that the right to jury trial is part of the Jones Act remedy.⁴⁶⁹ Therefore, a seaman need introduce only minimum or “slight” evidence of the employer’s negligence to get to the jury, and a verdict in favor of the seaman should not be taken away if the quantum of proof satisfies this minimal standard.⁴⁷⁰ As to the second factor, an employer of a Jones Act seaman has a duty to provide a safe place to work and to supply the seaman with proper tools and equipment. Furthermore, a seaman is under a duty to follow orders.⁴⁷¹

When an employer violates a statutory duty, and the violation causes injury to a seaman, the employer will be liable under the Jones Act without regard to its negligence.⁴⁷² This is a species of strict liability in that the violation is considered negligence per se. Unlike its land-based analog, it is irrelevant whether or not the seaman is within the class of persons the statute was designed to protect, or whether the harm caused the seaman is of the type the statute was designed to prevent.⁴⁷³

The traditional standard of proximate cause, however, is not required,⁴⁷⁴ and a seaman’s burden of proving causation is “featherweight.”⁴⁷⁵ Stated differently, a seaman need not prove that the employer’s negligence was a substantial cause of injury but simply that the employer’s negligence was *a* cause.⁴⁷⁶ Under this

468. *Williams v. Long Island R.R. Co.*, 196 F.3d 402 (2d Cir. 1999).

469. *See Force*, *supra* note 466, at 6, 7.

470. *Id.*

471. *Id.*

472. *Kernan v. Am. Dredging Co.*, 355 U.S. 426 (1958).

473. *Id.*

474. *Chisholm v. Sabine Towing & Transp. Co.*, 679 F.2d 60 (5th Cir. 1982).

475. *Evans v. United Arab Shipping Co. S.A.G.*, 4 F.3d 207 (3d Cir. 1993), *cert. denied*, 510 U.S. 1116 (1994).

476. *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107 (1959). This less demanding standard of causation was reaffirmed by the Supreme Court in a

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“featherweight” burden, the seaman-plaintiff need only prove that the employer’s negligence played some role, however “slight,” in causing the injury.⁴⁷⁷

Application of the Jones Act to Foreign Seamen

A foreign seaman may maintain a cause of action under the Jones Act where, after a choice-of-law analysis, sufficient contacts are present so as to allow the application of the statute. In determining the applicability of the Jones Act to a foreign seaman, the following factors are considered in the choice-of-law analysis: (1) the place of the wrongful act, (2) the law of the vessel’s flag, (3) the allegiance or domicile of the injured seaman, (4) the allegiance of the shipowner, (5) the place of the contract, (6) inaccessibility of the foreign forum, (7) the law of the forum, and (8) the vessel owner’s base of operations.⁴⁷⁸

Where the Jones Act claimant is a foreign seaman employed in the production of offshore energy and mineral resources of a country other than the United States, however, Congress has proscribed recovery under the statute unless the seaman can show that no other remedy is available.⁴⁷⁹

Unseaworthiness

Nature of the Cause of Action

Under the general maritime law, vessel owners and owners *pro hac vice* (e.g., demise charterers) owe a duty to seamen to provide a seaworthy vessel aboard which the seaman works, and “the vessel and her owner are . . . liable . . . for injuries received by seamen in

FELA case, and the same standard will be applied in seamen’s cases. *CSX Transp. Inc. v. McBride*, 131 S. Ct. 2630 (2011).

477. *In re Cooper/T. Smith*, 929 F.2d 1073 (5th Cir.), *cert. denied*, 502 U.S. 865 (1991).

478. *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970); *Lauritzen v. Larsen*, 345 U.S. 571 (1953). *See also* *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166 (3d Cir. 1995).

479. 46 U.S.C. § 30105 (2006).

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consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.”⁴⁸⁰

Only seamen have a cause of action for unseaworthiness.⁴⁸¹ The doctrine of unseaworthiness imposes on the vessel owner or owner *pro hac vice* a duty that is both absolute and nondelegable.

The so-called “warranty” of seaworthiness covers all parts of the vessel and its operation, including the hull, machinery, appliances, gear and equipment, and other appurtenances.⁴⁸² The equipment must be an appurtenance of or attached to the vessel or otherwise under the vessel’s control in order for the warranty of seaworthiness to attach. Where defective, shore-based equipment causes the seaman’s injury or death, no cause of action for unseaworthiness will lie because the equipment lacks the requisite connection to the vessel to be considered part of its equipment.⁴⁸³ The duty of seaworthiness is implicated where cargo is improperly loaded or stowed,⁴⁸⁴ and a statutory or regulatory violation may amount to unseaworthiness *per se*.⁴⁸⁵ The warranty of seaworthiness extends also to manning the vessel, and an incompetent or inadequate master or crew may render the vessel unseaworthy.⁴⁸⁶ Indeed, where the vessel owner employs a crewmember of “savage disposition” who assaults a fellow seaman, the vessel may be considered unseaworthy.⁴⁸⁷

The test for determining a vessel’s seaworthiness is whether the vessel as well as her equipment and other appurtenances are “reasonably fit for their intended use.”⁴⁸⁸ However, the vessel owner is not required to furnish an accident-free vessel—i.e., the “standard

480. *The Osceola*, 189 U.S. 158, 175 (1903); *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

481. *Griffith v. Martech Int’l, Inc.*, 754 F. Supp. 166 (C.D. Cal. 1989).

482. *Havens v. F/T Polar Mist*, 996 F.2d 215 (9th Cir. 1993).

483. *Feehan v. United States Lines, Inc.*, 522 F. Supp. 811 (S.D.N.Y. 1980).

484. *Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206 (1963).

485. *Smith v. Trans-World Drilling Co.*, 772 F.2d 157 (5th Cir. 1985).

486. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967).

487. *Gutierrez*, 373 U.S. at 210.

488. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960).

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is not perfection but reasonable fitness,”⁴⁸⁹ with reasonableness determined by the traditional “reasonable person” standard of tort law.⁴⁹⁰ No distinction, however, is made between unseaworthy conditions that are permanent and those that are transitory.⁴⁹¹

Negligence plays only a tangential role in an unseaworthiness action, in that negligence may create an unseaworthy condition, but liability under the doctrine of seaworthiness is not contingent on the finding of negligence. The vessel owner is held to the standard of strict liability.⁴⁹² Where an unseaworthy condition exists and causes injury to a seaman, it is no defense that the vessel owner had exercised due diligence to make the vessel seaworthy, that it was not negligent in creating the unseaworthy condition, or that it was without notice of the unseaworthy condition and did not have an opportunity to correct it.⁴⁹³ Operational negligence—i.e., an isolated act of negligence by an otherwise qualified fellow worker that injures the seaman—will not render the vessel unseaworthy⁴⁹⁴ unless it is “pervasive.”⁴⁹⁵

To state a cause of action for unseaworthiness, a seaman must allege not only that the vessel was unseaworthy but also that the unseaworthy condition was the proximate cause of the seaman’s injury or death.⁴⁹⁶ Proximate causation is satisfied by a showing that the injury or death was either a direct result of the unseaworthy condition or a reasonably probable consequence thereof.⁴⁹⁷

489. *Id.*

490. *Allen v. Seacoast Prods., Inc.*, 623 F.2d 355 (5th Cir. 1980).

491. *Mitchell*, 362 U.S. at 550.

492. *Id.* at 548.

493. *Id.* at 550.

494. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971).

495. *Cf. Daughdrill v. Ocean Drilling & Exploration Co.*, 709 F. Supp. 710 (E.D. La. 1989).

496. *Bommarito v. Penrod Drilling Corp.*, 929 F.2d 186 (5th Cir. 1991).

497. *Phillips v. W. Co. of N. Am.*, 953 F.2d 923 (5th Cir. 1992).

Right of Action

The plaintiff in an action for unseaworthiness may bring an *in personam* action against the party exercising operational control over the vessel (either the vessel owner or demise charterer) as well as an *in rem* action against the vessel itself.⁴⁹⁸

Contributory Negligence and Assumption of Risk in Jones Act and Unseaworthiness Actions

Contributory negligence or assumption of risk by a seaman-plaintiff will not bar recovery in a Jones Act⁴⁹⁹ or unseaworthiness action. The employer's burden of proving that the seaman's negligence contributed to his or her injury is the same standard as the seaman's burden of proving causation. In Jones Act cases the employer must prove that the seaman's negligence was a cause of the injury.⁵⁰⁰ In unseaworthiness cases, the employer must prove that the seaman's negligence was a proximate cause of the injury. However, under principles of comparative fault, the seaman's recovery, if any, will be reduced in proportion to his or her degree of fault.⁵⁰¹ Where a seaman is injured by an unseaworthy condition caused exclusively by the seaman's own negligence, however, recovery in an action for unseaworthiness will be denied.⁵⁰² Where an employer has violated a safety statute or regulation, the seaman-plaintiff's recovery under the Jones Act will not be reduced proportionately under contributory negligence or assumption of risk.⁵⁰³

In the absence of a statutory violation, where a seaman is solely at fault in bringing about his or her injury, there can be no recovery under the Jones Act because proof of employer fault is a prerequisite

498. *Baker v. Raymond Int'l*, 656 F.2d 173 (5th Cir. 1981), *cert. denied*, 456 U.S. 983 (1982).

499. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158 (2007). The same rule applies in Jones Act cases.

500. *Sorrell*, 549 U.S. 158.

501. *Villers Seafood Co. v. Vest*, 813 F.2d 339 (11th Cir. 1987).

502. *Keel v. Greenville Mid-Stream Serv., Inc.*, 321 F.2d 903 (5th Cir. 1963).

503. *Smith v. Trans-World Drilling Co.*, 772 F.2d 157 (5th Cir. 1985).

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to recovery.⁵⁰⁴ However, the mere fact that a seaman's negligence creates a risk or contributes to an injury does not mean that the employer did not likewise contribute to the risk and ensuing injury. This could occur, for example, where an inexperienced, unsupervised seaman is ordered to perform tasks that he or she is not competent to perform or if the seaman is ordered to work in an unsafe or dangerous environment.⁵⁰⁵ In assessing a seaman's duty to care for himself or herself, the fact finder must bear in mind that the employer is under a duty to provide its seamen with a safe place to work and to supply proper tools and equipment and that seamen are under a duty to follow orders.

Maritime Workers' Remedies

Longshore and Harbor Workers' Compensation Act

Persons other than seamen engaged in "maritime employment," such as longshoremen and harbor workers, enjoy a special status that affects both the rights and remedies available to them as a result of work-related injuries or disabilities. Under the Longshore and Harbor Workers' Compensation Act (LHWCA),⁵⁰⁶ workers who come within the coverage of the Act and who sustain injury or illness related to their maritime employment are entitled to scheduled compensation benefits from their employers.

The LHWCA is essentially a federal workers' compensation statute in which a covered worker "accepts less than full damages for work-related injuries. In exchange, he is guaranteed that these statutory benefits will be paid for every work-related injury without regard to fault."⁵⁰⁷ The statute was enacted in response to Supreme Court decisions that held that state worker compensation schemes could not supply remedies to longshoremen who were injured or

504. 45 U.S.C. § 151 (2000). *See also In re Cooper/T. Smith*, 929 F.2d 1073 (5th Cir.), *cert. denied*, 502 U.S. 865 (1991); *Valentine v. St. Louis Ship Bldg. Co.*, 620 F. Supp. 1480 (E.D. Mo. 1985), *aff'd*, 802 F.2d 464 (8th Cir. 1986).

505. *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975).

506. 33 U.S.C. §§ 901–948(a) (2006).

507. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979) (Blackmun, J., dissenting).

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killed while working on navigable waters,⁵⁰⁸ although such state benefits could be awarded where injuries occurred on land.⁵⁰⁹

Scope of Coverage

To qualify for coverage under the LHWCA, the maritime worker must meet both “status” and “situs” requirements.⁵¹⁰

Employee Status

Coverage under the LHWCA is accorded to those who are engaged in “maritime employment.” This includes “any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker.”⁵¹¹ The list of individuals in the LHWCA, however, is illustrative rather than exhaustive: an employee engaged in activities, the nature of which are an integral part of loading, unloading, repairing, building, or disassembling a vessel, satisfies the status requirement for coverage under the LHWCA.⁵¹²

There is an important exception to the maritime employment status requirement. The LHWCA originally covered only employees who were injured or killed on navigable waters. Location alone was the sole criteria for eligibility; there was no occupational status requirement. After the maritime employment status requirement was added in 1972, the Supreme Court nevertheless continued to find LHWCA coverage where a worker’s job assignment requires work in or on navigable waters. The fact that the employee is required to work on navigable waters satisfies the occupational status requirement, and to the extent that the worker would have been covered prior to the 1972 amendment, he or she will be covered under the amended

508. *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

509. *State Indus. Comm. of State of N.Y. v. Nordenholt Corp.*, 259 U.S. 263 (1922); *T. Smith & Son v. Taylor*, 276 U.S. 179 (1928).

510. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40 (1989); *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414 (1985).

511. 33 U.S.C. § 902(3) (2006).

512. *Schwalb*, 493 U.S. 40; *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979). However, a welder on an oil or gas fixed platform does not qualify. *See Herb’s Welding, Inc. v. Gray*, 470 U.S. 414 (1985).

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Act.⁵¹³ Mere “presence” on the water when an injury is sustained may not be sufficient, such as where an employee is only fortuitously or transiently on navigable waters.⁵¹⁴

The Act also excludes a number of occupations from its coverage.⁵¹⁵ Importantly, the Act excludes from coverage “a master or member of the crew of any vessel,” the definition of which is co-extensive with that of “seaman” for purposes of the Jones Act.⁵¹⁶ The remedies are considered mutually exclusive.⁵¹⁷ However, the mere fact that a person does the kind of work enumerated in the LHWCA does not automatically preclude that worker from satisfying the criteria for seaman status. In *Southwest Marine, Inc. v. Gizoni*,⁵¹⁸ the Supreme Court held that an employee engaged in one of the occupations enumerated in the LHWCA nevertheless may be a seaman if he or she satisfies the criteria for seaman status under the Jones Act.⁵¹⁹ For example, a regular member of a ship’s crew assigned to maintain and repair equipment during the vessel’s voyages would be a seaman even though the crewmember was a ship repairer.

Where a worker who brings a Jones Act action against an employer is found to be a seaman but does not recover because of the absence of employer negligence, the seaman status determination will not bar subsequent recovery in an LHWCA action.⁵²⁰ A denial of LHWCA benefits based on an administrative or judicial finding that the applicant was a seaman does not preclude a subsequent suit under

513. *Director, O.W.C.P. v. Perini N. River Assocs.*, 459 U.S. 297 (1983).

514. *Bienvienu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999).

515. Section 902(3)(A)–(F) of the Act specifically excludes from the definition of the term “employee” certain classes of employees if they are covered under state statutes.

516. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337 (1991).

517. *See, e.g., Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2d 977 (5th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988).

518. 502 U.S. 81 (1991).

519. *Id.* at 88.

520. *See, e.g., Strachan Shipping Co. v. Shea*, 406 F.2d 521 (5th Cir.), *cert. denied*, 395 U.S. 921 (1969).

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the Jones Act.⁵²¹ There is some dispute as to whether a formal award in a contested case bars a subsequent Jones Act action.⁵²² A worker's voluntary acceptance of LHWCA benefits does not preclude a later Jones Act action, but if a worker recovers under the Jones Act, any compensation benefits received must be returned.⁵²³

Situs of the Injury or Disability

The LHWCA, as amended in 1972, covers injuries or deaths that occur

upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).⁵²⁴

The status of an employee is relevant only when the injury does not occur on navigable waters but rather on a pier, wharf, or adjoining area. Where the worker clearly satisfies the occupational status requirement but is injured on a situs outside the scope of the LHWCA, coverage will be denied.⁵²⁵

The test for determining navigable waters is the same as that used for determining admiralty jurisdiction over torts.⁵²⁶ The LHWCA also applies to injuries occurring on the high seas.⁵²⁷

Though many cases hold that proximity to navigable waters is not determinative of whether coverage will attach to an adjoining area,⁵²⁸

521. *McDermott, Inc. v. Boudreaux*, 679 F.2d 452 (5th Cir. 1982).

522. *Compare* *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203 (9th Cir. 1995), *rev'd on other grounds*, 520 U.S. 548 (1997), *with* *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423 (5th Cir. 1992), *cert. denied*, 508 U.S. 907 (1993).

523. 33 U.S.C. § 903(e) (2006); *Gizoni*, 502 U.S. 81.

524. 33 U.S.C. § 903(a) (2006).

525. *Humphries v. Director, O.W.C.P.*, 834 F.2d 372 (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988).

526. *Rizzi v. Underwater Constr. Corp.*, 84 F.3d 199, 202 (6th Cir.), *cert. denied*, 519 U.S. 931 (1996).

527. *Kollias v. D & G Marine Maint.*, 29 F.3d 67 (2d Cir. 1994), *cert. denied*, 513 U.S. 1146 (1995); *see also* 33 U.S.C. § 939(b) (2006).

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the Fourth Circuit holds that geographic proximity is dispositive, requiring that an “adjoining area” be contiguous with or touching navigable waters.⁵²⁹

The shoreward extension of coverage under the 1972 amendments to the LHWCA creates a jurisdictional overlap between the Act and state workers’ compensation statutes.⁵³⁰ Therefore, a worker who qualifies for both LHWCA and state compensation benefits may file for both, either concurrently or successively.⁵³¹ Where an employee recovers under a state regime an amount more generous than under the LHWCA, an employer’s obligation to provide LHWCA benefits is discharged, since the worker will in no case be allowed to recover twice for the same injury.⁵³² Where the worker files first for state benefits and later receives a higher award under the LHWCA, the worker may recover under both regimes, with the amount of the state recovery credited against the recovery under the LHWCA.⁵³³

Remedies under the LHWCA

Under the LHWCA, the payment of compensation is the exclusive remedy of a covered worker against his or her employer, with limited exception.⁵³⁴ The right to benefits does not depend on employer fault, nor is the right overcome or diminished by the comparative fault of

528. See, e.g., *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978).

529. *Parker v. Director, O.W.C.P.*, 75 F.3d 929 (4th Cir.), cert. denied, 519 U.S. 812 (1996); *Sidwell v. Express Container Servs., Inc.*, 71 F.3d 1134 (4th Cir. 1995). The Fifth Circuit, in *New Orleans Depot Services, Inc. v. Director, Office of Workers’ Compensation Programs*, No. 11-60057, 2013 U.S. App. LEXIS 8674 (5th Cir. April 29, 2013), overruled its prior decision in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 518 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981), and adopted the narrower approach of the Fourth Circuit.

530. *Sun Ship, Inc. v. Penn.*, 447 U.S. 715 (1980).

531. *Id.* at 723–24.

532. 33 U.S.C. § 933(e) (2006); *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).

533. *Sun Ship*, 447 U.S. at 725, n.8.

534. 33 U.S.C. § 905(a) (2006).

the worker.⁵³⁵ However, an employee is not entitled to compensation if the injury was caused solely by the employee's intoxication, or the willful intention to injure or kill oneself.⁵³⁶ The benefits are fixed according to schedule. Compensation includes medical expenses,⁵³⁷ disability benefits,⁵³⁸ and rehabilitation benefits,⁵³⁹ in addition to a percentage of the employee's average weekly wage.⁵⁴⁰ Where the worker's injuries result in death, the LHWCA enumerates a beneficiary class and a schedule of benefits to which the members of that class are entitled.⁵⁴¹

Section 933 of the LHWCA preserves all causes of action an injured worker may have against third parties for tort damages.⁵⁴² An injured worker who brings an action against a negligent third-party tortfeasor need not elect remedies⁵⁴³—that is, the worker can recover LHWCA benefits from the employer and still maintain an action in tort against the third-party tortfeasor. For example, where a longshoreman or ship repairman is working aboard a vessel and is injured by a defective piece of equipment, the worker may bring an action in products liability against the manufacturer of that equipment.⁵⁴⁴

Though a worker need not elect remedies, acceptance of LHWCA benefits from an employer pursuant to an award operates as an assignment of rights of the injured worker to the employer, unless the worker commences an action against the third-party tortfeasor within six months of accepting compensation benefits.⁵⁴⁵ If the employer

535. *Id.* § 904(b).

536. *Id.* § 903(c).

537. *Id.* § 907.

538. *Id.* § 908.

539. *Id.* §§ 908(g), 939(c).

540. *Id.* § 906.

541. *Id.* § 909.

542. *See generally* § 933.

543. *Id.* § 933(a).

544. *See, e.g.,* *Lewis v. Timco, Inc.*, 697 F.2d 1252 (5th Cir. 1983), *modified*, 736 F.2d 163 (1984).

545. 33 U.S.C. § 933(b) (2006).

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fails to bring its action against the third-party tortfeasor within ninety days of the assignment, it loses the right to the assignment, which reverts back to the worker.⁵⁴⁶ Where the employer does bring a cause of action against the third-party tortfeasor, the employer is entitled to retain from any judgment all amounts paid as compensation to the worker, including the present value of any benefits that will be paid in the future, as well as reasonable attorney fees expended in bringing suit.⁵⁴⁷ Recovery in excess of these amounts will be turned over to the injured worker.⁵⁴⁸ Where an employee brings suit against a third party, the employer or the employee's insurance company may intervene to recover indemnification for the compensation benefits it has paid.⁵⁴⁹

Section 905(b) of the LHWCA expressly recognizes the right of a covered employee to sue the vessel as a third party in an action for injuries or death caused by the vessel's negligence.⁵⁵⁰ The term "vessel"⁵⁵¹ is broadly defined and includes, inter alia, the vessel's owner. As to "covered" employees, the LHWCA expressly abolished the judicially created action for unseaworthiness that the Supreme Court had extended to injured longshoremen.⁵⁵² Through the interrelationship between §§ 933 and 905(b), the LHWCA preserves "the traditional maritime tort remedy of an Act-covered employee for injuries caused by the negligence of a vessel ... while on the

546. *Id.*

547. *Id.* § 933(e).

548. *Id.*

549. *The Etna*, 138 F.2d 37 (3d Cir. 1943).

550. 33 U.S.C. § 905(b) (2006).

551. For LHWCA purposes, the definition of "vessel" is the same as it is under the Jones Act. *See Stewart v. Dutra Constr. Co.*, 534 U.S. 481 (2005), discussed *supra*, text accompanying note 443.

552. In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946), the Court extended the warranty of seaworthiness to longshoremen performing their work aboard vessels, thereby allowing an injured longshoreman (hence a "*Sieracki* seaman") to maintain actions for both negligence and unseaworthiness. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991). In 1972 Congress amended § 905(b) of the LHWCA to deny covered employees the right to sue for unseaworthiness.

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navigable waters.”⁵⁵³ The LHWCA articulates neither the elements of the cause of action for negligence nor the elements of the damages recoverable. The courts, however, have done so as part of the development of this general maritime law remedy.⁵⁵⁴

In *Scindia Steam Navigation Co., Ltd. v. De Los Santos*,⁵⁵⁵ the Supreme Court articulated guidelines setting forth the duties that a vessel owes to maritime workers. In general, a vessel owner who turns part of a ship over to a stevedore may rely on the expertise of the stevedore in loading or discharging cargo from the vessel. Negligence that occurs during these operations usually is the fault of the stevedore or its employees and is not attributable to the vessel owner. Nevertheless, a vessel owner must exercise “reasonable care under the circumstances.”⁵⁵⁶ *Scindia* described the following three duties that the vessel owner owes to a maritime worker:⁵⁵⁷

[1] [A] vessel owes to the stevedore and his longshoremen employees the duty of exercising due care “under the circumstances.” This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not

553. *Hall v. Hvide Hull No. 3*, 746 F.2d 294, 303 (5th Cir. 1984), *cert. denied*, 474 U.S. 820 (1985).

554. *See, e.g., Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92 (1994); *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981).

555. 451 U.S. 156 (1981).

556. *Id.* at 168.

557. Though precedent refers to stevedores and longshoremen, the *Scindia* duties are applicable to other maritime workers as well. *See, e.g., Cook v. Exxon Shipping Co.*, 762 F.2d 750 (9th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986).

