



# ADAMS AND REESE LLP

NEW ORLEANS • BATON ROUGE • MOBILE • HOUSTON • JACKSON • WASHINGTON, D.C.

Winter 2002

## Oilfield Maritime Risks and American Maritime Law Newsletter\*



### Contents

Jones Act.....	1
Death on the High Seas Act.....	4
Longshore Harbor Worker's Compensation Act.....	4
General Maritime Law.....	5
Allision/Collision.....	7
Contractual Indemnity.....	8
Limitation of Liability.....	8
Insurance.....	9
Suits in Admiralty and Public Vessels Act.....	10
Panama Canal Act.....	10
Shipping Act of 1984.....	10

---

We take this means to advise you of significant developments which have occurred since our last Newsletter.

---

### Jones Act

#### 1. Jurisdiction

In *Michaeledes v. Golden Gate Bridge, Highway and Transportation District*, 2002 A.M.C. 1951 (N.D. Cal. 2002), the court asserted jurisdiction over Jones Act and unseaworthiness claims by a seaman injured on a Golden Gate Bridge District vessel. The court rejected the district's argument that it was entitled to tort immunity as a state entity. The court reasoned that tort immunity was not based on titles or designations under State law, but rather on the governmental powers and functions exercised by the district. *See also Stoflinsky v. The Ohio River Co.*, 2002 A.M.C. 2019 (S.D. W. Va. 2002) (exercising supplemental jurisdiction over claims of Jones Act seaman injured while riding in his employer's van ashore).

In *McMichael v. Falls City Towing Co.*, 199 F. Supp. 2d 632 (W.D. Ky. 2002), the court held that there was no admiralty jurisdiction for a seaman's claim to overtime wages based solely on Kentucky's overtime wage law, KRS § 337.285. The court, however, noted other decisions which came to a different conclusion. *See, e.g., Core v.*

\*Place this update in the "Newsletters" Section of the "Oilfield Maritime Risks and American Maritime Law" publication.

*Jack Towing Co.*, 2002 A.M.C. 961 (S.D. Ill. 2002); *Price v. Ashland, Inc.*, 2001 A.M.C. 2110 (E.D. Ky. 2000).

## 2. Seaman Status

In *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 2002 A.M.C. 1356 (2d Cir. 2002), a dockbuilder worked slightly over one-half of his time over a five-month period on two dumb barges, a crane barge and a materials barge. The barges were tied up to the piers on which he was working and were moved only by winches without his assistance. He was injured retrieving heavy equipment while the crane was disabled. The Second Circuit held that the dockbuilder was not a Jones Act seaman because he had only a transitory and sporadic connection to the barges.

In *Echert v. United States*, 2002 A.M.C. 2064 (S.D. Fla. 2002), the court initially noted that there can only be one Jones Act employer, and that a technician employed by a government contractor cannot be a Jones Act seaman of the United States. The court, however, allowed the technician's Jones Act claim against his employer to be tried on the merits, despite the fact that his time afloat was estimated at 16% to 25% of his total time, a percentage of time which fell short of the 30% guideline enunciated by the U.S. Supreme Court. *Cf. Gault v. Modern Continental/Roadway Construction Co. Inc. Joint Venture*, 2002 A.M.C. 1881 (Ca. Ct. App. - 2d Dist. 2002) (reversing summary judgment against plaintiff on Jones Act status issues).

## 3. Vessel Status

In *Leonard v. Transoceanic Sedco Forex*, 189 F. Supp. 2d 627 (S.D. Tex. 2002), the court held that an injured galley hand, who was hurt on a drilling rig while it was in port in Galveston, Texas being readied for subsequent offshore placement in the Gulf of Mexico, was not a Jones Act seaman. The court concluded that the rig was not yet a vessel in navigation when he was injured. The drilling rig had been towed from Korea to Galveston where drilling supplies were loaded and a portion of optional equipment was swapped out. The gal-

ley hand was injured when the rig was floating dockside at the Port of Galveston, before the rig began earning its first commercial daily rates.

## 4. Primary Duty Clause

In *Northern Queen, Inc. v. Kinnear*, 298 F.3d 1090 (9th Cir. 2002), the Ninth Circuit reaffirmed the "primary duty" rule and denied the personal injury claims of a fishing vessel captain. The court held that the captain consciously assumed the duty to operate the vessel in a safe manner, as part of his employment contract, and that he violated the duty by failing to respond to weather and vessel conditions. Safer alternatives were available, and the captain's accident and injuries were caused by his failure to maintain a safe work environment and to carry out his duties as vessel master.

