RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW

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I. INTRODUCTION

This article discusses noteworthy admiralty and maritime decisions issued by U.S. federal and state courts between October 1, 2015, and September 30, 2016. The selection of cases included in this survey reflects trends in the law, such as examination of Rule B attachment and maritime liens, several relevant criminal decisions, developments regarding marine insurance, and ongoing interpretation of the Limitation of Liability Act.

II. SEAMEN'S CLAIMS

A. Jones Act and Seaman Status

In *Thompson v. Oceania Cruises, Inc.*, a seaman suffered a slip-and-fall injury due to suds he created during the cleaning of overhead vents in the ship's kitchen.[1] The suds had dripped down his apron and accumulated below on his stepladder. The U.S. District Court for the Southern District of Florida held that there was no negligence by the employer as a matter of law because the employer's directions were not inherently unsafe, the condition was open and obvious, and the employer did not cause the dangerous condition.[2] The court held that although the Jones Act relaxes an employee's burden of proof on the causation element of a negligence claim, it does not abolish it entirely.[3] A Jones Act employer is not an insurer of employee safety, but is liable only for its own negligence.[4]

1. 2015 WL 12562892, at *1 (S.D. Fla. Oct. 13, 2015). The Jones Act is codified at 46 U.S.C. § 30104 *et seq.*
2. *Id.* at *2.
3. *Id.* at *1.
4. *Id.*

Nevor v. Moneypenny Holdings, LLC involved a bench trial on a seaman's claims against his employer for injuries sustained on board a racing sailboat.[5] The U.S. District Court for the District of Rhode Island found in the seaman's favor on all counts and awarded judgment in favor of a seaman.[6] The case was notable for the court's determination that the appropriate pre-judgment interest rate to apply was the twelve percent adopted by the Rhode Island General Assembly.[7]

In *Gold v. Helix Energy Solutions Group, Inc.*, the plaintiff brought Jones Act negligence claims after he was injured aboard the Helix 534—a long drill watercraft.[8] The plaintiff's employment occurred while the Helix 534 was in dry dock at a shipyard undergoing major renovations to convert it to a well-intervention ship.[9] The Texas Court of Appeals held that genuine issues of fact existed as to whether the Helix 534 was a "vessel in navigation."[10] Citing *Stewart v. Dutra Construction*, the court noted that the key question is "whether the watercraft's use 'as a means of transportation on water' is a practical possibility or merely a theoretical one."[11] The court rejected arguments that the vessel lacked self-propulsion, was placed in dry dock, and was arguably undergoing a "major overhaul."[12] Rather, factors such as its physical characteristics, the fact that "everybody" referred to it as a vessel, and a concession that the Helix 534 was a traditional sea-going vessel prior to the repairs might cause a reasonable fact-finder to determine "that the ship was designed to a practical degree for carrying people or things over water, and that the Helix 534's use as a means of transportation on water was a practical possibility."[13]

In *Brown v. Carmeuse Lime & Stone, Inc.*, the U.S. District Court for the Northern District of Ohio addressed unseaworthiness under the general maritime law.[14] The plaintiff brought claims for maintenance and cure, unseaworthiness, and negligence under the Jones Act for injuries he sustained when he slipped and fell on iron ore pellets left on the dock after he had safely disembarked the vessel.[15] The court granted the defendant's motion for summary judgment as to the unseaworthiness claim because the dock was not an appurtenance of the ship and the plaintiff failed to

5. 2016 WL 183906, at *1 (D.R.I. Jan. 14, 2016).
6. Nevor v. Moneypenny Holdings, LLC, 2016 WL 3693468, at *1 (D.R.I. Feb. 16, 2016).
7. *Id.*
8. 482 S.W.3d 638, 641 (Tex. App. 2015), *review granted* (Oct. 21, 2016).
9. *Id.* at 644.
10. *See id.* at 641, 650.
11. *Id.* at 643 (citing Stewart v. Dutra Const. Co. 543 U.S. 481, 496 (2005)).
12. *See id.* at 647–48.
13. *Id.* at 648–50.
14. 2016 WL 3878111, at *1 (N.D. Ohio July 18, 2016).
15. *Id.*

provide evidence that the defendant's employees were improperly trained, incompetent, or "played a substantial part in bringing about or actually causing the injury, and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness."[16] However, the court denied the motion with respect to the Jones Act claim because there were factual issues as to whether spotlights could have illuminated the dock area, whether the plaintiff's crewmates knew about and failed to warn him of the hazardous condition of the dock, and whether the plaintiff was properly trained.[17]

The U.S. District Court for the Southern District of New York in *In re M/V MSC Flaminia* addressed the application of remedies under U.S. law to foreign crewmembers.[18] The mater involved a cargo ship that exploded while sailing from the United States to Belgium.[19] Its German owner and operator commenced a Limitation of Liability action in the United States.[20] The estate of a crewmember killed by the explosion and fire filed a claim seeking damages pursuant to the Jones Act, the Death on the High Seas Act, and U.S. general maritime law.[21] The owner and operator filed a motion for summary judgment seeking to dismiss the estate's claim on the grounds that it was exclusively subject to German law.[22] The court applied the federal choice of law principles set forth in *Lauritzen v. Larsen* and *Hellenic Lines Ltd. v. Rhoditis* to determine whether the Jones Act was applicable.[23] Although the operator had a permanent office in the United States, forty percent of the operator's vessels sailed to and from the United States, and the operator carried passengers on voyages that began, visited, or ended in the United States, those facts did not, when taken together, amount to substantial contacts with the United States.[24] Further, the estate was already receiving full benefits pursuant to German law.[25] Therefore, the court granted the owner and operator's motion for summary judgment.[26]

16. *Id.* at *1–2.
17. *Id.* at *3.
18. 2016 WL 1718252, at *1 (S.D.N.Y. Apr. 27, 2016), *appeal withdrawn*, No. 16-1419 (Aug. 11, 2016).
19. *Id.*
20. *Id.*; 46 U.S.C. § 30511.
21. *In re M/V MSC Flaminia*, 2016 WL 1718252, at *1.
22. *Id.*
23. *Id.* at *4 (citing Lauritzen v. Larsen, 345 U.S. 571 (1953); Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306 (1970)).
24. *Id.* at *7.
25. *Id.* at *9.
26. *Id.*

B. Maintenance and Cure

In *Block Island Fishing, Inc. v. Rogers*, the U.S. District Court for the District of Massachusetts addressed several aspects of maintenance and cure.[27] The court held that a seaman is entitled only to his actual living expenses in calculating the proper rate of maintenance.[28] Furthermore, the vessel owner could not recover overpayment of maintenance benefits already paid, but was entitled to an offset to whatever the seaman was awarded, if anything, at trial.[29] The court also concluded that the vessel owner's liability for maintenance and cure ended on the date when the seaman's treating physician declared that the seaman reached maximum feasible recovery, which the court interpreted as the date that curative treatment terminated.[30]

In a decision addressing an award of punitive damages post-*Townsend*,[31] *Stermer v. Archer-Daniels-Midland*, a seaman alleged that her employer had unreasonably refused to pay her maintenance and cure for two-and-a-half years following her injury.[32] The trial court awarded the seaman $150,000 in punitive damages and $309,174 in attorney fees specifically for arbitrary and capricious failure to pay maintenance and cure.[33] The trial court's award of attorney fees accounted for all of the seaman's estimated fees from the time of the injury until the final judgment of the trial court, despite the fact that she had reached maximum medical improvement more than two years prior to trial and the employer conditionally paid all past due maintenance and cure while reserving its rights to contest the issue at trial.[34] The Louisiana Court of Appeal affirmed, holding that that the seaman was entitled to an award of attorney fees for all work performed on the matter rather than for work done prior to the conditional tender of maintenance and cure by the employer.[35] The court reasoned that the employer's payment of maintenance and cure was "under protest" and subject to a reservation of rights and thus still imposed "[an] obligation [on the seaman] to prove up all the elements necessary to recover maintenance and cure."[36] Furthermore, because the record supported that the employer was arbitrary and capricious in its failure to pay maintenance and cure and that the amount of attorney fees award was equitable, the

27. 149 F. Supp. 3d 214 (D. Mass.), *aff'g in part, vacating in part*, 844 F.3d 358 (1st Cir. 2016).
28. *Id.* at 217–18, 219 n.6.
29. *Id.* at 218 n.5.
30. *Id.* at 219.
31. Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009).
32. 186 So. 3d 319, 321 (La. Ct. App. 2016).
33. *Id.*
34. *Id.*
35. *Id.* at 329.
36. *Id.* at 325.

court affirmed the trial court's award and also awarded $10,000 in attorney fees for work on appeal.[37]

