MONTGOMERY McCRACKEN

# *Maritime and Transportation Newsletter*

**Fall/Winter 2013**

## PIRATES ARE SUBJECT TO "UNIVERSAL JURISDICTION" BECAUSE BAD GUYS ARE "ENEMIES OF ALL MANKIND"

*U.S. Statutes Applied to Pirates' Foreign Negotiator Regarding German and U.S. Vessels*

A foreign individual who did not personally take part in pirates' capture of German and U.S. vessels on the high seas, but who aided and abetted the pirates as a shoreside negotiator for ransoms after vessels were captured, was convicted of piracy and conspiracy under various U.S. statutes.

The extraterritorial application of U.S. piracy statutes for crimes committed overseas against German and U.S. vessels and crews by non-nationals was upheld by the Fourth Circuit Court of Appeals because "universal jurisdiction" allows any nation's jurisdiction to prescribe punishment for certain offenses recognized by the community of nations.

The foreign defendant, although he did not personally take part in the capture of the vessels on the high seas, could be prosecuted as a conspirator, aider and abettor of the pirates.

The Court also held as irrelevant the fact that the defendant was seized in Somalia and involuntarily removed to the U.S. by the FBI, or that one of the vessels was German. (*U.S.A. v. Mohammed Saaili Shibin*).

*Note: This case can be contrasted with an article in The New York Times on Oct. 15, in which Belgian authorities performed a "sting" operation on a well-known Somali pirate by inviting him to Belgium to sign a movie deal about his swashbuckling past in the Somali piracy business. When he got off the plane in Brussels, he was greeted by cameras and the police, who arrested him.*

## VESSEL MOORED IN NARROW WATERWAY FOUND 70 PERCENT AT FAULT WHEN STRUCK BY A PASSING VESSEL

*The "Pennsylvania Rule" Applied*

In common law tort cases, contributory negligence of the plaintiff, no matter how small, can bar any recovery from the party who may have been more negligent in causing the loss. In contrast, maritime law will apportion the loss among the parties in proportion to the percentage of negligence the court attributes to each party. Moreover, the burden of proof may change where a party is in violation of a statutory rule established by law.

*(Continued on page 2)*

### JURISDICTION IN LHWCA CASES DEPENDS ON SITUS

In order to be covered by the Longshoreman and Harbor Workers' Compensation Act (LHWCA), an employee must prove that his injury occurred in an "area adjoining navigable waters customarily used by the employer in loading or unloading a vessel," such as a dock or pier. When an employee of a stevedore was injured in a facility in New Orleans about 300 yards from the Intracoastal Canal, near a radiator shop, an auto repair shop and other manufacturers, the injury was not covered by the LHWCA. (*New Orleans Depot Services v. Director, Office of Workers' Compensation Programs*).

## VESSEL MOORED IN NARROW WATERWAY

*(Continued from page 1)*

The Fifth Circuit Court of Appeals approved a 70 percent at fault finding against a dredge that was moored in a narrow channel of the Intercoastal Waterway when it was struck by a passing vessel. Usually a moored vessel would not be found negligent at all in such an "allision." If both vessels were moving, it would have been called a "collision."

The dredge was moored on the bank of a narrow channel in violation of the Island Navigation Rule 9, which prohibits such mooring. Furthermore, violation of an Inland rule triggered another rule that the U.S. Supreme Court laid down in *The Pennsylvania* in 1873 that shifted the burden of proving causation to the party in violation of a statutory rule.

The district court apportioned 70 percent of the liability to the stationary dredge and the Fifth Circuit affirmed. In *The Pennsylvania,* the U.S. Supreme Court established a harsh burden shifting presumption for causation when a vessel "at the time of a collision is in actual violation of a statutory rule intended to prevent collisions." The violating ship 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. The rule creates a presumption that one who violates a clear statutory regulation will be deemed responsible.

The presumption is rebuttable, but it is an uphill fight, as demonstrated by the Fifth Circuit decision in *Mike Hooks Dredging Company v. Marquette Transportation Gulf Inland, LLC*.