## 5. State Whistleblower Claims

In *Winkler v. Coastal Towing, L.L.C.*, 823 So.2d 351 (La. App. 1st. Cir. 2002), the court held that Louisiana's Whistleblower Statute, LSA-R.S. 23:967 was not preempted by federal maritime law. The statute applied to claims asserted by a seaman who was asked to work more than 12 hours in a twenty-four hour period. The seaman and his employer were Louisiana citizens, and the facts occurred solely in Louisiana.

## 6. Fair Labor Standards Act

In *Do v. Ocean Peace, Inc.*, 279 F.3d 688 (9th Cir. 2002), the Ninth Circuit dismissed wage claims under the "first processing" exemption of the Fair Labor Standards Act, 29 U.S.C. §§ 201-19. The court held that the exemption includes those on trawlers who dress, clean, pack and freeze fish, even where there is no further processing shown, as well as those who cook and care for fish. The court, however, refused to dismiss the remaining wage claims under the six-month time limitation of 46 U.S.C. § 10601-02, because the fisherman's

contracts were not signed by the vessel owner or master. *See also Harper v. U.S. Seafoods*, 278 F.3d 971 (9th Cir. 2002) (invalidating employment contracts because the master did not sign it).

In *Coil v. Jack Tanner Co., Inc.*, 2002 A.M.C. 761 (S.D. Ill. 2002), the court held that Illinois Minimum Wage Law was preempted by federal law through the Fair Labor Standards Act, 29 U.S.C. § 213(b)(6). Therefore, the seamen were not entitled to overtime pay.

## 7. Employment Contracts

In *Francisco v. Stolt Achievement MT*, 293 F.3d 270, 2002 A.M.C. 1529 (5th Cir. 2002), the Fifth Circuit dismissed the personal injury lawsuit of a Filipino seaman, who was injured on a Liberian vessel on the Mississippi River. The seaman was working under a contract of the Philippine Overseas Employment Administration, which contained an arbitration clause providing for a Philippine venue and for application of the laws of the Republic of the Philippines. The court reasoned that the claim fell within the New York Convention and that the Federal Arbitration Act's exception for seamen's employment contracts did not apply.

## 8. Collective Bargaining Agreements

In *Inlandboatmen Union of the Pacific v. Dutra Group*, 279 F.3d 1075 (9th Cir. 2002), the Ninth Circuit explained when collective bargaining agreements ("CBA") apply to later side agreements. The court declared that, when parties to a CBA make a side agreement settling a dispute which contains no arbitration clause of its own and a dispute arises under the side agreement, the CBA's arbitration clause applies to the dispute, if it relates to a subject that falls within the scope of that clause.

## 9. Non-Pecuniary Damages

Federal courts have affirmed that Jones Act seamen cannot receive punitive damages or

damages for loss of consortium. However, non-seamen passengers can recover such non-pecuniary damages under general maritime law. *See, e.g., In re Plaquemine Towing Corp.*, 190 F. Supp. 2d 889 (M.D. La. 2002).

## 10. Settlements

In *Hanson v. Gimrock Construction, Inc.*, 2002 A.M.C. 748 (Fla. App. 3d Cir. 2002), a crane operator on a barge mistakenly filed a state workers' compensation claim, to which his employer did not object. The court held that the crane operator, who was almost certainly a Jones Act seaman, was barred from asserting Jones Act claims by a general release of "any and all claims, whether or not asserted" against his employer. The compensation judge approved the release. The seaman was competent, represented by counsel, and received a substantial lump sum payment of \$10,000.

## 11. Forum Selection Clauses

In *Macphail v. Oceaneering Int'l, Inc.*, 302 F.3d 274 (5th Cir. 2002), the plaintiff suffered from decompression sickness and toxic chemical exposure after working as a diver in the South China Sea. He was treated in his homeland of Australia and eventually signed a release for his claims against Oceaneering for \$280,000, a \$25,000 escrow fund to cover future medical expenses, and a commitment from Oceaneering to provide him additional training courses. The release was governed by the laws of Western Australia, and contained an Australian forum selection clause, and was approved by a District Court of Western Australia. The plaintiff later filed suit in federal court in Texas after seeking additional opinions and treatment in the United States. Oceaneering instituted an action for specific performance in the Western Australia court, and the U.S. federal district court subsequently enjoined this action on the grounds that prior release and settlement was unreasonable. The Fifth Circuit disagreed and allowed the Australian action to proceed. The court reasoned that the foreign litigation was not duplicitous or vexatious, and that the injunction was not necessary to protect the U.S. federal court's jurisdictions, which was contingent

upon whether the Australian court originally had jurisdiction over the approval of the release and settlement.

