



ADAMS AND REESE LLP

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



Spring 2002

Oilfield Maritime Risks and American Maritime Law Newsletter*



Contents

Jones Act.....	1
Longshore and Harbor Workers' Compensation Act.....	4
General Maritime Law.....	5
Allision/Collision.....	8
Outer Continental Shelf Lands Act.....	10
Oil Pollution Act of 1990.....	10
Contractual Indemnity.....	11
Limitation of Liability.....	11
Insurance.....	12
OSHA Inspections.....	14

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

Jones Act

1. Seamen Status

A Jones Act seaman must have a connection to an identifiable fleet of vessels under common ownership or control that is substantial in duration or nature. In *Roberts v. Cardinal Services, Inc.*, 266 F.3d 368, (5th Cir. 2001), the Fifth Circuit held that an offshore worker engaged in plugging and abandoning oil wells, who spent only 27.7%, and not at least 30%, of his time on vessels, was not a Jones Act seaman.

In *Nunez v. B&B Dredging, Inc.*, 2002 WL 522901 (5th Cir. 2002), the Fifth Circuit also declared that a land-based, dredge pump foreman, who was permanently assigned to work in the service of a dredge, but spent only 10% of his time working on the vessel, was not a Jones Act seaman.

In *Richard v. Mike Hooks*, 799 So. 2d 462 (La. 2001), the Louisiana Supreme Court declared that a welder's helper's connection with his employer's vessels was not substantial in nature or duration. Even if he spent in excess of 30% of his time work-

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

ing on his employer's vessels and may have been exposed to some perils of the sea, all the vessels upon which he worked were dockside. The helper never slept or ate on the vessels, was not a member of the employer's dredge crew that performed welding on dredges in operation, never performed repair duties that took him to sea, and never worked on a vessel while it was performing its primary mission. The helper took orders from a land-based foreman and was only aboard small moving vessels once every month, for short durations, where he assisted in moving dredge pipe along a canal adjacent to the employer's yard. Therefore, the helper was not a seaman under the Jones Act.

In *Lara v. Arctic King, Ltd.*, 178 F. Supp. 2d 1178 (W.D. Wash. 2001), the court denied seaman status to an at-will dayworker whose duties consisted of chipping and scraping a fishing trawler at a shipyard pier. The plaintiff's expectation that he might become a member of the trawler's crew was immaterial. Further, shifting the trawler between piers at the shipyard did not constitute going to sea, nor was the gust of wind which caused the metal lid of the container to strike the plaintiff's head a special hazard unique to the sea. The court concluded that the dayworker was a shore-based harbor worker, rather than a seaman.

2. Vessel Status

In *Grobe v. Hollywood Casino-Aurora, Inc.*, 2002 A.M.C. 273 (Ill. Ct. App. 2001), the gaming facility had all the characteristics and the appearance of a navigating vessel, including being licensed as a passenger vessel by the U.S. Coast Guard. The court, however, noted that a permanently moored floating casino, whose owners have no intention of navigating it, had been removed from navigation and was not a vessel for purposes of the Jones Act. Accordingly, an engineer's personal injury claims were covered by state workers' compensation law and not the Jones Act.

3. Fair Labor Standards Act Exemption

In *Owens v. Seariver Maritime, Inc.*, 272 F.3d 698 (5th Cir. 2001), the plaintiff filed a putative class action to recover damages for alleged viola-

tions of the maximum hour and overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* The district court had determined that the plaintiff, a tankerman, was exempt from FLSA coverage because he was "employed as a seaman" under 29 U.S.C. § 213(b)(6). On appeal, the Fifth Circuit reiterated that, if one spends a substantial amount of time on non-seaman's work, he cannot properly be considered a seaman for purposes of the FLSA. The court concluded as follows: "[b]ecause the primary purpose of [plaintiff's] position was to accomplish non-seaman's work (loading and unloading petroleum), [plaintiff] was not a seaman under the FLSA. . . ." The court noted that it was not suggesting that plaintiff "was not a seaman for Jones Act purposes."

4. Dual Employment

In *Ballance v. Energy Transp. Corp.*, 2002 A.M.C. 198 (S.D.N.Y. 2001), the court reiterated that "only one person, firm, or corporation can be sued as employer under the Jones Act, and that all Jones Act and maintenance and cure claims against other parties must be dismissed."

5. Employment Contracts

In *Sawicki v. K/S Stavanger Prince*, 802 So. 2d 598 (La. 2001), a seaman's employment contract provided that disputes with the employer would be subject to Norwegian law and the jurisdiction of Norwegian courts. The Louisiana Supreme Court held that Louisiana law, LSA-R.S. 23:921(A)(2), which voids choice of forum claims, unless an employee ratifies the clause after the occurrence of the incident which is the subject of the action, retroactively applied to the 1995 injury claim. The Court, however, refused to decide the case on summary judgment.

Under 46 U.S.C. § 10601, the written employment contract of a fisherman must be signed by him, the vessel owner, and the mas-

ter. In *Harper v. U.S. Seafood*, 2002 A.M.C 77 (W.D. Wash. 2001), the court invalidated an employment contract because the vessel master did not sign it.

6. Negligence and Unseaworthiness Claims

In *Gifford v. American Canadian Caribbean Line, Inc.*, 276 F.3d 80 (1st Cir. 2002), the captain of a cruise liner was injured when he fell from a small inflatable boat that he was using to ferry a passenger ashore. The boat circled backward and struck the captain's leg with its propeller. The jury found no negligence or unseaworthiness. The First Circuit affirmed the finding and rejected the captain's claim that the jury instructions regarding unseaworthiness were erroneous.

