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Reconsidering *Gowen*: Toward a Rationalized View of Fishing Permits and Maritime Liens

By Andrew I. Aley & Stephen B. Johnson

It has been roughly thirteen and a half years since the United States Court of Appeals for the First Circuit issued its decision in *Gowen, Inc. v. F/V Quality One*, which affirmed the decision of the district court below and held that the *Quality One*'s fishing permits and history were appurtenant to the vessel and therefore subject to its maritime liens.[1] *Gowen* has been a source of ongoing discussion and debate—both in this publication and others—about the merits of its reasoning and the impact of its result.[2] Although the central holding in *Gowen* has not been widely cited by other courts, the cases that have considered it have

[1] Gowen, Inc. v. F/V Quality One, 244 F.3d 64 (1st Cir. 2001).

[2] For commentary generally critical of *Gowen* and its conclusion, *see*, *e.g.*, Stephen B. Johnson & Bruce A. King, *Financing the Fishing Industry—Current Status*, 1 BENEDICT'S MAR. BULL. 48 (2003); David J. Farrell, *Maritime Liens on Fishing Privileges: Towards a Congressional Resolution*, 2 BENEDICT'S MAR. BULL.339 (2004); Charles W. Olcott, *Hook, Line and Sinker (and Fishing Permits, Too?): The Inclusion of Fishing Permits as Appurtenances to Maritime Liens*, 8 OCEAN & COASTAL L.J. 205 (2003); Bruce A. King, *Ships as Property: Maritime Transactions in State and Federal Law*, 79 TUL. L. REV. 1259 (2005). For commentary generally supportive of *Gowen* and its conclusion, *see*, *e.g.*, Robert J. Zapf, *Appurtenances: What Are They and Are Fishing Permits Among Them?*, 79 TUL. L. REV. 1339 (2005); Byrant E. Gardner, *Fishing for Change*, 10 BENEDICT'S MAR. BULL. 18 (2012).

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Managing Editor's Note

Our Editor in Chief has been unable to provide us with his usual insightful introductory note because of a death in his family. Our sincere condolences and best wishes go out to Frank and his family in this trying time.

In this edition we again re-visit the intriguing issue of maritime liens, appurtenances, and fishing permits. We have two articles that on first blush take opposite sides of the question. I think our readers will, however, see that there is a harmonization the authors suggest quite independently. As always, we wish to bring such issues to the attention of our readers for their own edification, use, and perhaps, to focus their own thoughts on the issue presented.

We also here shed some light on a question that often faces litigants seeking to obtain discovery abroad, in this case, focusing upon the ability to do so in England. Readers may well use the information provided in their own practices.

A further procedural issue is addressed in the context of arrest and attachment, in this editor's humble opinion, the heart of maritime practice. Nothing brings such tension and effort as that Friday afternoon call to seize something about to leave the jurisdiction!

Our Window on Washington column brings us interesting developments in our Nation's Capital on the energy front. Perhaps not as exciting as developments in the last few days, but nonetheless, addressing issues that affect all of us.

Finally, we do not bring you our customary column "Flotsam & Jetsam" in this edition. As many of you know, Phil Berns, who has been entertaining and enlightening us since the foundation of this publication with his wit, humor, and insight, is seriously ill. Our thoughts and prayers go out to Phil and his family.

Robert J. Zapf

Reconsidering *Gowen*: Toward a Rationalized View of Fishing Permits and Maritime Liens

By Andrew I. Aley & Stephen B. Johnson

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nominally followed suit,[3] if at times reluctantly.[4] The implications of its holding have been seen in Congress, where legislation to amend the Commercial Instruments and Maritime Lien Act[5] to expressly provide that maritime liens do not apply to fishing permits has been introduced on more than one occasion.[6]

Furthermore, over-generalizations concerning the scope of *Gowen*'s holding have appeared in cases and commentary alike and create the risk that future courts may heedlessly extend *Gowen* beyond its facts; *e.g.*, to cases involving limited entry permits that are issued to persons rather than vessels.[7] The risks that *Gowen*'s holding may be carelessly extended are twofold. First, it represents an unprincipled extension of a traditionally disfavored category of liens to general intangibles—a class of assets not generally subject to maritime liens. Second, and arguably of more immediate concern to the commercial fishing industry, it creates uncertainty with respect to the financing of fishing enterprises and whether the priority of consensual, recorded security interests will be trumped by secret maritime liens. The adverse implications of this risk are significant because of the significant value associated with limited entry permits and the role they play in financing the modern commercial fishing industry. The economic viability and stability of fishing enterprises benefit crewmembers, suppliers of necessaries, vessel owners and their lenders alike. The heedless extension of maritime liens to a category of assets not historically within their reach ultimately benefits no one.