In *Nunez v. American Seafoods*, 2002 A.M.C. 1841 (Alaska 2002), the Alaska Supreme Court relied on *Boyd v. Grand Trunk R.R. Co.*, 338 U.S. 263 (1949) and held that a forum selection clause in the contract of a seaman, who has FELA rights, is void. Therefore, a state court lawsuit was allowed to proceed under FELA and the “Saving to Suitors” Clause. *But see Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

## 12. Expert Testimony

In *Sadler v. Moran Towing Corp.*, 204 F. Supp. 2d 695 (S.D.N.Y. 2002), the court noted that a tug captain was not competent to give expert testimony that exertion by a seaman in retrieving a dropped towing cable by himself caused a physiological effect.

## 13. Drug Testing

In *Periman v. Lawson and Lawson Towing Co., Inc.*, 2002 A.M.C. 2047 (Mo. Cir. Ct. - St. Louis 2001), the court held that the drug test of a seaman ordered by the employer and performed by an independent laboratory is not medical treatment falling under a shipowner’s duty to provide medical care. Therefore, the employer-shipowner was not liable for any negligence of the laboratory in finding that the seaman used marijuana, which resulted in the Coast Guard revoking his license.

# Death on the High Seas Act

## 1. Punitive Damages

One federal court reiterated that the term “high seas” in the Death on the High Seas Act (“DOHSA”) includes all foreign territorial waters which are more than twelve miles from the United States. Accordingly, an air crash within Canadian waters was covered by the DOHSA because it oc-

curred in Nova Scotia, more than twelve miles from the United States. Claims for punitive damages were dismissed as prohibited by the DOSHA. *In re Air Crash Disaster Near Peggy’s Cove, Nova Scotia on September 2, 1998*, 2002 A.M.C. 769 ( E.D. Pa. 2002).

# Longshore Harbor Workers’ Compensation Act

## 1. Employer Liability - Multiple Injuries/Employers

In *Delaware River Stevedores, Inc. v. Director*, 279 F.3d 233 (3d Cir. 2002), the Third Circuit declared that, when an employee has multiple traumatic injuries, the first employer will be responsible for LHWCA benefits for a later disability which is a natural progression of the first injury and which would have occurred, notwithstanding the second injury. The second employer is responsible only where the later injury aggravates, accelerates, or combines with the prior injury, resulting in the disability.

## 2. Last Employer Rule

In *Stevedoring Services of America v. Director*, 2002 A.M.C. 1892 (9th Cir. 2002), the Ninth Circuit noted that it is possible to have more than one “last employer” when a cumulative disability produces successive claims. The court refused to merge an unresolved claim of partial disability from hearing loss followed by another claim for further injury in a different employment. The court ultimately allocated the first claim to the last employer at its own time and the second claim to the last employer at the later time.

## 3. Average Weekly Wages

In *Custom Ship Interiors v. Roberts*, 300 F.3d 510 (4th Cir. 2002) the Fourth Circuit held that per diem payments to an employee to cover food and lodging expenses could be included

as wages for the purpose of calculating disability benefits under the LHWCA. The payments were made in the employee's weekly paycheck as part of his employment contract, regardless of whether he actually incurred food and lodging expenses. There was no requirement that he spend the payments on room and board. The payments also correlated to the days that he actually worked.

In *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157 (9th Cir. 2002), the Ninth circuit reiterated the LHWCA compensation for permanent partial disability is not calculated, as in torts, by the difference between actual wages before injury and wages that would be earned without any injury, but by the difference between wages before and actual wages afterward. Therefore, when wages post-injury are higher than pre-injury, although not as high as if no injury had occurred, no compensation is payable.

In *Johnston v. Director*, 280 F.3d 1272 (9th Cir. 2002), the Ninth Circuit declared that a longshoreman with a permanent partial disability, who was working part time after injury at the same hourly rates as before, pursuant to a union contract, was not entitled to have his award adjusted for wage inflation because the actual wage rates remained the same.