In *Perkins v. Am. Elec. Power Fuel Supply, Inc.* 246 F.3d 593 (6th Cir. 2001), a deckhand fell from a barge's deck onto a tug's deck while using a ratchet to attach a wire between the vessels. The Sixth Circuit concluded that the Jones Act employer was negligent for failing to install safety devices, such as handrails, safety chains, or guardrails. Further, the court held that the vessel was unseaworthy due to the defective ratchet, which malfunctioned, and the lack of safety devices. *See also Boudreaux v. U.S.*, 280 F.3d 461 (5th Cir. 2002) (finding that seamen's decision to lift 300-pound weight and traverse deck covered with dirty and greasy piping was the cause of the accident, and that no unseaworthy condition existed where there was no evidence that the piping was intended to safely support these seaman).

7. Sexual Harassment - Title VII Claims

In *Ballance v. Energy Transp. Corp.*, 2002 A.M.C. 198 (S.D.N.Y. 2001), the court held that an isolated incident where a crewman touched a female cook's buttocks and untied her apron, without others present, did not constitute a hostile work environment as a matter of law under 42 U.S.C. § 2000 *et seq.*

8. Assault Claims

In *Frederick v. Harvey's Iowa Mgm't. Co., Inc.*, 177 F. Supp. 2d 933 (S.D. Iowa 2001), the court initially found that a river boat casino blackjack dealer, who regularly worked a shift when the boat was moored and sometimes when it was cruising, was a Jones Act seaman. The court also held that her claim against the Jones Act employer arising out of an assault by a frequent patron known to be rough and violent may support a claim for negligence, but not for unseaworthiness.

9. Third-Party Negligence

In *Rannals v. Diamond Jo Casino*, 265 F.3d 442 (6th Cir. 2001), the court held that the negligence of a third party in failing to provide a safe workplace may be imputed to a Jones Act employer, where the third party has a contractual relationship with the Jones Act employer and the employee is acting in the course of her employment on the third party's premises.

10. Medical Monitoring

While Jones Act seamen can recover from employers for injury or illness on the grounds of negligence, unseaworthiness or the right to maintenance and cure, the Ninth Circuit declared that symptomless seamen exposed to asbestos are not entitled to medical monitoring. *In re Marine Asbestos Cases*, 265 F.3d 861 (9th Cir. 2001).

11. Comparative Negligence

In *Boudreaux v. U.S.*, 280 F.3d 461 (5th Cir. 2002), the Fifth Circuit reiterated that the standard of care for a Jones Act seaman is to act as an ordinary prudent seaman would act in similar circumstances. The court held that two seamen were equally at fault in deciding to traverse an open deck carrying a 300-pound weight. One of them slipped, resulting in neck and knee injuries.

In *Hopkins v. Jordan Marine, Inc.*, 271 F.3d 1 (1st Cir. 2001), the First Circuit confirmed that Jones Act cases are subject to comparative negligence

principles, that the assumption of risk defense has been eliminated, and that the defendant's negligence is a legal cause of an injury or damage if that negligence played any part, no matter how small, in bringing about or causing the injury or damage.

12. Statutory Wage Penalties

46 U.S.C. § 10313(g) provides that the master or owner of a vessel is liable for statutory wage penalties when a seaman has not been promptly paid ("within 24 hours after the cargo has been discharged or within 4 days after the seaman has been discharged, whichever is earlier...") at the end of the voyage. In *Williams v. Wilmington Trust Co.*, 2002 A.M.C. 452 (S.D.N.Y. 2002), the court held that a registered owner trustee was the owner of the vessel and subject to penalty wages - double wages - for late payment of amounts due to the seaman.

13. Punitive Damages

In *Blige v. M/V Geechee Girl*, 180 F. Supp. 2d 1349 (S.D. Ga. 2001), the court confirmed that the Jones Act prohibits claims for punitive damages.

14. Evidence - Racial Slurs

In *Preatto v. Tidewater Marine, Inc.*, 809 So. 2d 1084 (La. App. 4th Cir. 2002), the plaintiff sought to introduce evidence that the defendant's employee, a boat captain, made inappropriate racial slurs which were heard by him, but not directed at him. The court refused to admit the evidence because any probative value was far outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

Longshore Harbor Worker's Compensation Act

1. Situs

To be covered by the LHWCA under the Outer Continental Shelf Lands Act, the death or injury must occur on the Outer Continental Shelf ("OCS").

In *Pickett v. Petroleum Helicopter, Inc.*, 266 F.3d 366 (5th Cir. 2001), a pilot was killed when his helicopter crashed on land during a test flight. Therefore, the pilot's widow was ineligible for Longshore benefits because the accident did not occur over the OCS.

2. Claims - One Year Time Limitation

Under 33 U.S.C. § 913(a), a claimant has one year from the date of last payment to file a claim for additional benefits. In *Pool Co. v. Cooper*, 274 F.3d 173 (5th Cir. 2001), a longshoreman received his last disability benefit payment on April 25, 1994 and filed his LS-203, seeking additional compensation less than one year later on February 25, 1995. The Fifth Circuit rejected an argument that the claimant lacked a viable claim for benefits at the time when the LS-203 was filed and, therefore, failed to satisfy the one-year statute of limitation.