## FORUM SELECTION CLAUSE IN AN OCEAN BILL OF LADING IS ENFORCEABLE UNLESS UNJUST OR UNREASONABLE

*Courts Apply Three-Part Test*

Maritime bills of lading usually contain a forum selection clause dictating where claims or suits are to be filed. Sometimes they are challenged by shippers because the forum specified in the printed contract is convenient only for the carrier that issued the bill of lading. However, a forum selection clause is *prima facie* valid unless the shipper can prove that it is unreasonable or unjust.

In evaluating whether a forum selection clause is invalid, the court will consider the following three factors: (1) was the clause included in the contract as a result of fraud or overreaching; (2) would the party challenging the clause be effectively deprived of its day in court; and (3) would enforcement of the clause contravene a strong public policy in the state where the suit was brought.

A forum selection clause is usually enforced where the venue is specified in mandatory and exclusive language. For example: "Any and all actions shall be brought in the District Court of Tokyo, Japan, to the exclusion of the jurisdiction of any other courts."

Where it can be shown that the foreign forum would reduce the carrier's liability compared to that of the U.S. Carriage of Good by Sea Act (COGSA), the shipper might prevail. But where the foreign forum has adopted law based on the same international laws, such as The Hague Rules, on which COGSA is based, the challenge will not prevail. (*Al Good v. NYK Lines*).

## COGSA "FAIR OPPORTUNITY" DOCTRINE DEPENDS ON THE BILL OF LADING TERMS

Under the "Fair Opportunity" doctrine of the U.S. Carriage of Goods by Sea Act (COGSA) §4(5), the $500 per package limitation is inapplicable if the shipper does not have a fair opportunity to declare higher value of his goods and pay the corresponding higher freight rates.

In determining whether the shipper received a fair opportunity, the carrier bears the initial burden of offering *prima facie* evidence, usually found in the terms of the covering bill of lading. If the carrier is able to cite the appropriate language in the bill of lading, the burden of proof then shifts to the shipper to demonstrate that a fair opportunity was not in fact provided.

The usual bill of lading clause provides that "unless the nature and value of such goods have been declared by the shipper before shipment, agreed by the carrier, inserted in the bill of lading and freight paid on an *ad valorem* basis.

Some carriers, in order to play it safe, provide a space or box on the face of their bill of lading in which to insert the declared value. As shippers usually obtain cargo insurance covering full value, the space or box is seldom filled in. (*OOO "Garant-S" v. Empire United Lines Co.*).

## SUPREME COURT SPLITS OVER MEANING OF "VESSEL"

The word "vessel" appears in practically every maritime decision and is usually a basis for admiralty jurisdiction. Because under maritime law a vessel is given personification, it can be sued, arrested, and put up a bond to be released, like a person. This is important because when the owner cannot be found in the jurisdiction, a claimant can sue the vessel as security.

What qualifies as a "vessel" under maritime law may be anything from a rowboat to an ocean liner and all sorts of contrivances that float in navigable waters and are capable of transportation—but not all. For example, a floating casino permanently tied to a dock is not a "vessel." A motorized houseboat is a "vessel." A vessel loses its personality while in a floating dry dock, and the dry dock is also not a "vessel."

The U.S. Supreme Court this year grappled with the issue of whether a house built on a float capable of being towed between marinas where it was docked for long periods is a "vessel." The Court said it took a practical rather than a theoretical approach: Would a reasonable observer looking at the floating home consider it "designed to a practical degree for carrying people or things over water?" The home had no means of propulsion, no power, no steering mechanism and French doors instead of watertight portholes. In the majority's view, it was not designed to any practical degree to transport persons or things over water.

The word "vessel" is defined in the Rules of Construction Act as an "artificial contrivance capable of being used as a means of transportation on water." The U.S. Supreme Court focused on "capable" and "transportation on water."

Two dissenting justices objected to the creation of the novel "reasonable observer" standard because in their view, it introduced a vague subjective component that could lead to more confusion. As part of their dissent, they would have remanded the case to get more evidence. (*Lozman v. City of Rivera Beach*).