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be obvious to or anticipated by him if reasonably competent in the performance of his work.⁵⁵⁸

[2] It is also accepted that the vessel may be liable if it actively involves itself in the cargo operations and negligently injures a longshoreman or if it fails to exercise due care to avoid exposing longshoremen to harm from hazards they may encounter in areas, or from equipment, under the active control of the vessel during the stevedoring operation.⁵⁵⁹

...

[3] We are of the view that absent contract provision, positive law, or custom to the contrary ... the shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedore. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty to inform himself.⁵⁶⁰

However, the Court qualified the preceding statement with the following:

If *Scindia* was aware that the winch was malfunctioning to some degree, and if there was a jury issue as to whether it was so unsafe that the stevedore should have ceased using it, could the jury also have found that the winch was so clearly unsafe that *Scindia* should have intervened and stopped the loading operation until the winch was serviceable?⁵⁶¹

The third rule means that if a shipowner is not aware that a stevedore is employing unsafe practices, it is not liable for injuries that result. A

558. *Scindia*, 451 U.S. at 166–67.

559. *Id.* at 167.

560. *Id.* at 172.

561. *Id.* at 178.

shipowner who is aware that a stevedore is using unsafe practices may be liable, under some circumstances, for its failure to intervene.

Dual-Capacity Employers

An owner of a vessel who is also the employer of the maritime worker has dual capacity under the LHWCA. There are restrictions on the right to sue where the vessel owner has dual capacity.⁵⁶² No tort action will lie against an owner-employer where a maritime worker, engaged in one of the “harbor worker” occupations (e.g., shipbuilding and repairing or breaking services) enumerated in § 905(b), is injured. The worker’s exclusive remedy is compensation benefits under the LHWCA. If the injured worker is a longshoreman employed directly by a vessel, a tort action against the dual-capacity employer may be available under § 905(b), but the action is against the employer only in its capacity as vessel owner.⁵⁶³ A longshoreman may not recover against a vessel under § 905(b) “if the injury was caused by persons engaged in providing stevedoring services to the vessel.”⁵⁶⁴

Indemnity and Employer Liens

If an injured worker brings an action under § 905(b) and recovers damages from the vessel, the vessel may not recover those damages, either directly or indirectly, from the injured worker’s employer, notwithstanding any agreement to the contrary.⁵⁶⁵ Where the injured worker recovers damages in a § 905(b) action, the worker is obligated to repay any compensation benefits received, and the employer has a judicially created lien in that amount.⁵⁶⁶ Further, where the employer’s workers’ compensation carrier (insurance company) has

562. 33 U.S.C. § 905(b) (2006).

563. *Reed v. The Yaka*, 373 U.S. 410 (1963). It is not always an easy matter to determine whether an employer has been negligent in its capacity as employer or vessel owner. *Gravatt v. City of New York*, 226 F.3d 108 (2d Cir. 2000), *cert. denied*, 532 U.S. 957 (2001).

564. 33 U.S.C. § 905(b) (2006). *See also* *Singleton v. Guangzhou Ocean Shipping Co.*, 79 F.3d 26 (5th Cir.), *cert. denied*, 519 U.S. 865 (1996).

565. 33 U.S.C. § 905(b) (2006). *See also* *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256 (1979).

566. *Bloomer v. Liberty Mut. Ins. Co.*, 445 U.S. 74 (1980).

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paid benefits to the injured employee, the carrier may intervene to protect its interests even where the recovery is against the employer in its capacity as vessel owner.⁵⁶⁷

Forum and Time for Suit

With respect to the jurisdiction over claims for compensation benefits, the maritime worker's claim is handled by administrative process through the U.S. Department of Labor.⁵⁶⁸ Any dispute regarding the claim for benefits will be adjudicated by an administrative law judge⁵⁶⁹ with appellate review of this decision, if appropriate, by the Benefits Review Board.⁵⁷⁰ The board will affirm the decision of the administrative law judge where it is supported by "substantial evidence."⁵⁷¹ The court of appeals for the circuit in which the injury giving rise to the claim occurred has appellate jurisdiction over the Benefits Review Board's decision.⁵⁷²

The period beyond which an injured maritime worker's claim will be barred depends on whether it is a claim for compensation benefits or an action for damages. The LHWCA provides for a one-year statute of limitations.⁵⁷³ Suit under § 905(b) is subject to the three-year statute of limitations for personal injuries and death under the general maritime law.⁵⁷⁴

Offshore Workers' Remedies

The Outer Continental Shelf Lands Act

The discovery and production of offshore energy resources exposed a new class of workers to the perils of maritime employment. The Outer Continental Shelf Lands Act (OCSLA)⁵⁷⁵ extends the

567. *Taylor v. Bunge Corp.*, 845 F.2d 1323 (5th Cir. 1988).

568. *See generally* 33 U.S.C. § 913 (2006).

569. *Id.* § 919(d).

570. *See generally id.* § 921.

571. *Id.* § 921(b)(3).

572. *Id.* § 921(c).

573. *Id.* § 913(a).

574. 46 U.S.C. § 30106 (2006).

575. 43 U.S.C. §§ 1331–1356 (2006).

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LHWCA's compensation benefits provisions to offshore workers engaged in extracting natural resources on the Outer Continental Shelf.⁵⁷⁶ For offshore workers (as with maritime workers), the exclusive remedy against their employers is compensation; they may not maintain a tort action against their employers.⁵⁷⁷ There is considerable litigation over the status of offshore workers because some offshore structures qualify as vessels and employees assigned to such structures may qualify as seamen entitled to seamen's remedies.⁵⁷⁸

Workers engaged in activities on areas of the Continental Shelf that lie within state waters have remedies with respect to their employers under state workers' compensation laws.⁵⁷⁹ Tort claims may be brought as state claims or general maritime law claims, depending on the circumstances. With respect to injuries occurring on the Continental Shelf within state waters, the OCSLA is silent. However, because the OCSLA makes nonconflicting state laws applicable to injuries occurring on covered situses adjacent to a state, presumably state law would be applicable to similar events occurring within a state's territorial waters. Where, however, the general maritime law provides the injured person with a remedy against a third party, that person may pursue a maritime claim.

Status and Situs Requirements

OCSLA by its own terms excludes from coverage government employees⁵⁸⁰ and seamen. This does not mean, however, that all others injured while engaged in activities on the Outer Continental Shelf are covered. For OCSLA coverage to attach, an offshore worker must be engaged in one of the enumerated activities—e.g., “exploring for,” “developing,” “removing,” or “transporting” natural resources as set forth in OCSLA. A worker satisfying the status requirement who

576. *Id.* § 1333(b).

577. *Wentz v. Kerr-McGee Corp.*, 784 F.2d 699 (5th Cir. 1986).

578. *Demette v. Falcon Drilling Co.*, 280 F.3d 492 (5th Cir. 2002).

579. *Miles v. Delta Well Surveying Corp.*, 777 F.2d 1069 (5th Cir. 1985). Such workers are not engaged in maritime employment and thus don't qualify for benefits under the LHWCA. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985).

580. 43 U.S.C. § 1333(b)(1) (2006).

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is injured while working on the Outer Continental Shelf meets the situs requirement and is entitled to compensation benefits. As to the situs requirement, the Supreme Court resolved a conflict among the Circuits and held that benefits are available to an employee regardless of where he or she is injured, as long as the injury occurred “as a result of operations conducted on the Outer Continental Shelf.”⁵⁸¹

Remedies

Offshore workers injured on the Outer Continental Shelf have the same remedies available to maritime workers under the LHWCA.⁵⁸² In addition to compensation benefits from their employers, they have a § 905(c) action for damages caused by the negligence of a vessel and for injuries caused by the negligence of other third parties, and these actions, depending on the circumstances, may be pursued under state law or as a general maritime law cause of action.

The OCSLA extends federal law to the Outer Continental Shelf and to injuries suffered thereon that result from energy-related activities.⁵⁸³ In addition, the OCSLA adopts as federal law the laws of each adjacent state where they are not in conflict with federal law, “for that portion of the subsoil and seabed of the Outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the Outer Continental Shelf.”⁵⁸⁴ State law does not supplant the general maritime law, however, and injuries resulting from tortious activity on navigable waters are governed by the latter, despite the fact that the subsoil beneath those waters may form part of the Outer Continental Shelf.⁵⁸⁵

581. *Pacific Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680 (2012), *abrogating* *Mills v. Director, O.W.C.P.*, 877 F.2d 356 (5th Cir. 1989); *Kaiser Steel Corp. v. Director, O.W.C.P.*, 812 F.2d 518 (9th Cir. 1987); and *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988).

582. 43 U.S.C. § 1333(a)(1) (2006).

583. *Id.*

584. *Id.* § 1333(a)(2)(A).

585. *Id.* § 1333(f). *See also* *Tenn. Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150 (5th Cir. 1996).

Remedies of Nonmaritime Persons

Passengers and Others Lawfully Aboard a Ship

Duty and Standard of Care Generally⁵⁸⁶

A variety of people other than seamen and maritime workers may be lawfully present on a vessel. Every day, passengers board cruise ships, government officials inspect ships, and seamen receive visitors aboard vessels.

As a general rule, a shipowner is under a duty to exercise reasonable care toward persons lawfully present aboard the shipowner's vessel.⁵⁸⁷ The standard of care is not dependent on whether the injured person is a "licensee" or "invitee" on the vessel.⁵⁸⁸

Nevertheless, the duty to exercise reasonable care applies only where the injured person is lawfully present aboard the vessel. With respect to stowaways and other individuals who have no legal right to be or remain aboard the vessel, the shipowner is subject to a less demanding standard of care, a duty of humane treatment.⁵⁸⁹ In such situations a shipowner is only liable for its willful or wanton misconduct toward stowaways.⁵⁹⁰

A shipowner is liable when it or its employee negligently causes an injury to a person lawfully present aboard the vessel.⁵⁹¹ By statute, a shipowner is liable when a passenger is injured or a passenger's property is damaged by "explosion, fire, collision, or other cause" if it

586. The materials in this section have been adapted, with permission, from Robert Force, A.N. Yiannopoulos & Martin Davies, 1 *Admiralty and Maritime Law*, pp. 378-80 (Beard Books 2012).

587. *Leathers v. Blessing*, 105 U.S. 626, 629-30 (1881); *The Max Morris v. Curry*, 137 U.S. 1, 2 (1890).

588. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959) (holding that "the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case," *id.* at 632, and thereby rejecting the tort rules commonly applied to determine the liability of landowners).

589. *The Laura Madsen*, 112 F. 72 (W.D. Wash. 1901).

590. *Taylor v. Alaska Rivers Navigation Co.*, 391 P.2d 15, 17 (Alaska 1964).

591. *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 64 (2d Cir. 1988).

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happens through neglect, in violation of various safety measures, or through known defects in the vessel.⁵⁹² Under this provision, liability is imposed not only on shipowners but also on masters and other key members of the crew. Otherwise, a shipowner is only bound to exercise that degree of care as would be exercised by a reasonable shipowner under like circumstances. Specifically, with respect to medical care for passengers, a cruise ship operator is not liable for the negligence of the ship's doctor, but liability would attach if the shipowner failed to exercise reasonable care to provide a reasonably competent doctor.⁵⁹³ The shipowner's liability to passengers (nonmaritime persons) is not limited to conduct that occurs within the confines of the ship.⁵⁹⁴ A shipowner may be absolutely liable for the intentional torts of its crewmembers.⁵⁹⁵

The general maritime rule of comparative negligence may be used by a shipowner to reduce the amount of damages.⁵⁹⁶

Contractual Limitation of Shipowner's Liability

The United States is not a party to any international convention, such as the Athens Convention, relating to personal injuries or death of passengers and damage to or loss of passengers' luggage. A statute, however, does provide that a carrier may not "contract out" of its liability for negligent acts that result in personal injury or death of

592. 46 U.S.C. §§ 30102-30103 (2006).

593. *Barbetta v. S.S. Bermuda Star*, 848 F.2d 1364, 1371 (5th Cir. 1988).

594. *Gillmor v. Caribbean Cruise Line, Ltd.*, 789 F. Supp. 488, 490 (D.P.R. 1992) (denying cruise line's motion to dismiss passengers' complaint alleging negligence in failing to advise them that the pier, where they were injured, was high-crime area; noting alleged failure to warn took place on board vessel; *id.* at 491, 492); *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004) (passenger raped on shore by crewmember).

595. *Morton v. De Oliveira*, 984 F.2d 289 (9th Cir. 1993) (holding that passenger raped by member of crew could recover against shipowner without showing any negligence on part of shipowner); *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891 (11th Cir. 2004) (strict liability). *Contra* *York v. Commodore Cruise Line*, 863 F. Supp. 159 (S.D.N.Y. 1994) (showing of breach of due care required).

596. *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 205 (1st Cir. 1988).

passengers.⁵⁹⁷ To a limited extent, a carrier may avoid liability for emotional distress, mental suffering, or psychological injury except when such injury occurs in specified circumstances.⁵⁹⁸ The general Limitation of Liability Act applies, including the special provisions relating to personal injury and death (see *infra* Chapter 5).

Likewise, a statute prohibits a carrier from requiring passengers to give notice of personal injury within a period of less than six months after the injury or from requiring that suit be commenced within a period of less than one year after the injury.⁵⁹⁹ Notice and commencement of suit provisions that comply with these limits are enforceable. A carrier may not unreasonably limit the time for giving notice or for the commencement of suit in cases involving lost or damaged luggage.⁶⁰⁰

In *Carnival Cruise Lines, Inc. v. Shute*,⁶⁰¹ the Supreme Court held that forum selection clauses are enforceable as long as they are not deemed to be fundamentally unfair. The Court found that the forum selection clause in the passage tickets in *Shute* was reasonable because the plaintiffs had notice of it and the forum designated was not a “remote alien forum.”

Recreational Boating and Personal Watercraft

Recreational boating accidents and injuries resulting from the operation of personal watercraft on navigable waters satisfy the requirements for admiralty tort jurisdiction.⁶⁰² In these situations, courts have applied the tort rules of the general maritime law, recognizing a right of recovery for injuries caused by negligence. Negligence under the general maritime law is no different than under land-based law except that the rule of proportionate fault applies.⁶⁰³ Contributory negligence and assumption of risk are not complete

597. 46 U.S.C. § 30509(a) (2006).

598. *Id.* § 30509(b).

599. *Id.* § 30506(b).

600. *The Kensington*, 182 U.S. 261 (1902).

601. 499 U.S. 585 (1991).

602. *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982).

603. *See, e.g., Carey v. Bahama Cruise Lines*, 864 F.2d 201 (1st Cir. 1988).

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defenses. In addition, other maritime rules (e.g., those that relate to collision, limitation of liability, maritime liens, salvage) may be applicable. The use of personal watercraft, such as jet skis, has occasioned numerous maritime products liability actions.⁶⁰⁴

Maritime Products Liability

In *East River Steamship Corp. v. Transamerica Delaval, Inc.*,⁶⁰⁵ the Supreme Court created the tort of maritime products liability. This action may be based on negligence or strict liability. The Court has also adopted the rule that recovery may not be had where the only damage is to the product itself. The Supreme Court has not otherwise given guidance as to the substantive rules of maritime products law, such as whether it will follow Restatement of Torts Second or Third or some other approach.

Remedies for Wrongful Death

Introduction

The general maritime law, as stated in *The Harrisburg*,⁶⁰⁶ once followed the common-law rule that tort causes of action died with the injured person.⁶⁰⁷ The Supreme Court, in 1907, ameliorated the holding of *The Harrisburg* by allowing admiralty courts to apply state wrongful death statutes for deaths in state territorial waters under the “maritime but local doctrine.”⁶⁰⁸ In 1920, Congress partially overruled *The Harrisburg* through the enactment of the Death on the High Seas Act,⁶⁰⁹ which provides a statutory wrongful death remedy for those killed on the high seas, and the Jones Act,⁶¹⁰ which provides a remedy in the case of the death of a seaman. Finally, in 1970 the

604. See, e.g., *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996).

605. 476 U.S. 858 (1986).

606. 119 U.S. 199 (1886).

607. *Id.*

608. *The Hamilton*, 207 U.S. 389 (1907). See Robert Force, *Choice of Law in Admiralty Cases: “National Interests” and the Admiralty Clause*, 75 Tul. L. Rev. 1421, 1451–63 (2001).

609. 46 U.S.C. §§ 30301-30308 (2006).

610. *Id.* § 30104.

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Supreme Court, in *Moragne v. States Marine Lines, Inc.*,⁶¹¹ overruled *The Harrisburg*. Currently, claimants in actions for wrongful death have several remedies, again depending generally on the status of their decedent and where the decedent was killed. These remedies include an action under the Death on the High Seas Act, state wrongful death statutes, the general maritime law, and, for seamen, the Jones Act.

Death on the High Seas Act

The Death on the High Seas Act (DOHSA)⁶¹² provides in pertinent part that

When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.⁶¹³

Enacted in 1920, DOHSA has been amended to exclude from its terms deaths that result from commercial aviation accidents twelve miles or closer to the shore of any state: Such deaths are subject to the rules applicable under any federal, state, or other law.⁶¹⁴

DOHSA provides a wrongful death⁶¹⁵ remedy in favor of the beneficiaries of all decedents who die as a result of tortious acts committed beyond state territorial waters, generally more than three

611. 398 U.S. 375 (1970). For further discussion of *Moragne*, see *infra* notes 637–58 and accompanying text.

612. 46 U.S.C. §§ 30301-30308 (2006).

613. *Id.* § 30302.

614. *Id.* § 30307(c).

615. Wrongful death remedies must be distinguished from survival actions. Wrongful death beneficiaries are accorded causes of actions, the elements of damages of which are based on the beneficiaries' loss; conversely, survival actions allow the decedent's personal representative to maintain a cause of action based on claims for damages the decedent would have had if he or she had lived.

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miles⁶¹⁶ from shore⁶¹⁷ (except for deaths that result from commercial air accidents, as noted above). Importantly, it is the situs of the tortious conduct when it impacts the decedent that is controlling, rather than the actual place of death.⁶¹⁸

The DOHSA action may be predicated upon any tort theory, including intentional tort,⁶¹⁹ negligence,⁶²⁰ and strict products liability.⁶²¹ With respect to causation, in order for the beneficiaries to recover, the tortious conduct must have proximately caused the decedent's death.⁶²²

DOHSA provides a cause of action to a clearly defined beneficiary class, including the decedent's "wife, husband, parent, child, or dependent relative."⁶²³ The listing of beneficiaries is not preclusive, and, for example, a dependent relative may recover under the Act notwithstanding that the decedent is survived by a spouse, children, or parents.⁶²⁴

616. Sometimes the limit includes an area greater than three miles. *See* Robert Force, *Tort Reform by the Judiciary: Developments in the Law of Maritime Personal Injury and Death Damages*, 23 Tul. Mar. L.J. 351, 363–66 (1999).

617. 46 U.S.C. § 30302 & § 30307(b) (2006). Coverage under DOHSA extends to the "high seas" as well as foreign territorial waters. *Howard v. Crystal Cruise Line*, 41 F.3d 527 (9th Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995); *Public Adm'r of N.Y. Cnty. v. Angela Compania Naviera, S.A.*, 592 F.2d 58 (2d Cir.), *cert. dismissed*, 443 U.S. 928 (1979).

618. *Motts v. M/V Green Wave*, 210 F.3d 565 (5th Cir. 2000); *Bergen v. F/V St. Patrick*, 816 F.2d 1345 (9th Cir. 1987), *cert. denied*, 493 U.S. 871 (1989).

619. *Renner v. Rockwell Int'l Corp.*, 403 F. Supp. 849 (C.D. Cal. 1975).

620. *Bodden v. Am. Offshore, Inc.*, 681 F.2d 319 (5th Cir. 1982).

621. *Pavrides v. Galveston Yacht Basin, Inc.*, 727 F.2d 330 (5th Cir. 1984).

622. *Solomon v. Warren*, 540 F.2d 777 (5th Cir. 1976), *cert. dismissed*, 434 U.S. 801 (1977).

623. 46 U.S.C. § 30302 (2009). It is for the decedent's personal representative to prosecute the claim, though. *See, e.g., Porche v. Gulf Miss. Marine Corp.*, 390 F. Supp. 624 (E.D. La. 1975).

624. *Evich v. Connelly*, 759 F.2d 1432 (9th Cir. 1985), *cert. denied*, 484 U.S. 914 (1987).

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Plaintiff-beneficiaries under DOHSA may recover only for their pecuniary losses,⁶²⁵ which include loss of support;⁶²⁶ loss of services;⁶²⁷ loss of nurture, guidance, care, and instruction;⁶²⁸ loss of inheritance;⁶²⁹ and funeral expenses.⁶³⁰ Nonpecuniary damages, such as loss of society, loss of consortium, and punitive damages, are not available in an action under DOHSA.⁶³¹ However, Congress not only removed from DOHSA deaths from commercial air crashes occurring twelve miles or closer to the shore of any state,⁶³² but also authorized the recovery of nonpecuniary damages in cases where death occurs beyond twelve miles from the shore of any state.⁶³³ Such damages include loss of care, comfort, and companionship.⁶³⁴ Punitive damages may not be recovered. The Supreme Court has specifically refused to create a “survival” action to supplement DOHSA.⁶³⁵

In *Offshore Logistics, Inc. v. Tallentire*,⁶³⁶ the Supreme Court held that DOHSA was preemptive of state law and that a claimant could not append a state law claim to an action under DOHSA in order to supplement damages available under the Act. The Court also held that a DOHSA action may be brought in state court.

625. 46 U.S.C. § 30303 (2006). *See also* Mobil Oil Co. v. Higginbotham, 436 U.S. 618 (1978).

626. Howard v. Crystal Cruises, Inc., 41 F.3d 527 (9th Cir. 1994), *cert. denied*, 514 U.S. 1084 (1995); Bergen v. F/V St. Patrick, 816 F.2d 1345 (9th Cir. 1987), *cert. denied*, 493 U.S. 871 (1989).

627. Sea-Land Serv., Inc. v. Gaudet, 414 U.S. 573 (1974).

628. Nygaard v. Peter Pan Seafoods, Inc., 701 F.2d 77 (9th Cir. 1983).

629. Zicherman v. Korean Airlines Co., Ltd., 43 F.3d 18 (2d Cir. 1994), *aff'd in part*, 516 U.S. 217 (1996).

630. Neal v. Barisich, Inc., 707 F. Supp. 862 (E.D. La.), *aff'd*, 889 F.2d 273 (5th Cir. 1989).

631. Zicherman v. Korean Airlines Co., Ltd., 516 U.S. 217 (1996) (loss of society); Mobil Oil Co. v. Higginbotham, 436 U.S. 618 (1978) (same); Bergen v. F/V St. Patrick, 816 F.2d 1345 (9th Cir. 1987) (punitive damages), *cert. denied*, 493 U.S. 871 (1989).

632. 46 U.S.C. § 30307(c) (2006).

633. *Id.* § 30307(b).

634. *Id.* § 30307(a) & (b).

635. Dooley v. Korean Airlines Co., 524 U.S. 116 (1998).

636. 447 U.S. 207 (1986).

Wrongful Death under the General Maritime Law

Subsequent to the passage of DOHSA and the Jones Act, the Supreme Court, in *Moragne v. States Marine Lines, Inc.*,⁶³⁷ followed Congress's lead and overruled *The Harrisburg*. *Moragne* created a wrongful death remedy under the general maritime law for deaths occurring within state territorial waters. The plaintiff in that case was the widow of a *Sieracki* seaman (i.e., a longshoreman)⁶³⁸ who was killed on a vessel in navigable waters, and the lawsuit was based on an unseaworthiness theory as was then permitted. Subsequently, in *Norfolk Shipbuilding and Drydock Corp. v. Garris*,⁶³⁹ the Court extended the *Moragne* action to encompass a negligence claim based on the death of a maritime worker. Because nothing in the *Garris* decision limits its application to maritime workers, the case may be taken as encompassing a general maritime law wrongful death claim for any person killed in state waters.