3. 905(b) Claims

In *Christensen v. Georgia-Pacific Corp.*, 279 F.3d 807 (9th Cir. 2002), a longshoreman was injured while helping retie a ship which had broken free from the dock. The district court had granted summary judgment in favor of the shipowner. The Ninth Circuit, however, reversed, finding that the shipowner had duties under the active control and intervention doctrines. The court reasoned that it was a maritime industry custom to have the ship's crew, not stevedores or longshoremen, monitor mooring lines, and that the ship's crew followed that custom or practice in this case. Further, the court noted that the duty to intervene was triggered when the weather and decreased weight of the ship created a strain on the mooring lines. The court also confirmed that the "rescue doctrine" - that foreseeable damages for the injuries sustained by one who seeks to rescue the person first endangered by that wrongful act - applied to the rescue of property, as well as people. All of these issues were remanded for a trial on the merits.

In *Rodriguez v. Bowhead Transp. Co.*, 270 F.3d 1283 (9th Cir. 2001), the Ninth Circuit held that a clause in a stevedoring contract which called for the time charterer to provide a representative to direct services and materials and inspect was not an agreement to actively supervise the loading in light of a further clause referring to its specifications and instructions before loading and right to call for correction afterwards. Accordingly, a longshoreman, allegedly injured as a result of the stevedore violating the loading plan, had no basis to claim liability against the time charterer for failure to object and prevent the mistake.

In *Sinagra v. Atlantic Ocean Shipping, Ltd.*, 182 F. Supp. 2d 294 (E.D.N.Y. 2001), the crew left twist locks hanging from the bottom of a container being discharged. A longshoreman's hand was smashed when a stevedore crane suddenly lowered the container onto the chassis as the longshoreman was trying to remove a twist lock. The court found that the ship violated no *Scindia* duty which caused the injury.

4. Suitable Alternative Employment

In *Newport News Shipbuilding and Dry Dock Co. v. Riley*, 262 F.3d 227 (4th Cir. 2001), the Fourth Circuit held that a longshoreman made out a *prima facie* case of work-related disability. The employer did not meet its burden of proving that suitable alternative employment was available when the employer terminated the apprentice employee for poor performance from alternative work that was not within her physical restrictions.

5. Punitive Damages

One federal court followed the majority of courts in allowing longshoremen injured in territorial waters to recover punitive damages. *Rutherford v. Mallard Bay Drilling, L.L.C.*, 2001 A.M.C. 2813 (E.D. La. 2000).

However, in *Welch v. Fugro Geosciences, Inc.*, 804 So. 2d 710 (La. App. 1st Cir. 2001),

the court held that nonpecuniary damages, including punitive damages, cannot be recovered for the deaths of seamen or longshoremen in state waters.

6. Attorney's Fees

The fee-shifting provision of the LHWCA, 33 U.S.C. § 928(a), contemplates four triggering events for assessing fees against the employer: (1) formal notice of a claim; (2) employer controversion of a claim within 30 days; (3) successful prosecution by the claimant; and (4) use of an attorney to prosecute the claim. Any attorney's fees incurred before receipt of such notice cannot be charged against the employer. In *Weaver v. Ingalls Shipbuilding, Inc.*, 282 F.3d 357 (5th Cir. 2002), the Fifth Circuit "concluded that [attorney's] fees incurred within the thirty-day window may be assessed against an employer, if the other triggers have been satisfied." See also *Pool Co. v. Cooper*, 274 F.3d 173 (5th Cir. 2001).

7. Settlement Credits

In *Alexander v. Director*, 273 F.3d 1267 (9th Cir. 2001), the Ninth Circuit held that the last employer liable for an asbestos injury is not entitled to a credit for the claimant's settlements with prior employers under the LHWCA. The court declared that 33 U.S.C. § 903(e) limits such credits to compensation under other acts.

General Maritime Law

1. Admiralty Jurisdiction

In *Ayers v. U.S.*, 277 F.3d 821 (6th Cir. 2002), the Sixth Circuit held that a claim against the government for a drowning when water was released from a lock to let vessels pass through, satisfied the location and maritime connection tests. After finding admiralty jurisdiction existed, the court dismissed the claims as time-barred for failure to file a Suits in Admiralty Act ("SAA") claim within two years of the incident. The court reiterated that SAA claims were not recognizable under the Federal Tort Claims Act ("FTCA"), and that the two-year time

period for filing a SAA claim was not equitably tolled when the claimant mistakenly proceeded under the FTCA.

In contract claims, admiralty jurisdiction exists only if the contract is maritime in nature, that is, if the contract has reference to maritime services or transactions. To determine whether there is jurisdiction over a contract to build or supply equipment, a structure is not a vessel until it is both completed and until it is fitted to perform its purpose, even though it has been delivered earlier. In *Hyundai Heavy Industries Co., Ltd. v. M/V Saibos FDS*, 163 F. Supp. 2d 1307 (S.D. Ala. 2001), a vessel built for laying underwater pipe that sailed across the Pacific Ocean for the addition of necessary equipment by a subcontractor was not a vessel for admiralty jurisdiction purposes.

In *St. Paul Fire and Marine Ins. Co. v. Gulfside Casino Partnership*, 2002 A.M.C. 143 (S.D. Miss. 2001), the court held that a former ocean-going vessel, now moored permanently on navigable waters as a gaming casino, was not a vessel. Accordingly, hull and P&I policies were not marine contracts under admiralty jurisdiction.

2. Federal Wreck Act

In *Terre Aux Boeufs Land Co., Inc. v. J.R. Gray Barge Co.*, 803 So. 2d 86 (La. App. 4th Cir. 2001), the court held that the Federal Wreck Act, 33 U.S.C. § 409, did not apply to a barge stranded on a landowner's property during a hurricane, where the barge was not in a waterway. After concluding that the law of trespass did not apply due to the lack of an intentional act by the owner, operator or charterer, the court declared that the barge was a disturbance in fact, and that the barge owner was responsible for removing the barge.