#### 4. Credits/Offsets

In a case of first impression, the Fifth Circuit held that 33 U.S.C. § 914(j) does not provide a basis for crediting disability overpayments to a longshoreman against his widow's subsequent death benefits award. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 2002 A.M.C. 2097 (5th Cir. 2002).

In *Alexander v. Director*, 2002 A.M.C. 2107 (9th Cir. 2003), the Ninth Circuit declared that the last employer liable for a sheet metal worker's asbestosis was not entitled to a credit for the worker's settlements of LHWCA claims against prior employers. The court noted that

the LHWCA limits credits to compensation under other acts, 33 U.S.C. § 903(e).

#### 5. Settlements - Ryan Indemnity

Under the *Ryan* Indemnity doctrine, indemnity for breach of a warranty of workmanlike performance or service is only allowed when an indemnitee is liable for unseaworthiness. In this case, a barge owner had settled with the barge cleaner's employees for injuries sustained in an explosion and sought indemnity from the barge cleaning company. The court noted that the employees had no Jones Act claim against the barge owner because they were not employed by the owner, and that, even if they were *Sieracki* seaman, the 1972 Amendments to the LHWCA had abolished the warranty of seaworthiness. The court ultimately concluded that the barge owner, which had vehemently denied any negligence and was not liable for unseaworthiness, failed to show any exposure to liability needed to support the reasonableness of the settlements. Accordingly, the barge owner was not entitled to indemnity. *In re TPT Transp.*, 191 F. Supp. 2d 717 (M.D. La. 2001).

## General Maritime Law

#### 1. Preemption

In *Sprietsma v. Mercury Marine*, 2002 A.M.C. 609 (Ill. 2001), the Illinois Supreme Court held that the Federal Boat Safety Act of 1971, 46 U.S.C. § 4301 *et seq.*, preempts state common law causes of action based on the manufacturer's failure to install propeller guards on boat engines. The Court reasoned that, where the U.S. Coast Guard considered requiring propeller guards on boats and determined that no guards should be required, the supremacy of federal law precludes the conflict that would exist if a state jury were allowed to find common law liability based on lack of a guard.

#### 2. Unseaworthiness

In *Freeze v. Lost Isle Partners*, 2002 A.M.C. 842 (Cal. Ct. App. 2002), the plaintiff was a laborer

at a resort island who sometimes helped crew a small boat used as a barge to the mainland and was injured on the boat. After disavowing LHWCA coverage, a jury concluded that she was not a Jones Act seaman. The court, however, allowed her to assert unseaworthiness claims.

In *Foster v. Maritrans, Inc.*, 790 A.2d 328, 2002 A.M.C. 1487 (Pa. Super. Ct. 2002), a merchant seaman slipped and fell on naturally occurring ice that had formed from sea spray on a tug's deck while the tug was underway. The court reiterated that a tug does not have to be accident free, but must only be reasonably fit for her intended use. The court reversed a jury finding that the tug was unseaworthy. See also *American Seafoods Co. v. Norvak*, 2002 A.M.C. 1659 (W.D. Wash. 2002).

### 3. Good Samaritan Rule

In *Hurd v. U.S.A.*, 2002 A.M.C. 1584 (4th Cir. 2002), aff'g 134 F. Supp. 2d 745, the Fourth Circuit held that the Coast Guard had commenced a rescue effort when it asked a nearby pilot boat to investigate a distress call for help heard by the pilot of a ship entering the Charleston Harbor. The court concluded that the Coast Guard's termination of the search before daylight was wanton and reckless and worsened the positions of the vessel passengers in the water. The court affirmed a finding of liability against the Coast Guard under the "Good Samaritan" rule.

A Coast Guard vessel towing a powerless stranded vessel is subject to the "Good Samaritan" Rule of liability only for the negligent-worsening of the victims position or for reckless or wanton conduct. The court refused to subject the government to a higher standard of care than a private rescuer and denied an attempt by the plaintiff to impose the "reasonable care and skill" standard of towage and salvage law. *Le Brothers Fishing, Inc. v. U.S.A.*, 2002 A.M.C. 1577 (D. Haw. 2002).

### 4. Dram Shop Liability

In *Horak v. Argosy Gaming Co.*, 2002 A.M.C. 1919 (Iowa 2002), the Iowa Supreme Court exer-

cised admiralty jurisdiction over a claim against a riverboat casino by the estate of an intoxicated patron who died in a car accident after being served too much alcohol. Iowa Dram Shop Law applied to allow recovery by the decedent's innocent children, rather than general maritime law which would be less favorable due to the application of comparative fault principles.