Prior to *Garris*, the Supreme Court had held that *Moragne*'s creation of a general maritime wrongful death action for deaths in state waters did not preempt state remedies in cases involving nonseafarers. In *Yamaha Motor Corp., U.S.A. v. Calhoun*,⁶⁴⁰ the Supreme Court held that with respect to nonseafarers⁶⁴¹ the general maritime law cause of action created by *Moragne* did not supply the exclusive remedy for wrongful deaths occurring in state territorial waters. Thus, at least where a decedent's beneficiaries are not provided with a preclusive wrongful death remedy by legislation, such as the Jones Act or the LHWCA, damages may be recovered under state wrongful death law.⁶⁴²

637. 398 U.S. 375 (1970).

638. The term "*Sieracki* seaman" is explained *supra* note 552.

639. 532 U.S. 811 (2001).

640. 516 U.S. 199 (1996).

641. "Seafarers" include Jones Act seamen and maritime workers covered by the LHWCA. *Calhoun*, 516 U.S. at 205, n.2.

642. On remand, the Third Circuit held that the general maritime law determined whether plaintiffs had a cause of action; Pennsylvania law determined the measure of wrongful death damages; and the law of Puerto Rico determined the right to recover punitive damages. The case is important because it accentuates the disparity of recovery between the general maritime law and the laws of some states.

Admiralty and Maritime Law

In *Sea-Land Service, Inc. v. Gaudet*,⁶⁴³ the Supreme Court applied an expansive rule of damages to actions for wrongful death in state territorial waters, holding that the wife of a longshoreman whose death resulted from an accident in territorial waters could recover for loss of society. Subsequently, in *Miles v. Apex Marine Corp.*,⁶⁴⁴ the Court denied recovery for loss of society, holding that the surviving (nondependent) mother of a Jones Act seaman could recover only for pecuniary loss, even though, as in *Gaudet*, the action was based on unseaworthiness under the general maritime law. The Court reasoned that the damages recoverable under the general maritime law could not exceed those available under the Jones Act. However, it did not expressly overrule *Gaudet*.

After *Miles*, some lower federal courts held that recoverable damages under the general maritime law in both death and injury cases are restricted to pecuniary losses and refused to allow recovery of loss of society regardless of the status of the parties.⁶⁴⁵ Most courts have denied recovery of punitive damages.⁶⁴⁶ Thus, the damages recoverable under *Moragne* and DOHSA may be the same.

Persons Entitled to Recover under *Moragne*

In *Moragne v. States Marine Lines, Inc.*,⁶⁴⁷ the Supreme Court created a wrongful death remedy under the general maritime law for deaths occurring within state territorial waters. Only the decedent's personal

Calhoun v. Yamaha Motor Corp. U.S.A., 216 F.3d 338 (3d Cir.), *cert. denied*, 531 U.S. 1037 (2000).

643. 414 U.S. 573 (1974).

644. 498 U.S. 19 (1990).

645. Both the cases that extend *Miles* and those that restrict *Miles* to its facts are collected in Robert Force & Martin J. Norris, *The Law of Seamen* §§ 30.67-30.73 (5th ed. 2003), and Robert Force & Martin J. Norris, *The Law of Maritime Personal Injuries* §§ 11.08-11.09, 12.08 (5th ed. 2004).

646. *See, e.g.*, *Horsley v. Mobil Oil Corp.*, 15 F.3d 200 (1st Cir. 1994); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084 (2d Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450 (6th Cir.), *cert. denied*, 510 U.S. 915 (1993).

647. 398 U.S. 375 (1970).

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representative may bring suit on behalf of the beneficiaries.⁶⁴⁸ Beneficiaries of a *Moragne* action include the decedent's spouse, dependent children, parents, and dependent relatives.⁶⁴⁹

Seaman's Claims

A Jones Act action provides a seaman's beneficiaries with the exclusive remedy against an employer for negligence.⁶⁵⁰ A Jones Act negligence action is available regardless of whether death occurs on the high seas, in state territorial waters, or on land. Death actions predicated on other grounds, such as unseaworthiness or against nonemployers,⁶⁵¹ may be brought under DOHSA where death occurs on the high seas and under *Moragne* where death occurs in state territorial waters. As with DOHSA, the beneficiary class is specified in the statute: the surviving spouse and children; if none, then parents; and if none, then next of kin dependent on the decedent. Jones Act beneficiaries are ranked in preclusive order—i.e., a higher ranked class “takes” to the exclusion of a lower ranked class.⁶⁵² The Jones Act also creates a right to bring a survival action for the seaman's conscious pain and suffering between the time of injury and death.⁶⁵³ There is no right to recover future lost earnings.⁶⁵⁴

648. *Tidewater Marine Towing, Inc. v. Dow Chem. Co.*, 689 F.2d 1251 (5th Cir. 1982); *Ivy v. Sec. Barge Lines, Inc.*, 585 F.2d 732 (5th Cir. 1978), *cert. denied*, 446 U.S. 956 (1980); *Neal v. Barisich, Inc.*, 707 F. Supp. 862 (E.D. La.), *aff'd*, 889 F.2d 273 (5th Cir. 1989).

649. *See, e.g., In re Patton-Tully Transp. Co.*, 797 F.2d 206 (5th Cir. 1986) (spouse); *Sistrunk v. Circle Bar Drilling Co.*, 770 F.2d 455 (5th Cir. 1985) (parents), *cert. denied*, 475 U.S. 1019 (1986); *Spiller v. Thomas M. Lowe, Jr. & Assocs., Inc.*, 466 F.2d 903 (8th Cir. 1972) (dependent stepchildren); *Smith v. Allstate Yacht Rentals, Ltd.*, 293 A.2d 805 (Del. 1972) (dependent siblings).

650. *Furka v. Great Lakes Dredge & Dock Co.*, 775 F.2d 1085 (4th Cir. 1985).

651. *See, e.g., In re Cleveland Tankers, Inc.*, 843 F. Supp. 1157 (E.D. Mich. 1994).

652. *Hamilton v. Canal Barge Co.*, 395 F. Supp. 978 (E.D. La. 1975).

653. *Snyder v. Whittaker Corp.*, 839 F.2d 1085 (5th Cir. 1988); *Nygaard v. Peter Pan Seafoods, Inc.*, 701 F.2d 77 (9th Cir. 1983).

654. *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

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Maritime Workers' Claims

Under the Longshore and Harbor Workers' Compensation Act (LHWCA), the maritime worker's beneficiaries are entitled to the payment of scheduled death benefits from the decedent's employer, subject to the special rules applicable to employer vessel owners. Where the maritime worker's death is caused by the negligence of a vessel, the action may be brought under § 905(b) of the LHWCA. Though the Supreme Court in *Moragne* created a general maritime law wrongful death remedy in favor of the beneficiaries of a longshoreman whose death resulted from the unseaworthiness of the vessel upon which he was working, this action was legislatively overruled by the LHWCA.⁶⁵⁵

Further, because the LHWCA preserves the rights of maritime workers against third parties, actions against nonemployer and nonvessel defendants will proceed in the same manner as any other wrongful death claim.⁶⁵⁶ Where the decedent's death is caused by third-party negligence, if it results from an accident on land, state wrongful death and survival statutes will apply; where the accident takes place on territorial waters, *Moragne-Garris* applies; and where the death results from tortious conduct on the high seas, DOHSA will apply.

Offshore Oil and Gas Workers' Claims

If an offshore worker is covered by the LHWCA via OCSLA, then recovery for the worker's wrongful death is limited to the remedies available to maritime workers; claims against the employer are controlled by §§ 904, 905(a), and 905(c) of the LHWCA, notwithstanding the fact that the death occurred in the water or on a vessel while the employee was performing his or her duties or while

655. 33 U.S.C. § 905(b) (2006); *see also* *Easley v. S. Shipbuilding Corp.*, 936 F.2d 839 (5th Cir. 1991), *cert. denied*, 506 U.S. 1050 (1993). The longshoreman is no longer entitled to a warranty of seaworthiness. *See Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156 (1981) (discussed *supra* text accompanying notes 555–61).

656. 33 U.S.C. § 933 (2006). *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001).

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being transported to a platform.⁶⁵⁷ If an offshore worker is killed on a fixed platform in state waters, state workers' compensation schemes supply the remedy against the employer.⁶⁵⁸ As to actions against nonemployers, *Moragne-Garris* applies to deaths resulting from maritime torts in state waters. If an offshore worker's death results from a wrongful act on the high seas, then DOHSA provides the remedy.

657. See, e.g., *Wentz v. Kerr-McGee Corp.*, 784 F.2d 699 (5th Cir. 1986).

658. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985); *Hollier v. Union Tex. Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992).

4. Collision and Other Accidents

Introduction

The Basic Collision Regulations (COLREGS), or International Rules, were developed by the Intergovernmental Maritime Commission (originally IMCO, now IMO), and agreed on in the 1972 Convention on the International Regulations for Preventing Collisions at Sea. In 1977, these rules were adopted by statute in the United States⁶⁵⁹ and became part of the law of the United States. These rules essentially deal with the safe navigation of vessels; they are analogous to “rules of the road.” It should be noted, however, that in the internal waters of the United States a separate set of navigational rules, referred to as the Inland Navigational Rules, apply.⁶⁶⁰ Although there are many similarities between the two, they are by no means identical.

The basic international law applicable to collision liability is embodied in the 1910 Brussels Collision Convention.⁶⁶¹ The United States has not ratified this convention. Under the convention, liability for damage or injury caused by a collision is based on fault. Despite the fact that collision law in the United States is also based on fault, including the proportionate fault rule,⁶⁶² important differences exist between U.S. and international law relating to collisions.

Collision law applies in two situations. The first is the traditional collision situation, where two moving vessels come in physical contact with each other. The second situation, referred to as an “allision,” occurs when a moving vessel strikes a stationary object, such as a docked vessel, a bridge, or a wharf.

659. 33 U.S.C. §§ 1601–1608 (2006).

660. *Id.* §§ 2002–2073.

661. International Convention for the Unification of Certain Rules of Law with respect to Collision between Vessels, Brussels, Sept. 23, 1910.

662. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

Liability

Fault in a collision case may arise because of (1) negligence or lack of proper care or skill on the part of the navigators; (2) a violation of the rules of the road (i.e., the applicable rules of navigation laid down by, or under the authority of, statute or regulation); (3) failure to comply with local navigational customs or usage; or (4) an unseaworthy condition or malfunction of equipment. Liability is imposed where the negligence of the navigator of a vessel is found to have caused a collision. The test is whether the collision could have been avoided by the exercise of ordinary care, caution, and maritime skill.⁶⁶³ Collision cases tend to be fact-specific, and the circumstances of each case are controlling.

Also, a vessel may be held at fault for violation of a local navigational custom.⁶⁶⁴ A party seeking to rely on a custom to establish fault has the burden of establishing that such custom, in fact, exists. Custom may be relied on only if it does not conflict with statutory rules of navigation.⁶⁶⁵

Causation

No liability will be imposed, even where negligent navigation is shown, unless it is proved that the negligence was the proximate cause of the collision. A proximate cause must, however, be a substantial factor in bringing about the collision. There may be more than one proximate cause to a collision. In *United States v. Reliable Transfer Co.*,⁶⁶⁶ the Supreme Court replaced the admiralty rule of “divided damages” with the “proportionate fault” rule. Prior to that, lower courts had created a series of “causation” rules to ameliorate the unfairness of the divided damages rule. Most courts have since held that some of these special collision-causation rules were

663. *The Jumna*, 149 F. 171, 173 (2d Cir. 1906).

664. *Valley Towing Serv., Inc. v. S.S. Am. Wheat, Freighters, Inc.*, 618 F.2d 341 (5th Cir. 1980).

665. *Zim Israel Navigation Co. v. Special Carriers Inc.*, 611 F. Supp. 581 (E.D. La. 1985).

666. 421 U.S. 397 (1975), discussed *infra* text and accompanying notes 688-89 and 697.

Collision and Other Accidents

abrogated by *Reliable Transfer*.⁶⁶⁷ However, the basic rules of proximate cause still apply, including the rule of superseding cause, whereby under appropriate circumstances a subsequent negligent act may supersede prior fault and relieve from any liability the party initially at fault.⁶⁶⁸

Presumptions

A number of presumptions may arise under U.S. collision law.⁶⁶⁹ The most important presumption is the Pennsylvania Rule,⁶⁷⁰ which comes into play when a vessel violates a safety standard established by statute or regulation. Under the Pennsylvania Rule, a vessel that violates a statute or regulation must show “not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been”⁶⁷¹ the cause of the collision. Therefore, a vessel that violates a safety statute has the burden of proving that its violation of the statute could not have caused the accident. Where two colliding vessels have both violated a safety statute, the presumption of causation will be applied to both vessels.

Although the Pennsylvania Rule was formulated in a collision case, it is now accepted as a general rule applicable in maritime tort cases.⁶⁷² Often the Pennsylvania Rule is invoked together with the tort doctrine of negligence per se, which permits fault to be presumed against a party whose conduct violated a governmentally established norm of behavior. A party seeking to rely on the doctrine of

667. *Getty Oil Co. (E. Operations), Inc. v. S.S. Ponce de Leon*, 555 F.2d 328 (2d Cir. 1977) (major-minor rule abrogated); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987) (active-passive rule abrogated, but Pennsylvania rule still applies), *cert. denied*, 486 U.S. 1033 (1988).

668. *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830 (1996).

669. These presumptions are in direct conflict with Article 6 of the 1910 Brussels Collision Convention that abolished all presumptions of fault in collision cases.

670. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873).

671. *Id.* at 136.

672. *Candies Towing Co. v. M/V B & C Eserman*, 673 F.2d 91 (5th Cir. 1982) (sinking of barge); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987) (personal injury and death), *cert. denied*, 486 U.S. 1033 (1988).

negligence per se must show that a statute or regulation established a safety standard intended to protect that party and that the conduct of the other party fell below that standard, thereby causing injury or loss. The tandem of presumptions, negligence per se and the Pennsylvania Rule, imposes on the alleged tortfeasor the dual burden of disproving both fault and causation.

Another important presumption is that when a moving vessel strikes a nonmoving vessel or stationary object, the moving vessel is at fault.⁶⁷³ This presumption may be rebutted by showing, for example, that the stationary object was a hazard to navigation.⁶⁷⁴

Damages

The measure of damages in a collision or allision case depends on whether the vessel is deemed a total loss or a partial loss capable of being repaired. In a total loss, the damages include the market value of the vessel at the time of the loss plus pending freight and pollution cleanup, wreck removal, and other incidental costs proximately resulting from the casualty.⁶⁷⁵ Loss of earnings and detention are not recoverable.⁶⁷⁶

In a partial loss capable of being repaired, damages include the cost of repairs (or diminution in value if no repairs are made), the loss of earnings for the period the vessel is out of service, and incidental costs such as wharfage, pilotage, and salvage.⁶⁷⁷ Repairs for damage that was not caused by the collision will not be included in a damage recovery.⁶⁷⁸ In order to recover lost earnings, the vessel owner must prove the loss.⁶⁷⁹ A vessel owner may prove lost earnings by showing

⁶⁷³. *The Oregon*, 158 U.S. 186 (1895).

⁶⁷⁴. *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978).

⁶⁷⁵. *The Umbria*, 166 U.S. 404 (1897).

⁶⁷⁶. *Id.*

⁶⁷⁷. *Skou v. United States*, 478 F.2d 343 (5th Cir. 1973).

⁶⁷⁸. *Bouchard Transp. Co. v. The Tug "Ocean Prince,"* 691 F.2d 609 (2d Cir. 1982).

⁶⁷⁹. *Delta S.S. Lines, Inc. v. Avondale Shipyards, Inc.*, 747 F.2d 995 (5th Cir. 1984).

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that because of the damage to the vessel the owner has been unable to fulfill contractual commitments and has lost charter hire or freight.⁶⁸⁰ When a vessel is not under charter, the vessel owner may prove lost earnings during the period the vessel was unusable by showing earnings prior to the accident and after the repairs were made.⁶⁸¹

The exclusionary rule set forth *Robins Dry Dock & Repair Co. v. Flint*⁶⁸² limits a negligent tortfeasor's liability for damages caused by a collision or allision. In *Robins Dry Dock*, the Supreme Court held that a negligent tortfeasor who damages a vessel cannot be held liable for economic losses suffered by the vessel's time charterer because the vessel owner was unable to fulfill its contractual commitments under the charter.⁶⁸³ The principle has been interpreted more broadly to mean that recovery for economic losses cannot be had from a tortfeasor whose negligence damaged property unless the plaintiff had a proprietary interest in the property.⁶⁸⁴ This is a rule of general maritime law and applies in all maritime tort cases.

In *Robins Dry Dock*, the charter party had an "off hire" clause, and thus the charterer was not obligated to pay charter hire during the period it was unable to use the vessel. Nevertheless the Court held that the vessel owner, who obviously had a proprietary interest in the vessel, was entitled to recover for not only the physical damage to the vessel but also its lost hire. However, some courts have held that where a vessel is time chartered and the charter hire is not suspended while the vessel is out of service, the charterer may recover damages from the negligent tortfeasor in the amount of the charter hire paid.⁶⁸⁵ In these situations, the charterer steps into the shoes of the owner who would have been able to recover in the absence of the clause obligating the charterer to continue paying hire.

680. *Moore-McCormack Lines v. The Esso Camden*, 244 F.2d 198 (2d Cir.), *cert. denied*, 355 U.S. 822 (1957).

681. *Id.*

682. 275 U.S. 303 (1927).

683. *Id.*

684. *State of La. ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986). *But see* *Sekco Energy Inc. v. M/V Margaret Chouest*, 820 F. Supp. 1008 (E.D. La. 1993).

685. *Venore Transp. Co. v. M/V Struma*, 583 F.2d 708 (4th Cir. 1978).

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In *State of Louisiana ex rel. Guste v. M/V Testbank*,⁶⁸⁶ where a hazardous substance spilled into the water as a result of a collision, various plaintiffs who were not directly involved in the collision and sustained no physical damage to their property were denied recovery for their economic losses. The plaintiffs included operators of marinas and boat rentals, marine suppliers, tackle and bait shops, wholesale and retail seafood enterprises, seafood restaurants, cargo terminal operators, recreational fishermen, and vessel owners whose vessels were trapped when the Coast Guard closed the waterway. There was some suggestion that losses suffered by commercial fishermen may be an exception to the rule requiring physical damage as a prerequisite to recover for economic loss in an unintentional maritime tort, but the other plaintiffs were denied recovery.⁶⁸⁷

In *United States v. Reliable Transfer Co.*,⁶⁸⁸ the Supreme Court abandoned its longstanding “divided damages” rule, which provided in collision cases that damages would be divided equally between two or more tortfeasors regardless of the degree of fault of the respective tortfeasors. The Court adopted the “proportionate fault” rule, which allocates the aggregate loss according to the degree of fault of the parties.

When two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault.⁶⁸⁹

If a vessel sinks in navigable waters of the United States, through collision or otherwise, the owner of the vessel has a statutory duty to mark and remove the wreck as soon as possible.⁶⁹⁰ If a vessel collides with an unmarked sunken vessel, the owner of the sunken vessel will

686. 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986).

687. *Id.* at 1021.

688. 421 U.S. 397 (1975).

689. *Id.* at 411.

690. The Wreck Act, 33 U.S.C. §§ 409, 411 (2000).

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be liable for damages caused by the collision if the owner is found to have been negligent.⁶⁹¹ Further, a nonowner may be held liable for contribution where the nonowner was at fault in causing a vessel to sink, and a collision involving the wreck subsequently occurs.⁶⁹² The Supreme Court has held that a negligent nonowner who caused a vessel to sink may be liable for the costs of removal, or may be required to remove the vessel.⁶⁹³

Where damages are sustained by cargo interests in a maritime accident in which both vessels are to blame, COGSA or the Harter Act may prevent cargo owners from recovering damages directly from the carrying vessel or may limit the amount of recovery to \$500 per package or customary freight unit.⁶⁹⁴ However, cargo interests are able to recover full damages from the noncarrying vessel.⁶⁹⁵ COGSA defenses and COGSA limitation of liability are not available to the noncarrying vessel.

In computing the amount of its damages, the noncarrying vessel will include the full amount of damages paid to cargo interests in its damages calculation. The noncarrying vessel may then recover the amount of the cargo damage in proportion to the carrying vessel's fault. A vessel owner may not force a cargo interest to forfeit part of its recovery from the noncarrying vessel by use of a "both to blame" clause because, in these circumstances, such clauses are unenforceable.⁶⁹⁶ A "both to blame" clause obligates the cargo owner to pay the carrying vessel any amount it recovers from the noncarrying vessel beyond that which it is entitled to recover from the carrying vessel. Thus, if the carrying vessel's liability to its cargo is limited to \$500 under COGSA, the cargo interest who recovers its full damages from the non-carrying vessel must pay the difference between that amount and \$500 to its carrier. The rule that permits an

691. *Ison v. Roof*, 698 F.2d 294 (6th Cir.), *cert. denied*, 461 U.S. 957 (1983).

692. *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455 (5th Cir.), *cert. denied*, 469 U.S. 832 (1984).

693. *Wyandotte Transp. Co. v. United States*, 389 U.S. 191 (1967).

694. The Harter Act, 46 U.S.C. § 30704 (2006); COGSA § 4(5).

695. *United States v. Atl. Mut. Ins. Co.*, 343 U.S. 236 (1952).

696. *Id.*

innocent cargo owner to obtain full recovery has survived the *Reliable Transfer* case.⁶⁹⁷

Pilots

Liability of vessel owners for the negligence of pilots is discussed *infra* Chapter 7. A vessel owner whose vessel is involved in a collision while under control of a voluntary pilot is liable *in personam* if the collision was caused by the negligence of the pilot, but not if the pilot is a compulsory pilot. Nevertheless, in the latter situation, the vessel would be liable *in rem*. If the collision were caused both by the pilot's negligence and crew negligence, the owner would be liable *in personam*. In any event, the vessel at fault is liable *in rem*.

Place of Suit and Choice of Law

The general rule is that a forum will apply its own collision law to collisions that occur in its waters.⁶⁹⁸ Thus, U.S. courts will apply U.S. law to collisions that occur in U.S. waters.⁶⁹⁹ If suit were brought in the United States based on a collision that occurred in the territorial waters of a foreign country, then the U.S. court would apply the law of the country where the collision occurred.⁷⁰⁰ As to collisions on the high seas, U.S. courts will apply U.S. collision law.⁷⁰¹ There appears to be an exception to the latter rule where both vessels involved in the collision are under the same flag. In such cases, a U.S. court should apply the law of the flag.⁷⁰² Also, it appears that even where vessels are not under the same flag, if their respective flag states have adopted the same collision liability regime, such as the 1910 Brussels

697. *Allied Chem. Corp. v. Hess Tankship Co. of Del.*, 661 F.2d 1044 (5th Cir. 1981).

698. *The Mandu*, 102 F.2d 459 (2d Cir. 1939).

699. *The Scotland*, 105 U.S. (15 Otto) 24 (1881).

700. *The Mandu*, 102 F.2d 459.

701. *The Scotland*, 105 U.S. (15 Otto) 24.

702. *Id.*

Collision and Other Accidents

Collision Convention, then the forum should apply the law of that common regime.⁷⁰³

703. *The Mandu*, 102 F.2d 459.

5. Limitation of Liability

Introduction

In the United States, a shipowner's right to limit its liability is governed by the Limitation of Vessel Owner's Liability Act of 1851.⁷⁰⁴ The Limitation Act permits a shipowner to limit its liability following maritime casualties to the value of the owner's interest in its vessel and pending freight, provided that the accident occurred without the privity or knowledge of the owner.⁷⁰⁵ However, the owner of a seagoing vessel involved in a marine casualty that results in the loss of life or personal injuries may be required to set up an additional fund if the value of the vessel and pending freight is insufficient to pay such losses in full.⁷⁰⁶ The United States has not adopted either of the international conventions relating to limitation of liability that apply in many other countries.⁷⁰⁷

Practice and Procedure

The Limitation Act and Rule F of the Supplemental Rules of Civil Procedure specify the procedures for limitation proceedings. To initiate a limitation proceeding, a shipowner must file a complaint within six months of its receipt of a claim in writing.⁷⁰⁸ It is not the date of the casualty that is controlling but the date the shipowner receives notice of a claim. The complaint may seek "exoneration" as well as limitation of liability—that is, the owner may plead that it is not liable at all, and in the alternative that if it is liable it is entitled to

704. 46 U.S.C. §§ 30501-30512 (2006).