3. Time Charterer v. Rig Owner Liability

The Fifth Circuit addressed the duties of a vessel owner and/or time charterer as opposed to a drilling rig owner, which was neither a vessel owner nor a charterer. In *re Graham Offshore, Inc.*, 2002 WL 480894 (5th Cir. 2002). Two employees of a

service contractor were injured as they were being ferried ashore in rough waters while evacuating a drilling rig during Hurricane Danny in July 1997. The district court had apportioned the drilling rig owner with 20% fault because its rig superintendent had been designated as the person in charge of implementing its Emergency Evacuation Plan ("EEP"). The court also indicated that the rig owner shared in a hybrid duty with the vessel owner for the safe transportation of the plaintiffs for elements which fell within their "sphere of control." On appeal, the Fifth Circuit absolved the drilling rig owner of any fault. The court concluded that the EEP did not impose any legal duty on the rig owner to oversee and/or execute the operations of the vessel used to evacuate personnel from the rig. As the court reiterated, "[t]he general mission route, cargo, and timing of a chartered vessel's voyage are traditionally within the control of the vessel operator and the time-charterer." The Fifth Circuit held that the EEP did not alter this traditional arrangement, and that the drilling rig owner, which did not own, operate, or charter the evacuation vessel, had no legal duty regarding the operation of the vessel.

4. Unseaworthiness

In *Ballance v. Energy Transp. Corp.*, 2002 A.M.C. 198 (S.D.N.Y. 2001), the court confirmed that mere sexual harassment does not establish the savage and vicious nature of a seaman necessary to support a finding of unseaworthiness.

5. Products Liability

In *LaPlante v. Wellcraft Marine Corp.*, 2002 A.M.C. 130 (Calif. Ct. App. 2001), the court held that the Federal Boating Safety Act ("FBSA"), 46 U.S.C. § 430 *et seq.*, does not preempt the entire field of recreational boating. The FBSA's provision authorizing regulations governing handholds does not signify express preemption when no such regulations are issued. The court allowed the plaintiff's claim

for lack of and/or defective handholds against the vessel manufacturer to proceed under state law.

6. Passenger Claims

A carrier must establish that it did all that it reasonably could to warn a passenger of terms in its ticket affecting legal rights. In *Ward v. Cross Sound Ferry*, 273 F.3d 520 (2d Cir. 2001), the Second Circuit adopted a two-factor test to examine this rule: (1) physical characteristics of the ticket, and (2) circumstances permitting the passenger to become meaningfully informed. The court held that the carrier failed the “meaningfully informed” part of the test where the ferry ticket was only held by the passenger for two to three minutes before it was handed to the ticket collector after the passenger had fallen on the gangway. The court concluded that the lawsuit, which was filed two-and-a-half years after the accident, was not time-barred by the one-year limitation contained in the ticket.

In *Resnick v. Magical Cruise Co., Ltd.*, 148 F. Supp. 2d 1298 (M.D. Ga. 2001), the court held that the Americans With Disabilities Act applies generally to places of accommodation on a cruise ship, but not to new construction and alteration of facilities. The court found that the founding member of Access Now and the not-for-profit corporation had no standing to sue the cruise ship operator for ADA violations. The founder had not attempted to board the cruise ship and had no definite intention to do so.

7. Dram Shop Liability

In *Quinn v. St. Charles Gaming Co., Inc.*, 2002 WL 183852 (La. App. 3d Cir. 2002), a riverboat casino patron consumed large amounts of alcoholic beverages aboard a gaming vessel and was involved in a fatal accident on a Louisiana highway after leaving the casino. The court held that the Admiralty Extension Act applied, that maritime law preempted

Louisiana’s anti-dram shop statute, LSA-R.S. 9:2800.1, and that maritime law provided a cause of action for dram shop liability. Further, the court allowed claims for loss of society and for punitive damages for the death of a non-seaman within state territorial limits.

8. Negligent Infliction of Emotional Distress

In *Hutton v. Norwegian Cruise Line Ltd.*, 144 F Supp. 2d 1325 (S.D. Fla. 2001) a cruise ship collided with a cargo ship in the English Channel. The defendant attempted to have a class action dismissed. The court refused to dismiss the case, holding that, under the “zone of danger” test of negligent infliction of emotional distress, there is no requirement of a physical manifestation of the alleged emotional injury.

9. Maintenance & Cure

In *Boudreaux v. U.S.*, 280 F.3d 461 (5th Cir. 2002), the Fifth Circuit concluded that a seaman working on a U.S. government vessel had not reached maximum medical improvement and was entitled to receive maintenance and cure until such time. The court, however, noted that the government was entitled to a credit against its cure obligation to the extent it paid any past and future medical expenses.

In *Espinal v. Royal Caribbean Cruises, Ltd.*, 253 F.3d 629 (11th Cir. 2001), the Eleventh Circuit held that a Collective Bargaining Agreement binds a seaman’s rate and duration of such pay.

In *Greenwell v. Aztar Indiana Gaming Corp.*, 268 F.3d 486 (7th Cir. 2001), a casino riverboat employee had seen a chiropractor about her back before experiencing back pain on the riverboat casino. She was referred to two independent doctors, who plaintiff alleged negligently operated on her back. The Seventh Circuit dismissed the maintenance and cure claims with prejudice because no injury or illness occurred in the service of the ship, and because there was no fault in the referral and the doctors were not servants of the ship.