In *Kenney v. Ingram Barge Co.*, the employer argued that the *McCorpen* defense applied and that plaintiff was prohibited from maintenance and cure because he intentionally concealed a pre-existing medical condition from a car accident four years prior to his current injury.[38] The U.S. District Court for the Middle District of Tennessee rejected application of the *McCorpen* defense in this instance because, following the plaintiff's car accident, "[h]e was sent for an x-ray, but, upon a clean finding, was released."[39] Later, when applying for a job with the defendant, the seaman signed a medical submission form and answered "No" to whether he ever had back trouble or prior injuries to his back, including soft muscle injuries, disc/vertebrae injuries, or neurological injuries.[40] The seaman maintained that his answer was accurate because he was told by his physician at the time that "nothing was wrong with him" after his x-ray results were negative.[41] Further, the medical evidence—an initial report of pain and a clear x-ray—was contradictory.[42] The court denied the motion for summary judgment finding that the first requirement of the *McCorpen* defense, intentional concealment, was unresolved because it was plausible that when the plaintiff filled out his medical submission form, he could have been under the objective impression that he never had a prior injury to his back.[43]

III. LIMITATION OF LIABILITY

Courts have been particularly active during the past year in addressing several aspects of the Limitation of Liability Act of 1851.[44] Several relevant decisions have been issued out of the U.S. District Court for the District of Massachusetts. In the *Complaint of Urbelis*, the court addressed a claimant's motion to stay the limitation action in order to try her claims against the vessel owner and other defendants before a jury in state court.[45] The vessel owner filed its limitation action before the claimant filed her complaint in state court.[46] "The district court denied the claim-

37. *Id.* at 329–30.
38. 2016 WL 1660398, at *4 (M.D. Tenn. Apr. 27, 2016) (discussing McCorpen v. Cent. Gulf Steamship Corp., 396 F.2d 547 (5th Cir. 1968)).
39. *Id.* at *7.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. 46 U.S.C. §§ 30501–30512.
45. 2016 WL 4579120, at *2 (D. Mass. Aug. 31, 2016).
46. *Id.* at *1.

ants motion, expressing doubt that it could allow the state court action to proceed while simultaneously preserving the vessel owner's rights to litigate the limitation issue in federal court and to be free from liability in excess of the limitation fund."

In *In re Block Island Fishing, Inc.*, the court held that a complaint for Limitation of Liability pursuant to Rule F(1) must be filed within six months from the notice of a claim, but a delay in posting security for the value of the vessel has no effect on the timeliness of the action.[47] The court also ruled that a potential claimant's motion to dismiss the complaint was premature because the claimant had failed to file a claim and therefore lacked standing.[48]

In re Polito involved a motion for issuance of an injunction to restrain all other suits in a limitation action.[49] The vessel owners valued the vessel based on the declaration of one of the owners with no indication as to how that value was determined.[50] The court rejected such a valuation by an "interested party" and denied the petitioners' motion due to their failure to provide adequate support for the amount submitted as security.[51]

In *Kaminski v. Ervin*,[52] the U.S. District Court for the District of Maryland addressed the procedural standards and sufficiency required for filing a verified complaint for limitation of liability under the Limitation of Liability Act.[53] The petitioners' complaint alleged that they were at all times the owners of the vessel at issue, certain passengers on board allegedly suffered injuries resulting in potential claims for personal injury and death, and that the petitioners received notice from counsel for several of the passengers by letter less than two months after the incident.[54] The limitation complaint further alleged that the claims exceeded the petitioners' interest in the vessel and that

> the occurrence and any loss, damage, or injury resulting therefrom occurred without the privity or knowledge of the [p]laintiffs and were not caused or contributed to by any fault or negligence on the part of the Vessel or those in charge of her, or of the [p]laintiffs, or of anyone else for whose acts or omissions the [p]laintiffs may be responsible.[55]

47. 2016 WL 3976581, at *2 (D. Mass. July 22, 2016) (mot. for recons. pending).
48. *Id.* at *2.
49. 2015 WL 5554018, at *1 (D. Mass. Sept. 21, 2015).
50. *Id.* at *4.
51. *Id.*
52. 2016 WL 3997296, at *1 (D. Md. July 25, 2016).
53. *See* 46 U.S.C. §§ 30501–30512.
54. *Kaminski*, 2016 WL 3997296 at *1 (the allision occurred on July 26, 2015 and the plaintiffs received notice on Aug. 12, 2015).
55. *Id.*

In determining the sufficiency of the petitioners' limitation complaint, the court noted that the standard to be applied should be consistent with Rule 8(a) of the Federal Rules of Civil Procedure, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief."[56] The court further noted that Rule F(2) mandates that petitioners sufficiently meet the burden of proof as to absence or lack of privity or knowledge and that simply stating legal conclusions as factual allegations, such as the "damage was done, occasioned and incurred without the privity or knowledge of the plaintiffs," could not pass muster.[57] Accordingly, the court dismissed the petitioners' limitation complaint because it failed to "set forth the facts on the basis of which the right to limit liability is asserted."[58]

IV. CRUISE LINES

In *Lieberman v. Carnival Cruise Lines*, the plaintiffs slipped and fell on a puddle, caused by a spilt drink, directly outside of the elevator on a cruise ship.[59] The plaintiffs filed a seven-count complaint asserting causes of action against the cruise line for negligence; violations of the New Jersey Consumer Fraud Act; breach of contract; breach of good faith and fair dealing; violations of New Jersey's Law Against Discrimination, the Rehabilitation Act of 1973, and the Americans with Disabilities Act ("ADA"); *respondeat superior*; and loss of consortium.[60] The U.S. District Court for the District of New Jersey dismissed the ADA claims as a matter of law, holding that Congress did not define the statutory purpose so broadly as to include common law claims in tort, nor did it mention damages for personal injury.[61] The district court likewise disposed of the plaintiffs' claim for loss of consortium, holding that the general maritime law does not permit loss of consortium claims for passengers.[62] Emphasizing the significance of uniformity in federal maritime law, the district court aptly reasoned that uniformity would hardly exist in the Third Circuit if a plaintiff could recover loss of consortium damages for an injured cruise ship passenger, but could not recover those same losses for a deceased seaman.[63]

In an issue of first impression, the Eleventh Circuit in *Alberts v. Royal Caribbean Cruises* examined enforcement of an arbitration clause in a cruise line musician's employment contract under the New York Conven-

56. *Id.* at *2.
57. *Id.*
58. *Id.* (citing FED. R. CIV. P. F(2)).
59. 2015 WL 7069654, at *2 (D.N.J. Nov. 12, 2015).
60. *Id.*
61. *Id.*at *10.
62. *Id.* at *30–31.
63. *Id.* (citing Miles v. Apex Marine Corp., 498 U.S. 19, 33 (1990)).

tion.[64] Absent an affirmative defense, a district court must compel arbitration under the New York Convention if four jurisdictional requirements are met: (1) the agreement must be in writing; (2) the agreement must provide for arbitration in the territory of a signatory to the Convention; (3) the agreement must arise out of a commercial relationship; and (4) the party to the agreement is either not an American or the relationship involves foreign property, envisages performance abroad, or has some reasonable relation to one or more foreign states.[65] The issue before the court was whether the contract for the musician's performance onboard the cruise ship "envisaged performance abroad."[66] The musician argued that the term "abroad" required the musician to be in a foreign state and not merely in international waters.[67] The cruise line argued that "abroad" meant anywhere outside of the country.[68] The Eleventh Circuit adopted an intermediate position and held that "abroad" meant in or traveling to or from a foreign state. Conversely, performance in international waters on a voyage from a domestic port to another domestic port would not be considered "abroad."[69] Because the musician's performance was during travel in international waters to foreign ports, the Eleventh Circuit enforced the arbitration clause.[70]

V. COLLISION, TOWAGE, AND THE WRECK ACT

Following several years of litigation and a remand from the Third Circuit, the district court in *United States v. CITGO Asphalt Refining Co.* (*In re Frescati Shipping Co.*), conducted a bench trial and issued an extensive decision determining liability for an oil spill on the Delaware River.[71] The oil tanker M/T ATHOS had struck an unknown abandoned ship anchor on the bottom of the river, resulting in a spill of 264,000 gallons of crude oil.[72] The U.S. District Court for the Eastern District of Pennsylvania determined that the sub-charterer of the vessel breached the safe-berth warranty contained in the sub-charter party and that the vessel owner was a third-party beneficiary to the sub-charter agreement.[73] As a result, the sub-charterer was held liable to the vessel owner for breach of contract in excess of $55 million for cleanup costs, plus pre-judgment