705. *Id.* § 30505.

706. *Id.* § 30506.

707. International Convention Relating to the Limitation of Liability of Owners of Seagoing Ships (1957) and International Convention on Limitation of Liability for Maritime Claims (1976).

708. 46 U.S.C. § 30511(a) (2006); Fed. R. Civ. P. Supp. R. F(1).

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limit its liability as provided in the Limitation Act.⁷⁰⁹ A complaint seeking limitation may only be filed in a federal district court.

Upon filing a complaint for limitation, the owner of the vessel must “deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner’s interest in the vessel and pending freight.”⁷¹⁰ Alternatively, the owner may transfer its interest in the vessel and pending freight to a trustee. If the owner chooses to transfer its interest in the vessel to a trustee, the owner must include in its complaint any prior paramount liens and any existing liens that arose upon any voyages subsequent to the marine casualty.⁷¹¹ The owner must also provide security for costs.⁷¹² There is no requirement either in the statute or Rule F that these other liens be satisfied by the owner as a precondition to its right to limitation. The lien claimants may seek to intervene and file their claims in the limitation proceeding. Any claimant to the fund may file a motion to have the fund that has been deposited with the court increased on the ground either that it is less than the value of the owner’s interest in the vessel and pending freight, or that the fund is insufficient to meet all of the claims against the owner in respect to loss of life or bodily injury.⁷¹³ Upon filing such a motion, the burden of proof is on the movant.

Once the owner of the vessel complies with the requirements of Rule F(1), the court “shall” enjoin all claims and proceedings against the owner of the vessel or its property with respect to the matter in question.⁷¹⁴ The court must then give notice to all parties asserting claims with respect to the incident for which the owner of the vessel has sought limitation, advising the parties to file their claims in the limitation proceeding. The owner of the vessel is also required to mail a copy of the notice to all persons known to have made claims against

709. Fed. R. Civ. P. Supp. R. F(2).

710. *Id.* Supp. R. F(1).

711. *Id.* Supp. R. F(2).

712. *Id.* Supp. R. F(1). If the owner of the vessel chooses to post security, it must include interest at the rate of 6% a year from the date the security is posted. *Id.*

713. *Id.* Supp. R. F(7).

714. 46 U.S.C. § 30511(c) (2006); Fed. R. Civ. P. Supp. R. F(3).

Limitation of Liability

the owner or its vessel regarding the incident for which limitation is sought.⁷¹⁵

Rule F, therefore, results in a single proceeding, referred to as a “concursum” of claims, in which all suits arising out of the marine casualty must be litigated. There are two situations, however, in which a claimant will be allowed to maintain its claim outside of the limitation of liability proceeding. First, when the owner of the vessel has deposited with the court an amount in excess of all claims, a concursum is not necessary because there is no possibility that the owner could be held liable in an amount in excess of the limitation amount. In such circumstances, claimants must be allowed to pursue their actions in the forum of their choice.⁷¹⁶ The second exception to the concursum originally applied to situations where there was but a single claimant who stipulated that (1) the admiralty court had exclusive jurisdiction to adjudicate the limitation of liability issues and (2) the claimant would not seek to enforce a damage award in excess of the limitation fund established by the federal court.⁷¹⁷ Some courts have extended this exception to include cases involving multiple claimants who protect the shipowner’s right to limited liability with similar stipulations.⁷¹⁸ The Supreme Court has reaffirmed these exceptions and stated that the right of a claimant to sue in a state court cannot be undermined by a shipowner’s filing a federal limitation proceeding if the shipowner’s protection under the Limitation Act is not in jeopardy.⁷¹⁹ Furthermore, the fact that a shipowner is permitted to plead exoneration in a limitation proceeding does not mean that it has the right to compel the adjudication of that issue in a federal court.⁷²⁰

When a vessel owner files a limitation petition, the supposition is that the limitation fund will be insufficient to pay all claims in full.

715. Fed. R. Civ. P. Supp. R. F(4).

716. *Lake Tankers Corp. v. Henn*, 354 U.S. 147 (1957).

717. *In re Port Arthur Towing Co.*, 42 F.3d 312 (5th Cir.), *cert. denied*, 516 U.S. 823 (1995).

718. *In re Texaco, Inc.*, 847 F. Supp. 457 (E.D. La. 1994).

719. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438 (2001).

720. *Id.*

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Under the Limitation Act, if the owner of the vessel is held liable but is allowed to limit its liability, the funds deposited with the court, or the proceeds from the sale of the vessel and the amount of pending freight, are distributed by the court on a pro rata basis among the claimants in proportion to the amounts of their respective claims. The distribution is subject to all relevant provisions of law, such as the rules relating to priority of claims.⁷²¹ Priorities among claimants are discussed *infra* Chapter 9.

Limitation of liability petitions may not be filed in state courts. Some courts have held that a shipowner sued in a federal or state court may plead its right to limitation of liability as a defense to the claim.⁷²²

The Limitation Fund

The limitation fund is generally equal to the amount of the owner's interest in the vessel and pending freight.⁷²³ The value of the vessel is determined at the termination of the voyage or of the marine casualty.⁷²⁴ If a vessel is a total loss, then its value is zero. Insurance proceeds received by a vessel owner as a result of the marine casualty, such as where a vessel is a total loss, are not included in the limitation fund.⁷²⁵ "Pending freight" refers to the owner's total earnings for the voyage.⁷²⁶ It includes both prepaid earnings, which by contract are not to be returned to shippers should the voyage not be completed, and uncollected earnings.⁷²⁷ A question may arise as to what constitutes a voyage.⁷²⁸ Depending on the circumstances, a round-trip voyage may be the equivalent of a single adventure (which

721. Fed. R. Civ. P. Supp. R. F(8) (1992).

722. *Mapco Petroleum, Inc. v. Memphis Barge Line, Inc.*, 849 S.W.2d 312 (Tenn.), *cert. denied*, 510 U.S. 815 (1993).

723. 46 U.S.C. § 30505 (2006).

724. *Norwich & N.Y. Transp. Co. v. Wright*, 80 U.S. (13 Wall.) 104 (1871).

725. *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468 (1886).

726. *The Main v. Williams*, 152 U.S. 122 (1894).

727. *Id.* at 132. *See also* 3 *Benedict on Admiralty* § 65 (7th rev. ed. 1983).

728. *In re Caribbean Sea Transp., Ltd.*, 748 F.2d 622 (1984), *amended*, 753 F.2d 948 (11th Cir. 1985).

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requires earned freight to be surrendered for the entire round-trip), or it may be broken into distinct units (with freight considered pending for the particular leg of the voyage in which the marine casualty occurred).⁷²⁹

If there are personal injuries or death associated with the marine casualty, and the limitation fund is not adequate to cover such losses in full, then the shipowner must increase that portion of the limitation fund allocable to personal injury and death claims up to a maximum of \$420 per ton of the vessel's tonnage.⁷³⁰ The limitation fund needs to be increased only in instances where the owner of a "seagoing vessel" seeks limitation.⁷³¹ The term "seagoing vessel" is defined in the statute and excludes, among other vessels, pleasure yachts, tugs, and towboats.⁷³²

The computation of the limitation fund may be complicated when a marine casualty involves two or more vessels in a tug and tow situation. In a "pure tort"⁷³³ situation, only the vessel actively at fault is valued or surrendered for purposes of the limitation fund.⁷³⁴ In contrast, under the "flotilla rule,"⁷³⁵ where a contractual relationship exists between the vessel owner and the party seeking damages, both the active vessel and the vessels in tow must be included in the computation of the fund.⁷³⁶ The continued vitality of the distinction between a "pure tort" situation and a contractual relationship situation

729. *Id.* at 626–27.

730. 46 U.S.C. § 30506 (2006).

731. *Id.*

732. *Id.* § 30506(a).

733. *Sacramento Navigation Co. v. Salz*, 273 U.S. 326 (1927).

734. *Liverpool, Brazil & River Plate Steam Navigation Co. v. Brooklyn E. Dist. Terminal*, 251 U.S. 48 (1919). Notwithstanding this decision by the Supreme Court, several lower courts have required that the limitation fund equal the value of several vessels engaged in a common project. *In re United States Dredging Corp.*, 264 F.2d 339 (2d Cir.), *cert. denied*, 360 U.S. 932 (1959); *In re Offshore Specialty Fabricators, Inc.*, 2002 AMC 2055 (E.D. La. 2002).

735. *Standard Dredging Co. v. Kristiansen*, 67 F.2d 548, 550 (2d Cir. 1933), *cert. denied*, 290 U.S. 704 (1934).

736. *Salz*, 273 U.S. 326.

is questionable.⁷³⁷ As a result, some courts have applied the flotilla rule in tort cases to situations where all the vessels belong to the same owner, are under common control, and are engaged in a common enterprise at the time of the marine casualty.⁷³⁸

Parties and Vessels Entitled to Limit

The owner of any vessel may petition for limitation of liability under the Limitation of Vessel Owner's Liability Act. The Act is available to both American and foreign vessel owners.⁷³⁹ Demise or bareboat charterers may apply for limitation of liability under the Act as well.⁷⁴⁰ However, time charterers are not allowed to limit their liability. The United States may apply for limitation of liability under the Act when a vessel owned by the government is involved in a marine casualty.⁷⁴¹

A shipowner's insurer is not authorized to limit liability under the Limitation Act.⁷⁴² Most states do not allow a direct action by an injured party against the tortfeasor's liability insurer. Thus, a party who is precluded from recovering full damages from a vessel owner who has successfully limited its liability may not proceed directly against the vessel owner's insurer to recover its full damages. However, both Louisiana and Puerto Rico provide a statutory right to proceed directly against the insurer. These "direct action statutes" have survived constitutional challenges in the Supreme Court.⁷⁴³ Despite the fact that the insurance carrier is not allowed the same protection as the vessel owner under the Limitation Act,⁷⁴⁴ the

737. *Wirth Ltd. v. S.S. Acadia Forest*, 537 F.2d 1272 (5th Cir. 1976); *Valley Line Co. v. Ryan*, 771 F.2d 366 (8th Cir. 1985).

738. *Cenac Towing Co. v. Terra Res., Inc.*, 734 F.2d 251, 254 (5th Cir. 1984).

739. 46 U.S.C. § 30505 (2006).

740. *Id.* § 30501.

741. *Dick v. United States*, 671 F.2d 724 (2d Cir. 1982).

742. *Md. Cas. Co. v. Cushing*, 347 U.S. 409 (1954).

743. *Id.*

744. *Olympic Towing Corp. v. Nebel Towing Co.*, 419 F.2d 230 (5th Cir. 1969), *cert. denied*, 397 U.S. 989 (1970). *Olympic* was "overruled" by *Crown Zellerbach Corp. v. Ingram Indus., Inc.*, 783 F.2d 1296 (5th Cir.), *cert. denied*, 479

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availability of a direct action may be small consolation because a marine insurer may indirectly limit its liability by contract. It may do so by including a provision in its insurance policy stating that the insurer is not liable for any amount greater than that for which its insured owner could be held liable under the Limitation Act.⁷⁴⁵

The Limitation Act applies to “all seagoing vessels” as well as “all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters.”⁷⁴⁶ Most courts have held that the Act is applicable to pleasure crafts, including personal watercraft, as well as commercial vessels.⁷⁴⁷

Grounds for Denying Limitation: Privity or Knowledge

Under the Limitation Act, limitation will be denied if the owner had “privity or knowledge” of the act or condition that caused the marine casualty.⁷⁴⁸ In the case of an individual owner, privity or knowledge refers to the owner’s personal participation in the act or awareness of the condition that led to the marine casualty.⁷⁴⁹ Where a corporate owner seeks to limit its liability under the Limitation Act, limitation will be denied only if a managing officer or supervisory employee had knowledge or privity.⁷⁵⁰ The term “managing officer” generally does not include the master of the vessel in the corporate context.⁷⁵¹ However, where there is a claim for personal injury or death, the

U.S. 821 (1986) (en banc), but its holding that insurers have no statutory right to limit their liability is still valid.

745. *Crown*, 783 F.2d 1296.

746. 46 U.S.C. § 30502 (2006).

747. *In re Young*, 872 F.2d 176 (6th Cir. 1989), *cert. denied*, 497 U.S. 1024 (1990); *Gibboney v. Wright*, 517 F.2d 1054 (5th Cir. 1975); *In re Guglielmo*, 897 F.2d 58 (2d Cir. 1990); *In re Hechinger*, 890 F.2d 202 (9th Cir. 1989), *cert. denied*, 498 U.S. 848 (1990).

748. 46 U.S.C. § 30505(b) (2006).

749. *Coryell v. Phipps*, 317 U.S. 406 (1943).

750. *Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225 (7th Cir. 1993), *cert. granted*, 510 U.S. 1108 (1994), *aff’d*, 513 U.S. 527 (1995).

751. *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724 (9th Cir. 1969).

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master's privity or knowledge prior to and at the beginning of the voyage of an act or condition that resulted in the injury or death will be attributed to the owner of a "seagoing vessel."⁷⁵² Furthermore, the owner of a vessel will be denied limitation if the court finds that the individual or corporate owner was negligent in that it failed to provide adequate procedures to ensure the maintenance of equipment,⁷⁵³ failed to provide the vessel with a competent master or crew,⁷⁵⁴ or failed to use reasonable diligence to discover the act or condition that caused the marine casualty.⁷⁵⁵ Finally, the owner of a pleasure craft will be denied limitation of liability for negligently entrusting its vessel to a person who subsequently causes a marine casualty.⁷⁵⁶

Claims Subject to Limitation

The Limitation Act allows the owner of a vessel to limit its liability "for any embezzlement, loss, or destruction ... of any property, goods, or merchandise ... or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred."⁷⁵⁷ A shipowner may also limit liability for debts.⁷⁵⁸ However, a vessel owner may not limit its liability for wages owed to its employees⁷⁵⁹ or for maintenance and cure.⁷⁶⁰ Further, liability for wreck removal under the Wreck Act⁷⁶¹ is not subject to limitation,⁷⁶² nor is liability for pollution damages under

752. 46 U.S.C. § 30506(e) (2006).

753. *Waterman*, 414 F.2d 724.

754. *Coryell*, 317 U.S. 406.

755. *China Union Lines, Ltd. v. A.O. Anderson & Co.*, 364 F.2d 769, 787 (5th Cir. 1966), *cert. denied*, 386 U.S. 933 (1967).

756. *Joyce v. Joyce*, 975 F.2d 379 (7th Cir. 1992).

757. 46 U.S.C. § 30505(b) (2006).

758. *Id.* § 30505.

759. *Id.* § 30505(c).

760. *Brister v. A.W.I., Inc.*, 946 F.2d 350 (5th Cir. 1991).

761. 33 U.S.C. § 409 (2006).

762. *Univ. of Tex. Med. Branch at Galveston v. United States*, 557 F.2d 438 (5th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978).

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federal law subject to limitation under the Limitation Act.⁷⁶³ The various statutes that deal with pollution have their own superseding limitation of liability provisions.⁷⁶⁴

The owner of a vessel may also be denied limitation of liability under the “personal contract doctrine.”⁷⁶⁵ This rule exempts from limitation claims based on the failure to perform contractual obligations that the owner personally undertook to perform.⁷⁶⁶ For example, the owner of a vessel who breaches a charter party will be denied limitation of liability.⁷⁶⁷ Similarly, contracts made for supplies and repairs are excluded from limitation of liability.⁷⁶⁸ However, a vessel owner will be allowed to limit liability where he or she personally enters into a contract that is breached by the negligence of the vessel’s master or crew.⁷⁶⁹

Choice of Law

The Supreme Court held, in *The Titanic*,⁷⁷⁰ that limitation of liability is a procedural device, and when a foreign shipowner seeks to limit its liability in a limitation proceeding brought in a U.S. court, U.S. law determines the amount of the limitation fund. A subsequent Supreme Court case, *The Norwalk Victory*,⁷⁷¹ concerned casualties that occurred not on the high seas but in the territorial waters of a foreign

763. Oil Pollution Act of 1990, 33 U.S.C. § 2718 (2006).

764. See Robert Force, Martin Davies & Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 Tul. L. Rev. 889 (2011); Robert Force & Jonathan M. Gutoff, *Limitation of Liability in Oil Pollution Cases: In Search of Concorsus or Procedural Alternatives to Concorsus*, 22 Tul. Mar. L.J. 331, 338 (1998).

765. *Richardson v. Harmon*, 222 U.S. 96 (1911).

766. *The Soerstad*, 257 F. 130 (S.D.N.Y. 1919).

767. *Cullen Fuel Co. v. W.E. Hedger, Inc.*, 290 U.S. 82 (1933).

768. *Richardson*, 222 U.S. 96.

769. *Signal Oil & Gas Co. v. The Barge W-701*, 654 F.2d 1164 (5th Cir. 1981), *cert. denied*, 455 U.S. 944 (1982).

770. *Ocean Steam Navigation Co. v. Mellor (The Titanic)*, 233 U.S. 718 (1914).

771. *Black Diamond S.S. Corp. v. Robert Stewart & Sons (The Norwalk Victory)*, 336 U.S. 386 (1949).

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country. The Court admonished lower federal courts not to assume that all countries classify their limitation laws as procedural. Therefore, if a limitation proceeding is filed in federal district court based on a casualty that occurred in the waters of a foreign country, the court should ascertain whether the law of that country classifies the right to limitation as procedural or substantive. If the court determines that it is procedural, then U.S. law determines the limitation amount. If a court determines that it is substantive, then the limitation law of the foreign country applies. Some lower federal courts apply *The Norwalk Victory* to casualties that occur in the waters of a foreign country⁷⁷² and *The Titanic* to casualties on the high seas.⁷⁷³ The results are far from consistent.⁷⁷⁴

772. *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980), *cert. denied*, 450 U.S. 921 (1981).

773. *In re Ta Chi Navigation (Panama) Corp. S.A.*, 416 F. Supp. 371 (S.D.N.Y. 1976).

774. *Compare Bethlehem Steel*, 631 F.2d 441 (affirming district court finding Canadian limitation statute to be procedural), *with In re Geophysical Serv., Inc.*, 590 F. Supp. 1346 (S.D. Tex. 1984) (holding Canadian law to be substantive); *and compare Ta Chi*, 416 F. Supp. 371 (holding U.S. law applied to casualty on high seas involving Panamanian flag vessel), *with In re Chadade S.S. Co. (The Yarmouth Castle)*, 266 F. Supp. 517 (S.D. Fla. 1967) (holding Panamanian limitation law was substantive and applied to casualty on high seas).

6. Towage

Towage Contracts

In the United States, there is a distinction between towage contracts and contracts of affreightment.⁷⁷⁵ The distinction is important because different legal liability regimes apply depending on which type of contract is used. A towage contract involves an undertaking by one party to move another party's vessel (such as a barge) or structure from one place to another.⁷⁷⁶ A contract of affreightment essentially is an undertaking by one party to transport cargo from one place to another. Where the party performing the transportation function supplies both the tug and the barge to carry another party's goods from one place to another, the contract is one of affreightment.⁷⁷⁷

Towage contracts are governed by the general maritime law. Under U.S. towage law, a tower does not become the bailee of the towed vessel or its cargo.⁷⁷⁸ Further, a tower (often a tug boat operator) may not "contract out" of liability for its own negligence, though creative lawyering has developed a way of circumventing this rule.⁷⁷⁹ The formation of towage contracts, either written or oral,⁷⁸⁰ is subject to the common law of contracts. A maritime lien will arise against a towed vessel whose owner does not pay for services rendered under a towage contract.⁷⁸¹

775. *Agrico Chem. Co. v. M/V Ben W. Martin*, 664 F.2d 85 (5th Cir. 1981).

776. *Sacramento Navigation Co. v. Salz*, 273 U.S. 326 (1927).

777. *Id.* Contracts of affreightment are discussed *supra* Chapter 2.

778. *Stevens v. The White City*, 285 U.S. 195 (1932).

779. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). *See also infra* text accompanying notes 808–11.

780. *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) (upholding oral contracts under general maritime law).

781. 46 U.S.C. § 31301(4) (2006).

Duties of Tug

If a tug damages its tow, its liability is determined under tort law.⁷⁸² Towage law imposes duties on the tug beyond any specific undertakings stated in the towage contract. Foremost among these duties is “the duty to exercise such reasonable care and maritime skill as prudent navigators employ for the performance of similar service.”⁷⁸³ However, there is no presumption of negligence against a tug that receives a tow in good condition and later delivers it in damaged condition.⁷⁸⁴ On the contrary, the owner of the towed vessel has the burden of proving that the damage was caused by the breach of the tug’s duty to exercise reasonable care.⁷⁸⁵

Federal courts have established other duties, the breach of which may result in a tug being held liable for negligent damage to a tow or its cargo.⁷⁸⁶ A tug owner must provide a seaworthy vessel with a qualified master and crew.⁷⁸⁷ The tug must have proper lighting and must obey all navigational rules of the road.⁷⁸⁸ It must maintain a watch over the tow during its voyage.⁷⁸⁹ Finally, the tug has a duty to save the tow from sinking if possible.⁷⁹⁰

Although the burden of proof usually lies with the tow to prove that the tug was negligent, several courts have recognized a narrow exception.⁷⁹¹ The exception, based on the doctrine of *res ipsa*

782. *Stevens*, 285 U.S. 195.

783. *Id.* at 202.

784. *Id.* at 195.

785. *Id.*

786. For an explanation of case law, see Alex L. Parks & Edward V. Cattell, Jr., *The Law of Tug, Tow & Pilotage* 127–97 (3d ed. 1994).

787. *Id.* at 127–33.

788. *Id.* at 129–33, 144–48.

789. *Id.* at 144–48.

790. *Curtis Bay Towing Co. of Va. v. S. Lighterage Corp.*, 200 F.2d 33 (4th Cir. 1952); *Chemical Transporter, Inc. v. M. Turecamo, Inc.*, 290 F.2d 496 (2d Cir. 1961).

791. *Mid-America Transp. Co. v. Nat’l Marine Serv., Inc.*, 497 F.2d 776 (8th Cir. 1974), *cert. denied*, 425 U.S. 937 (1976); *The Anaconda*, 164 F.2d 224 (4th Cir. 1947).

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loquitur, is applied in certain situations, such as where the tow is unmanned⁷⁹² or is grounded in a channel that is well marked and reasonably wide.⁷⁹³ Although the tug has a duty of explanation in these circumstances, the ultimate burden of proof remains upon the tow.⁷⁹⁴

Duties of Tow

A vessel owner that contracts to have its vessel towed has the duty of providing a seaworthy vessel.⁷⁹⁵ The tow must be structurally sound and properly equipped.⁷⁹⁶ Further, it must be properly manned, if it has a crew,⁷⁹⁷ and properly loaded.⁷⁹⁸ The tug has a duty to visually inspect the tow before the voyage but does not have to perform a detailed inspection of the tow to ensure its seaworthiness.⁷⁹⁹ However, if the tug knows that the tow is unseaworthy and fails “to use reasonable care under the circumstances,”⁸⁰⁰ then the tug may be held liable for the loss.⁸⁰¹ Generally, there is a presumption of unseaworthiness against a tow that sinks in calm water for no

792. *W. Horace Williams Co. v. The Wakulla*, 109 F. Supp. 698 (E.D. La. 1953), *aff'd*, 213 F.2d 27 (5th Cir. 1954).

793. *The Anaconda*, 164 F.2d at 224.

794. *Id.*; *Mid-America Transp. Co.*, 497 F.2d 776.

795. *Derby Co. v. A. L. Mechling Barge Lines, Inc.*, 258 F. Supp. 206 (E.D. La. 1966), *aff'd*, 399 F.2d 304 (5th Cir. 1968).

796. *Id.*

797. *Great Lakes Towing Co. v. Am. S.S. Co.*, 165 F.2d 368 (6th Cir.), *cert. denied*, 333 U.S. 881 (1948).

798. *Salter Marine, Inc. v. Conti Carriers & Terminals, Inc.*, 677 F.2d 388 (4th Cir. 1982).

799. *Nat G. Harrison Overseas Corp. v. Am. Tug Titan*, 516 F.2d 89, *modified*, 520 F.2d 1104 (5th Cir. 1975).