In *Blige v. M/V Geeche Girl*, 2001 A.M.C. 2425 (S.D. Ga. 2001), the court reiterated that Medicaid payments satisfy a shipowner's obligation to pay cure, except for out-of-pocket expenses, such as premiums or co-payments. Therefore, the Jones Act employer was entitled to a credit for cure payments made by Medicaid.

10. Robins Dry Dock

The Ninth Circuit held that the *Robins Dry Dock* rule prohibiting certain economic damage claims is not essential to admiralty uniformity and that Alaska's law allowing such claims applied. Therefore, the court allowed tenderboat operators and crews, and seafood processors, dealers, wholesalers and processor employers to assert loss of income claims from damage to fishing. *In re Exxon Valdez*, 2002 A.M.C. 1 (9th Cir. 2002).

11. Punitive Damages

The Ninth Circuit declared that the burden of proof for punitive damage claims under admiralty law is preponderance of the evidence, rather than clear and convincing evidence. Noting conflicting decisions, the court held that an award of punitive damages is sanctioned against a corporate owner based on the reckless conduct of its vessel captain, as a managerial employee in the scope of his employment, regardless of approval or ratification by higher authority. Evidence that the captain was drunk, inattentive, violated regulations and common sense, and that corporate management knew of the captain's alcoholism and failure to maintain his treatment for drinking, supported an award of punitive damages. However, the Ninth Circuit noted that the highest permissible civil penalty for the Exxon Valdez spill was \$786 million and concluded that the \$5 billion award of punitive damages must be reduced. The case was remanded to the district court. *In re Exxon Valdez*, 2002 A.M.C. 1 (9th Cir. 2002).

Allision/Collision

1. Statute of Limitations

In *Voge v. Schnaidt*, 2002 A.M.C. 123 (N.D. 2001), the Supreme Court of North Dakota held that the federal maritime three-year statute of limitations, 46 U.S.C. § 763a, rather than North Dakota's six-year statute, applied to a boat on Lake Sakakwea, an impoundment of the Missouri River.

2. Liability After Vessel Sale

In *Benetic v. M/Y Athena Alexander*, 2002 A.M.C. 297 (C.D. Calif. 2001), the seller of a vessel was not liable under any ownership theory for the purchaser's allision with a moored vessel sixteen days after full payment by and delivery to the purchaser. Typographical errors on the Bill of Sale sent to the Coast Guard and state sales tax questions did not affect ownership.

3. Pennsylvania/Oregon Rules

Under the *Pennsylvania* Rule, a party who violates a statutory or regulatory rule designed to prevent collisions has committed negligence *per se* and has the burden of proving that its statutory fault was not a contributing cause of the accident. The *Oregon* rule states that a moving vessel is presumptively at fault when it hits a stationary object. In *Union Pacific R.R. Co. v. Kirby Inland Marine, Inc. of Mississippi*, 2001 A.M.C. 2857 (S.D. Iowa 2001), the court declared that, where the Coast Guard issued an order citing a bridge as an unreasonable obstruction to navigation, a vessel that strikes it is not subject to the *Oregon* presumption of fault, and that the bridge is subject to the *Pennsylvania* rule and must show its freedom from causation.

In *McLean Contracting Co. v. Waterman Steamship Corp.*, 277 F.3d 477 (4th Cir. 2002), the Fourth Circuit held that the presumption of fault when a moving object strikes a fixed one applies to acts of an agent to presume fault of a

principal in an *in personam* action, while noting that the presumption does not apply when the persons are independent contractors.

In *Pearce v. U.S.*, 2001 A.M.C. 2586 (6th Cir. 2001), the Sixth Circuit reiterated that federal regulations may have the force of law, thus bringing the *Pennsylvania* Rule on causation into play. However, an Army Corps of Engineers' regulation about the posting of warnings at dams requires a discretionary act not reviewable under the Suits in Admiralty Act. Further, a regulation on horns was only part of an internal operating manual that did not have the force of law. Although the Corps installed a horn, thus raising a Good Samaritan duty, it was not negligent when the horn was out of service due to high water.

In *OMI Trent Transport, Inc., v. Marine Inland Transp. Co.*, U.S. Dist. Lexis 23075 (S.D. Tex. 2001), the court held that vessels moored abreast at a bulkhead and extending several feet into the Sabine Neches Waterway's designated 400-foot-wide shipping channel, which were struck by a large passing vessel, were responsible for the resulting damage for encroachment on the channel, regardless of other negligence.

In *Inland River Towing, Inc. v. Am. Commercial Barge Line Co.*, 143 F. Supp. 2d 646 (N.D. Miss. 2000), the court found that both vessels involved in a collision on the lower Mississippi River violated a host of Inland Navigational Rules, 33 U.S.C. § 2001-2038, and concluded that an upbound tug pushing barges was 70% at fault for a collision with a downbound tug pushing barges.

4. Tug/Tow Duties

In *Arkansas State Highway Commission v. Arkansas River Co.*, 271 F.3d 753 (8th Cir. 2001), the court held that a towed dredge whose boom was rigged too high to pass under a bridge was liable for damages caused by its allision with the bridge. While noting that the tug's

master had a duty to observe obvious conditions and guard accordingly, the court concluded that the tug had breached no duty when her master had checked river stages and bridge clearance and judged by eye that the boom would clear.

5. Pilotage Clauses

Bisso v. Inland Waterways Corp., 349 U.S. 85 (1955) limits pilotage exculpatory clauses to towing exculpatory clauses and not an individual pilot's exculpatory clause. In *Enterprise Ship Co. v. Norfolk Southern Ry. Co.*, 2001 A.M.C. 2602 (E.D. Va. 2001), the court found no sufficient proof of a monopoly on pilotage by an individual pilot. Therefore, where a docking pilot was not required by law, but only as a condition to dock at a private terminal, the pilotage clause was valid to exonerate the pilot for simple negligence in docking a live ship.