## NVOCC IS PROTECTED BY COGSA $500 LIMITATION ALTHOUGH AUTOS WERE STOLEN FROM ITS FACILITY AND A BILL OF LADING WAS NOT ISSUED

A federal court in New York has held that a Non-Vessel Operating Carrier (NVOCC) is entitled to U.S. Carriage of Good by Sea Act (COGSA)'s $500 limitation although the autos were stolen from its facility before they were delivered to the loading pier and before a bill of lading was issued by the carrier.

There have been COGSA cases where an ocean carrier was protected from thefts on its pier before the cargo was loaded and before bills of lading were issued. The COGSA statute applies only from loading to discharge, but usually by contract the bill of lading extends its protection before loading and after discharge while the goods remain in the custody of the Carrier at the ocean terminals. It is common for ocean carriers not to issue bills of lading until after the cargo is loaded.

Usually "dock receipts" are issued to shippers when cargo is delivered to a pier, and those receipts incorporate by reference the carrier's bill of lading.

What is unusual in this case is that the NVOCC, who is recognized as a maritime carrier regulated by the Federal Maritime Commission (FMC), although it does not own or charter the carrying vessel, extended the COGSA provision in its house bills of lading to the time the cargo was delivered to its "facility," which could be a warehouse miles inland. Because the autos were stolen, the NVOCC had not actually issued bills of lading. Its custom was to issue the house bills of lading after the autos had been loaded on a vessel. The shipper was aware of this practice and was well aware of the terms of the house bills of lading since it was a regular customer of the NVOCC. The Court held the shipper was bound by the terms of the unissued bills of lading. (*OOO "Garant-S" v. Empire United Lines Co.*).

## A STEVEDORE HIRED BY BOTH THE SHIPPER AND CARRIER IS STILL PROTECTED BY BILL OF LADING THAT WAS NEVER ISSUED

A stevedores company was hired by the shipper to unload 143,200-pound boiler from a railcar, store the boiler until the ship arrived, and then move the boiler to shipside for loading. The stevedore also had an exclusive contract with the ocean carrier.

The stevedore company received the boiler and stored it. When the ship arrived, the stevedore loaded the boiler onto the stevedore's trailer and moved it to the vessel's side. While maneuvering the trailer into proper location for loading, as directed by the vessel's port captain, the boiler fell off the trailer and sustained significant damage. The shipper sued the stevedore for $284,415 in damages, as well as fees, interest and cost.

The trial court held that the stevedore's liability was not limited by the U.S. Carriage of Good by Sea Act (COGSA) because the stevedore at the time was not acting as the agent of the ocean carrier. It found the stevedore was solely liable for the loss.

On appeal, the Fifth Circuit Court of Appeals found that the agency dispute had no bearing on the outcome of the case because the bill of lading "unambiguously resolved the question" of limiting the stevedore's liability.

The bill of lading extended COGSA's coverage to include the period before loading so long as the goods are in the actual custody of the carrier or any "servant or agent." Moreover, the bill of lading defined "servants or agents" as including inter alia, the stevedores. Therefore, the $500 COGSA package limitation "necessarily applied." It should be noted that no bill of lading was issued. However, the Fifth Circuit noted that when circumstances intervene to prevent issuance of a bill of lading, the shipper is still bound by its terms, which were known by the shipper. (*Rafinasi v. Coastal Cargo Company Incorporated*).

## U.S. GOVERNMENT CANNOT CHALLENGE A LIMITATION PROCEEDING WITHOUT FIRST FILING A PROOF OF CLAIM

*Even if a U.S. Claim is Not Subject to Limitation*

A party who does not first file a claim in response to a petition for exoneration from a limitation of maritime liability has no standing to contest the petition, according to the Eighth Circuit Court of Appeals.

The owner of a towboat that lost four barges on the Mississippi River, causing extensive damage to a lock and dam, filed a petition for exoneration or limitation of liability and notified the federal government of its action. The government did not file a proof of claim or answer as required by the rules, but instead appeared in the proceeding and filed a motion to dismiss. It argued that its claims were not subject to limitation under the Rivers and Harbors Act.

Rule F(5) of the Supplemental Rules for Admiralty provides that anyone wishing to contest a vessel owner's right to limitation must file a proof of claim and an answer. The district court dismissed the action, finding that the federal government's claim was not subject to the Limitation Act, and there were no other claimants.