In *Quinn v. St. Charles Gaming Co., Inc.*, 815 So.2d 963, 2002 A.M.C. 1566 (La. App. 3d Cir. 2002), the court found that admiralty jurisdiction existed in a case involving a land-based auto accident involving a casino customer who had received free drinks and had a blood alcohol level of .15 at the time of the fatal collision. The court refused to apply Louisiana's Anti-Dram Shop Liability Statute, LSA-R.S. 9:2800.1(A), and held that general maritime law provided a cause of action against the shipowner or operator for providing alcohol without adequate supervision.

In *Kludt v. Majestic Star Casino, LLC*, 2002 A.M.C. 886 (N.D. Ind. 2001), the court addressed the claims of an intoxicated casino patron who fell down the stairs. The court dismissed punitive damage claims for lack of evidence, but allowed the patron to proceed with his negligence claims under general maritime law.

### 5. Maintenance and Cure

In *Thomas v. New Commodore Cruise Lines Ltd., Inc.*, 202 F. Supp. 2d 1356 (S.D. Fla. 2002), the court held that a seaman, who tested positive for HIV virus, cannot receive maintenance and cure benefits because of the venereal disease in the absence of sufficient evidence that it was contracted innocently. The court refused to allow the Americans With Disabilities Act to negate the employer's defense.

In *American Seafoods Co. v. Nowak*, 2002 WL 31262105, 2002 A.M.C. 1655 (W.D. Wash. 2002), an employer suspended judgement on a

seaman's need for further surgery and filed a declaratory judgment to determine it, rather than pay maintenance and medical expenses, even though medical opinion established the need for surgery. The court held that the employer's conduct was arbitrary and entitled the employee to recover attorney's fees.

## 6. Punitive Damages

In *Jurgensen v. Albin Marine, Inc.*, 214 F. Supp. 2d 504 (D. Md. 2002), the court noted that the admiralty prohibition against punitive damages applies only in Jones Act seamen claims. The court allowed a vessel owner to assert punitive damage claims in a products liability, breach of contract, and breach of warranty action against a vessel designer-manufacturer. The court applied the maritime standard for punitive damages, intentional or wanton and reckless conduct amounting to a conscious disregard of the rights of others, instead of Maryland law, but concluded that punitive damages were not warranted.

While noting that Jones Act seamen cannot recover non-pecuniary damages from the owner of a vessel which collided with their vessel, a federal district court has held that non-seamen, vessel passengers can recover punitive damages, as well as loss of consortium damages, under general maritime law. *In re Plaquemines Towing Corp.*, 190 F. Supp. 2d 889 (M.D. La. 2002).

## 7. Indemnity and Contribution

In *Szolloosky v. Hyatt Corporation*, 208 F. Supp. 2d 205, 2002 A.M.C. 1432 (D. Conn. 2002), a child was injured in a jet ski accident off the coast of the Cayman Islands. The child's mother sued several defendants, who third-partied the minor child's father and alleged that the father's negligence caused the accident and injuries. The father asserted that Connecticut's parent-child immunity doctrine barred the third-party claim. The court, however, disagreed and held that the immunity would not apply because

it was abrogated by a Connecticut statute for negligence in the operation of a vessel. Further, the court noted that neither federal maritime law or Cayman Islands law recognized parent-child immunity.

# Allision/Collision

## 1. Regulation of Pilotage

In *Gillis v. State of Louisiana*, 2002 A.M.C. 2010 (5th Cir. 2002), the Fifth Circuit confirmed that State pilotage waters are not limited to territorial waters of the State, and that the regulation for pilots under 46 U.S.C. § 8501 does not impose a territorial limit. The court validated a Louisiana statute, LSA-R.S. 34:11073, which required pilots servicing Lake Charles and the Calcasieu Channel to provide pilotage at the Outer Bar, a stretch about 30 miles long, beyond Louisiana's three-mile territorial limit.

## 2. Rivers and Harbors Act

In *U.S. v. Angell*, 292 F.3d 333 (2d. Cir. 2002), the Second Circuit initially found that the Silver Brook Canal in New York was a navigable waterway, although easy passage may be possible only at high tide, because it is subject to the tides' ebb and flow. Under the Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. §§ 401 *et seq.*, the Corps of Engineers had exclusive jurisdiction. Therefore, the plaintiff, who had added to his permitted piers with authority from the State, but not the Corps, had to remove the additional piers.