6. Superseding Cause

In *Trias Maritime Co. Ltd. of Liberia v. Great Lakes Towing Co.*, 2002 A.M.C. 596 (N.D. Ill. 2001), a 729-foot oceangoing vessel allided with the Federal Marine Terminal dock on the Calumet River in Chicago, Illinois. The defendant's tugs were moored near to, but not encroaching upon, the approach channel to the dock. The ship's captain and compulsory pilot testified that the tugs' presence made it more difficult to dock the vessel safely, but admitted that it was "possible and reasonable" to safely dock the vessel. The court concluded that the tugs were not a "substantial or material factor" in causing the accident, and that the sole and superseding cause of the allision was the negligence of those in charge of the oceangoing vessel.

7. Punitive Damages

In *BP Exploration & Oil. Co., Inc. v. Moran Mid-Atlantic Group Corp.*, 147 F. Supp. 2d 333 (D.N.J. 2001), a tug boat allided with a dock facility on the Delaware River in Paulsboro, New Jersey. The mate on watch for more than twelve hours had fallen asleep in the wheelhouse. The tug company had no procedure to ensure that its crew complied with federal law, which prohibits a crewmember from work-

ing more than twelve hours in a consecutive twenty-four hour period, except in an emergency. The court held that the company's failure to have such a procedure in place was simple negligence and would not support the imposition of punitive damages.

Outer Continental Shelf Lands Act

1. Jurisdiction/Choice of Law

In *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487 (5th Cir. 2002), a barge operator suffered a back injury while unloading groceries from a box on a supply boat onto an oil platform located on the Outer Continental Shelf ("OCS"). Noting that the injury must be caused by "a defective appurtenance of a ship on navigable waters," the court reiterated that the Admiralty Extension Act ("AEA") "is meant to apply to the vessel and her appurtenances and does not include those performing actions for the vessel." After confirming Outer Continental Shelf Lands Act ("OCSLA") jurisdiction, the Fifth Circuit held that the AEA did not apply to this case because the allegation was that the box was improperly loaded, not that it was defective. The court applied Louisiana law to the negligence claims and concluded that the grocery supplier did not have an affirmative duty to pack the groceries in the order that deliveries would be made.

Oil Pollution Act of 1990

1. Federal Jurisdiction - Removal

In *Tanguis v. M/V Westchester*, 2001 A.M.C. 2652 (E.D. La. 2001), the court confirmed that the Oil Pollution Act of 1990 ("OPA") created a comprehensive federal scheme for the recovery of oil spill cleanup costs and compensation upon which federal question jurisdiction may be based. Even though the OPA contained a "saving to suitors" clause, it did not prohibit the removal of claims subject to concurrent jurisdiction. Accordingly, fishing and oyster interests' state court class action

arising out of oil spill on the Mississippi River was properly removed to federal court.

2. Federal Regulatory Taking Claims

In *Maritrans, Inc. v. U.S.*, 2002 A.M.C. 419 (Fed. Cl. Ct. 2001), the court held that there was no categorical taking by the government of single-hull barges purchased in 1987 which have to be retired under OPA by 2005. The vessel owner had income from the vessels for ten or more years and recouped its money from the sale of five barges. The court denied an attempt to separate the years that the owner used the vessels profitably from the time when the vessels must be retired. Further, the court rejected the vessel owner's federal regulatory taking claim because the government restrictions for public benefit did not impose disproportionate burdens and were not consistent with a taking. The court focused on the economic impact test and reasoned that a 13% diminution in fair market value of vessels did not approach the high figures that would support regulatory taking.

3. Act of God Defense

In *Apex Oil Co., Inc. v. U.S.*, 2002 A.M.C. 493 (E.D. La. 2002), the court confirmed that an Act of God defense to the strict liability imposed under OPA is more onerous to establish than the common law defense. The phenomenon must be proven to be exceptional, inevitable, and irresistible and must not have been able to be prevented or avoided by exercising due care or foresight. The court held that the National Pollution Fund Center was not arbitrary and capricious in finding a tug, which pushed a barge on the Mississippi River, failed to establish an Act of God. The tug knew about high water and strong currents before it began to proceed with an underpowered tug, and its tow aft barges allided with concrete bridge spans, causing a discharge of 840,000 gallons of slurry oil.

Contractual Indemnity

1. Definition of Indemnity

In *Yang Ming Marine Transport Corp. v. Oceanbridge Shipping Int'l, Inc.*, 2001 A.M.C. 2529 (9th Cir. 2001), the court declared that the word “indemnity” in a contract means not just recovery for payments to third parties, but includes expenses and other losses of the indemnitee.

2. Outer Continental Shelf Cases

In *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487 (5th Cir. 2002), a platform owner time chartered a supply boat to service oil and gas platforms on the OCS of the Gulf of Mexico. A barge operator injured his back while unloading groceries from a box on a supply boat onto an oil platform. The platform owner sought indemnity from the supply boat owner. The Fifth Circuit rejected the indemnity claim because the accident did not arise out of or relate to the performance of the vessel during the charter. The court also affirmed the district court’s finding that the plaintiff was the borrowed employee of the platform owner, a finding which precluded coverage under the policy in question.