64. 2016 WL 4437557, at *1 (11th Cir. 2016); 9 U.S.C. § 202.
65. *Alberts*, 2016 WL 4437557, at *1.
66. *Id.* at *3.
67. *Id.* at *2.
68. *Id.*
69. *Id.* at *3.
70. *Id.*
71. 2016 WL 4035994 (E.D. Pa. July 25, 2016).
72. *Id.* at *2.
73. *Id.* at *58.

interest.[74] The court further held that the equitable defense of recoupment limited the U.S. government's recovery of cleanup costs to fifty percent of its expenditures because the government and the sub-charterer could have both taken steps to locate the unknown anchor.[75]

Holt v. Brown concerned an allision involving a nineteen-foot center console bay boat and a dock in the South Carolina's Intracoastal Waterway, resulting in personal injuries.[76] At issue was application of the lookout Rule under the Inland Rules of Navigation. Although a passenger may have been at the helm at the time of the allision, the U.S. District Court for the District of South Carolina held that the duty to maintain a proper lookout remained with the operator or captain of the vessel, who "alone owed his passengers a duty to maintain a proper lookout at all times during the Boat's night cruise."[77] Thus, Inland Rule 5 "must be followed precisely," and "[w]hoever is keeping a lookout must be able to give proper attention to that task and should not . . . undertake duties that would interfere with this function."[78]

In *In re Buccina*, the Sixth Circuit addressed whether a "collision," as that term is used in Inland Rules of Navigation 6 and 8, occurs when a vessel strikes a wake or wave, but not another vessel, so as to invoke application of the *Pennsylvania* rule.[79] Although the appeal was ultimately dismissed for lack of jurisdiction, the court stated that "[d]efining collision so broadly would lead to too many disputes whenever a driver of a boat comes into contact with a wave—which happens virtually every time a boat enters the water. In other words, this definition simply takes in too many circumstances that do not apply the Rule of *The Pennsylvania* in a practical or workable way."[80] The court clarified, however, that "[n]othing in this opinion calls into question the principle that boats may be liable for damages to other boats for creating a dangerous or excessive wake."[81]

In *In re Ingram Barge Co.*,[82] the petitioner-in-limitation's vessel unsuccessfully attempted to navigate past the Marseilles, Illinois dam, and allided into the Marseilles Canal during a high-water situation.[83] The tow broke apart, resulting in seven of its barges either alliding with the dam or sinking

74. *Id.* at *89.
75. *Id.* at *80.
76. 2016 WL 5402240, at *10 (D.S.C. May 5, 2016).
77. *Id.*
78. *Id.* at *5 (citation omitted).
79. 2016 WL 3597632, at *4 (6th Cir. 2016).
80. *Id.* at *2.
81. *Id.* at *2 n.3 (citing Matheny v. Tenn. Valley Auth., 557 F.3d 311, 316 (6th Cir. 2009); *In re* Cleveland Tankers, Inc., 67 F.3d 1200, 1205–06 (6th Cir. 1995)).
82. 2016 WL 1450027 (N.D. Ill. Apr. 13, 2016).
83. *Id.* at *1.

upriver.[84] Statutory criminal penalties appearing in the Wreck Act (33 U.S.C. § 409) permit the United States to recover implied civil remedies (i.e., money damages) from vessel owners who violate the Wreck Act.[85] The United States moved for summary judgment on this issue of its immunity from liability under the Flood Control Act, 33 U.S.C. § 702c, or in the alternative, under the discretionary function exception.[86] The U.S. District Court for the Northern District of Illinois held that although the United States may avail itself of Flood Control Act immunity when it is engaged in "'flood control activity' resulting in damage by flood waters,"[87] the record contained an issue of fact regarding whether the U.S. Army Corps of Engineers acted upon the Marseilles waters for the purpose of flood control.[88] The simple fact that the river ran high without any concern from the dam operators that the river was in jeopardy of flooding precluded summary judgment.[89] However, dismissal was appropriate for any claim based on the lockmaster's operation of the dam gates during the attempted transit because the lockmaster's conduct—even if negligent—was discretionary and policy-based, and, therefore, was subject to immunity from tort liability under the discretionary function exception.[90]

In re Moran involved a barge crane that was damaged in the Port of Philadelphia while it was being moved by a tugboat.[91] The tower sought to invoke its schedule of rates and term and conditions, including a limitation of liability provision that was published on its website, capping damages at a certain dollar amount.[92] The U.S. District Court for the Eastern District of Pennsylvania granted the tower's motion for partial summary judgment and applied the limitation of damages.[93] The district court noted that it is common in the towage industry for a towage contract to be oral, often consisting of a telephone conversation, with the remaining terms to be determined based on previous dealings.[94] Under this guidance, the court concluded that although the towage contract was made orally by telephone with the only term discussed being the rate, the course of dealing between the parties supported the notion that the schedule was incorporated into the oral contract for towage services.[95]

84. *Id.*
85. *Id.* at *11–12.
86. *In re* Ingram Barge Co., 2016 WL 3742850, at *4 (N.D. Ill. July 13, 2016).
87. *Id.* at *8.
88. *Id.* at *11.
89. *Id.* at *12.
90. *Id.*
91. 175 F. Supp. 3d 508 (E.D. Pa. Mar. 31, 2016).
92. *Id.*
93. *Id.*
94. *Id.* at 517 (citing Sun Oil Co. v. Dalzell Towing Co., Inc., 55 F.2d 63, 64 (2d Cir. 1932)).
95. *Id.* at 522.

The tow interest's failure to read the schedule did not raise an issue of fact.[96] Likewise, the court found that the tower's failure to send a follow-up invoice after the allision did not raise a question of fact.[97]

In *Mount v. Keahole Point Fish, LLC*, the U.S. District Court for the District of Hawaii granted partial summary judgment in favor of the defendants and against a diver on his claims of negligence *per se* and unseaworthiness.[98] The diver argued that the defendants were subject to and had violated the regulations of the U.S. Coast Guard (USCG) as they pertained to commercial diving operations.[99] The defendants argued that their fish farming vessels were not subject to these regulations.[100] The plaintiffs did not appear to dispute the defendants' position on this point; however, they argued that the defendants' vessels legally qualified as "towing vessels," which would be subject to the regulations.[101] The court held that the vessels were not towing vessels and refused to reclassify them as such simply because the defendants' vessels had previously towed two other vessels as a "Good Samaritan."[102]

VI. MARINE INSURANCE

Several important decisions concerning interpretation of marine insurance policies were recently issued by the U.S. District Court for the Southern District of New York. In *AGCS Marine Insurance Co. v. World Fuel Services, Inc.*, an international oil supplier sold about $17 million of marine gas oil to a person who claimed to be an employee of the U.S. Defense Logistics Agency, but was actually an imposter and a thief who absconded with the marine gas oil after delivery.[103] In a declaratory judgment action filed by the insurer, the court addressed several of the policy's clauses. The all-risk clause at issue covered physical loss or damage from any external cause during transit.[104] Under New York law, an insured makes out a *prima facie* case for recovery under an all-risk clause if it shows the existence of the clause, an insurable interest, and a fortuitous loss.[105] The insurer did not dispute any of those elements, but rather whether the loss occurred during the covered period.[106] The insurer argued that the loss occurred be-

96. *Id.* at 524–25.
97. *Id.* at 525–26.
98. 147 F. Supp. 3d 1116, 1124 (D. Haw. 2015).
99. 46 C.F.R. § 197.200.
100. *Keahole Point Fish*, 147 F. Supp. 3d at 1120.
101. *Id.*
102. *Id.* at 1123.
103. 2016 WL 2918428, at *2 (S.D.N.Y. May 17, 2016).
104. *Id.* at *6.
105. *Id.*
106. *Id.* at *7.

fore transit began, when the fraud commenced, or after delivery when the thief absconded with the marine gas oil.[107] The court held that under applicable New York law, "delivery to a thief is not delivery at all."[108] Therefore, the transit had not ceased and the loss occurred within the covered period.[109] The court also considered whether the loss was covered under the fraudulent bill of lading and F.O.B. clauses.[110] The court held that the loss was not covered under the fraudulent bill of lading clause because the fraudulent sales contract was not a "shipping document"—it only initiated and started the shipping process.[111] Furthermore, the F.O.B. clause did not cover the loss because the supplier's insurable interest ended when it transferred the marine gas oil to the buyer.[112]