800. *King Fisher Marine Serv., Inc. v. NP Sunbonnet*, 724 F.2d 1181, 1184 (5th Cir. 1984).

801. *Id.*

apparent reason.⁸⁰² To overcome the presumption, the tow must prove that the loss resulted from the tug's negligence.⁸⁰³

Liability of the Tug and the Tow to Third Parties

Where a third party seeks recovery against either the tug, tow, or both for loss of cargo, personal injury, or damage to other vessels, each vessel will be held liable for damages in proportion to its individual degree of fault.⁸⁰⁴ If damage is caused by a towed vessel, the courts will apply the theory of "the dominant mind" to shift liability for the damage from the tow to the tug, which was actually in control of the tow.⁸⁰⁵ However, that theory may be overcome if the tug can present evidence that the damage was in fact the fault of the tow.⁸⁰⁶ The negligence of the tug cannot be attributed to the tow under a towage contract between a separately owned tug and tow. Therefore, an innocent tow cannot be held liable for damages caused by the tug.⁸⁰⁷

Exculpatory and Benefit-of-Insurance Clauses

A towage contract cannot include an exculpatory clause that purports to relieve a tug from liability for its own negligence.⁸⁰⁸ Similarly, a towage contract that includes a clause that attempts to allow the tug to escape liability for the negligence of its crew by designating the tug's crew as servants of the tow does not create any rights in third parties against the tow.⁸⁰⁹ Finally, a towage contract cannot include a clause

802. See discussion of cases in Parks & Cattell, *supra* note 786, at 202–04.

803. Consolidated Grain & Barge Co. v. Marcona Conveyor Corp., 716 F.2d 1077 (5th Cir. 1983); Derby Co. v. A. L. Mechling Barge Lines, Inc., 258 F. Supp. 206 (E.D. La. 1966), *aff'd*, 399 F.2d 304 (5th Cir. 1968).

804. United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

805. Dow Chem. Co. v. Tug Thomas Allen, 349 F. Supp. 1354 (E.D. La. 1972).

806. Chevron U.S.A., Inc. v. Progress Marine, Inc., 1980 AMC 1637 (E.D. La. 1979), *aff'd*, 632 F.2d 893 (5th Cir. 1980).

807. The Hector, 65 U.S. (24 How.) 110 (1860).

808. Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955).

809. Boston Metals Co. v. The Winding Gulf, 349 U.S. 122 (1955).

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that requires a tow to indemnify the tug for damage claims brought by third parties resulting from the tug's negligence.⁸¹⁰ However, the Supreme Court upheld the use of a foreign forum selection clause in a towage contract despite the fact that the selected forum enforced exculpatory provisions.⁸¹¹

Recognizing the economic inefficiency of requiring both the tug and tow to procure separate insurance to protect against loss, several courts of appeals approve the use of "benefit-of-insurance" clauses.⁸¹² A typical benefit-of-insurance clause requires that the tow procure insurance to cover any damage that may result to the tow or the tow's cargo.⁸¹³ Further, the clause will require that this insurance policy name the tug as an additional insured with a waiver of subrogation.⁸¹⁴ The tug undertakes to procure insurance for its vessel with comparable provisions. The Fifth Circuit concluded that benefit-of-insurance clauses are not the type of exculpatory clauses that were disapproved by the Supreme Court.⁸¹⁵

810. *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

811. *The M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (involving international towage operation where contract was competitively negotiated).

812. *See, e.g., Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp.*, 707 F.2d 1086 (9th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984); *Fluor W., Inc. v. G & H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972); *Twenty Grand Offshore, Inc. v. W. India Carriers, Inc.*, 492 F.2d 679 (5th Cir.), *cert. denied*, 419 U.S. 836 (1974). *See also* Charles S. Donovan, *Exculpatory and Benefit of Insurance Clauses in Towage and Pilotage*, 70 Tul. L. Rev. 605-06 (1995).

813. *Fluor*, 447 F.2d 35; *Twenty Grand*, 492 F.2d 679.

814. *Fluor*, 447 F.2d 35; *Twenty Grand*, 492 F.2d 679.

815. *Fluor*, 447 F.2d 35; *Twenty Grand*, 492 F.2d 679.

7. Pilotage

Introduction

The term “pilot” may be broadly used to describe any person directing the navigation of a vessel.⁸¹⁶ However, under maritime law, the term is generally used to describe a person who is taken on board in order to navigate a vessel through a particular river, road, or channel, or into or out of a port.⁸¹⁷ A pilot is characterized as a “compulsory” pilot if there is a statutory mandate requiring the use of a pilot in a particular situation that imposes a criminal sanction on a vessel owner and any other person who violates the requirement.⁸¹⁸ If an owner is not subject to criminal sanctions but elects to engage the services of a pilot, the pilot is considered to be a “voluntary” pilot.⁸¹⁹ Even when an owner has the option of not using a pilot’s services but is nevertheless obligated to pay full or partial pilotage fees, the situation is one of voluntary pilotage.

A compulsory pilot is not an agent or servant of the vessel owner; hence, the vessel owner cannot be held liable *in personam* for damages caused by a compulsory pilot. However, as stated in Chapter 4 on collision, the vessel may still be held liable *in rem*.⁸²⁰ A voluntary pilot is considered to be an employee of the vessel owner and, under the rule of *respondeat superior*, the pilot’s conduct—including negligent acts—is attributed to the owner. In these circumstances, a vessel owner may be held liable *in personam* for damages caused by the negligence of a voluntary pilot, and the vessel may also be held liable *in rem*.⁸²¹

816. See case law in Parks & Cattell, *supra* note 786, at 992.

817. For an explanation of relevant common law, see Francis Rose, *The Modern Law of Pilotage* 1 (1984).

818. See *The China*, 74 U.S. (7 Wall.) 53 (1868). See also discussion of cases in Parks & Cattell, *supra* note 786, at 1018–19.

819. See cases discussed in Parks & Cattell, *supra* note 786, at 1019.

820. *The China*, 74 U.S. (7 Wall.) 53.

821. *Homer Ramsdell Transp. Co. v. La Compagnie Generale Transatlantique*, 182 U.S. 406 (1901).

Regulation of Pilots

Pilotage is regulated at both the state and federal levels. Under federal law, the U.S. Coast Guard is responsible for the regulation of pilots.⁸²² Federal law requires that all seagoing vessels engaged in coastwise trade be navigated by a pilot who has been licensed by the U.S. Coast Guard.⁸²³ Only U.S. licensed vessels may engage in domestic or coastwise trade.⁸²⁴ Therefore, there is no requirement that foreign vessels engaged in trade between U.S. ports and foreign ports be navigated by federally licensed pilots. Also, U.S. registered vessels engaged in foreign trade do not need to be piloted by a federally licensed pilot.⁸²⁵ Federally regulated vessels engaged in coastwise trade are not required to use state-licensed pilots.⁸²⁶

Federal law grants the states the right to regulate the pilotage of registered vessels engaged in foreign trade as well as “pilots in the bays, rivers, harbors, and ports of the United States.”⁸²⁷ Therefore, under the statute, states may regulate the pilotage of foreign vessels as well as vessels sailing under U.S. registry.⁸²⁸ However, there is an exception with regard to the pilotage of foreign and U.S. registered vessels navigating the Great Lakes. Vessels navigating the Great Lakes must be piloted by a federally licensed pilot.⁸²⁹ Wide latitude is given to the states in determining the waters in which a vessel must procure a state-licensed pilot.⁸³⁰

822. 46 U.S.C. §§ 7101 & 8502 (2006).

823. *Id.* § 8502(a).

824. *Id.* §§ 12103 & 12112.

825. *Id.* § 8502.

826. *Id.* § 8501(d).

827. *Id.* § 8501(a). *See also* *Cooley v. Bd. of Wardens of Port of Phila.*, 53 U.S. (12 How.) 299 (1851).

828. 46 U.S.C. § 8501(a) (2006). *See also* *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

829. 46 U.S.C. § 9302 (2006).

830. *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976). *See also* *Wilson v. McNamee*, 102 U.S. (12 Otto) 572 (1880) (upholding state pilotage regulation requiring use of state-licensed pilot about 50 miles from port).

Liability of Pilots and Pilot Associations

In the United States, pilots are held to a high standard of care. A pilot must have “personal knowledge of the topography through which he navigates his vessel.”⁸³¹ Further, pilots must be aware of all possible dangers located in the body of water that they navigate and must remain informed of any changes that might represent a hazard to the vessel.⁸³² Compulsory pilots are held to an exceptionally high standard of care and, as a matter of law, may be charged with knowledge of a local condition.⁸³³ Pilots may be held liable to the vessels they control⁸³⁴ and to third parties for damages caused by the pilot’s negligence.⁸³⁵

A pilot may belong to a pilots’ association. Pilots’ associations often do not actually employ pilots but rather represent pilots and inform them of employment opportunities. These associations often perform administrative services for the pilots. A pilots’ association that is merely a representative of its members and does not employ pilots or control the manner in which pilots perform their duties cannot be held liable for damages caused by a negligent member pilot.⁸³⁶ On the other hand, a pilots’ association, pilot company, or port authority that employs pilots may be held liable for damages caused by one of its pilots.⁸³⁷ However, a port commission or authority that regulates or licenses pilots but does not employ them cannot be held liable for damages caused by a pilot.⁸³⁸

831. *Atlee v. Union Packet Co.*, 88 U.S. (21 Wall.) 389, 396 (1874).

832. *Id.*

833. *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978).

834. *Bethlehem Steel Corp. v. Yates*, 438 F.2d 798 (5th Cir. 1971).

835. *Gulf Towing Co. v. Steam Tanker, Amoco, N.Y.*, 648 F.2d 242 (5th Cir. 1981).

836. *Guy v. Donald*, 203 U.S. 399 (1906).

837. *City of Long Beach v. Am. President Lines, Ltd.*, 223 F.2d 853 (9th Cir. 1955).

838. *Kitanihon-Oi S.S. Co. v. Gen. Constr. Co.*, 678 F.2d 109 (9th Cir. 1982).

Exculpatory Pilotage Clauses

As a matter of common practice, an exculpatory pilotage clause is inserted into pilotage contracts between a pilot's employer or representative and a shipowner, allowing the pilot and the employer or representative to escape liability for damages caused by the pilot. These clauses, in essence, provide that the pilot, while navigating the vessel, is the employee of the vessel owner. The effect of a pilotage clause is to make the vessel liable for damages caused by the pilot. The Supreme Court has upheld the use of exculpatory pilotage clauses.⁸³⁹ It has distinguished its decision invalidating exculpatory clauses in towage contracts on the ground that in pilotage situations the pilot is actually controlling the movement of the vessel by using the vessel's own power and navigational equipment. However, a pilotage clause may be held invalid in certain compulsory pilot situations.⁸⁴⁰ Further, a company that supplies a pilot to a vessel may not use a pilotage clause offensively in order to collect damages for injuries caused to its own property by one of its pilots acting under a pilotage contract.⁸⁴¹

839. Sun Oil Co. v. Dalzell Towing Co., 287 U.S. 291 (1982).

840. Kane v. Hawaiian Indep. Refinery, Inc., 690 F.2d 722 (9th Cir. 1982); Texaco Trinidad, Inc. v. Afran Transp. Co., 538 F. Supp. 1038 (E.D. Pa. 1982), *aff'd*, 707 F.2d 1395 (3d Cir. 1983).

841. United States v. Nielson, 349 U.S. 129 (1955).

8. Salvage

Introduction

The United States is a party to both the 1910 Brussels Salvage Convention⁸⁴² and the 1989 Salvage Convention.⁸⁴³ However, U.S. courts usually decide salvage controversies under the principles of the general maritime law without reference to international conventions.⁸⁴⁴ Federal courts have exclusive jurisdiction over salvage cases brought *in rem*. It is not clear whether state courts may entertain salvage claims brought *in personam*, but such cases are rare. Suit for a salvage award may be brought against either the owner of the vessel salvaged or the vessel itself *in rem*.⁸⁴⁵ The statute of limitations for filing a salvage award claim is two years.⁸⁴⁶ A claim for salvage is a claim either for “pure salvage” or “contract salvage.”

The Supreme Court has stated that “no structure that is not a ship or vessel is a subject of salvage.”⁸⁴⁷ Nevertheless, it is apparent that cargo, fuel, and other property salvaged from or with a vessel may

842. International Convention for the Unification of Certain Rules Relating to the Salvage of Vessels at Sea, signed at Brussels, Sept. 23, 1910 (codified, with minor modifications, in the United States as the Salvage Act, 46 U.S.C. § 80107 (2006)).

843. International Convention on Salvage, signed in London, Apr. 28, 1989. Important innovations were introduced in the 1989 Convention, especially in regard to salvage efforts that protect against environmental damage. Article 14, and Attachment 1, Common Understanding Concerning Articles 13 and 14 of the International Convention on Salvage, 1989.

844. *See, e.g.,* *Sobonis v. Steam Tanker Nat’l Defender*, 298 F. Supp. 631 (S.D.N.Y. 1969) (allowing salvage awards without reference to Salvage Treaty). *See* cases discussed in Gilmore & Black, *supra* note 14, at 534.

845. *The Sabine*, 101 U.S. (11 Otto) 384 (1879) (lien arises against salvaged vessel in favor of salvor of vessel). Where salvage services are rendered without request by the owner or someone acting on authority of the owner, the salvor may be limited to its lien as the sole remedy. *See, e.g.,* *Jupiter Wreck, Inc. v. Unidentified, Wrecked & Abandoned Sailing Vessel*, 691 F. Supp. 1377 (S.D. Fla. 1988).

846. 46 U.S.C. app. § 80107 (2006).

847. *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625 (1887).

also give rise to a salvage award.⁸⁴⁸ In order for a court to make a salvage award, there should be a nexus between the item salvaged and traditional maritime activities.⁸⁴⁹ Lower federal courts, however, have liberally interpreted the Supreme Court's statement in determining whether the property has a maritime connection. Accordingly, some courts have held that items such as seaplanes⁸⁵⁰ and money found on a floating human body⁸⁵¹ are proper subjects of salvage. One court, however, has held that a house that sank while being transported by truck over a frozen lake lacked a maritime relationship.⁸⁵²

A party may render salvage services to a vessel without the request of the owner, master, or other agent of the vessel if it appears that a reasonable owner would have ordered the services had he or she been present at the scene.⁸⁵³ However, a party who renders services to a vessel despite the objection of a person who has authority over the vessel will be denied a salvage award.⁸⁵⁴

Elements of "Pure Salvage" Claims

"Pure salvage" is a reward for perilous service. Public policy mandates a pure salvage award for laborious, and sometimes dangerous, efforts to provide maritime assistance. Awards are therefore designed to be reasonably liberal in the salvor's favor. There are three elements of a pure salvage claim. First, the property must be exposed to a marine peril. Second, the salvage service must be voluntary, whereby the salvor is under no preexisting duty to render

848. *Allseas Mar., S.A. v. M/V Mimosa*, 812 F.2d 243 (5th Cir. 1987).

849. *Provost v. Huber*, 594 F.2d 717 (8th Cir. 1979).

850. *Lambros Seaplane Base v. The Batory*, 215 F.2d 228 (2d Cir. 1954).

851. *Broere v. Two Thousand One Hundred Thirty-Three Dollars*, 72 F. Supp. 115 (E.D.N.Y. 1947).

852. *Provost*, 594 F.2d 717.

853. *Lambros Seaplane*, 215 F.2d 228.

854. *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir.), *cert. denied*, 464 U.S. 818 (1983).

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the service. Third, the salvage operation must be successful in whole or in part.⁸⁵⁵

A salvor is anyone who saves maritime property from a peril. An “inadvertent” salvor does not qualify for a salvage award. The would-be salvor must have the specific intent to confer a benefit on the salvaged vessel. For example, where a person was trying to put out a fire to save a wharf and in the process saved a ship, the unintended result was not a salvage service.⁸⁵⁶

To qualify as a marine peril the danger need not be imminent. There need only be a reasonable apprehension of peril.⁸⁵⁷ A claimant seeking a salvage award must show that, at the time assistance was rendered, the salvaged vessel had been damaged or exposed to some danger that could lead to her destruction or further damage in the absence of the service provided.⁸⁵⁸ The party seeking a salvage award has the burden to prove that a marine peril existed.⁸⁵⁹

Services must be rendered voluntarily. The owner of the salvaged vessel has the burden of proving that the salvage services were not voluntarily rendered.⁸⁶⁰ For the services to be considered voluntary, they must be “rendered in the absence of any legal duty or obligation.”⁸⁶¹ This requirement does not preclude professional salvors from claiming salvage awards,⁸⁶² but may bar certain people, such as firemen, from claiming salvage awards.⁸⁶³ Similarly, a vessel’s crew is generally precluded from claiming salvage awards because of their preexisting duty to the vessel. They may, however, be eligible for awards under exceptional circumstances. It is clear, however, that persons may claim a salvage award for rendering

855. *The Sabine*, 101 U.S. (11 Otto) 384 (1879).

856. *See, e.g., Merritt & Chapman Derrick & Wrecking Co. v. United States*, 274 U.S. 611 (1927).

857. *Markakis v. S.S. Volendam*, 486 F. Supp. 1103 (S.D.N.Y. 1980).

858. *Conolly v. S.S. Karina II*, 302 F. Supp. 675 (E.D.N.Y. 1969).

859. *Am. Home Assurance Co. v. L & L Marine Serv., Inc.*, 875 F.2d 1351 (8th Cir. 1989).

860. *Clifford v. M/V Islander*, 751 F.2d 1, 5 n.1 (1st Cir. 1984).

861. *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333 (2d Cir. 1983).

862. *Id.*

863. *Firemen’s Charitable Ass’n v. Ross*, 60 F. 456 (5th Cir. 1893).

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services to an endangered vessel notwithstanding the fact that they are members of the crew of another vessel owned by the same person who owns the salvaged vessel.⁸⁶⁴

Finally, a party claiming a salvage award has the burden of proving that the salvor's effort contributed to success in saving the property.⁸⁶⁵ This requirement has two dimensions. First, under the "no cure–no pay" rule, there can be no salvage award if the property is lost despite the efforts of the party rendering services.⁸⁶⁶ Second, the party must show it played a role in the success of the salvage. This role need not have been laborious or dangerous. As stated by one court, activities such as

standing by or escorting a distressed ship in a position to give aid if it becomes necessary, giving information on the channel to follow ... to avoid running aground, [and] carrying a message as a result of which necessary aid and equipment are forthcoming have all qualified.⁸⁶⁷

Salvage and Finds Distinguished

Disputes arising out of the discovery and excavation of historic shipwrecks require courts to distinguish between the law of salvage and the law of finds. Under the law of salvage, title to a salvaged vessel remains with the owner of the vessel. Although the salvor of the vessel has a lien on the vessel and may claim a salvage award, the salvor does not gain title to the vessel.⁸⁶⁸ In contrast, under the law of finds, the finder acquires title to the property upon a determination that property has been permanently abandoned.⁸⁶⁹

864. *Markakis v. S.S. Volendam*, 486 F. Supp. 1103 (S.D.N.Y. 1980).

865. *The Sabine*, 101 U.S. (11 Otto) 384 (1879).

866. *Id.*

867. *Markakis*, 486 F. Supp. at 1106 (quoting Gilmore & Black, *supra* note 14, at 536–37).

868. *Chance v. Certain Artifacts Found & Salvaged from The Nashville*, 606 F. Supp. 801 (S.D. Ga. 1984), *aff'd*, 775 F.2d 302 (11th Cir. 1985).

869. *Id.* See also *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978).

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The laws of salvage and finds may be subject to statutory laws conferring federal government control over historic structures. In an effort to protect artifacts that may be retrieved from historic shipwrecks within the United States, Congress passed the Archaeological Resources Protection Act of 1979,⁸⁷⁰ which protects archaeological remains within federally owned lands other than the Outer Continental Shelf. The United States claims shipwrecks in specified areas subject to U.S. control. Under the Abandoned Shipwreck Act of 1987,⁸⁷¹ the United States asserts ownership of all shipwrecks embedded in the land within state territorial waters and, in turn, transfers title to those vessels to the state in which the shipwreck is located.⁸⁷² The Act further provides that neither the law of salvage nor the law of finds applies to shipwrecks covered under the Act.

The Antiquities Act of 1906⁸⁷³ confers control in the federal government over historic landmarks, historic and prehistoric structures, and items of historic and scientific interest located on land owned and controlled by the United States. The Outer Continental Shelf Land Act,⁸⁷⁴ which extends jurisdiction and control of the United States over the Continental Shelf, relates to the exploitation of the mineral resources on the Continental Shelf and, as made clear by the Convention on the Continental Shelf,⁸⁷⁵ does not apply to wrecked ships and their cargo lying on the seabed or covered by sand or subsoil.

Salvage Awards

If a court finds that a salvage service was performed, it must then determine the amount of the salvage award. Each salvage situation is

870. 16 U.S.C. § 470aa (2006).

871. 43 U.S.C. §§ 2101–2106 (2006).

872. *Id.*

873. 16 U.S.C. §§ 431–433 (2006).

874. 43 U.S.C. § 1332 (2006).

875. Convention on the Continental Shelf, *done* Apr. 29, 1958, 15 U.S.T. 471, 11 U.N. GAOR, Supp. No. 9, at 42, U.N. doc. A/3159 (1956) (entered into force June 10, 1964). *See also* *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 569 F.2d 330, 339 (5th Cir. 1978).

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unique, and the circumstances of each case must be considered in fixing the award.⁸⁷⁶ In *The Blackwall*,⁸⁷⁷ the Supreme Court listed a set of factors that should be considered in determining a salvage award:

- (1) the labor expended by the salvors in rendering the salvage service;
- (2) the promptitude, skill, and energy displayed in rendering the service and saving the property;
- (3) the value of the property employed by the salvors in rendering the service and the degree of danger to which such property was exposed;
- (4) the risk incurred by the salvors in securing the property from the impending peril;
- (5) the value of the saved property; and
- (6) the degree of danger from which the property was rescued.⁸⁷⁸

All of the factors should be considered in determining the amount of the salvage award.⁸⁷⁹ Each factor, however, is not given equal weight. Furthermore, several courts have reversed the order of these factors so that greater weight is given to the value of the salvaged property, which includes both ship and cargo,⁸⁸⁰ and the degree of danger in a given situation, thus permitting a more realistic appraisal of the respective costs and benefits to the parties.⁸⁸¹

A salvage award may include damages if the salvor's property is lost or damaged in the course of rendering its service.⁸⁸² Further, the

876. *B.V. Bureau Wijsmuller v. United States*, 702 F.2d 333 (2d Cir. 1983).

877. 77 U.S. (10 Wall.) 1 (1869).

878. *Id.*

879. *Wijsmuller*, 702 F.2d 333.

880. *Brown v. Johansen*, 881 F.2d 107 (4th Cir. 1989); *Wijsmuller*, 702 F.2d 333; *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 695 F.2d 893 (5th Cir. 1983); *The Haxby v. Merritt's Wrecking Org.*, 83 F. 715 (4th Cir. 1897).

881. *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976 (5th Cir. 1998). This is an interesting case that uses an "economic analysis" in calculating the award for a fully laden tanker that saved a barge transporting a component of the space shuttle.

882. *Perez v. Barge LBT No. 4*, 416 F.2d 407 (5th Cir. 1969).

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salvor may recover expenses incurred during the salvage effort in addition to the salvage award.⁸⁸³ A salvage award will be apportioned amongst all co-salvors commensurate with each salvor's degree of participation and will include both the owner and crewmembers of the salvaging vessel.⁸⁸⁴ Finally, professional salvors are generally granted more liberal salvage awards than chance salvors because of their unique skills and their investment in specialized equipment.⁸⁸⁵

As to liability for salvage awards, any party who was involved in the common venture must pay its proportionate share of the award. This means that the cargo interests may have the duty to contribute to the award.⁸⁸⁶ If salvage services have not been requested by a person authorized to do so (such as the master of a vessel), the owner of the salvaged property is not liable *in personam*; the property, however, is liable *in rem*.