3. Gross Negligence

Houston Exploration Co. v. Halliburton Energy Services, Inc., 269 F.3d 528 (5th Cir. 2001) involved a blowout on a natural gas well on the Outer Continental Shelf in the Gulf of Mexico. The district court had concluded that Halliburton’s conduct amounted to gross negligence and held that, under Louisiana law, the indemnity agreement was unenforceable. On appeal, the Fifth Circuit held that under Louisiana or federal maritime law, Halliburton’s conduct did not amount to gross negligence.

4. Attorney’s Fees

In *Natco Ltd. Partnership v. Moran Towing of Florida, Inc.*, 267 F.3d 1190 (11th Cir. 2001),

a towage contract provided that the tow had to hold the tower harmless from “any and all loss . . . arising out of, or in any way contributed to” by unseaworthiness of the tow or deficiency of its equipment. A barge-mounted crane was lost overboard in stormy weather off the coast of North Carolina. It was ultimately found that the loss and damage was solely caused by the tow’s unseaworthiness. The Eleventh Circuit held that the tower was entitled to recover its attorney’s fees for defending against such by the tow and other parties, as well as its counterclaim for breach of contract, but not its fees for establishing its right to indemnity.

Limitation of Liability

1. Jurisdiction - Waiver

In *Karim v. Finch Shipping Co., Ltd.*, 265 F.3d 258 (5th Cir. 2001), the Fifth Circuit held that, by filing for limitation, a shipowner waived any challenge to personal jurisdiction. “Shipowners cannot avail themselves of the benefits under the United States laws, but then refuse to bear the possible burdens under those laws.”

2. Park System Resource Protection Act

The Eleventh Circuit has confirmed that the Park System Resource Protection Act, 16 U.S.C. § 19, *et seq.*, does not limit liabilities it creates for damages to marine resources in the National Park System and precludes application of the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.* In *re Matter of Tug Allie-B Inc.*, 2002 A.M.C. 49 (11th Cir. 2001).

3. Limitation Fund

In *Bayside Towing, Ltd. v. Canadian Pacific Ry. Co.*, 2001 A.M.C. 243 (Canada 2001), the court held that only the tonnage of the tug at fault should be used to calculate the Canadian limitation fund when a dumb barge under tow is involved in a casualty.

4. Injunctions/Stays

The Second Circuit declared that the district court erred in enjoining a Korean shipyard from pursuing relief in Korea, seeking a declaration that it was not liable for damage to a vessel whose owner sought limitation. The court held that the district court should have determined whether the shipyard forfeited its defense of lack of personal jurisdiction before seeking to enjoin the limitation action. *In re Rations Enterprises, Inc. of Panama*, 2001 A.M.C. 2610 (2d Cir. 2001).

The Seventh Circuit has declared that the modification of an injunction to permit injury and death claimants to proceed with state court claims was improper because all claimants did not sign off on the stipulation to abide by the federal court's decision as to limitation. *In re Holly Marine Towing, Inc.*, 2001 A.M.C. 2934 (7th Cir. 2001).

In *Riverway Harbor Service v. Bridge & Crane Inspection, Inc.*, 263 F.3d 786 (8th Cir. 2001), the plaintiff stipulated that a claim of \$15,000 would take priority over his Jones Act claim. The Eighth Circuit held that the plaintiff was entitled to have the federal court stay lifted and to pursue his Jones Act claim in state court.

A claimant is not required to stipulate to exoneration to obtain a lift of a stay order issued under the Limitation of Liability Act. *In re Am. Commercial Lines, L.L.C.*, 158 F. Supp. 2d 1312 (S.D. Ala. 2001); *In re Louisiana Dry Dock Co., L.L.C.*, 157 F. Supp. 2d 1267 (S.D. Ala. 2001).

In *Matter of Thunder Marine, Inc.*, 2001 A.M.C. 2558 (M.D. Fla. 2001), the court held that 46 U.S.C. § 187 expressly preserves claims against a vessel's master, officers, or seamen. Therefore, an injunction of other actions against a vessel owner does not affect a lawsuit against a boat operator.

5. Exoneration

One federal court exonerated the owner of a charter fishing vessel from any liability to a passenger who injured his knee while boarding the vessel. The captain of the vessel had not initiated

the boarding process and did not know or expect that the passenger would attempt to board the vessel unassisted. *In re S&T Fishing, Inc.*, 2002 A.M.C. 375 (D. Hawaii 2001).

6. Late Claims

In *Alter Barge Line, Inc. v. Consolidated Grain & Barge Co.*, 272 F.3d 396 (7th Cir. 2001), the Seventh Circuit opined that an explanation, rather than good cause, is all that is needed for leave to file a late claim in a limitation proceeding, if the action is ongoing and the late claim will not prejudice other parties. The court exercised its equitable powers under admiralty law to achieve substantial justice and ordered the district court to allow the late claim.

Insurance

1. Definition of Accident

In *Harken Exploration Co. v. Sphere Drake Ins., PLC*, 261 F.3d 466 (5th Cir. 2001), a trust which owned a ranch where an oil company was conducting operations, sued for pollution damages under several theories of liability. The Fifth Circuit held that, under Texas law, the insurer had a duty to defend the oil and gas exploration company. The court reasoned that "if the act is deliberately taken, performed negligently, and the effect is not the intended or expected result had the deliberate act been performed non-negligently, there is an accident."

2. Uberimae Fidei Doctrine

The doctrine of *uberimae fidei* requires that an insured fully and voluntarily disclose to the insurer all facts material to a calculation of the insurance risk. In *AXA Global Risks (UK) Ltd. v. Pierre*, 2001 A.M.C. 228 (S.D. Fla. 2001), the court held that ambiguous questions on an application regarding boat ownership, storage location, use of crew, and prior insurance claims would be construed against the insurer and precluded summary judgment.