Swift Spindrift Ltd. v. Alvada Insurance Inc. involved a bulk cargo vessel that was arrested in Libya.[113] After judgment was entered in the arrest proceedings, the vessel was released.[114] The insurer rejected the owner's claim that the duration of the arrest rendered the vessel a constructive total loss under applicable insurance policies.[115] The court considered whether the arrest was covered under the insurance policies.[116] The phrase "arrest," however, appeared throughout the policies' messy patchwork of coverages and exclusions, making the analysis and answer to that question complex.[117] For example, the policies' perils clauses covered ". . . Arrests, Restraints and Detainments of all Kings, Princes and Peoples, or what nation, condition or quality whatsoever . . ."[118] The court found that these perils clauses covered only arrests by sovereign powers, but did not cover arrests by private commercial parties.[119] The policies' supplemental coverage clauses, which restored coverage for "arrests" otherwise excluded by the exclusions clauses, similarly covered only arrests by sovereign powers.[120] Overall, the court found in favor of the insurer, reasoning that the meaning of a covered peril should not change from coverage clause to exclusions clause to supplemental coverage clause.[121]

107. *Id.*
108. AGCS Marine Ins. Co. v. World Fuel Servs., Inc., 2016 WL 2918428, at *8 (S.D.N.Y. May 17, 2016) (internal quotation omitted).
109. *Id.* at *11.
110. *Id.* at *16.
111. *Id.* at *16–18.
112. *Id.*
113. 175 F. Supp. 3d 169 (S.D.N.Y. Mar. 29, 2016).
114. *Id.* at 171.
115. *Id.*
116. *Id.* at 175.
117. *Id.* at 176–77.
118. Swift Spindrift Ltd. v. Alvada Ins. Inc., 175 F. Supp. 3d 169, 177 (S.D.N.Y. Mar. 29, 2016).
119. *Id.* at 179–86.
120. *Id.* at 185.
121. *Id.* at 185–86.

Fireman's Fund Insurance Co. v. Great American Insurance Co. of New York involved a deteriorated dry dock that sank.[122] An insurer providing a marine general liability policy and a marine excess liability policy agreed to fund the removal and cleanup costs (in excess of $12 million), but reserved its rights to seek reimbursement from other insurers providing a pollution policy and an excess property policy.[123] The Second Circuit found that the dispute, which concerned a sunken dry dock, would directly impact maritime commerce and that the pollution policy, which covered pollution in navigable waters, was a maritime contract.[124] Therefore, the doctrine of *uberrimae fidei* applied.[125] Because the marine construction company failed to disclose the dry dock's deteriorated condition to the pollution insurer and the pollution insurer relied upon the absence of this material fact, the marine construction company breached its duty of "utmost good faith" under the doctrine, and therefore the pollution insurer was entitled to void the policy.[126] However, the doctrine of *unberrimae fidei* did not apply to the excess property policy, which was not a maritime contract.[127] Under the applicable state law of Mississippi, an insurer can void a policy if the insured makes a material misrepresentation in its application.[128] The marine construction company's failure to disclose the dry dock's deteriorated condition amounted to a material misrepresentation and the excess property insurer was entitled to void the policy.[129]

In *Great Lakes Reinsurance (UK) PLC v. Kan-Do, Inc.*, the Eleventh Circuit examined an all-risk policy where a blown fuse led to the mechanical failure of the bilge pump system and subsequent sinking of the insured's yacht.[130] The insurer argued that the insured failed to prove with specificity the cause of the blown fuse and was not entitled to coverage under the all-risk policy. In general terms, all-risk policies cover losses from "fortuitous events," unless there is a specific exclusion in the policy.[131] A fortuitous event is an event that, so far as the parties are aware, is dependent on chance.[132] The Eleventh Circuit held that the insured met its "light burden" of proving a chance event with proof that that the yacht was well

122. 822 F.3d 620, 626–27 (2d Cir. 2016).
123. *Id.* at 630.
124. *Id.* at 630–34.
125. *Id.* at 637.
126. *Id.* at 640.
127. Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of N.Y., 822 F.3d 620, 641 (2d Cir. 2016).
128. *Id.* at 645–46.
129. *Id.* at 645–50.
130. 639 F. App'x 599, 602 (11th Cir. 2016).
131. *Id.* at 601.
132. *Id.* at 601–02.

maintained and there was no evidence presented by the insurer of wear and tear or lack of maintenance.[133]

In *Brawner Builders, Inc. v. Northern Assurance Co. of America*, the Fourth Circuit examined the extent of insurance coverage where the policy at issue required the crewmembers to be specifically named in an attached endorsement.[134] The insurer denied coverage where the insured failed to inform its insurer that an injured crewmember had been working on its vessels until the day of the incident.[135] The Fourth Circuit ruled that the policy unambiguously required crewmembers to be named in the endorsement for coverage to apply, and that the crewmember's claim was not covered because he was not a named crewmember at the time he suffered his injury.[136]

In *Markel American Insurance Co. v. Vantage Yacht Club, LLC*, an employee of a boat rental agency provided a group of friends with a free boat ride on the Chicago River after they were unable to pay the rental fee.[137] After the boat returned to the dock, a passenger fell into the water and drowned.[138] Based on the allegations in the underlying complaint, the U.S. District Court for the Northern District of Illinois held that the facts alleged to have led to the casualty did not occur from conduct arising on the vessel, but on the "premises" of the dock, which was not within the scope of coverage.[139] This distinction relieved the insurer from its duty to defend because the policy covered only those liabilities arising out of "ownership, maintenance, or use of" the boat.[140]

Continental Insurance Co. v. George J. Beemsterboer, Inc.[141] involved a class action alleging improper storage of petroleum coke at a storage and transfer terminal in Chicago, leading to contamination of nearby communities.[142] The insurer denied coverage, asserting that the policy's respirable dust exclusion relieved it of the duty to defend.[143] The U.S Northern District of Indiana reviewed the applicability of a respirable dust exclusion and held that the claims for damages caused by petroleum

133. *Id.* at 602.
134. 637 F. App'x 703, 708 (4th Cir. 2015). The endorsement provided "[i]t is a condition of this Policy that the named crew members covered under this policy [are] . . . [six (6) names listed]"; the injured crew member was not among the names listed.
135. *Id.*
136. *Id.*
137. 158 F. Supp. 3d 699, 703 (N.D. Ill. Jan. 26, 2016).
138. *Id.*
139. *Id.* at 705–06.
140. *Id.* at 705.
141. 148 F. Supp. 3d 770 (N.D. Ind. Dec. 8, 2015).
142. *Id.* at 775.
143. *Id.* at 791.

coke dust created during the loading and off-loading activities were not covered under the policy.[144]

VII. CARGO

In *OOCL (USA) Inc. v. Transco Shipping Corp.*, a shipper transported cargo on a carrier's vessel and after the cargo arrived at its destination, a consignee endorsed and presented the bills of lading.[145] The consignee notified a third-party buyer that the cargo arrived, but the third-party buyer had gone out of business and never took possession.[146] The carrier incurred demurrage charges until the unclaimed cargo was transported to a salvaging agent, where it continued to incur reduced detention charges until the unclaimed cargo was sold.[147] The carrier sued the consignee for, among other things, breaches of the bills of lading and sought to recover demurrage and detention charges that it incurred while the cargo sat unclaimed.[148] The U.S. District Court for the Southern District of New York found that the consignee became a party to the bills of lading, and was aware of the applicable terms and conditions, when it endorsed and presented the bills of lading.[149] Further, the carrier performed its obligations under the bills of lading, the consignee breached the bills of lading when it failed to pay demurrage and detention charges, and the carrier suffered damages as a result and adequately mitigated its damages.[150] Therefore, the district court found in favor of the carrier and awarded damages in the amount of the demurrage and detention charges, less the sale proceeds, plus prejudgment interest and reasonable attorney fees.[151]

In *Transatlantic Lines, LLC v. Portus Stevedoring, LLC*, a charterer claimed that stevedores negligently stowed and improperly secured cargo containers aboard the vessel, resulting in the containers being lost overboard.[152] The charterer sought indemnity from the stevedores based on the Supreme Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, which held that a shipowner is strictly liable for personal injuries resulting from unseaworthiness, but that a stevedore must completely indemnify the shipowner for any such injury caused by

144. *Id.* at 792–93.
145. 2015 WL 9460565, at *2 (S.D.N.Y. Dec. 23, 2015), *recons. denied*, 2016 WL 4481153 (S.D.N.Y. Aug. 23, 2016).
146. *Id.* at *3
147. *Id.*
148. *Id.* at *1.
149. *Id.* at *4–5.
150. *Id.* at *6.
151. *Id.* at *6–7.
152. 2015 WL 5813389, at *4 (S.D. Fla. Oct. 6, 2015).

the stevedore's negligence.[153] However, the U.S. District Court for the Southern District of Florida held that the *Ryan* decision did not apply to cases of property damage or negligence and the court found both parties to be at fault, apportioning damages between them.[154] The stevedore failed to secure the cargo in a manner that was either customary or reasonable under the circumstances. The charterer was at fault for approving the stevedore's actions, tendering the vessel in poor condition, and failing to monitor the cargo.[155]