Misconduct of Salvors

“[A] salvor must act in good faith and exercise reasonable skill and prudent seamanship” in providing salvage services.⁸⁸⁷ A salvor's negligence may result in a reduction of the salvage award, a total denial of any award, and liability for affirmative damages.⁸⁸⁸ Mere negligence that results in an unsuccessful salvage will, in turn, result in a denial of an award under the “no cure–no pay” rule.⁸⁸⁹ Negligence that only reduces the degree of success will result in a reduction of the award. However, where a salvor is guilty of “gross negligence or willful misconduct,” the salvor not only will be denied

883. *Reynolds Leasing Corp. v. Tug Patrice McAllister*, 572 F. Supp. 1131 (S.D.N.Y. 1983).

884. *The Lydia*, 49 F. 666 (E.D.N.Y. 1892).

885. *Id.*

886. *In re Pac. Far E. Line, Inc.*, 314 F. Supp. 1339 (N.D. Cal. 1970), *aff'd*, 472 F.2d 1382 (9th Cir. 1973).

887. *Basic Boats, Inc. v. United States*, 352 F. Supp. 44, 48 (E.D. Va. 1972). *See also The Noah's Ark v. Bentley & Felton Corp.*, 292 F.2d 437 (5th Cir. 1961).

888. *Basic Boats*, 352 F. Supp. at 49.

889. The “no cure–no pay” rule is discussed *supra* text accompanying note 866 and *infra* text accompanying notes 895 & 898.

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a reward or suffer a reduction of its award but will be liable for affirmative damages for loss or damage to the salvaged vessel.⁸⁹⁰ Furthermore, there is authority for the proposition that even in the absence of gross negligence, if the salvor inflicts a “distinguishable” or “independent” injury on the salvaged vessel, it may be held liable to pay affirmative damages.⁸⁹¹ A “distinguishable” injury “is some type of damage caused by the salvor to the salvaged vessel other than that which she would have suffered had salvage efforts not been undertaken to extricate her from the perils to which she was exposed.”⁸⁹² Finally, a salvor may be denied a salvage award when dishonesty or fraudulent conduct is involved.⁸⁹³ Dishonesty by the master of a salvaging vessel is attributed to the vessel’s owner so as to deny the owner an award. Dishonesty by the master will not be attributed to the crew unless they had knowledge of the master’s conduct.⁸⁹⁴

Contract Salvage

Salvage services may be rendered under a salvage contract. A salvage contract may call for compensation at a fixed rate payable regardless of success, or it may incorporate a “no cure–no pay” provision whereby compensation is contingent on the success of the salvage operations.⁸⁹⁵ A court will generally enforce a salvage contract that was fairly bargained for⁸⁹⁶ even if it turned out to be a “bad bargain” for the owner of the salvaged vessel, such as where the work turned out to be less onerous than the parties anticipated.⁸⁹⁷ The fact that a

890. *Black Gold Marine, Inc. v. Jackson Marine Co.*, 759 F.2d 466 (5th Cir. 1985); *The Elfrida*, 172 U.S. 186 (1898).

891. *Id.*

892. *The Noah’s Ark*, 292 F.2d at 441.

893. *Jackson Marine Corp. v. Blue Fox*, 845 F.2d 1307 (5th Cir. 1988).

894. *Id.* at 1311.

895. *The Elfrida*, 172 U.S. 186 (1898).

896. *Onaway Transp. Co. v. Offshore Tugs, Inc.*, 695 F.2d 197 (5th Cir. 1983), *superseded on other grounds*, 948 F.2d 179 (1991), *cert. denied*, 507 U.S. 1050 (1993).

897. *The Elfrida*, 172 U.S. at 197.

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contract is on a “no cure–no pay” basis is a factor that tends to establish its fairness. However, even a “no cure–no pay” contract may be set aside if it was procured through fraud, misrepresentation, or other compulsion.⁸⁹⁸

In recent years various versions of Lloyds Open Form (LOF), a salvage contract form, have been used. The use of these forms does not immunize salvors from claims of fraud.⁸⁹⁹ Furthermore, where services are rendered in U.S. waters and both vessel owner and salvor are U.S. citizens, some courts have refused to enforce the London arbitration provisions contained in the LOF.⁹⁰⁰

Life Salvage

There is a statutory duty to render assistance to save lives at sea,⁹⁰¹ thereby precluding compensation for pure life salvage.⁹⁰² However, under the Life Salvage Act,⁹⁰³ a party who provides services that result in the saving of lives is entitled to share in any salvage award granted to other persons who saved the vessel or cargo where both were engaged in a common salvage operation. Salvors who act jointly and in concert—whereby some save lives, thus foregoing an opportunity to save property, while others save property—are entitled to a share of the salvage award.⁹⁰⁴ Such an award will be granted only to those who have foregone the opportunity to engage in the more profitable work of property salvage.⁹⁰⁵

898. *Id.* See also *Black Gold Marine, Inc. v. Jackson Marine Co.*, 759 F.2d 466 (5th Cir. 1985).

899. *Black Gold*, 759 F.2d 466.

900. *Jones v. Sea Tow Servs. Freeport N.Y. Inc.*, 30 F.3d 360 (2d Cir. 1994); *Reinholtz v. Retriever Marine Towing & Salvage*, 1994 AMC 2981 (S.D. Fla. 1993), *aff'd*, 46 F.3d 71 (11th Cir. 1995); *Brier v. Northstar Marine, Inc.*, 1993 AMC 1194 (D.N.J. 1992).

901. 46 U.S.C. §§ 2303–2304 (2006).

902. *The Emblem*, 8 F. Cas. 611, 2 Ware 68, No. 4434 (D. Me. 1840).

903. 46 U.S.C. app. § 729 (1994).

904. *In re Yamashita-Shinnihon Kisen*, 305 F. Supp. 796 (D. Or. 1969).

905. *St. Paul Marine Transp. Corp. v. Cerro Sales Corp.*, 313 F. Supp. 377 (D. Haw. 1970).

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A person who incurs expenses in order to save lives has a right to be reimbursed for any expenditure incurred in performing a duty owed by a shipowner to a member of its crew.⁹⁰⁶

⁹⁰⁶. *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers*, 553 F.2d 830 (2d Cir.), *cert. denied*, 434 U.S. 859 (1977).

9. Maritime Liens and Mortgages

Liens

Much has been written about the exact nature of maritime liens in the United States.

A maritime lien is a secured right peculiar to maritime law. A lien is a charge on property for the payment of a debt, and a maritime lien is a special property right in a vessel given to a creditor by law as security for a debt or claim arising from some service rendered to the ship to facilitate her use in navigation or from an injury caused by the vessel in navigable waters.⁹⁰⁷

The basic purpose of the maritime lien is to provide security for a claim while permitting the ship to proceed on her way in order to earn the freight or hire necessary to pay off the claim. The simplest way of understanding the nature of a maritime lien is by examining its function. “A maritime lien is a nonpossessory security device that is created by operation of law.”⁹⁰⁸ Although parties may waive or surrender the right to a maritime lien by contract or otherwise, they may not agree to confer a maritime lien where the law does not provide for one.⁹⁰⁹ The United States has never ratified any of the international conventions on maritime liens, and the U.S. law of maritime liens is purely domestic.

Under U.S. law, maritime liens are based on the fiction of a “personified” vessel. Under the personification doctrine, a vessel is held liable for its torts and for contractual obligations undertaken on its behalf to facilitate the accomplishment of its mission. As a corollary to this doctrine, an action based on a maritime lien may only be brought *in rem* against the vessel itself.

The maritime lien is different from the general common-law lien in several respects.⁹¹⁰ Maritime liens are secret liens; they do not

907. Robert Force, A.N. Yiannopoulos & Martin Davies, 2 Admiralty and Maritime Law 2-1 (2012).

908. *Id.*

909. *See* cases discussed in *id.*

910. *See* Gilmore & Black, *supra* note 14, §§ 9-1 to 9-2, at 586–89.

require recordation. In a fictional sense maritime liens are considered to attach themselves to a particular vessel and follow that vessel wherever it goes and from owner to owner. Having said this, it should be noted that in the vast majority of cases the same facts that establish *in rem* liability of the vessel also establish *in personam* liability of the owner of the vessel.

Property to Which Maritime Liens Attach

Virtually every case involving maritime liens involves assertion of a lien against a vessel. The term “vessel” is very broad and includes not only the hull but also “components” and “accessories.”⁹¹¹ Components are things attached to the vessel that become an integral part of it. Accessories include things that are placed on a vessel for completion or ornamentation but are not attached so as to become an integral part of it. The distinction between components and accessories is not always clear. Prepaid freight, for example, is not considered part of the vessel.⁹¹² A person who has a lien against a vessel does not, by that fact, have a lien against that vessel’s cargo. Cargo carried on board the vessel,⁹¹³ even where it is the property of the vessel owner, is not part of the vessel and consequently is not subject to a maritime lien against the vessel.

Where a change in the character of a vessel so alters its “vessel” status, it may no longer be a vessel for the purpose of acquiring a maritime lien. As long as the lien arises at a time when the structure is still considered a vessel, courts will sustain the assertion of the lien.⁹¹⁴ Thus, where a vessel subject to a maritime lien subsequently is reduced to a pile of scrap metal as a result of damage sustained in a collision, the maritime lien still exists against the scrap metal.

911. *The Joseph Warner*, 32 F. Supp. 532 (D. Mass. 1939).

912. *Galban Lobo Trading Co. S/A v. The Diponegaro*, 103 F. Supp. 452 (S.D.N.Y. 1951).

913. *Vlavianos v. The Cypress*, 171 F.2d 435 (4th Cir. 1948), *cert. denied*, 337 U.S. 924 (1949).

914. *Arques Shipyard v. The Charles Van Damme*, 175 F. Supp. 871 (N.D. Cal. 1959).

Maritime Liens and Mortgages

However, events that occur once the structure loses its status as a vessel do not give rise to maritime liens.⁹¹⁵

There seems to be no reason why liens cannot be asserted against other maritime property, although relatively few cases discuss the matter. Such liens would have to be based on claims against the cargo itself. Thus, a salvor who saved imperiled cargo would have a lien on the cargo because of the service rendered to the cargo. There are cases that acknowledge the propriety of asserting a maritime lien against cargo.⁹¹⁶

Custodia Legis

Generally, maritime liens do not arise for expenses incurred while a vessel is in the custody of a federal court pursuant to arrest or attachment.⁹¹⁷ Nevertheless, expenses properly incurred while a vessel is in the custody of a court are preferentially paid out of the resultant fund from the sale of the vessel or from security given to secure its release prior to any distribution of the fund to the lien claimants.⁹¹⁸ Court approval prior to contracting expenses may be required to qualify as a proper *custodia legis* expense.⁹¹⁹

Categories of Maritime Liens

Most maritime claims arising from torts, contracts, or a peculiarly maritime operation, such as salvage, give rise to maritime liens. Jurisprudential and statutory exceptions have been established to this general rule. Thus, a seaman's claim for personal injuries under the

915. *Slavin v. Port Serv. Corp.*, 138 F.2d 386 (3d Cir. 1943); *Hayford v. Doussony*, 32 F.2d 605 (5th Cir. 1929); *Johnson v. Oil Transp. Co.*, 440 F.2d 109 (5th Cir.), *cert. denied*, 404 U.S. 868 (1971).

916. *See, e.g., Logistics Mgmt., Inc. v. One (1) Pyramid Tent Arena*, 86 F.3d 908 (9th Cir. 1996).

917. *The Nisseqogue*, 280 F. 174 (E.D.N.C. 1922). *But see City of Erie v. S.S. N. Am.*, 267 F. Supp. 875 (W.D. Pa. 1967) (limiting application of *custodia legis* rule to federal seizure and not state foreign attachment).

918. *The Poznan*, 274 U.S. 117 (1927); *Roy v. M/V Kateri Tek*, 238 F. Supp. 813 (E.D. La. 1965).

919. *United States v. The Audrey II*, 185 F. Supp. 777 (N.D. Cal. 1960).

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Jones Act is not supported by a lien. Historically, premiums due under a contract of marine insurance were not supported by a lien.⁹²⁰ However, in *Equilease Corp. v. M/V Sampson*,⁹²¹ the Fifth Circuit held that unpaid insurance premiums gave rise to a maritime lien.⁹²² That case is exceptional because federal courts generally apply the law of maritime liens strictly and usually are reluctant to extend maritime liens to new situations.

Maritime claims that give rise to maritime liens include the following claims: seamen's wages; salvage; torts that arise under the general maritime law; general average preferred ship mortgages; supplies, repairs, and other necessities furnished to a vessel; towage, wharfage, pilotage, and stevedoring; damage or loss to cargo while aboard a vessel; claims by carriers for unpaid freight; and breach of charter parties.

Contract Liens

Contract claims also may give rise to maritime liens because contracts for necessities, repairs, and the like are intended for the benefit of the ship itself, and contracts of affreightment and charter parties relate to the use of the ship.⁹²³ In order for a maritime lien to exist, there must be a maritime claim. Not all contracts that relate to vessels are classified as "maritime" contracts (*see* Chapter 1 *supra*). The distinction between maritime and nonmaritime contracts is important here because only maritime contracts may give rise to a maritime lien, and, as will be seen, not all maritime contracts support maritime liens: If a contract is not subject to admiralty jurisdiction, it cannot give rise to a maritime lien.⁹²⁴

920. *In re* Ins. Co. of State of Pa., 22 F. 109 (N.D.N.Y. 1884).

921. 793 F.2d 598 (5th Cir.), *cert. denied*, 479 U.S. 984 (1986).

922. *Id.*

923. *See* cases discussed in Thomas A. Russell, 2 Benedict on Admiralty § 21, at 2-2 (7th rev. ed. 1999).

924. For an illustration, *see Cary Marine, Inc. v. M/V Papillon*, 872 F.2d 751 (6th Cir. 1989). *See* cases discussed in Gilmore & Black, *supra* note 14, §§ 9-20, at 624.

Maritime Liens and Mortgages

Executory Contracts

There is no maritime lien for breach of an executory contract, notwithstanding that it may be classified as a maritime contract and fall within admiralty jurisdiction. If a contract is in its executory stage, no lien exists. Thus, if a vessel has contracted to carry cargo or passengers and then repudiates the contract before the cargo is loaded or before the passengers board the vessel, the injured parties may have a claim for breach of a maritime contract, but they do not have a maritime lien.

As an illustration, consider the case of a contract of affreightment, admittedly a maritime contract, where the carrier failed to carry all of the cargo it had contracted to transport. As to the cargo that had not been loaded on board, the contract is still executory. Failure to load and carry that portion constitutes a breach of the contract of affreightment, allowing the shipper to bring an *in personam* action in admiralty against the carrier. Nevertheless, that breach does not give rise to a maritime lien. In contrast, if some of the cargo loaded on board had been lost or damaged, that breach of contract would give rise to a maritime lien.

Agency Contracts

At one time it was thought that “agency contracts,” whereby one party agrees to act as an agent for another person, were not maritime contracts. This per se rule was overruled by the Supreme Court in *Exxon Corp. v. Central Gulf Lines, Inc.*⁹²⁵ In that case Exxon, an oil company agreed to supply bunkers to a shipping company as needed. Exxon usually supplied its own oil to the shipping company, but on the occasion in question it did not have any oil available at the location where it was needed. Exxon contracted with another company to supply the oil. The bunkers were delivered to the vessel, and Exxon paid the supplier. When the shipping company failed to pay, Exxon brought an action alleging breach of a maritime contract. The shipping company argued that in procuring bunkers on its behalf, Exxon was acting as its agent; the shipping company relied on the rule that agency contracts did not give rise to maritime liens. The

925. 500 U.S. 603 (1991).

Supreme Court held that Exxon supplied necessities to the vessel and that a contract whereby one supplies necessities to a vessel is a maritime contract. The Court specifically declined to express a view as to whether the breach of the contract gave rise to a maritime lien, leaving that issue to the lower court to resolve on remand. There does not appear to be any reason why Exxon should not have had a lien.

Closely related to the agency contract rule is a rule that likewise excluded all “preliminary contracts.” In fact, the agency contract exclusion may have evolved from the preliminary contract rule.

Under the preliminary doctrine, a contract to provide services that leads to a subsequent maritime contract is not itself a maritime contract. For example, courts have held that although a charter party is a maritime contract, a contract with a charter broker to find a ship available for charter or to find a party seeking to charter a vessel is not a maritime contract.⁹²⁶

Just as the *Exxon* decision overruled the *per se* exclusion agency contract, it may have provided the rationale for overruling the *per se* preliminary contract doctrine.⁹²⁷

Preferred Ship Mortgage

The Ship Mortgage Act of 1920⁹²⁸ provides that a preferred mortgage “is a lien on the mortgaged vessel in the amount of the outstanding mortgage indebtedness secured by the vessel.”⁹²⁹ The requirements to qualify as a preferred mortgage are specified in the statute, and preferred status may extend to both domestic and foreign mortgages.⁹³⁰ The statute permits enforcement of a preferred mortgage in an *in rem* action.⁹³¹

926. Robert Force, *The Aftermath of Norfolk Southern Railway v. James N. Kirby, Pty. Ltd.: Jurisdiction and Choice-of-Law Issues*, 83 Tul. L. Rev. 1393, 1408 (2009).

927. *Id.* at 1407-13.

928. 46 U.S.C. §§ 31301–31330 (2006).

929. *Id.* § 31325(a). Mortgages are discussed *infra* text accompanying notes 967-83.

930. *Id.* §§ 31301(6)(B) (foreign), 31322 (domestic).

931. *Id.* § 31325(b).

Liens for Necessaries

Part of the law of contract liens has been codified, primarily to provide protection to those who provide necessary services or supplies to vessels. The Federal Maritime Lien Act (FMLA)⁹³² states that “a person providing necessaries to a vessel on the order of the owner or person authorized by the owner ... has a maritime lien on the vessel ... [and] may bring a civil action in rem to enforce the lien”⁹³³

The FMLA defines necessaries as including “repairs, supplies, towage and the use of a dry dock or marine railway.”⁹³⁴ The enumeration of specific necessaries is merely by way of illustration and is not preclusive. Necessaries have been held to include “most goods or services that are useful to the vessel, keep her out of danger, and enable her to perform her particular function.... What is a ‘necessary’ is to be determined relative to the requirements of the ship.”⁹³⁵

In *Piedmont & George’s Creek Coal Co. v. Seaboard Fisheries Co.*,⁹³⁶ the Supreme Court held that the necessaries must be provided by the supplier directly to the vessel.⁹³⁷ Following this approach, it has been held that although a contract to supply containers to a carrier is a maritime contract and that containers are necessaries as that term is used in the FMLA, such contracts do not give rise to a maritime lien because typically containers are delivered to the carrier in bulk and not directly to a particular vessel.⁹³⁸

932. *Id.* §§ 31341-31343 (originally codified at 46 U.S.C. §§ 971-974).

933. *Id.* § 31342.

934. *Id.* § 31301(4).

935. *Equilease Corp. v. M/V Sampson*, 793 F.2d 598, 603 (5th Cir.), *cert. denied*, 579 U.S. 984 (1986).

936. 254 U.S. 1 (1920).

937. *Id.* See also *The Vigilancia*, 58 F. 698 (S.D.N.Y. 1893); *The Cimbria*, 156 F. 378 (D. Mass. 1907); *The Curtin*, 165 F. 271 (E.D. Pa. 1908).

938. *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd.*, 808 F.2d 697 (9th Cir.), *cert. denied*, 484 U.S. 828 (1987). See also *Container Applications Int’l, Inc. v. Lykes Bros. S.S. Co. (In re Lykes Bros. S.S. Co.)*, 233 F.3d 1361 (11th Cir. 2000).

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Under the FMLA, it is insufficient for a supplier to merely furnish necessaries to a vessel; necessaries must be supplied “on the order of the owner or a person authorized by the owner.” A question may arise as to whether a person who requested necessaries has authority to procure necessaries for a vessel where that person is not the owner. The issue of authority is resolved under ordinary agency principles.⁹³⁹

The FMLA, as amended, states that necessaries may be provided “on the order of a person listed in section 31341 ... or a person authorized by the owner [of the vessel].”⁹⁴⁰ The persons listed in § 31341 are *presumed* to have authority to procure necessaries and include “a person entrusted with the management of the vessel at the port of supply; or an officer or agent appointed by a charterer.” There is a statutory presumption that a charterer, for example, has authority to procure necessaries for the vessel and to incur a lien on the vessel. The presumption, however, may not be invoked by a supplier who has actual knowledge that there is a “no lien” clause in the charter party or that the charterer otherwise lacks authority. (Under a “no lien” clause a charterer is prohibited from entering into transactions that result in a lien on the vessel.) Courts have concluded that only “actual knowledge” will defeat the lien; constructive knowledge, that is, what a reasonable supplier would have known, is insufficient to defeat the lien.⁹⁴¹

The use of a subcontractor⁹⁴² and intermediaries⁹⁴³ to fulfill the obligation of the prime contractor can present problems if the owner or charterer never authorized the use of such persons. Under such circumstances, the subcontractor or intermediary could have trouble

939. *See, e.g.*, *Epstein v. Corporacion Peruana de Vapores*, 325 F. Supp. 535 (S.D.N.Y. 1971).

940. 46 U.S.C. § 31342 (2006).

941. *Belcher Oil Co. v. M/V Gardenia*, 766 F.2d 1508 (11th Cir. 1985).

942. *Turecamo of Savannah, Inc. v. United States*, 824 F. Supp. 1069 (S.D. Ga. 1993), *aff'd*, 36 F.3d 1083 (11th Cir. 1994), *cert. denied*, 516 U.S. 1028 (1995); *Stevens Technical Servs., Inc. v. United States*, 913 F.2d 1521 (11th Cir. 1990); *Integral Control Sys. Corp. v. Consol. Edison Co. of N.Y., Inc.*, 990 F. Supp. 295 (S.D.N.Y. 1998).

943. *Lake Charles Stevedores, Inc. v. Professor Vladimir Popov MV*, 199 F.3d 220 (5th Cir. 1999).

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showing that it furnished necessaries on the “order” of the owner or charterer.

The FMLA also contains provisions that permit a supplier of necessaries to assert a lien even where the necessaries are supplied in the vessel’s home port. The supplier need not show that it relied on the credit of the vessel. However, the right to a lien may be waived, either expressly, by implication, or by showing that the supplier obtained special security for the provision of its services.⁹⁴⁴

Persons Who May Acquire Maritime Liens

The owner, part owner, or agent of a vessel may not acquire a lien against the vessel.⁹⁴⁵ However, a joint venturer may acquire a lien for necessaries.⁹⁴⁶ A stockholder in a vessel also may acquire a lien but must overcome a presumption that any advances were made on general credit. If the presumption is overcome, a lien may exist as long as it does not unfairly prejudice other creditors.⁹⁴⁷ Maritime liens are assignable; the assignee ordinarily assumes the rank of the assignor in determining lien priority.⁹⁴⁸ Additionally, a person who advances funds for the purpose of discharging a maritime lien succeeds to the lien status of the former lien holder.

Priorities of Liens

Ranking of Liens

The sale of a vessel in an *in rem* proceeding generates a fund in the registry of an admiralty court. Where this fund, or a comparable security posted by the shipowner to secure the vessel’s release, is

944. *Racal Survey U.S.A., Inc. v. M/V Count Fleet*, 231 F.3d 183 (5th Cir. 2000) (waiver), *cert. denied*, 532 U.S. 1051 (2001); *J.T. Clark & Son v. Neris Shipping Co.*, 1974 A.M.C. 1489 (S.D.N.Y. 1974) (waiver). *Contra* *Nacirema Operating Co. v. S.S. Al Kulsum*, 407 F. Supp. 1222 (S.D.N.Y. 1975) (no waiver).

945. *The Gloucester*, 285 F. 579 (D. Mass. 1923).

946. *Compagnia Maritima La Empresa, S.A. v. Pickard*, 320 F.2d 829 (5th Cir. 1963).

947. *The Cimbria*, 214 F. 131 (D.N.J. 1914); *The Puritan*, 258 F. 271 (D. Mass. 1919).

948. *Sasportes v. M/V Sol de Copacabana*, 581 F.2d 1204 (5th Cir. 1978).