## 3. Truman-Hobbs Act

In *Union Pacific Railroad Co. v. Kirby Inland Marine, Inc.*, 2002 A.M.C. 1865 (8th Cir. 2002), the U.S. Coast Guard issued an order, declaring that the Clinton Bridge on the Mississippi River was "an unreasonable obstruction to navigation" under the Truman-Hobbs Act, 33 U.S.C. § 511-24. The Eighth Circuit initially held that the Coast Guard finding did not call for application of the *Pennsylvania* Rule and application of a presumption of fault against the bridge owner. The court reasoned as

follows: (1) the Truman-Hobbs Act was not designed to protect marine safety, but to provide government funds to assist a bridge owner to alter a bridge; (2) the Truman-Hobbs Act imposed no mandatory duty as the owner need only prepare a plan to alter the bridge; and (3) the Truman-Hobbs Act was not designed to prevent a specific injury. The court also declared that a finding that a bridge is an unreasonable obstruction to navigation does not, as a matter of law, eliminate the *Oregon* presumption of fault when a moving vessel hits a fixed object.

#### 4. Louisiana Rule

In *Tetuan Shipping Corp. v. M/V Tug Ann Moran*, 2002 A.M.C. 790 (11th Cir. 2001), the court addressed the *Louisiana* rule which imputes negligence to a vessel that strikes a fixed object. The court noted that a tug assisting a ship was part of the ship's management when the ship grounded. Therefore, the *Louisiana* rule did not apply in a suit by the ship against the tug. *See also Pan American Grain Manufacturing Co., Inc. v. Puerto Rico Ports Authority*, 2002 A.M.C. 1988 (1st Cir. 2002) (declining to apply *Pennsylvania* Rule where no uncharted obstructions or pilings were found in the maneuvering area).

## Contractual Indemnity

### 1. Maritime Law

Over a strong dissent, the Fifth Circuit applied Section 905(c) of the LHWCA to an accident involving an injury to a non-seaman casing worker on a jack-up drilling rig on the Outer Continental Shelf. Therefore, the rig owner was entitled to defense and indemnity from the plaintiff's employer. The dissent argued that the drilling rig was not a vessel when spudded down firmly on the ocean floor, and that a drilling or casing contract and work were not maritime, a result of which Louisiana state law should have been applied. Application of the Louisiana Oilfield Indemnity Act would have voided the indemnity agreement. *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492 (5th Cir. 2002).

In *Sumrall v. Ensco Offshore Co.*, 291 F.3d 316 (5th Cir. 2002), Santa Fe Energy Resources had a contractual relationship with Ensco Offshore for the provision of a drilling rig vessel and services. The contract required Santa Fe to indemnify Ensco for claims brought by its employees and its contractor's employees. Santa Fe contracted separately with Premiere for casing services, and the contract required Premiere to indemnify Santa Fe for claims asserted by Premiere's employees. An employee of Premiere was injured and filed suit against Ensco. The Fifth Circuit noted that the Santa Fe - Premier contract covered Santa Fe and its contractors/subcontractors, as well as claims "arising out of contract/tort," and held that Premiere must defend and indemnify Ensco. In reaching this conclusion, the court found the indemnity for provisions of the Santa Fe - Premiere contract were "sufficiently reciprocal" to satisfy Section 905(c) of the LHWCA.

## Limitation of Liability

### 1. Six-Month Time Limitation

The Limitation of Liability Act requires one to file a petition seeking limitation within six months of receiving written notice from the claimant. 46 U.S.C § 185. One federal court declared that a limitation proceeding, which was filed almost ten months after receipt of a letter from claimant's counsel informing the petitioner of the facts of the incident, the claimant's belief that the vessel owner-petitioner was liable for the damages, and of the claimant's intention to sue the petitioner, was time-barred. *In re Mark Lewis*, 190 F. Supp. 2d 885 (M.D. La. 2002).

However, another federal court concluded that letters from a seaman's counsel stating that he remains under treatment and that medical records will be forwarded and later enclosing a medical records release authorization, did not constitute written notice of a claim that would start the six-month period for a shipowner to

file a limitation action. *In re Salty Sons Sports Fishing, Inc.*, 192 F. Supp. 2d 631 (D. Md. 2002).