In *Maher Terminals, LLC v. Port Authority of New York and New Jersey*, a landside marine terminal operator sought to avoid rent due under its lease agreement with the Port Authority of New York and New Jersey, arguing that the agreement's obligations violated the U.S. Constitution's Tonnage Clause, the Rivers and Harbors Appropriation Act, and the Water Resources Development Act (WRDA).[156] The Third Circuit held that terminal operator failed to state a claim under the Tonnage Clause because the alleged injury was not to a vessel or its representative.[157] The Rivers and Harbors Appropriation Act was inapplicable because the rent was not a tax or fee imposed on or collected from a vessel, its passengers, or its crew.[158] Lastly, the terminal operator failed to state a claim under the WRDA because the WRDA applied only to fees on vessels and cargo and the Port Authority never purported to impose rent pursuant to the WRDA.[159]

VIII. RULE B ATTACHMENT AND MARITIME LIENS

There have been numerous pertinent decisions issued over the past year involving attachments of property under Federal Rule of Civil Procedure Supplemental Rule B[160] and arrests of vessels and assertions of maritime liens under Federal Rule of Civil Procedure Supplemental Rule C.[161]

Turning first to Rule B interpretation, the issue in *World Fuel Services Europe Ltd. v. Thoresen Shipping Singapore Private Ltd.* was whether the U.S. District Court for the Southern District of Alabama maintained jurisdiction over a defendant after Rule B property was released and left the

153. *Id.*; Ryan Stevedoring Co., Inc. v. Pan-Atl. Steamship Corp., 350 U.S. 124 (1956).
154. *Ryan*, 350 U.S. at 132–35.
155. Transatlantic Lines, LLC, 2015 WL 5813389, at *4.
156. 805 F.3d 98 (3d Cir. 2015).
157. *Id.* at 104–10.
158. *Id.* at 110–11.
159. *Id.* at 111.
160. *See* Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.
161. *See* Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions.

district.[162] A Rule B attachment is *quasi in rem* and permits the assertion of jurisdiction over a defendant's property, even though the court has no *in personam* jurisdiction over the defendant.[163] Assuming that the defendant does not waive personal jurisdiction and restricts its appearance pursuant to Rule E(8) for the sole purpose of testing the validity of the attachment, the court held that its jurisdiction over the defendant terminates upon the release of the defendant's property. Accordingly, after the attached vessel was released, the court dismissed the case against the defendant for lack of jurisdiction.[164]

In *Montemp Maritime Ltd. v. Hanjin Shipping Co. Ltd.*, the U.S. Central District of California declined to issue a Rule B writ of attachment without requesting any briefing on the application.[165] Relying on the availability of a state court seizure provisions through Rule 64 of the Federal Rules of Civil Procedure, the court held that even though the plaintiff had carried its burden of demonstrating that it was entitled to a Rule B attachment, it had not carried its burden of proving that the requirements of obtaining an attachment under the California Code of Civil Procedure had been met.[166] Specifically, the court did not believe the plaintiff had demonstrated it would suffer great or irreparable injury if the application was heard on a noticed motion pursuant to California Code of Civil Procedure § 485.220(a), since "nothing in the Plaintiff's Applications . . . indicates Hanjin is likely to hide or diminish its own assets prior to a noticed hearing."[167] Shortly thereafter, a stay was issued in the Hanjin bankruptcy, effectively precluding the plaintiff from pursuing the attachment.

In *Malin International Repair & Drydock, Inc. v. Oceanografia*, a shipyard operator sought to recover the balance of unpaid invoices for work, services, and supplies it provided to a bareboat charterer.[168] Under Rule B, the shipyard operator attached the fuel bunkers aboard the vessel two weeks after the bareboat charterer had taken delivery of the vessel.[169] In turn, the bareboat charterer moved to vacate the attachment, asserting that it did not hold an attachable interest in the bunkers at the time of the attachment because title had not yet passed to it and because it had neither paid nor received an invoice for the bunkers and therefore did not own them.[170] Because "[t]he body of federal mar-

162. F. Supp. 3d 1226, 1232 (S.D. Ala. Dec. 18, 2015), *appeal dismissed* (11th Cir. May 25, 2016).
163. *Id.* at 1231.
164. *Id.* at 1233.
165. 2016 WL 4621194, at *1 (C.D. Cal. Sept. 9, 2016).
166. *Id.* at *1–2.
167. *Id.* at *2.
168. 817 F.3d 241, 243 (5th Cir. 2016).
169. *Id.*
170. *Id.*

itime jurisprudence presents ambiguity as to whether . . . a possessory interest is attachable under Rule B[,]" the Fifth Circuit applied state law to determine whether the vessel operator possessed an attachable interest in fuel bunkers under the bareboat charter agreement.[171] Applying Texas common law, the court found that the charter party provision obligating the bareboat charterer to "purchase the bunkers" at the time of delivery and the actions of the parties demonstrated that the parties contemplated a credit sale—rather than a cash sale—which does not require concurrent payment on delivery to pass title.[172] Therefore, the Fifth Circuit held that bareboat charterer acquired title to the bunkers on delivery and thus possessed an attachable interest at the time of the shipyard operator's attachment.[173]

Several recent decisions have addressed the assertion of *in rem* maritime lien claims under the Commercial Instruments and Maritime Lien Act (CIMLA),[174] specifically the element of CIMLA requiring that bunkers be provided "to a vessel on the order of the owner or a person authorized by the owner" in order for a maritime lien for necessaries to exist over a vessel.[175] In *Valero Marketing & Supply Co. v. M/V ALMI SUN*, a decision now on appeal to the Fifth Circuit, the physical supplier of bunker fuel, Valero, alleged that it supplied approximately 200 metric tons of marine bunker fuel to the subject vessel, for which it was never paid.[176] Valero further contended that it entered into a maritime contract for the supply of fuel bunkers to the vessel with O.W. Bunker USA, Inc., which Valero alleged acted as an agent or broker for the vessel, an allegation the court rejected.[177] The court held that Valero did not possess a lien against the vessel because the vessel captain's knowledge that Valero would supply the vessel with bunker fuel did not, by itself, demonstrate that the provision of necessaries were made on order of the vessel's owner or an authorized person.[178] The court was not persuaded by the fact that the vessel's captain was forewarned that the physical supplier would be supplying fuel to the vessel and was given instruction to coordinate the delivery with Valero.[179] The court held that these actions did not constitute selection or ratification by the vessel under the CIMLA and

171. *Id.* at 246; *see id.* at 244–47 (discussing the body of federal maritime jurisprudence concerning attachable property interests under Supplemental Admiralty Rule B).
172. *Id.* at 247–49.
173. *Id.* at 249.
174. 46 U.S.C. § 31341 *et seq.*
175. 46 U.S.C. § 31342(a).
176. 160 F. Supp. 3d 973, 975 (E.D. La. Feb. 8, 2016), *appeal filed*, No. 16-30194 (5th Cir. Mar. 7, 2016).
177. *Id.*
178. *Id.* at 984.
179. *See id.* at 983–85.

therefore did not entitle Valero to a maritime lien.[180] The court ultimately concluded that "merely knowing that a subcontractor would be used, or even that a particular supplier would most likely be used, to ultimately furnish necessaries, does not necessarily create a maritime lien."[181] Recent decisions issued by the U.S. District Court for the Western District of Washington in *Bunker Holdings Ltd. v. M/V YM Success*[182] and the U.S. District Court for the Southern District of New York in *O'Rourke Marine Services. L.P., v. M/V COSCO Haifa*[183] held likewise.

Choice of law concerning maritime liens was addressed by the Fifth Circuit in *World Fuel Services Singapore Pte, Ltd. v. BULK JULIANA M/V*, wherein a company that provided fuel to ocean faring vessels filed suit against a vessel to enforce a lien under the Federal Maritime Lien Act for bunkers supplied while the vessel was moored in Singapore.[184] An email between the bunker supplier and vessel charterer incorporated the "general terms and conditions" of the supplier, which were available online or in hard copy upon request.[185] The general terms adopted by the parties provided that any transactions were to be "governed by the General Maritime Law of the United States."[186] The Fifth Circuit held that the U.S. choice of law provision was incorporated into the bunker supply agreement under Singapore law despite the fact that neither the vessel owner nor the vessel itself was party to the bunker confirmation e-mail.[187] Therefore, applying the Federal Maritime Lien Act, the court held that the charterer of vessel had authority to bind the vessel, through maritime lien, for necessaries that it procured for the vessel.[188]

The District Court of Maine conducted two bench trials concerning maritime lien claims brought against the same vessel. In *Maine Uniform Rental, Inc. v. M/V Nova Star*, a linen and cleaning services provider brought maritime lien claims against the vessel after its invoices remained unsatisfied.[189] The court determined that the provider's delivery of linens satisfied the requirements of establishing a maritime lien for necessaries because they were physically delivered to the vessel.[190] However, the items that remained in the provider's inventory were not

180. *Id.*
181. *Id.* at 983.
182. 2016 WL 3144403 (W.D. Wash. June 6, 2016).
183. 2016 WL 1544742 (S.D.N.Y. Apr. 8, 2016).
184. 822 F.3d 766 (5th Cir. 2016).
185. *Id.*
186. *Id.* at 769.
187. *Id.* at 772–74.
188. *See id.*
189. 2016 WL 4681097, at *1–2 (D. Me. Sept. 7, 2016).
190. *Id.* at *3 (citing Cianbro Corp. v. George H. Dean, Inc., 596 F.3d 10, 14–15 (1st Cir. 2010); Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 6–7 (1920)).