3. Third Party Liability

In *Norfolk Shipbuilding & Drydock Corp. v. Seabulk Transmarine Partnership, Ltd.*, 274 F.3d 249 (5th Cir. 2001), the Fifth Circuit declared that a builder's risk policy issued to the buyer and the builder as named insureds, containing a clause insuring against third-party liabilities, did not cover liabilities or expenses when either named insured sued the other. The court reasoned that a principal insured cannot be a third party.

4. Warranty of Seaworthiness

In *Underwriter's at Lloyd's v. Labarca*, 2001 A.M.C. 2409 (1st Cir. 2001), the First Circuit examined a hull policy which warranted that the vessel would be "maintained in a seaworthy condition at all times." The court concluded that the underwriters were not liable for a vessel sinking at a pier because the owner inadvertently left uncapped two seawater cooling hoses for the vessel's air conditioning system while the system was running. The court reasoned that even a temporary condition of unseaworthiness which causes a loss breaches the warranty and voids coverage.

5. Commercial Use Warranty

In *Acadia Ins. Co. v. Allied Marine Transport LLC*, 151 F. Supp. 2d 107 (D. Me. 2001), the court concluded that a vessel which sank in calm waters was unseaworthy because its sole operator was incompetent. Further, the court declared use of the vessel was to carry cargo to and from coastal islands. However, the vessel was being used for diving operations when it sank, breaching the warranty of commercial use. Accordingly, there was no insurance coverage.

6. Open Cargo Policy Clauses

In *New York Marine & General Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112 (2d Cir. 2001), a typewritten addition in the certificate issued

by the holder of an open cargo policy stated that "notwithstanding anything contained herein to the contrary," followed by a list of clauses. The Second Circuit held that this wording was unambiguous and overrode anything inconsistent in the open policy. Therefore, the "all risks" clause of the open cargo policy was superseded by the narrower terms of the listed London ICC Clauses (C).

7. Coverage - Stacking

In *Great Lakes Dredge & Dock Co. v. City of Chicago*, 260 F.3d 789 (7th Cir. 2001), the Seventh Circuit reiterated that an occurrence policy is not triggered unless loss to the claimant occurs during the policy period. In this case involving the Chicago Flood of 1992, the initial damage to the city by weakening its tunnel occurred in an earlier policy period, and later and greater damage to claimants by flooding during a later policy period. The negligent failure to prevent the flooding was an insurable risk and was an occurrence which triggered coverage for the flood claims. The court refused to allow stacking of the policies where the injury occurred during the earlier period and damage during the later period.

8. Direct Actions

In *Spomer v. Aggressor Int'l, Inc.*, 807 So. 2d 267 (La. App. 1st Cir. 2001), a dive instructor sought damages for personal injuries incurred in the Cayman Islands. The insurer provided coverage through "cover notes" generated by a Louisiana broker, delivered in Louisiana to an agent of the insured, and sent by the Louisiana agent to the Cayman Islands. In holding that the policy was subject to Louisiana's Direct Action Statute, the court stated: "by generating and delivering 'cover notes' in Louisiana, [the insurer] has constructively delivered its policies in this state."

9. Arbitration - Waiver

In *Federico v. Charterers Mut. Assurance Ass'n Ltd.*, 158 F. Supp. 2d 565 (E.D. Pa. 2001), the court concluded that a P&I insurer did not waive its right to arbitrate a claim by a longshoreman based on a

judgment obtained by the longshoreman against an insolvent insurer by not demanding arbitration during the underlying litigation. The insurer was not a party to the underlying lawsuit, which did not involve insurance policy and/or coverage issues. The plaintiff failed to establish any delay in seeking arbitration, the existence of extensive discovery, and any prejudice.

OSHA Inspections

1. Jurisdiction

In *Chao v. Transocean Offshore, Inc.*, 276 F.3d 725 (5th Cir. 2002), the Fifth Circuit held that OSHA had jurisdiction to inspect the decks of the M/V Discoverer Enterprise, an “inspected vessel” and subject to inspection by the U.S. Coast Guard. The Court noted that OSHA was inspecting the workplace of shipyard workers as authorized by statute and its regulations. A judgment of civil contempt and an award of attorney’s fees and costs to the Secretary of Labor was upheld.

2. Coast Guard vs. OSHA Regulations

In *Chao v. Mallard Bay Drilling, Inc.*, 122 S. Ct. 738 (2002), the United States Supreme Court declared that general marine safety regulations issued by the Coast Guard did not preempt OSHA’s jurisdiction over working conditions on an uninspected vessel conducting inland drilling operations, where the Coast Guard regulations did not address the occupational safety and health risks posed by such operations. The Court concluded that an oil and gas exploration barge, which was anchored in state territorial waters, was a “workplace” for purposes of OSHA jurisdiction.

3. Shipyard Violations/Citations

In *Trinity Marine Nashville, Inc. v. Occupational Safety and Health Review Commission*, 275 F.3d 423 (5th Cir. 2001), a shipyard worker was electrocuted and killed after plugging a drop light into a plug-in box that had been miswired. The Fifth Circuit overturned two OSHA citations. The

court held that an OSHA regulation prohibiting the use of “worn or frayed” extension cords did not prohibit the continued use of cords repaired with insulation tape and friction tape. The court also declared that Trinity was entitled to fair notice that OSHA had determined that the wood-framed plug-in boxes were unsafe or otherwise unsuitable, after having withdrawn the same citation in 1989, before being cited for a violation in this case.

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. No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.



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 Center, 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*

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