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insufficient to satisfy all valid liens and claims, the priority of the different categories of claims becomes of paramount importance. The ranking of maritime lien claims by the district courts and courts of appeals in conjunction with the priority rules codified in 46 U.S.C. §§ 31301(5)–(6) and 31326(b)(1)–(2) has generally resulted in the observance of the following rankings:

1. expenses of justice during *custodia legis* (see 46 U.S.C. § 31326(b)(1));
2. the following “preferred maritime liens” (see 46 U.S.C. § 31301(5)(A)–(F)):
 - (a) wages of the crew and master;⁹⁴⁹ maintenance and cure; wages of stevedores when directly employed by the shipowner or the shipowner’s agent (see 46 U.S.C. § 31341);
 - (b) salvage (including contract salvage) and general average;
 - (c) maritime torts (including personal injury, property damage, and cargo tort liens);⁹⁵⁰
 - (d) all maritime contract liens that arise before the filing of a preferred ship mortgage (U.S. flag vessel) (see 46 U.S.C. § 31301(5)(A))—these include liens for “necessaries,” such as repairs, supplies, towage, and the use of a dry dock or marine railway (see 46 U.S.C. § 31301(4)), as well as cargo damage liens and charterer’s liens;
3. preferred ship mortgages (U.S. flag vessels);
4. other maritime contract liens that accrue after the filing of a preferred ship mortgage (U.S. flag vessels) and prior to a

949. The master of a U.S. vessel has a lien under 46 U.S.C. § 11112. A master of a foreign vessel has a lien for wages only if the law of the flag of the vessel provides for one.

950. Tort liens also include damage to cargo. Therefore, claims for damage or loss to cargo are preferred liens. Where there is a possibility of pursuing either a tort or breach of contract for damage to cargo, if the breach sounds in tort, a tort claim will give rise to a “preferred lien.” See *Oriente Commercial, Inc. v. M/V Floridian*, 529 F.2d 221 (4th Cir. 1975). See also *All Alaskan Seafoods, Inc. v. M/V Sea Producer*, 882 F.2d 425 (9th Cir. 1989).

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foreign preferred ship mortgage; however, liens for all necessities provided in the United States have priority over foreign preferred ship mortgages irrespective of the time they arose (see 46 U.S.C. § 31326(b)(2));

5. foreign preferred ship mortgages; and
6. maritime contract liens, excluding those for necessities provided in the United States, accruing after foreign preferred ship mortgages, such as contractual claims for cargo damage liens and charterer's liens.

Inverse Order Rule

According to the above ranking scheme, competing liens are initially ranked as to superiority by class—for example, all wage liens would be grouped together and all tort liens would be grouped together. The top priority liens, such as wage liens, will of course be paid first. If, however, the funds in the registry of the admiralty court are insufficient to fully pay a particular class, the issue of priority of claims within the class itself must be resolved. The rule generally applied is the “inverse order” rule, under which claims of the same class are given priority among themselves according to the inverse order of their accrual. The most recent lien ranks first and the oldest lien ranks last. Having said this, admiralty judges have considerable equitable powers in distributing a fund. A court, for example, might decide not to apply the inverse order rule to a particular class of claims, such as wage claims.

Exceptions to the Inverse Order Rule—Special Time Rules

Although the inverse order rule is the basic general rule for the ranking of claims within a class, for practical reasons, it has been “subjected to a series of special rules which in effect have largely displaced it.”⁹⁵¹

Maritime Contract Liens

While the inverse order rule has the benefit of forcing a claimant to act quickly, it can also encourage a supplier of necessities to arrest a

951. Gilmore & Black, *supra* note 14, § 9-62, at 744.

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vessel on the same day as the necessities were supplied in order to protect itself from the liens of future suppliers. Such a practice would contradict the basic purpose of the maritime lien, which is to provide security for a claim while permitting the ship to proceed on her way in order to earn the freight or hire necessary to pay off the claim. Consequently, various special time rules—voyage, season, and calendar year—have been devised, whereby liens within a particular class accruing during a specific period are ranked without preference. Generally, for transoceanic transport the “voyage” rule will apply. This means that all contract liens that are accrued on a particular voyage will be grouped together; none will have priority over another. The inverse order rule still has some application. If, for example, the vessel made several voyages during which contract liens accrued, all of the contract liens from the most recent voyage would be grouped together and paid first. If the fund was insufficient to pay all of those contract claims in full, each claimant would receive its pro rata share. If there were sufficient funds to pay all those claims in full, then all of the contract claims incurred during the next most recent voyage would be grouped together and paid, and so on, until the fund was exhausted. For transport within the United States where a voyage rule is impractical, there are special rules applied that differ from one geographic area to another.

Preferred Mortgages

The existence or nonexistence of a preferred mortgage may play a role in deciding the priorities among contract lienors. Where there is no preferred mortgage, the traditional inverse order rule—last is first—applies. Where there is a preferred mortgage (U.S. vessel), all contract liens in effect at the time of the mortgage prime the mortgage. The mortgage, however, primes subsequent contract liens, and the inverse order rule is not applied in this situation. This results from the fact that “preferred maritime liens” prime a preferred mortgage, and all contract liens that predate the mortgage are included in the definition of “preferred maritime liens.” The presence of a preferred mortgage trumps the inverse order rule by insulating prior contract liens and subordinating later ones.

Governmental Claims

Governmental claims, including federal, state, and local municipality claims, are subordinate to all maritime liens.⁹⁵²

Conflicts of Laws

Transactions conducted outside of the United States and not involving U.S. parties are not subject to the Federal Maritime Lien Act (FMLA) but may give rise to a lien under foreign law. U.S. courts will use choice-of-law criteria to determine whether U.S. law or foreign law applies. If U.S. law does not apply, courts will consider whether to dismiss the case under the doctrine of *forum non conveniens*. If the case is not dismissed, U.S. courts will enforce maritime liens that arise under foreign law.⁹⁵³ U.S. courts, however, will apply U.S. law, including the FMLA, to protect an American supplier of fuel to a foreign vessel in a U.S. port even if the supply contract was made in a foreign jurisdiction.⁹⁵⁴

Extinction of Maritime Liens

Destruction or Release of the Res

Complete and total destruction of the res⁹⁵⁵ extinguishes all maritime liens.⁹⁵⁶ If the res is only partially destroyed, the lien remains an encumbrance upon the residue of the vessel.⁹⁵⁷ If the vessel is dismantled and rebuilt, the maritime lien persists.⁹⁵⁸ If a lienor has a vessel arrested and the owner posts a bond as security for the release

952. See cases discussed in *id.* §§ 9-73 to 9-76, at 757–64.

953. See cases discussed in 1 Thomas J. Schoenbaum, *Admiralty & Maritime Law*, § 9-8, at 515–16 (2d ed. 1994).

954. *Gulf Trading & Transp. Co. v. M/V Tonto*, 694 F.2d 1191 (9th Cir. 1982) (holding substantial contacts between United States and contracting parties justified application of U.S. law), *cert. denied*, 461 U.S. 929 (1983).

955. *Walsh v. Tadlock*, 104 F.2d 131 (9th Cir.), *cert. denied*, 308 U.S. 584 (1939).

956. *Hawgood & Avery Transit Co. v. Dingman*, 94 F. 1011 (8th Cir. 1899).

957. *Chapman v. Engines of the Greenpoint*, 38 F. 671 (S.D.N.Y. 1889).

958. *Dann v. Dredge Sandpiper*, 222 F. Supp. 838 (D. Del. 1963).

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of the vessel, the lien is transferred to the security; the lien on the vessel is extinguished.

Sale of the Res

The sale of a vessel by a federal court in admiralty following arrest under Rule C of the Supplemental Rules to the Federal Rules of Civil Procedure removes all liens on the vessel. It is said that the vessel is “scraped free” of all preexisting debts or liens. Likewise, if a vessel is sold pursuant to a judicial proceeding in a foreign country in an action that is similar to the U.S. action *in rem*, U.S. courts will apply the same rule. In making this determination, U.S. courts will place great weight on whether the vessel was subjected to the custody of the foreign court and whether, under the law of the country where the proceedings took place, a judicial sale is free and clear of all liens. By contrast, if a vessel is attached pursuant to Supplemental Rule B to vindicate an *in personam* claim, the judicial sale of the vessel does not discharge maritime liens.

Laches

There is no statute of limitation or prescriptive period during which a lien must be enforced or otherwise expire. However, a court may extinguish a lien by the application of the doctrine of laches.⁹⁵⁹ A lienholder must exercise reasonable diligence to enforce its lien. Courts often look to the comparable statute of limitations that would apply to an *in personam* action as a guide. Absence of the vessel from domestic territorial waters can relieve a lien holder to some extent from a claim of laches.⁹⁶⁰ Some courts try to ascertain the commercially feasible practice viewed against a background of industry custom.⁹⁶¹ This requires consideration of industry practice in extending credit as well as the payment history between the parties. Generally, the laches defense is evaluated on a case-by-case basis.

959. *McLaughlin v. Dredge Gloucester*, 230 F. Supp. 623 (D.N.J. 1964).

960. *S. Coal & Coke Co. v. Kugniecibas (The Everosa)*, 93 F.2d 732 (1st Cir. 1937).

961. *Bermuda Exp., N.V. v. M/V Litsa (Ex. Laurie U)*, 872 F.2d 554 (3d Cir.), *cert. dismissed*, 492 U.S. 939, *and cert. denied*, 493 U.S. 819 (1989).

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Often the courts must balance the equities of the respective parties. Thus, a court may reach different results depending on whether the parties affected include only the shipowner and the lienor or whether they include third parties whose interests have intervened. Prejudice to a subsequent purchaser for value who bought the vessel without knowledge of a lien may be an important consideration.

Waiver

The Federal Maritime Lien Act allows for the waiver of a lien or subordination of a lien status by agreement of the parties.⁹⁶² In the absence of an agreement, the relevant question is whether the lienor clearly manifests an intention to forgo a lien in favor of some other security.⁹⁶³ A mere request for additional security is not a waiver. Some courts require clear evidence of waiver of liens for necessities in light of the congressionally expressed policy of protecting suppliers.⁹⁶⁴

Bankruptcy

Neither bankruptcy nor reorganization eliminates a maritime lien.⁹⁶⁵ Nevertheless, the bankruptcy court has exclusive jurisdiction over the debtor's property wherever located.⁹⁶⁶ Thus, a person with a maritime lien claim may have to try to enforce it in bankruptcy court or request that the bankruptcy judge permit the claimant to enforce it in admiralty.

Ship Mortgages

A contract for the construction of a vessel is not considered a maritime contract and therefore does not fall within U.S. admiralty

962. 46 U.S.C. §§ 31301–31343, § 31305 (2006).

963. *The President Arthur*, 279 U.S. 564 (1929); *Nacirema Operating Co. v. S.S. Al Kulsum*, 407 F. Supp. 1222 (S.D.N.Y. 1975).

964. *Ryan-Walsh, Inc. v. M/V Ocean Trader*, 930 F. Supp. 210 (D. Md. 1996).

965. *In re Sterling Navigation Co.*, 31 B.R. 619 (S.D.N.Y. 1983).

966. 28 U.S.C. § 1334(d) (2000).

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jurisdiction.⁹⁶⁷ Thus, a mortgage to finance such construction is also outside the federal courts' admiralty jurisdiction. As a consequence, state law governs the interim financing of vessel construction through various state ship-mortgage statutes.⁹⁶⁸ Upon a vessel's completion, the financing of the project may fall within the ambit of the Federal Ship Mortgage Act (FSMA).⁹⁶⁹ If that is the situation, the interim financing can be converted to permanent financing under the FSMA through the cancellation of the interim mortgage and the qualification of the vessel as a "preferred" mortgage.⁹⁷⁰ However, if the vessel fails to fulfill the requirements of the FSMA, the mortgage will remain subject to the provisions of the applicable state ship-mortgage statute.⁹⁷¹ The principal advantage of receiving a preferred ship mortgage is the entitlement of the mortgagee to a maritime lien on the vessel that can be enforced through an *in rem* action against the vessel.⁹⁷²

To obtain a preferred ship mortgage, the FSMA requires the satisfaction of certain statutory criteria, including mortgaging the entire vessel,⁹⁷³ substantially complying with the filing, recording, and discharge procedures,⁹⁷⁴ attaining or having a current application submitted for U.S. documentation of the vessel,⁹⁷⁵ and ensuring that the mortgagee meets the prescribed standards.⁹⁷⁶

967. *People's Ferry Co. v. Beers (The Jefferson)*, 61 U.S. (20 How.) 393 (1858). "The admiralty jurisdiction, in cases of contract, depends primarily upon the nature of the contract, and is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation." *Id.* at 401.

968. *See, e.g.*, La. Rev. Stat. Ann. §§ 9:5521–9:5538 (West 1999).

969. 46 U.S.C. §§ 31301–31343 (2006).

970. *Id.*

971. *See* cases discussed in Gilmore & Black, *supra* note 14, § 9-50, at 695.

972. *See* discussion in 1 Schoenbaum, *supra* note 953, § 9-5, at 502. *See also* Thomas A. Russell, 2 *Benedict on Admiralty* § 69b, at 6-20 (7th rev. ed. 1999).

973. 46 U.S.C. § 31322(a)(1)(A) (2006).

974. *Id.* § 31322(a)(1)(B) (referring to § 31321).

975. *Id.* § 31322(a)(1)(C).

976. *Id.* § 31322(a)(1)(D).

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The mortgagee has several options in the event a mortgagor defaults on its obligations under a preferred mortgage. The mortgagee may enforce the preferred mortgage lien through an *in rem* action in district court.⁹⁷⁷ An *in personam* action may also be brought against the mortgagor, co-maker, or guarantor of the debt. Such action may be brought as a federal admiralty action or a nonadmiralty civil action.⁹⁷⁸

A foreign ship mortgage may also qualify as a preferred mortgage under the Act.⁹⁷⁹ To obtain such treatment in the United States, the foreign mortgage must be properly executed in accordance with the laws of the country where the vessel is documented and must be registered in a public registry at a central office or the port of registry of the vessel.⁹⁸⁰

The priority of a preferred mortgage lien is based on the time of filing.⁹⁸¹ The preferred mortgage lien has priority over all claims against the vessel except “for expenses and fees allowed by the court (*custodia legis* expenses), costs imposed by the court, and preferred maritime liens.”⁹⁸² Foreign mortgage lien claims also are subordinate to any U.S.-based liens for necessities.⁹⁸³

977. *Id.* § 31325(b)(1).

978. *Id.* § 31325(b)(2).

979. *Id.* § 31325(b)(1).

980. See Russell, *supra* note 972, § 70c, at 6-52.

981. 46 U.S.C. § 31326(b)(1) (2006) (noting 46 U.S.C. § 31305(1) provides that preferred maritime liens include all maritime liens that arise before filing of preferred mortgage).

982. *Id.*

983. *Id.* § 31326(b)(2). Priority of liens is discussed *supra* text accompanying notes 949-52.

10. Marine Insurance

Introduction: Federal or State Law

Federal courts have jurisdiction over marine insurance disputes because the insurance contracts that underlie such disputes are regarded as maritime contracts, satisfying the criteria for admiralty contract jurisdiction.⁹⁸⁴ Under the “saving to suitors” clause,⁹⁸⁵ state courts likewise have jurisdiction over marine insurance disputes. Insurance issues are decided either under the general maritime law or under state law. The United States has not adopted a comprehensive marine insurance code comparable to the British Marine Insurance Act of 1906.⁹⁸⁶ Until 1955 maritime lawyers, in general, were of the view that marine insurance law was federal law; in the absence of a controlling statute, federal courts formulated rules to resolve marine insurance disputes as part of the general maritime law,⁹⁸⁷ often relying on the British Marine Insurance Act and decisions of English courts as persuasive authority.⁹⁸⁸

The McCarran-Ferguson Act⁹⁸⁹ of 1945, provides that the regulation of insurance generally is a matter to be governed by state

984. *Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1 (1870). *See also* *N.H. Ins. Co. v. Home Sav. & Loan Co. of Youngstown, Ohio*, 581 F.3d 420 (6th Cir. 2009).

985. 28 U.S.C. § 1333 (2006).

986. Marine Insurance Act, 1906, 6 Edw. 7, ch. 41 (Eng.) [hereinafter MIA]. *See also* 1 Alex L. Parks, *The Law & Practice of Marine Insurance & Average* 16 (Cornell Maritime Press 1987).

987. *See* 1 Parks, *supra* note 986, at 12–15 (providing broad overview of marine insurance in United States). *See also* Edward V. Cattell, Jr., et al., *Introduction: An American Marine Insurance Act: An Idea Whose Time Has Come*, in *Marine Insurance Survey: A Comparison of United States Law to the Marine Insurance Act of 1906*, 20 Tul. Mar. L.J. 1 (1995) (comparing each section of British Marine Insurance Act with corresponding marine insurance law in United States).

988. *Queen Ins. Co. of Am. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487 (1924).

989. 15 U.S.C. § 1012 (2006).

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law. In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*,⁹⁹⁰ the issue before the Supreme Court was the effect to be given to the assured's breach of warranty. The Court held that if there is no generally established rule of maritime law governing the issue in question, and in the absence of some compelling need to create a federal rule, federal courts should not create a rule but rather should apply state law. In marine insurance disputes, federal courts apply the following rule from *Willburn*: A marine insurance contract will be interpreted in accordance with the law of the state in which it was formed unless there is a controlling and specific federal rule, or, in the absence of such rule, there is some compelling reason to create a federal rule.⁹⁹¹ In other words, where there is a federal marine insurance rule based on "entrenched federal precedent," that rule should be applied.⁹⁹² Where, however, there is no established federal rule and no compelling reason to establish one, state law should be applied.⁹⁹³

As a consequence of these developments, the insurance industry is regulated primarily by the individual states and not by the federal government. Although marine and inland marine insurance are not comprehensively regulated by the states, under the *Wilburn Boat* rationale, state substantive rules of insurance law are often applied in marine insurance disputes. Notwithstanding the fact that state rules may, in some respects, differ from what is thought by admiralty lawyers to be the maritime rule, in many instances there are great similarities between the two.⁹⁹⁴

990. 348 U.S. 310 (1955). *See also* *N.H. Ins. Co. v. Home Sav. & Loan Co. of Youngstown, Ohio*, 581 F.3d 420 (6th Cir. 2009).

991. *Ingersoll-Rand Fin. Corp. v. Employers Ins. of Wausau*, 771 F.2d 910 (5th Cir. 1985), *cert. denied*, 475 U.S. 1046 (1986).

992. *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 886 (5th Cir.), *cert. denied*, 502 U.S. 901 (1991) (citing *Wilburn Boat*, 348 U.S. at 310). *See also* *Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc.*, 518 F.3d 645 (9th Cir. 2008).

993. *Albany Ins. Co.*, 927 F.2d at 886.

994. *See* *Marine Insurance Survey: A Comparison of United States Law to the Marine Insurance Act of 1906*, 20 Tul. Mar. L.J. 1-103 (1995) (Student Symposium).

Interpretation of Insurance Contracts

An oral marine insurance contract will be upheld.⁹⁹⁵ Marine insurance contracts are subject to the rules that generally govern contracts, except to the extent that legislation provides a specific rule to apply to insurance contracts. An ambiguous marine insurance contract drafted by the insurer will be interpreted in favor of the insured.⁹⁹⁶

Limitation of Liability

A shipowner's insurer may not limit its liability under the general Limitation of Liability statute.⁹⁹⁷ The statute enumerates the persons entitled to limit their liability and does not name "insurers."

In states that follow the majority rule (nondirect-action states), insurers have *de facto* limitation. Where suit is brought against a shipowner, and the shipowner successfully invokes its right to limit its liability under the limitation statute, its insurer pays only the amount for which its assured has been held liable—that is, an amount that does not exceed the amount provided in the Limitation of Liability statute.

In states that permit direct actions, insurers may not limit their liability under the limitation statute. Nevertheless, the Fifth Circuit has held that an insurer can obtain the benefits of limitation indirectly by inserting into the insurance contract language limiting its liability to the amount for which the shipowner would be liable under the Limitation of Liability statute.⁹⁹⁸

995. *Great Am. Ins. Co. of N.Y. v. Maxey*, 193 F.2d 151 (5th Cir. 1951). In contrast, the British Marine Insurance Act requires that a marine insurance contract be in writing. MIA, *supra* note 986, § 22.

996. *Exxon Corp. v. St. Paul Fire & Marine Ins. Co.*, 129 F.3d 781 (5th Cir. 1997).

997. Limitation of Vessel Owner's Liability Act of 1851, 46 U.S.C. §§ 30501-30512 (2006). Limitation of liability is discussed *supra* Chapter 5.

998. *Crown Zellerbach Corp. v. Ingram Indus., Inc.*, 783 F.2d 1296 (5th Cir.), *cert. denied*, 479 U.S. 821 (1986).

Burden of Proof

The insured has the burden of proving that a covered peril was the proximate cause of its loss or damage. The insurer has the burden of showing the loss or damage was excluded from coverage and must prove affirmative defenses. In order for the insured to recover under a marine insurance policy, the loss or damage must have been proximately caused by a peril insured against.⁹⁹⁹ The discussion of proximate cause in the jurisprudence tends to be metaphysical and not very helpful.

Insurable Interest

In order for a marine insurance contract to be valid, the insured must have an insurable interest. The definition of “insurable interest” in the British Marine Insurance Act is an appropriate statement of U.S. law. A person has an insurable interest

where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by detention thereof, or may incur liability in respect thereof.¹⁰⁰⁰

The owner of a vessel has an insurable interest in the vessel and in any liability that may result from the operation of the vessel. A charterer has an interest in the use of the vessel, profits to be made in such use, and liability that may result from such use. Both the shipper and consignee have insurable interests in the goods. Aside from these obvious examples, the doctrine of insurable interest applies to many others.¹⁰⁰¹

999. See cases discussed in Graydon S. Staring & George L. Waddell, *Marine Insurance*, 73 Tul. L. Rev. 1619, 1673–1692 (1999).

1000. MIA, *supra* note 986, § 5(2).

1001. See, e.g., *Hooper v. Robinson*, 98 U.S. 528, 538 (1878) (“The agent, factor, bailee, carrier, trustee, consignee, mortgagee, and every other lien-holder, may insure to the extent of his own interest in that to which such interest relates”).

Types of Insurance

Introduction

Various types of coverage apply to marine transport. Typically, these include the hull policy, protection and indemnity (P&I) coverage, pollution insurance, and cargo insurance. There are numerous special coverages, such as builders risk, in port, and towers.

The hull policy is primarily, but not exclusively, first-party coverage. Its purpose is to cover damage to or loss of a vessel. However, its coverage is broader because the policy's "running down" clause indemnifies an owner for liability to a third party resulting from a collision. P&I coverage is primarily third-party coverage in that its purpose is to indemnify a vessel owner for liabilities incurred by third persons—these liabilities include personal injury and death, property damage not covered under the running down clause, and damage to cargo. Pollution insurance, which traditionally had been part of P&I coverage, emerged as a separate coverage in the United States in part because of the enactment of the Oil Pollution Act of 1990 (OPA 90).¹⁰⁰² OPA 90 establishes a strict liability regime on vessel owners and operators of facilities that discharge oil into the navigable waters of the United States. Liability is imposed not only for clean-up costs but also for natural resource damages. There are also provisions for private parties to recover damages.¹⁰⁰³

The Hull Policy

Uberrimae Fidei

A marine insurance contract is said to be a contract *uberrimae fidei*—that is, based on the utmost good faith.¹⁰⁰⁴ According to this doctrine, an underwriter is presumed to act on the belief that the party who has applied for insurance has disclosed all facts material to the risk. If an

1002. 33 U.S.C. §§ 2701–2761 (2006).

1003. For cases involving OPA 90, see, e.g., Robert Force, Martin Davies & Joshua S. Force, *Deepwater Horizon: Removal Costs, Civil Damages, Crimes, Civil Penalties, and State Remedies in Oil Spill Cases*, 85 Tul. L. Rev. 889 (2011).

1004. *McLanahan v. Universal Ins. Co.*, 26 U.S. (1 Pet.) 170 (1828).