## 2. Class Actions

Courts continue to confirm that a class action may not be instituted in a limitation of liability proceeding because Federal Rule of Civil Procedure 23 and Supplemental Admiralty and Maritime Claims Rule F are incompatible. Class actions cannot be reconciled to Supplemental Rule F's requirement that each claimant appear individually. *See, e.g., In re River City Towing Services, Inc.*, 204 F.D.R. 94, 2002 A.M.C. 1463 (E.D. La. 2001).

## 3. Privity or Knowledge

One court held that the master of an overtaking tug was solely at fault for his "spontaneous negligent navigational error" in having no dedicated lookout posted and facing aft writing in his log book and checking his GPS and tide tables before the collision. The court, however, concluded that the tug owner had no "privity or knowledge" where the master was properly licensed, trained and instructed and was familiar with the vessel and had a good safety record. Limitation was granted. *In re Western Pioneer, Inc.*, 2002 WL 31262108, 2002 A.M.C. 1743 (W.D. Wash. 2002).

# Insurance

## 1. Uberrimae Fidei Doctrine

In *Cusano v. Continental Cas. Co.*, 2002 A.M.C. 1499 (D. Conn. 2002), a boat had sunk on a prior occasion and its engines were replaced. The court noted that the prior sinking may create an issue of materiality requiring disclosure in applying for marine insurance and that the engine replacement was material as it affected the value to be insured. Accordingly, the insured's failure to disclose voided the policy.

## 2. Captain Warranty

In *Yu v. Albany Ins. Co.*, 2002 A.M.C. 660 (9th Cir. 2002), the Ninth Circuit strictly construed a captain warranty and held that there could be no recovery for a vessel sinking while under a captain not named in the warranty, regardless of causation. The owner had left a message for his broker to amend the warranty, but the insurer did not receive the request or grant it. The court concluded that it would be unreasonable for the owner to have relied on the proposed amendment without word from the insurer.

## 3. Passenger Warranty

In *Hartford Fire Ins. Co. v. Mitlof*, 2002 A.M.C. 1901 (S.D.N.Y. 2002), the court voided a combined hull and P&I policy for a passenger vessel for breach of her Passenger Warranty that she carry no more than 49 passengers or the lesser number permitted by the U.S. Coast Guard. The Coast Guard had certified her for 20 passengers, and the vessel was carrying at least 25 passengers when she capsized on the Hudson River.

## 4. Classification Societies - Surveyors

In *Achille Lauro Lines S.R.L. v. West Indies Transport Limitada, S.A.*, 2002 A.M.C. 1963 (11th Cir. 2002), a laden vessel encountered mechanical problems that could not be repaired in West India and sank while being towed to Gibraltar for drydocking. While the vessel remained in class, the vessel owner failed to adequately and fully disclose and describe the vessel conditions and had not had a surveyor actually in attendance before sailing. The Eleventh Circuit decided that the vessel owner was not entitled to coverage under a P&I policy where it failed to properly notify the American Bureau of Shipping as to incidents or conditions that might give rise to damage.

## 5. CGL vs. P&I Coverage

In *Steinunder v. McCall's Boat Rentals, Inc.*, 815 So.2d 1059, 2002 A.M.C. 1314 (La. App. 4th Cir. 2002), the court held that a Comprehensive Gen-

eral Liability policy provision which states that it does not cover any liability for which coverage is provided the named insured or additional assured by the terms of a Protection and Indemnity Form SP-23 is an exclusion from coverage, rather than another insurance clause. The P&I insurer under Form SP-23, with an escape “other insurance” clause could not require the CGL policy to contribute.

## 6. Professional Services Exclusion

In *Cochran v. B.J. Services, Co., USA*, No. 01-30640, 302 F.3d 499 (5th Cir 2002), an insurance coverage dispute arose out of a lawsuit filed by a derrick hand who was injured while removing a cement head on a drilling rig. Mid-Continent Group had contracted with Drillmark to provide insurance for its contractual obligations to an oil lease owner to supervise a drilling operation. The Fifth Circuit concluded that the CGL policy’s professional services exclusion did not apply to Drillmark, which was hired “to be the overall supervisor of ‘company operated drilling, completion and workover activities.’” Drillmark did not contract to provide any engineering or surveying services. Moreover, the removal of a cement head was a routine, not a specialized, task.