"delivered" to the ship in such a way as to create a maritime lien.[191] In *Portland Development Corp. v. M/V Nova Star*,[192] the court ruled that the plaintiff's loan and advances were for necessaries not physically delivered or dispatched to the vessel and therefore no maritime lien existed.[193] Furthermore, even if the necessaries had been delivered to the vessel, the plaintiff waived its claims to a maritime lien because it negotiated an unsecured loan.[194]

IX. CRIMINAL

In *United States v. Kaluza*, the Fifth Circuit interpreted the seaman's manslaughter statute, 18 U.S.C. § 1115, in the context of charges brought against BP's "well site leaders" on the Deepwater Horizon during its blowout, which resulted in the deaths of eleven men.[195] The district court granted the defendants' motion to dismiss the counts under § 1115 on the basis that neither defendant fell within the meaning of the phrase "[e]very . . . other person employed on any . . . vessel" as provided in the statute.[196] The Fifth Circuit affirmed, holding that because the meaning of the phrase "[e]very . . . other person employed on any . . . vessel" is ambiguous, it must apply *ejusdem generis* under which the defendants did not come within the statue.[197]

In *United States v. Black Elk Energy Offshore Operations, LLC*, the defendants were indicted under 43 U.S.C. § 1350 of the Outer Continental Shelf Lands Act (OSCLA) for knowingly and willfully violating OCSLA's enabling regulations through their alleged roles in a welding accident and explosion that occurred on an offshore oil platform eight miles off the coast of Louisiana, resulting in three casualties, several injuries, and pollution.[198] The U.S. District Court for the Eastern District of Louisiana dismissed the indictments against the contractor-defendants, holding that independent contractors do not fall under the class of persons defined in the statute.[199] Notably, the court rejected the government's position that the defendant-contractors fit within the defined class under traditional agency principles.[200] It concluded that "[t]he fact that a contractor must comply with OCSLA regulations does not also mean that it may be

191. *Id.* at *4.
192. 2016 WL 4660914, at *3 (D. Me. Sept. 7, 2016).
193. *Id.*
194. *Id.* at *4.
195. 780 F.3d 647, 650 (5th Cir. 2015).
196. *Id.*
197. *See id.* at 659–62.
198. 2016 WL 1458925, at *1–2 (E.D. La. Apr. 14, 2016).
199. *Id.* at *4.
200. *Id.*

held criminally liable for their violation. . . . Indeed, if Congress had intended to treat contractors as jointly and severally liable for violation of the regulations, there is no reason that it would not have expressly included contractors in the [statute]."[201]

In *United States v. Fafalios*, the Fifth Circuit held that chief engineers on foreign flagged vessels cannot be prosecuted under the Act to Prevent Pollution from Ships (APPS) for having failed to maintain an oil record book.[202] Even though Fafalios was the chief engineer of the vessel, was responsible for making oil record book entries accounting for the dumping of bilge water, ordered crew members to pump the bilge water directly into the ocean, and failed to record those discharges in the vessel's oil record book, he contended that the government failed to prove that he, as the chief engineer, was the "master or other person having charge of [the] ship" as required under the criminal statute.[203] The Fifth Circuit agreed, holding that because Section 151.25 "explicitly and exclusively designates the 'master' of the ship as the individual 'responsible' for maintaining the oil record book" and "the regulations [issued thereunder] mention only the 'master' when assigning [such] responsibility[,]" this plainly indicates that the responsibility does not extend to others on the vessel.[204]

X. ADMIRALTY JURISDICTION

A case included in last year's article, *In re Petition of Germain*, involved a claimant who was seriously injured when he dove from a boat into shallow water and struck his head on the bottom.[205] The Second Circuit addressed whether the district court had admiralty jurisdiction because the Limitation of Liability Act of 1851 does not provide an independent source of subject matter jurisdiction.[206] As to the first prong of the admiralty tort jurisdiction test, the parties agreed that the tort occurred on navigable waters.[207] As to the second prong, the Second Circuit held that the tort had a potentially disruptive effect on maritime commerce because the resulting injury could have distracted the vessel's crew and because commercial vessels might have been diverted to aid the injured claimant.[208] Further, the court held that admiralty jurisdiction was proper; the tort bore a substantial relationship to traditional maritime activity because the

201. *Id.* at *5.
202. 817 F.3d 155, 157 (5th Cir. 2016).
203. *Id.* at 157–59.
204. *Id.* at 159 (citing to 33 C.F.R. §§ 151.25(a), (j) (2015)).
205. 824 F.3d 258, 261 (2d Cir. 2016).
206. *Id.* at 264–76.
207. *Id.* at 271.
208. *Id.* at 273–74.

vessel owner transported passengers on navigable waters and anchored the vessel within navigable waters.[209]

In contrast, in *Petrobas America, Inc. v. Vicinay Cadenas, S.A.*, Petrobas and the underwriters of its all-risks insurance policy brought suit in federal district court for negligence, products liability, and failure to warn against the manufacturer of underwater tether chains used to secure oil piping systems.[210] The action arose when a tether chain broke after being installed to secure Petrobas's piping system for oil production from the Outer Continental Shelf of the Gulf of Mexico.[211] When the chain ruptured, it caused equipment to collapse to the sea floor, severing the connection between the wellhead and the surface and resulting in extensive monetary damages.[212] The Fifth Circuit held that "maritime law does not apply of its own force . . . [because] [t]he rupture of the tether chain was neither potentially nor actually disruptive to navigation and maritime commerce, nor did it bear a substantial relation to traditional maritime activity."[213] The court considered the incident in general terms, observing that where "a component failed on an underwater structure in an offshore production installation and caused the structure to fall to the sea floor[,] [s]uch an incident does not have the potential to disrupt maritime commercial or navigational activities on or in the Gulf of Mexico."[214] Accordingly, because the other OCSLA choice of law criteria were also satisfied, Louisiana law applied to the dispute.[215]

In re Complaint of Christopher Columbus, LLC involved a fight between patrons on a night cruise, which eventually resulted in the filing of a limitation of liability action.[216] The parties invited the district court to reconcile the "recurring and inherent conflict" between grounding a limitation proceeding in exclusive admiralty jurisdiction and ensuring that the exclusivity of that jurisdiction did not render the savings clause meaningless.[217] The U.S. District Court for the Eastern District of Pennsylvania concluded that the general run of cases involving fights between patrons on board vessels that are in the immediate process of docking presents concerns that are "too remote" from those underlying the primary purpose of admiralty jurisdiction.[218] Therefore, the limitation proceeding was dismissed for lack of admiralty jurisdiction.

209. *Id.* at 274–75.
210. 815 F.3d 211, 213–14, *order clarified on reh'g*, 2016 WL 3974098 (5th Cir. 2016).
211. *Id.* at 213.
212. *Id.*
213. *Id.* at 218.
214. *Id.* at 217.
215. *Id.* at 218.
216. 2016 WL 1241844, at *1 (E.D. Pa. Mar. 30, 2016).
217. *Id.* at *1 (citing Gorman v. Cerasia, 2 F.3d 519, 524 (3d Cir. 1993)).
218. *Id.* at *12.