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applicant fails to reveal material facts known to the applicant or presumed to be known, the insurer may avoid (void) the contract *ab initio*. The same is true with respect to material misrepresentations.¹⁰⁰⁵ Material facts are those that may have a bearing on whether the insurer would accept the risk, the premium, or terms under which the risk would be insured.¹⁰⁰⁶ The requirement to disclose material facts applies even where the insurer does not make an inquiry into a particular matter, but the failure to inquire may have a bearing on whether the withheld information will be found to have been material.¹⁰⁰⁷ Some courts regard the *uberrimae fidei* rule, which also applies to agents of the insured,¹⁰⁰⁸ as an “entrenched” rule of marine insurance law.¹⁰⁰⁹ Originally applied with reference to hull insurance policies, it is not clear whether the *uberrimae fidei* rule applies with the same strictness to other forms of marine insurance.¹⁰¹⁰

Warranties

A warranty is a promise that the assured will or will not undertake a particular act or that some condition will be fulfilled, or it is a statement in which the assured confirms or negates certain facts.¹⁰¹¹ The effect of a breach of warranty in a marine insurance policy is determined under the law of the applicable state.¹⁰¹² The Supreme Court concluded that there was no established federal marine insurance rule and no need to create one.¹⁰¹³ State rules on the effect

1005. *Id.*

1006. *Gulfstream Cargo Ltd. v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969).

1007. Charles M. Davis, *Maritime Law Deskbook* 410 (1997).

1008. *C.N.R. Atkin v. Smith*, 137 F.3d 1169 (9th Cir. 1998).

1009. *Port Lynch, Inc. v. New Eng. Int’l Assurety of Am., Inc.*, 754 F. Supp. 816 (W.D. Wash. 1991). *Contra* *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir.), *cert. denied*, 502 U.S. 901 (1991).

1010. Davis, *supra* note 1007.

1011. MIA, *supra* note 986, § 8.

1012. *Wilburn Boat Co. v. Fireman’s Fund Ins. Co.*, 348 U.S. 310 (1955). *See also* *N.H. Ins. Co. v. Home Sav. & Loan Co. of Youngstown, Ohio*, 581 F.3d 420 (6th Cir. 2009).

1013. *Wilburn Boat*, 348 U.S. 310.

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of a breach of warranty vary. For instance, in some states the breach must have been fraudulent or in bad faith.¹⁰¹⁴ Additionally, the breach must contribute to the loss insured against.

Warranty of Seaworthiness. There is an implied warranty in voyage policies that the vessel is seaworthy at the commencement of the voyage.¹⁰¹⁵ Voyage policies insure a vessel during a specific voyage. As to time policies, which insure a vessel for a specified period of time, the Fifth Circuit has stated that there are two warranties. First, a warranty of seaworthiness attaches at the inception of the policy.¹⁰¹⁶ Second, an owner will not, from bad faith or neglect, permit its vessel to “break ground” (i.e., commence voyage) in an unseaworthy condition.¹⁰¹⁷

Protection and Indemnity Insurance

Historically, protection and indemnity (P&I) insurance was created to supplement the hull policy. Today, however, aside from the “running down” clause in the hull policy, P&I insurance is the primary means whereby shipowners and operators protect themselves against third-party liability claims. Nevertheless, events that would ordinarily be included under a hull policy are expressly excluded from P&I coverage regardless of whether the requisite coverage is in effect. P&I clubs are associations of shipowners (members) who have joined together to mutually insure each other. The terms of insurance usually are not contained in insurance policies, but rather are set out in the club rules. P&I coverage is based on the principal of indemnification. In addition, the clubs provide a legal defense to a member who is being sued on a claim covered by the club rules. Coverage typically includes the following:

1014. *See, e.g., Albany Ins.*, 502 U.S. 901 (applying Texas law that requires insurer to prove assured’s intent to misrepresent material facts).

1015. *Saskatchewan Gov’t Ins. Office v. Spot Pack, Inc.*, 242 F.2d 385 (5th Cir. 1957).

1016. Two experienced marine insurance lawyers express doubt as to whether this warranty is part of U.S. law. *Staring & Waddell, supra* note 999, at 1690.

1017. *Saskatchewan*, 242 F.2d 385.

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personal injury and death claims (including maintenance and repatriation); passenger liability (including luggage); liability for cargo loss and damage (including extra handling costs); collision, wreck removal (where necessitated by law); pollution; loss of property on the insured vessel; damage to fixed and floating objects; towage; and general average.¹⁰¹⁸

Pollution Insurance

Because of the difficulty or expense of obtaining coverage for marine pollution, specialized insurance companies have been organized to provide this type of coverage. Pollution coverage includes removal expenses and damages, as well as expenses incurred in abating or avoiding discharges of oil and releases of hazardous and noxious substances.

Cargo Insurance

Cargo insurance is often written as an “all risks” policy. Cargo policies often cover the goods from the shipper’s warehouse to the consignee’s warehouse.¹⁰¹⁹ However, cargo policies often contain exclusions. “Notwithstanding the all-inclusive nature of the words ‘all risks,’ not all risks are covered, only those arising from *fortuitous accident or casualty* resulting in damage or loss attributable to an external cause.”¹⁰²⁰ Cargo insurance is often written on open policies that enable the assured to issue certificates to its consignee.¹⁰²¹

Particular Average

A policy written “free of particular average” (F.P.A.) means that the underwriters are liable only for a total loss. There is no liability in case of a partial loss unless the policy so provides, and the loss is from a peril not specifically excluded or a peril specifically included. A policy may be written “with average” (W.A.) to provide coverage

1018. Raymond P. Hayden & Sanford E. Balick, *Marine Insurance: Varieties, Combinations, and Coverages*, 66 Tul. L. Rev. 311, 327 (1991).

1019. *See, e.g.,* Brammer Corp. v. Holland-Am. Ins. Co., 228 N.Y.S.2d 512 (N.Y. 1962), *aff’d*, 240 N.Y.S.2d 940 (N.Y.A.D. 1963).

1020. 1 Parks, *supra* note 986, at 63.

1021. *Id.* at 73.

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for partial losses, but it may limit its coverage of those losses only if or to the extent that they exceed a percentage specified in the policy.

Subrogation

The right to subrogation exists in the United States. Subrogation is “the right by which an underwriter, having settled a loss, is entitled to place himself in the position of the assured, to the extent of acquiring all the rights and remedies in respect of the loss which the assured may have possessed.”¹⁰²²

Classification Societies

The notes in this section cover classification societies, their function, and the availability of liability to third parties.¹⁰²³ This is an area of law that is currently hotly debated.¹⁰²⁴ Moreover, the law regarding classification society liability varies significantly by nation.¹⁰²⁵ In

1022. Leslie J. Buglass, *Marine Insurance & General Average in the United States* 441 (Cornell Maritime Press 3d ed. 1991).

1023. *See generally* *Reino de España v. Am. Bureau of Shipping, Inc.*, 691 F.3d 461 (2d Cir. 2012). *See also* *Admiralty & Maritime Law* § 5-6 (5th ed. 2012); Robert G. Clyne & James Saville, *Classification Societies & Limitation of Liability*, 81 Tul. L. Rev. 1399 (2007); Machale A. Miller, *Liability of Classification Societies from the Perspective of United States Law*, 22 Tul. Mar. L.J. 75 (1997).

1024. *Compare Reino de España*, 691 F.3d at 468 (“Even assuming *arguendo* that in the proper circumstances [a classification society] could be liable to a coastal nation like Spain for reckless conduct, a matter on which we express no opinion, we hold that Spain has not adduced sufficient evidence to allow a reasonable jury to conclude that they should be held liable to Spain in *this* case.), *with* *Sundance Cruises Corp. v. Am. Bureau of Shipping*, 7 F.3d 1077, 1084 (“[A] shipowner is not entitled to rely on a classification certificate as a guarantee to the owner that the vessel is soundly constructed.”), *and* *Otto Candies v. Nippon Kaiji Kyokai Corp.*, 346 F.3d 530, 534 (5th Cir. 2003) (finding liability), *and* *Somarelf v. Am. Bureau of Shipping*, 720 F. Supp. 441 (D. N.J. 1989) (same).

1025. *See generally* Tuba A. Karaman, *Comparative Study on the Liability of Classification Societies to Third Party Purchasers with reference to Turkish, Swiss, German and US Law*, 42 Mar. L. & Com. 125 (2011); Juan L. Pulido Begines, *The EU Law on Classification Societies: Scope and Liability Issues*, 36 J. Mar. L. & Com. 487 (2005); Jurgen Basedow & Wolfgang Wurmnest, *Third-Party Liability of Classification Societies: A Comparative Perspective* (2005).

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light of this variety, the choice-of-law analysis in classification society cases can often be dispositive.¹⁰²⁶

1026. *See generally* Carbotrade S.p.A. v. Bureau Veritas, 99 F.3d 86 (2d Cir. 1996) (reversing grant of summary judgment based on English law, which precludes classification society liability because Greek law should govern); Sealord Marine Co. v. Am. Bureau of Shipping, 220 F. Supp. 2d 260, 271 (S.D.N.Y. 2002) (denying summary judgment because Greek law allows third-party suits against classification societies, and there was a genuine issue of material fact).

11. Governmental Liability and Immunity

The Federal Government

The federal government is immune from suit unless it has waived its sovereign immunity. In several statutes, the United States has waived its immunity directly relevant to maritime law.

The Suits in Admiralty Act

Congress's intent in enacting the Suits in Admiralty Act (SIAA)¹⁰²⁷ was to prevent the possibility of the seizure or arrest of U.S. vessels, which provide valuable national services in times of both war and peace, and to allow a remedy to be sought *in personam* by waiving federal sovereign immunity in admiralty claims involving U.S. vessels or cargo.¹⁰²⁸ Suits brought under the SIAA are governed by federal maritime law just as if they were suits involving private parties.¹⁰²⁹ Section 30908 of the SIAA prevents the arrest or seizure of vessels substantially owned or operated by the United States as part of a suit against the federal government. This immunity extends to cargo owned by the United States. Elimination of an *in rem* remedy is made up for in the creation of an action *in personam* in § 30903 that allows parties to sue the United States in admiralty if such a suit could have been maintained if the vessel were privately owned or operated. This statutory action *in personam* is subject to a two-year limitation period.¹⁰³⁰ The waiver also applies to cargo owned by the United States. Section 30906 provides special venue rules, and § 30907 outlines the proper methods of service of process and the procedure to be followed in such suits. Under § 30910, the United States may invoke the benefits of limitation of liability accorded to vessel owners. Traditional government defenses, like the discretionary

1027. 46 U.S.C. §§ 30901-30918 (2006).

1028. *Schnell v. United States*, 166 F.2d 479 (2d Cir.), *cert. denied*, 334 U.S. 833 (1948).

1029. 46 U.S.C. § 30903 (2006).

1030. *Id.* § 30905.

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function defense, have been recognized in admiralty actions against the United States.¹⁰³¹

The Public Vessels Act

Originally, the SIAA applied only to “merchant vessels.” The Public Vessels Act (PVA)¹⁰³² was enacted to cover other vessels. The PVA permits an admiralty action *in personam* to be brought against the United States for damages caused by, or for compensation for various services rendered to, a vessel of the United States.¹⁰³³ However, the SIAA was amended, and the “merchant vessel” restriction was eliminated. Thus, there is an overlap between the two statutes. Section 31103 of the PVA provides that suits brought under the PVA are subject to, and must “proceed in accordance with,” the SIAA so long as the SIAA is not inconsistent with the PVA. Congress’s intent was to allow the SIAA to cover any claims associated with public vessels that fell outside the PVA.¹⁰³⁴ Section 31111 of the PVA contains a requirement of reciprocity that restricts a foreign national’s right to sue the United States unless that foreign national’s government allows U.S. nationals to bring suit in its courts under similar circumstances.

The Federal Tort Claims Act

The Federal Tort Claims Act (FTCA)¹⁰³⁵ allows for suit against the United States for torts committed by U.S. government employees within the scope of their employment if, under like circumstances, a private entity would be liable according to the law of the location where the tort occurred. Liability is limited to money damages and does not extend to punitive damages.¹⁰³⁶

An important exception to federal tort claim liability that relates specifically to admiralty cases is provided under 28 U.S.C. § 2680. No claim may be made under the FTCA where a remedy is provided

1031. *Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

1032. 46 U.S.C. §§ 31101-31113 (2000).

1033. *Id.* § 31102.

1034. *United States v. United Cont’l Tuna Corp.*, 425 U.S. 164 (1976).

1035. 28 U.S.C. § 1346 (2006).

1036. *Id.* § 2674.

Governmental Liability and Immunity

by the SIAA or the PVA.¹⁰³⁷ This means that all admiralty claims against the United States must be brought under the SIAA or the PVA, including maritime tort actions against the United States that otherwise would fall under the FTCA. This is an important rule of exclusivity because of the substantive and procedural differences between the FTCA and the SIAA. The FTCA bars a claim unless it is presented in writing to the federal agency involved within two years after the claim accrues or unless an action is commenced within six months after an agency denial.¹⁰³⁸ Under the SIAA, on the other hand, suit must be commenced within two years after the cause of action accrues,¹⁰³⁹ except in suits where jurisdiction is based on the Admiralty Extension Act.¹⁰⁴⁰ Additionally, SIAA claims are governed by the substantive federal maritime law, while the FTCA provides for the application of state tort law.¹⁰⁴¹

State and Municipal Governments

The Eleventh Amendment of the Constitution prevents suit against a state or any of its departments or agencies without an express waiver of its sovereign immunity and its consent to being sued in federal court. This constitutional immunity makes it very difficult to bring an admiralty claim against a state in federal court. However, the Eleventh Amendment does not bar suits against state officials, even when acting in an official capacity, because the Supreme Court has held that unconstitutional actions by a state official are not attributable to the state under the Eleventh Amendment.¹⁰⁴² In essence, suits against state officials claiming that the officer acted outside the scope of authority or that the officer's authorized actions were unconstitutional are allowed. The Tenth Circuit held that the Eleventh Amendment is not violated when a plaintiff, who had filed a

1037. *Id.* § 2680(b).

1038. *Id.* § 2401(b).

1039. 46 U.S.C. § 30905 (2006).

1040. *Id.* § 30101(c).

1041. *Patentas v. United States*, 687 F.2d 707, 711 (3d Cir. 1982).

1042. *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

petition to limit its liability in federal court, removes to that proceeding a claim brought by a state against it in state court.¹⁰⁴³

Municipal governments are more open to liability. Municipalities performing governmental duties are immune from the consequences of their negligence but remain liable for their negligence involving property ownership or commercial functions.

Foreign Governments: The Foreign Sovereign Immunities Act

Section 1605(a) of the Foreign Sovereign Immunities Act (FSIA)¹⁰⁴⁴ provides a catalog of exceptions in the United States to the general rule of sovereign immunity for foreign governments in U.S. courts. Foreign states are not immune from suits where they have waived immunity,¹⁰⁴⁵ where the claims against them are based on their commercial activities in the United States,¹⁰⁴⁶ where damages are sought for injury or loss of life or property that occurred in the United States,¹⁰⁴⁷ or where actions have been brought concerning arbitration agreements.¹⁰⁴⁸

Subsections 1605(b), (c), and (d), however, expressly apply to specific maritime claims. Subsection (b) dictates that a foreign nation is not immune from admiralty suits to enforce maritime liens against its vessel or cargo, provided a lien is predicated on the foreign nation's commercial activities. Subsection (b) is subject to a proviso that there be proper notice given to the foreign government of both the suit and the beginning of such suit.¹⁰⁴⁹

Under the FSIA, a plaintiff who arrests or attaches the property of a foreign government is liable for damages if the plaintiff acted with actual or constructive knowledge that the property of a foreign state

1043. *Magnolia Marine Transp. Co. v. Oklahoma*, 366 F.3d 1153 (10th Cir. 2004).

1044. 28 U.S.C. §§ 1602–1611 (2006).

1045. *Id.* § 1605(a)(1).

1046. *Id.* § 1605(a)(2).

1047. *Id.* § 1605(a)(5)(A) & (B).

1048. *Id.* § 1605(a)(6).

1049. *Id.* § 1605(b)(1) & (2).

Governmental Liability and Immunity

was involved. The FSIA originally precluded the commencement of an action by arrest or attachment and provided that a plaintiff who did so forfeited that claim, but the Act was amended to do away with the forfeiture provision.

Subsection (c) allows maritime lien suits to proceed based on the law and practice of *in rem* actions just as if the vessel had been owned by a private entity. Subsection (d), additionally, allows suits to foreclose on a preferred ship mortgage¹⁰⁵⁰ where such suit could have been maintained had the vessel been privately owned.

1050. 46 U.S.C. §§ 30101–31343 (2006).

12. General Average

Introduction

The usual rule in maritime law is that a loss falls on the party that suffers it. Of course, fault on the part of another person who causes a loss may change this. “General average” is another exception to the usual rule. General average is a means of equitable sharing, between shipowner and cargo interests, of certain losses and expenses that occur during a voyage. Its origins are rooted in the notion that a voyage is a common adventure between the vessel owner and the cargo owners. As an equitable doctrine, the law of general average holds that some parties to the joint venture should not benefit from the misfortune of other parties to the venture. For example, the master of a vessel confronting a storm may decide that some cargo must be jettisoned to lighten the vessel, thereby giving her a better chance to avoid sinking. If some cargo is sacrificed and the vessel and remaining cargo survive the storm, the latter will have benefited at the expense of the sacrificed cargo. Under the rules of general average, all parties to the venture, including the shipowner and all owners of cargo, must absorb a proportionate share of the loss suffered by the owners of the sacrificed cargo. The law of general average is part of the general maritime law of the United States, and is not statutory.

The General Average Loss: Requirements

Historically, a party seeking to recover under a claim of general average had to establish three factors: (1) there was imminent, common danger or peril; (2) there was a voluntary jettison of the claimant’s portion of the joint venture for the purpose of avoiding peril; and (3) the attempt to avoid the peril was successful.¹⁰⁵¹ In more recent times, the circumstances in which general average may be declared have expanded. General average is no longer restricted to

1051. *Barnard v. Adams*, 51 U.S. (10 How.) 270 (1850).

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situations of jettison; other sacrifices will support a claim.¹⁰⁵² In fact, losses other than sacrifices of cargo or vessel may also give rise to general average claims. As the Supreme Court stated:

Losses which give a claim to general average are usually divided into two great classes: (1.) Those which arise from sacrifices of part of the ship or part of the cargo, purposely made in order to save the whole adventure from perishing. (2.) Those which arise out of extraordinary expenses incurred for the joint benefit of ship and cargo.¹⁰⁵³

Extraordinary expenses are those that are necessary for the safe completion of the voyage and may include costs of repairs, discharging and reloading cargo, additional wages, and other expenses incurred during any necessary interruption of a voyage.¹⁰⁵⁴

Another expansion in the scope of general average claims resulted from deemphasis of the “imminence” requirement. As stated by one court, “If the danger be real and substantial, a sacrifice or expenditure made in good faith for the common interest is justified, even though the advent of any catastrophe may be distant or indeed unlikely.”¹⁰⁵⁵

The York–Antwerp Rules

The rules on general average have been “codified” in the form of various versions of the York–Antwerp Rules.¹⁰⁵⁶ The rules consist of

1052. *Eagle Terminal Tankers, Inc. v. Ins. Co. of U.S.S.R.*, 637 F.2d 890 (2d Cir. 1981).

1053. *The Star of Hope*, 76 U.S. (9 Wall.) 203, 228 (1869), *quoted and relied on in Eagle Terminal*, 637 F.2d 890.

1054. *Eagle Terminal*, 637 F.2d 890.

1055. *Navigazione Generale Italiana v. Spencer Kellogg & Sons*, 92 F.2d 41, 43 (2d Cir.), *cert. denied*, 302 U.S. 751 (1937), *distinguished by Eagle Terminal*, 637 F.2d 890.

1056. The York-Antwerp Rules 2004 are available at <http://www.usaverageadjusters.org/YAR04.pdf>. For the text of the York–Antwerp Rules of 1994, see Frank Wiswall, 6 *Benedict on Admiralty*, The York–Antwerp Rules, doc. 4–6, pp. 4–28 (7th rev. ed. 2001). For a discussion of the circumstances leading to the adoption of the York–Antwerp Rules, see *Eagle Terminal*, 637 F.2d at 890. For

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both lettered rules and numbered rules. The lettered rules are more general and require some interpretation, whereas the numbered rules are fact specific. Where a numbered rule is applicable to a particular situation, it will be applied without regard to any of the lettered rules.¹⁰⁵⁷ The York–Antwerp Rules, although not binding as law in the United States, are generally inserted into bills of lading and charter parties and given effect by the courts.¹⁰⁵⁸ The rules are adopted by parties on a voluntary basis and have no bearing on claims that are governed by statutes such as COGSA.

General Average, Fault, and the New Jason Clause

At one time a carrier had no right to a general average contribution where the peril necessitating the sacrifice or expense arose through its fault.¹⁰⁵⁹ However, an agreement between the carrier and the cargo interests can modify this result. Consequently, most bills of lading and other contracts of carriage contain a clause designated as a “Jason” or “New Jason” clause that provides that a carrier is entitled to a general average contribution even when occasioned by its fault, if under those circumstances it is absolved from liability by law or contract.¹⁰⁶⁰

The General Average Statement

According to York–Antwerp Rule G, general average is calculated on the basis of the value at the time and place of the completion of the

a discussion of the rules themselves, see Leslie J. Buglass, *Marine Insurance and General Average in the United States* (3d ed. 1991).

1057. *Eagle Terminal*, 637 F.2d 890. See also Wiswall, *supra* note 1056.

1058. *Eagle Terminal*, 637 F.2d 890.

1059. See *Gilmore & Black*, *supra* note 14, § 5-13, at 266. See also *Flint v. Christall (The Irrawaddy)*, 171 U.S. 187 (1898).

1060. *Royal Ins. Co. of Am. v. Cineraria Shipping Co.*, 894 F. Supp. 1557 (M.D. Fla. 1995); *Cal. & Hawaiian Sugar Co. v. Columbia S.S. Co.*, 391 F. Supp. 894 (E.D. La. 1972), *aff'd*, 510 F.2d 542 (5th Cir. 1975). The appellation “Jason clause” arises from the name of the ship in the case that ultimately prompted the drafting of the clause. *The Jason*, 225 U.S. 32 (1912).

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voyage.¹⁰⁶¹ If the entire venture is lost, there is no general average contribution.¹⁰⁶² Usually general average statements are prepared by agents of shipowners referred to as “average adjusters.” In the United States, absent any agreement to the contrary, a general average statement prepared by a professional average adjuster is without any legal effect whatsoever and is open to question in every particular.¹⁰⁶³

1061. See Wiswall, *supra* note 1056.

1062. See Gilmore & Black, *supra* note 14, at 264.

1063. *United States v. Atl. Mut. Ins. Co.*, 298 U.S. 483 (1936).

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This is a multivolume work (currently 34 volumes)—arranged by subject matter—that deals with many areas of admiralty and maritime law. Edited by lawyers and law professors, it is published in loose-leaf form and supplemented on a regular basis online. The name of the current author or reviser is listed on the spine and cover page of each volume. The volumes edited by the publisher's staff are simply titled *Benedict on Admiralty*.

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Journal of Maritime Law and Commerce is published four times a year by the Jefferson Law Book Company, Baltimore, Md., under the supervision of an editorial board of admiralty lawyers and law professors.

Tulane Maritime Law Journal (originally *The Maritime Lawyer*) is published twice a year by students at Tulane Law School. In typical law review format, it contains lead articles by practitioners and law professors as well as shorter student comments and case notes.

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University of San Francisco Maritime Law Journal is published twice a year by students at the University of San Francisco Law School in a similar format to the *Tulane Maritime Law Journal*.

In every odd-numbered year, the papers delivered at the Tulane Admiralty Law Institute are published in the *Tulane Law Review* as a special issue. Many of the ALI proceedings have been devoted to one or two topics and often provide excellent in-depth source material not otherwise available.

Judicial Decisions

In addition to the cases reported in the National Reporter System, a group of admiralty lawyers oversees the publication of American Maritime Cases (abbreviated AMC or A.M.C.). In addition to publishing reported decisions, AMC frequently publishes decisions not published in the National Reporter System and publishes important maritime decisions of Canadian and British courts. Furthermore, AMC has its own unique indexing system that facilitates research.

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