## 7. Maritime Liens

English law does not recognize a lien for unpaid insurance premiums. By contrast, the Federal Maritime Lien Act, 46 U.S.C. §§ 31341-43 establishes a maritime lien for the provision of necessities, which include marine insurance. In *Liverpool and London Steamship Protection and Indemnity Assoc. Ltd. v. Queen of Leman MV*, 2002 A.M.C. 1521 (5th Cir. 2002), a P&I policy issued in England called for the application of English law and also provided that the insurer would have such a lien that may be enforced under local law, which in this case, was U.S. federal maritime law. Accordingly, the Fifth Circuit declared that a valid maritime lien existed in favor of the insurer. *Cf. Patricia Hayes & Assoc., Inc. v. M/V Big Red Boat II*, 2002 WL 1163555, 2002 A.M.C. 1722 (S.D.N.Y. 2002).

# Suits in Admiralty and Public Vessels Act

## 1. Jurisdiction

In *Cosmomar Shipping Co., Ltd. v. United States*, 2002 A.M.C. 2029 (S.D. Ga. 2002), the court disagreed with *B&F Trawlers, Inc. v. U.S.*, 841 F.2d 626 (5th Cir. 1988) and incorporated the Law Enforcement Exception to governmental liability in the Federal Tort Claims Act, 28 U.S.C. § 2680(c), into the Suits in Admiralty Act, 46 U.S.C. §§ 741 *et seq.* Accordingly, the United States was not liable for flooding a vessel in the custody of the U.S. Marshal’s Service under forfeiture proceedings for attempting to transport illegal aliens into the United States. The case was dismissed for lack of subject matter jurisdiction.

# Panama Canal Act

## 1. Jurisdiction

In *Galapagos Corporation Turistica “Galatours,” SA.*, 205 F. Supp. 2d 573 (E.D. La. 2002), the court held that the Discretionary Function Exception to governmental liability under the Federal Tort Claims Act (“FTCA”) cannot be incorporated into the Panama Canal Act (“FCA”), 22 U.S.C. §§ 3761-3779, because Section 3772 proscribes incorporation of the FTCA into the PCA. The court, therefore, exercised jurisdiction over the alleged negligent shipboard fire-fighting activities.

# Shipping Act of 1984

## 1. State Sovereign Immunity

In *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S. Ct. 392 (2002), the U.S. Supreme Court held that state sovereign immunity precluded the Federal

Maritime Commission from adjudicating a private party's complaint that a state-run port had violated the Shipping Act of 1984, 46 U.S.C. § 1701 *et seq.*

*We shall continue to keep you advised of recent developments and provide you with revisions of the manual text when appropriate. If you have any questions or would like to discuss these developments or other maritime issues, please feel free to contact us.*

**Maritime Practice Team**  
– **E. Gregg Barrios, Editor**



### **Editorial Statement**

This publication is informational only and is not intended to provide legal advice, nor to substitute for qualified legal counsel. Before citing or using any case or legislative enactment that is mentioned or discussed in this Newsletter, be sure to make certain that the decision has not been overruled or modified, or that the statute has not been amended subsequent to the time this Newsletter was prepared. Readers are encouraged to consult counsel of their choosing before making decisions or taking actions on the numerous and complex issues addressed in this Newsletter. **FREE BACKGROUND INFORMATION IS AVAILABLE UPON REQUEST:** No representation is made that the quality of the legal services to be performed is greater than the quality of the legal services performed by other lawyers. Not certified by the Texas Board of Legal Specialization except as noted.



# ADAMS AND REESE LLP

®

*4500 One Shell Square  
New Orleans, Louisiana 70139  
Telephone (504) 581-3234  
(800) 725-1990  
Facsimile (504) 566-0210*

*Bank One Centre, 19th Floor, North Tower  
451 Florida Street  
Baton Rouge, Louisiana 70801  
Telephone (225) 336-5200  
Facsimile (225) 336-5220*

*One St. Louis Street, Suite 4500  
Post Office Box 1348  
Mobile, Alabama 36633  
Telephone (251) 433-3234  
Facsimile (251) 438-7733*

*111 Capitol Street, Suite 350  
Post Office Box 24297  
Jackson, Mississippi 39225-4297  
Telephone (601) 353-3234  
Facsimile (601) 355-9708*

*4400 One Houston Center  
1221 McKinney  
Houston, Texas 77010  
Telephone (713) 652-5151  
Facsimile (713) 652-5152*

*401 9th Street, NW  
Suite 610 South  
Washington, D.C. 20004  
Telephone (202) 737-3234  
Facsimile (202) 737-0264*