The Eighth Circuit reversed. Assuming the government had a claim not subject to limitation under the Rivers and Harbor Act, the government did not have to appear at all in the limitation proceeding. It could prosecute its claim separately. But if the government chose to appear in the proceeding, it would have no standing to make any motion unless it first filed a claim in accordance with Rule F(5), the same as any other claimant. (*American River Transportation Company v. U.S.A. Cargo of Engineers*.)

## PARTY IS SANCTIONED FOR DESTRUCTION OF ELECTRONIC DOCUMENTS AFTER RECEIVING A CLAIM

*U.S. Law Presumes Prejudice Even If Data Are Protected by Law of a Party's Country*

Destroying electronic records relevant to a pending claim or lawsuit is never a good idea, even when emails are destroyed or deleted without malevolent intentions. A federal court in New York has ruled that, "When evidence is destroyed willfully or through any gross negligence, prejudice to the innocent party may be presumed," as a matter of law.

The reason, according to the court, is that when electronic documents requested for production cannot be produced because the evidence was deleted or destroyed intentionally, the judge can reasonably assume the deleted evidence would have been helpful to the other side. Moreover, the court may impose sanctioned for failure to produce the destroyed evidence. The complaining party does not have to show malevolence. It is enough to prove that a hold was not placed on the file until long after the claim was filed and that the emails or other relevant data were intentionally deleted. (*Sekisui Medical America v. Hart*).

After a claim is filed, no documents in the relevant file should be destroyed. Not even duplicates, for explaining that the destroyed emails or data were duplications only raises an issue of credibility which will be overcome by the presumption. When a claim is received, the hold should be placed promptly on relevant files of any department or of any outside investigators.

In a parallel case involving a Brazilian plaintiff, an apology and cultural explanation for failure to produce requested documents in the same court got nowhere when months went by and the plaintiff failed to produce documents that are requested by a defendant on discovery.

The Brazilian plaintiff claimed he did not understand English. His lawyers went to Brazil to discuss discovery requirements with him, but after a seven-month delay. They found plaintiffs had not produced several documents because they were considered private and protected from revelation under Brazilian law, which provide that "the secrecy of correspondence and of telegraphic data and telephone communications is unviable."

But the judge found the plaintiff and his trust "had a culpable state of mind as they and their counsel were at least negligent" in failing to comply with U.S. court rules for months. The judge added that having availed themselves of a United States court system, plaintiffs "have no credible excuse for their blatant disregard of the discovery process." The judge imposed sanctions on the plaintiff and his trust. (*Valentini v. Citigroup*).

## SHOULD OWNERS BUY SEPARATE INSURANCE TO COVER GENERAL AVERAGE EXPENDITURES IN CONTAINERSHIP CASES?

Although litigation growing out of the July 2012 explosion and fire onboard the M/V MSC Flaminia while in transit from Charleston, S.C. to Antwerp, Belgium is just beginning, it has already produced a significant decision involving security to be posted in favor of salvors and for general average (GA) expenditures. The salvage arbitrator ordered that security representing 65 percent of the value of the cargo be posted while the GA adjuster demanded 100 percent of that same value.

Cargo eventually agreed to post the amount ordered for the salvage, but resisted the GA adjuster's claim. The court sided with Cargo, ordering that Cargo put up 100 percent of its value, 65 percent for salvors, 35 percent for GA. The result reflects that only 100 percent of value is available to satisfy claims from a sale realizing that, in all probability, the salvors' lien would take precedence, and the salvors would get their 65 percent.

The Joint Hull Committee in London has recently floated a proposal whereby owners would buy separate insurance to cover what otherwise would be GA expenditures in these box ship cases. It remains to be seen whether the market will accept this proposal. (*MSC Flaminia*).

## FIRM HOSTS EIGHTH ANNUAL INTERNATIONAL MARITIME LAW SEMINAR IN LONDON

Montgomery McCracken had the pleasure of participating in the Eighth Annual International Maritime Law Seminar in London on September 26.