In *Barry v. Shell Oil Co.*, the U.S. District Court for the District of Alaska held that because complete diversity between the plaintiff-crewmember and all defendants did not exist, the plaintiff was not entitled to a jury trial on his maritime claims.[219] The court recognized that the Ninth Circuit has not decided whether complete diversity is required for a plaintiff to proceed with a jury trial in a mixed admiralty diversity case when admiralty jurisdiction is invoked to include a non-diverse defendant.[220] After examining the Ninth Circuit's prior decision in *Ghotra v. Bandila Shipping, Inc.*,[221] as well as cases from the Fifth and Fourth Circuits, the court was of the view that "the Ninth Circuit would not do away with the complete diversity requirement in mixed diversity-admiralty cases."[222]

In *Flame S.A. v. Freight Bulk Pte. Ltd*, the Fourth Circuit analyzed the general jurisdiction of admiralty courts and the ability of those courts to enforce foreign judgments and arbitral awards against alter ego corporations in the United States.[223] The plaintiffs sought and obtained a writ of maritime attachment under Supplemental Rule B to attach the vessel *M/V Cape Viewer* when it docked in Norfolk, Virginia.[224] Although the defendant was not the registered owner of the vessel, the plaintiffs asserted that the shipowner was, in fact, the alter ego of the defendant's defunct company, which had fraudulently conveyed its assets to the shipowner in order to evade its creditors. For that reason, according to the plaintiffs, the district court below could enforce their claims against defendant's company through the shipowner via attachment of the vessel.[225] Following a bench trial, the district court awarded judgment for the plaintiffs, ordered the vessel sold at auction, and confirmed the distribution of the sale proceeds to the plaintiffs.[226] On appeal to the Fourth Circuit, the defendants argued that the district court lacked subject matter jurisdiction because *Peacock v. Thomas*[227] precluded federal jurisdiction over alter ego and fraudulent conveyance claims that seek to shift liability for an

219. 175 F. Supp. 3d 1147, 1152 (D. Alaska Mar. 30, 2016).
220. *Id.* at 1151.
221. 113 F.3d 1050 (9th Cir. 1997).
222. *Barry*, 175 F. Supp. 3d at 1151.
223. 807 F.3d 572 (4th Cir. 2015).
224. *Id.* at 577. The defendant had attempted to vacate the order of attachment, contending the district court lacked subject matter jurisdiction because under either United States (federal) or English law, the FFAs were not maritime contracts. The district court denied and following interlocutory appeal, the Fourth Circuit held federal law governed the jurisdictional inquiry and that the FFAs at issue were "maritime contracts" under federal admiralty law; as such, "the district court had subject matter jurisdiction to adjudicate the matter before it." Flame S.A. v. Freight Bulk Pte. Ltd., 762 F.3d 352, 363 (4th Cir. 2014).
225. *Flame*, 807 F.3d at 577.
226. *Id.*
227. 516 U.S. 349 (1996).

existing judgment—including a maritime judgment—onto a non-party.[228] The Fourth Circuit disagreed, holding that *Peacock* was inapplicable because it involved federal question jurisdiction and did not arise under the court's admiralty jurisdiction. Furthermore, "while an enforcement action brought under § 1331 must demonstrate the existence of federal jurisdiction independent of the judgment to be enforced, a district court's ability to enforce foreign admiralty judgments has not been so limited."[229] Citing to its previous decision in *Vitol, S.A. v. Primerose Shipping Co., Ltd.*,[230] the Fourth Circuit noted that the district court's admiralty jurisdiction includes the inherent authority to grant attachments, including an attachment of assets pursuant to Rule B; that the defendant's challenge failed "to grasp key substantive distinctions between federal question and admiralty jurisdiction"; and that no choice of law dispute would remove the court's subject matter jurisdiction.[231]

XI. PRACTICE, PROCEDURE, AND UNIFORMITY

In a decision that may have ramifications concerning personal jurisdiction in Jones Act and general maritime law actions, *Tyrell v. BNSF Railway Co.*,[232] the plaintiffs filed suit against their employer-railroad operator in Montana state court for violations of the Federal Employers' Liability Act (FELA),[233] relating to injuries they sustained in states other than Montana. The railroad moved to dismiss the plaintiffs' lawsuits on the basis that the U.S. Supreme Court's decision in *Daimler AG v. Bauman*[234] prohibits a state court from exercising general personal jurisdiction over an out-of-state defendant, except where the defendant is essentially "at home" in the forum state.[235] The Montana Supreme Court interpreted *Daimler* narrowly, as only addressing the authority of a U.S. court to entertain claims brought by a foreign plaintiff against a foreign defendant, based on events that occurred outside the United States and did not involve a FELA claim or a railroad defendant.[236] The court reasoned that because the congressionally enacted FELA venue provision (45 U.S.C. § 65) fixes venue where the defendant was an inhabitant and other U.S. Supreme Court cases have consistently interpreted the venue provision as allowing state courts to hear cases brought under FELA even where

228. Flame S.A. v. Freight Bulk Pte. Ltd., 807 F.3d 572, 581 (4th Cir. 2015).
229. *Id.* at 582.
230. 708 F.3d 527, 537–38 (4th Cir. 2013).
231. *Flame*, 807 F.3d at 581.
232. 373 P.3d 1 (Mont. 2016).
233. 45 U.S.C. § 51 *et seq.*
234. 134 S. Ct. 746 (2014).
235. *Tyrell*, 373 P.3d at 5.
236. *Id.* at 6.

the only basis for jurisdiction is the railroad's doing business in the forum, the court did not believe its decision conflicted with *Daimler* or FELA's venue provision.[237] Since the railroad operator did business in Montana, under FELA and Montana's jurisdiction statute,[238] Montana courts had general personal jurisdiction over the defendant.[239] The court believed its conclusion was "in line with the U.S. Supreme Court's 'liberal construction' of the FELA in favor of injured railroad workers."[240] A petition for writ of certiorari has been filed with the U.S. Supreme Court.[241]

The Fifth Circuit also recently addressed personal jurisdiction issues in *Patterson v. Aker Solutions Inc.*, wherein the plaintiff filed suit against several defendants alleging the defendants' negligence caused injuries he suffered while working aboard a Luxembourg-flagged vessel off the coast of Russia.[242] After the completion of jurisdictional discovery, the district court granted Aker's motion to dismiss for lack of specific or general personal jurisdiction.[243] The plaintiff appealed, arguing that the defendant had sufficient contacts with the United States to establish general jurisdiction under Federal Rule of Civil Procedure 4(k)(2).[244] The Fifth Circuit disagreed, holding that under Rule 4(k)(2), in order to satisfy due process, the defendant's "contacts with the United States must be so continuous and systematic as to render it essentially at home in the United States."[245] Personal jurisdiction did not exist over the defendants because its business contacts with the United States were limited to eleven secondment agreements over a three-year period.[246] The court concluded that, when viewing the contacts as a whole,"[s]ending eleven employees to the United States over a brief period does not rise to the level of making [the defendant] at home in the United States[,]" and thus cannot satisfy due process concerns.[247]

In *A/S Dan Bunkering Ltd. v. M/V Centrans Demeter*, the Eleventh Circuit examined the requirement of an available alternative forum as a condition to a *forum non conveniens* dismissal.[248] The plaintiff arrested the subject vessel in Mobile, Alabama, and brought *in rem* claims to enforce a maritime lien for failure to satisfy a bunker contract.[249] The district

237. Tyrell v. BNSF Ry. Co., 373 P.3d 1, 3–5 (Mont. 2016).
238. Montana R. Civ. P. 4(b)(1).
239. *Tyrell*, 373 P.3d at 7–8.
240. *Id.* at 7.
241. 2016 WL 5462798 (2016).
242. 826 F.3d 231, 233 (5th Cir. 2016).
243. *Id.*
244. *Id.*
245. *Id.* at 234.
246. *Id.* at 234–37.
247. *Id.*
248. 633 F. App'x 755, 759 (11th Cir. 2015).
249. *Id.* at 756.

court dismissed the suit on grounds of *forum non conveniens*, finding that Hong Kong was the proper forum.[250] On appeal, the plaintiff argued that the alternative forum in Hong Kong was inadequate because Hong Kong law did not recognize an *in rem* remedy of a maritime lien for necessaries.[251] However, an alternative forum is deemed inadequate only in the rare circumstance that "the remedy offered by the other forum is clearly unsatisfactory."[252] The unavailability of a particular claim did not make the alternative forum inadequate, provided that other potential avenues to relief existed in that forum.[253] Furthermore, the private and public factors favored dismissal.[254] Because the appellant failed to show that Hong Kong deprived it of all relief, the Eleventh Circuit affirmed the district court's dismissal on the grounds of *forum non conveniens.*[255]

In *Rollins v. Bombardier Recreational Products, Inc.*, the Washington Court of Appeals affirmed the dismissal of a products liability claim against a recreational watercraft manufacturer based on preemption.[256] The plaintiff alleged that the manufacturer had negligently designed a jet ski by failing to include an engine ventilation system.[257] The court held that the Federal Boat Safety Act (FBSA)[258] was enacted by Congress to preempt conflicting state laws concerning recreational watercrafts.[259] Because the Secretary of Transportation delegated all regulatory authority under the FBSA to the USCG, which had granted an exemption to the manufacturer from the requirement of an engine ventilation system, the plaintiff's product liability claim was preempted.[260] The court rejected the plaintiff's argument that her state law product liability claims were saved under the FBSA's "savings clause," which provides that "[c]ompliance with this chapter or standards, regulations, or orders prescribed under this chapter does not relieve a person from liability at common or under [s]tate law."[261]

Regarding uniformity under general maritime law, two federal courts recently addressed the collateral source rule concerning damages. In *Buccina v. Grimsby*, the U.S. District Court for the Northern District of Ohio addressed the issue of whether evidence showing that an insurer paid a

250. *Id.* at 756–57.
251. *Id.* at 757.
252. *Id.* at 758.
253. *Id.* at 759.
254. *Id.*
255. *Id.*
256. 366 P.3d 33 (Wash. Ct. App. Dec. 21, 2015).
257. *Id.* at 34.
258. 46 U.S.C. § 4301 *et seq.*
259. *Rollins*, 366 P.3d at 36.
260. *Id.* at 37.
261. Rollins v. Bombardier Recreational Prods., Inc., 366 P.3d 33, 42 (Wash. Ct. App. Dec. 21, 2015) (citing 46 U.S.C. § 4311).

discounted rate to satisfy the plaintiff's medical bills was a violation of the collateral source rule.[262] Generally, the collateral source rule, which applies in admiralty cases, requires the exclusion of any evidence of collateral benefits.[263] The court found little guidance on whether the difference between the amount billed and the amount accepted as full payment for medical expenses (sometimes called the "written-off amount," "negotiated discount," or a "contractual discount") constituted a "benefit" for purposes of maritime law's collateral source rule.[264] Ultimately, the court held that "there appears to be no uniform maritime Rule governing the admissibility of contractual discounts, and that it is not inappropriate for a federal court exercising admiralty jurisdiction to look to state law for guidance." Accordingly, it applied the Ohio Supreme Court's holding that such write-offs do not constitute a benefit from a collateral source.[265]

The collateral source rule was also addressed in *Moreno v. Ross Island Sand & Gravel*, wherein the U.S. District Court for the Eastern District of California denied a defendant's motion *in limine* to exclude evidence of medical expenses billed to plaintiffs that were in excess of medical expenses actually paid.[266] The court recognized that the collateral source rule applies in admiralty cases and, because no U.S. Supreme Court or Ninth Circuit case was on point, considered a decision from the District Court of Nevada that recognized that "a creditor's partial forgiveness of a tort victim's medical bills via a write-down is properly considered a third-party payment, evidence of which is barred by the collateral source rule."[267] The court declined to apply California substantive law to the contrary.[268]

XII. REGULATIONS UPDATE

A. *U.S. Coast Guard Towage Inspection Standards and Safety Policies—Subchapter M*

Owners and operators of towing vessels now have an additional set of safety regulations governing the inspection, standards, and safety management systems of towing vessels—USCG's Subchapter M regulations.[269] These new regulations are intended to promote safer work practices

262. 157 F. Supp. 3d 704 (N.D. Ohio Jan. 27, 2016).
263. *Id.* at 705–06.
264. *Id.* at 706 (citing Jones v. Carnival Corp., 2006 WL 8209625 (S.D. Fla. Jan. 24, 2006)).
265. *Id.* at 707.
266. 2015 WL 6690067 (E.D. Cal. Oct. 29, 2015).
267. *Id.* at *3 (discussing McConnell v. Wal-Mart Stores, Inc., 995 F. Supp. 2d 1164, 1170 (D. Nev. Feb. 5, 2014)).
268. *Id.*
269. 46 C.F.R. §§ 136.100–144.920 (2016).

and reduce casualties on towing vessels. To continue operations, Subchapter M requires towing vessels to maintain a valid certificate of inspection and comply with a broad variety of obligations pertaining to design, construction, and vessel towing operations; safety equipment; and record-keeping. Violations, deficiencies, or non-conformities with Subchapter M regulations could result in limited or suspended operations until corrective action is accomplished—in addition to penalties and fines.

B. *U.S. Coast Guard Safety Examinations*

The safety and equipment requirements established by the Coast Guard Authorization Act of 2010[270] and the Coast Guard and Maritime Transportation Act of 2012,[271] amending 46 U.S.C. § 4502(f),[272] go into effect in 2016 regarding survival crafts and automatic identification systems (AIS). The terms "lifeboats or life rafts" were replaced with "a survival craft that ensures that no part of an individual is immersed in water. . . ." All commercial fishing industry vessels operating beyond three nautical miles of the baseline of the U.S. coastline of the Great Lakes are now required to carry a survival craft that keeps individuals out of the water in the event of the need to abandon ship. This requirement went into effect on February 16, 2016. In addition, all commercial vessels, including fishing vessels over sixty-five feet, will be required to carry either a Class A or Class B AIS. AIS is a shipboard broadcast system that acts similar to a transponder, operating in the VHF maritime band. The effective date to carry an AIS was March 2, 2016.

C. *Inert Gas and Chemical Tanker Safety Requirements*

An inter-industry working group that has studied incidents of fires and explosions on chemical and product tankers submitted amendments, International Maritime Organization (IMO) Resolution MSC.365(93), to the International Convention for the Safety of Life at Sea (SOLAS),[273] which are aimed at preventing explosions on oil and chemical tankers that transport low-flashpoint cargoes. These SOLAS amendments, which became effective on January 1, 2016, introduced mandatory requirements concerning inert gas systems on board new oil and chemical tankers of 8,000 deadweight tonnage and above, ventilation systems on board new ships, fire protection requirements for new ships designed to carry containers on or above the weather deck, mandatory means of es-

270. Coast Guard Authorization Act of 2010, Pub. L. No. 111-281 (2010).

271. Coast Guard and Maritime Transportation Act of 2012, Pub. L. No. 112–213 (2012).

272. This section sets forth requirements for individuals in charge of vessels concerning dockside examinations, equipment maintenance records, required instruction, and drills.

273. 32 U.S.T. § 47 (2016); 1184 U.N.T.S. § 278 (2016).

cape from machinery spaces, and additional safety measures for vehicle carriers with vehicle and roll-on/roll-off spaces for carrying motor vehicles with compressed hydrogen or compressed natural gas in their tanks for self-propulsion. Notable for tankers fitted with exhaust gas inerting systems, the application of inert gas must be carried out during loading and unloading, on passage, tank cleaning, and purging prior to gas freeing.

D. *Carriage Requirements*

New requirements for onboard stability instruments, applicable to all tankers, went into effect on January 1, 2016. These amendments to the International Convention for the Prevention of Pollution from Ships Annex I Chapter 4, the code for the Construction and Equipment of Ships, require implementation of stability instruments for oil tankers and chemical tankers.[274] New and existing tankers must be fitted with an approved stability instrument capable of verifying compliance with intact and damage stability requirements.

E. *Safe Carriage of Liquefied Gases*

The International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk implemented changes in 2016.[275] The code was first adopted in 1983 to provide an international standard for the safe carriage by sea of liquefied gasses. This revision, which affects newly manufactured ships, unless expressly provided otherwise, is the first major revision to reflect a number of technological advances for the safe carriage of liquefied gases by sea. For example, the revisions added new requirements for cargo sampling connections, cargo filters, and water curtains.

F. *Service Contract Flexibility*

The Federal Maritime Commission has proposed changes to increase flexibility for service contracts and vessel-operating-common-carrier service arrangements (NSAs).[276] The amendments seek to relax filing requirements for correcting errors in service contracts and NSAs, add the definition of "affiliate" to the service contract regulations that govern the scope of parties that may book as shippers under any particular service contract, add a new required field to the FMC's SERVCON filing system for the input of a non-vessel operating common carrier's (NVOCC)'s six-digit organization number when it is the contract holder or an affiliate,

274. MARPOL 73/78, Annex I, Chapter 4 (2016).

275. International Code for the Construction and Equipment of Ships Carrying Liquefied Gases in Bulk (IGC Code), International Maritime Organization (2016).

276. 46 C.F.R. §§ 530–531 (2016).

and add a new requirement for NVOCCs to obtain certification of shipper and affiliate status.

G. *Whistleblower Protections*

The Occupational Safety and Health Administration has issued its final regulations[277] governing employee protection provisions of the Seaman's Protection Act,[278] as amended by section 611 of the Coast Guard Authorization Act of 2010.[279] The Act protects seamen from retaliation for engaging in certain protected activity, such as providing information to the government about violations of maritime safety laws or regulations. The final regulations set forth the statutory procedures for filing a retaliation complaint with the Secretary of Labor. The regulations also establish procedures and timeframes for hearings before Department of Labor administrative law judges, review of those decisions by the Department of Labor Administrative Review Board, and judicial review of final administrative decisions.

277. 29 C.F.R Part 1986 (2016).
278. 46 U.S.C. § 2114 (2016).
279. 33 C.F.R. Part 53 (2016) (*implementing* 10 U.S.C. § 1034 (2016)).