More than 300 people attended the half-day event held at Gibson's Hall. Fifteen well-respected lawyers from 14 counties around the globe spoke on developments in their respective countries. Partner **Alfred Kuffler**, acting as anchor speaker, discussed several U.S. cases, including the recent decision by the Third Circuit in the Athos I which for the first time found that a warranty of safe berth between a terminal and charterer is impliedly warranted to a vessel and its owner. He also spoke about the M/V AKILI decision from the Second Circuit which holds that a sub-sub charterer has a lien for cargo loss against a vessel even though there is no privity of contract with the Owner, the bill of lading acts only as a receipt and the sub-charterparty prohibits direct action against the vessel. The *in rem* action was permitted because of the way COGSA was incorporated into the charter.

*Alfred J. Kuffler*

The London Seminar was modified this year to add a panel of industry speakers at the end of the session. Partner **Vincent DeOrchis,** founder of the London Seminar in 2005**,** moderated that panel, which included executives from the North of England, the American Club and Gard, as well as the in-house counsel to Enterprises Shipping. The speakers at this panel covered issues ranging from Club correspondents, to piracy, to bunker quality and government interference.

*Vincent M. DeOrchis*

The substantive program was followed by a cocktail party which provided guests with an opportunity to network. Next year's London Seminar is tentatively scheduled at Gibson's Hall in London for September 27, 2014.

## MONTGOMERY MCCRACKEN MARITIME ATTORNEYS ENJOY NOVEMBER MEETING OF THE VESSEL OWNERS' AND CAPTAINS' ASSOCIATION

On November 6, partners **John Levy** and **Alfred Kuffler** and associate **Melanie Leney** attended the November meeting of the Vessel Owners' and Captains' Association. The more-than-500 attendees enjoyed a "shore-style" lobster dinner as well as a lovely evening of socializing and networking.

## DO NOT TEXT SOMEONE WHO YOU KNOW IS DRIVING TO REPLY IMMEDIATELY

The Appellate Division of the New Jersey Superior Court ruled for the first time that "a person sending text messages has a duty not to text someone who is driving if the textor knows...the recipient will view the text while driving."

The textor can be held liable for injuries caused by the distracted driver to a third party. The plaintiff has the burden of showing that the textor "actively encouraged" the recipient, such as by asking for an immediate reply.

In the New Jersey case, where a teenager sent several texts to her boyfriend who was driving, there was no evidence that she required an immediate response. The accident occurred less than 30 seconds after the driver received her last text. (*Kubert v. Kyle Best, et al.*).

## NEWS AND MEDIA

- Partner **John Levy** was quoted in *Bloomberg*'s "BP Fights to Shrink Gulf Spill Estimate to Cap Verdict;" *Los Angeles Times*' "Second phase of BP Deepwater Horizon Oil Spill Trial Begins;" and *Chicago Tribune*'s "Analysis: BP's Legal Gamble May Trim Spill Bill By Billions"

- Partner **Vincent DeOrchis** was named to *The Best Lawyers In America*'s 2014 "Best Lawyers in the New York Area" in the category of Admiralty & Maritime Law

***Please Note:*** *This newsletter is not to be considered legal advice. It is meant for general information. Articles were prepared with assistance by* ***M.E. DeOrchis****. For more information, please contact any of the attorneys within the* ***Maritime and Transportation*** *practice group.*

## INTERN PROGRAM OPEN TO FOREIGN LAWYERS AND LAW SCHOOL GRADUATES

Montgomery McCracken continues to sponsor an intern program for foreign lawyers and law graduates.

During the last two years, the firm has hosted young lawyers from Russia, Italy, the Republic of Georgia, the United Kingdom and Belgium. A new trainee from France will be arriving shortly.

The program allows foreign lawyers to be exposed to the American legal system, and observe court hearings, trials, arbitration proceedings, depositions and other events in the course of routine cases handled by the firm.

The program is an outreach by the Maritime and Transportation practice of the firm, but interns can also be exposed to other areas of the law. Interns are generally assigned to the New York office, but may have an opportunity to work in the Philadelphia and New Jersey offices as well.

Anyone who may wish to participate in the three-month program should contact Kaspar Kielland at **kkielland@mmwr.com**.

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