This article revisits *Gowen* and its progeny, and the discussion that has followed in its wake, and concludes that despite recent assertions to the contrary,[8] limited entry permits should not, as a principle of general maritime law, be deemed appurtenances to a vessel and therefore subject to maritime liens. Rather, in light of the fact that a wide range of permit systems exist, including many involving limited entry permits issued to the persons rather than vessels, this article argues that *Gowen* should be confined to its facts.

The Creation and Nature of Maritime Liens

Much has been written on the subject of maritime liens, and a full recitation of the law of maritime liens is beyond the scope of this article.[9] A "charming legal fiction" relied on to explain the application of maritime liens posits that a vessel is an entity separate from its owner, thereby personifying the vessel and treating her

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[3] *Offenbacher v. Ahart*, No. 07-CV-326-BR, 2009 U.S. Dist. LEXIS 16231 (D. Or. Feb. 25, 2009); *Caterpillar Financial Services Corp. v. F/V Site Clearance I*, 275 Fed. Appx. 199, 2008 U.S. App. LEXIS 8982 (4th Cir. 2008); *PNC Bank Delaware v. F/V Miss Laura*, 381 F.3d 183 (3d Cir. 2004).

[4] *See F/V Miss Laura*, 381 F.3d at 184, 185 (stating that "[t]his case presents the question of whether, *assuming* a vessel's fishing history may be the subject of a maritime lien, the lien follows the transfer of the fishing history to a replacement vessel after the original vessel sinks" and noting that "*even if we were to follow Gowen* and hold that a vessel's fishing permits may be the subject of a maritime lien, we would still need some legal basis for concluding that the lien extends to a replacement vessel once the permits are transferred.") (emphasis added).

[5] 16 U.S.C. §§ 31301–31343.

[6] The Maritime Lien Reform Act, H.R. 1147, 113tth Cong. (2013); The Maritime Lien Reform Act of 2013, S. 542, 112th Cong. (2013). On November 15, 2011, the House of Representatives passed the Coast Guard and Maritime Transportation Act of 2011, Section 405 of which included language substantially identical to the 2013 bills, including language stating that "[a] fishing permit is not included in the whole of a vessel or as an appurtenance or intangible of a vessel for any purpose."

[7] *See*, *e.g.*, *Caterpillar Fin. Servs Corp. v. F/V Site Clearance I*, 275 Fed. Appx. 199, 2008 U.S. App. LEXIS 8982 (4th Cir. 2008) (acknowledging that the district court had "noted that fishing permits are *generally treated* as appurtenant to fishing vessels").

[8] *See*, *e.g.*, Gardner, *supra* note 2, at 22 ("Pursuant to the General Maritime Law, a vessel's fishing rights are deemed 'appurtenances' to the vessel. . . .").

[9] It has been stated that "[i]t is customary when reciting the law of maritime liens to being with a brief (and in some cases, extensive) summary of the history of maritime law back to the beginnings of recorded history." Raymond P. Hayden & Kipp C. Leland, *The Uniqueness of Admiralty and Maritime Law: The Unique Nature of Maritime Liens* 79 TUL. L. REV. 1227, 1229 (2005). Such a "historical tour" will not, however, be undertaken here.

as the wrongdoer, liable for her actions and subject to suit independent of her owner.[10] Thus, the maritime lien is a "privileged claim upon maritime property" that arises out of harms caused by or services provided to the maritime property.[11] The lien is "secret," in that it arises and is perfected without recording or filing—and thus without notice to the vessel owner or other creditors—the moment the underlying claim or debt arises.[12]

Maritime liens are a creation of the common law, but they have largely been codified by the Commercial Instruments and Maritime Lien Act (the "Maritime Lien Act").[13] Generally speaking, maritime liens take priority over, and must be satisfied before, non-maritime liens, although preferred mortgage liens take priority over all maritime liens except "preferred maritime liens."[14] Maritime liens differ in almost every respect from liens arising under Article 9 of the Uniform Commercial Code, including a last-in-time, first-in-right priority system that has the potential to operate to the detriment of a vessel's earlier creditors and the fact that no filing is required to perfect the lien.[15] Upon attachment, a maritime lien follows the offending vessel "everywhere and through all transfers of ownership, even into the hands of a bona fide purchaser without notice, unless the transferee has acquired title through an *in rem* judicial proceeding that extinguishes the lien."[16] As a general principle, a maritime lien attaches only to the offending vessel itself, although the "offending vessel" has been interpreted to include its appurtenances, pending freights, and, in certain special circumstances, its cargo and subfreights.[17]

Because maritime liens are secret and operate to the prejudice of both prior lenders to the vessel owner and subsequent purchasers of the vessel, the Supreme Court has recognized that they are disfavored in the law and must not be extended by "construction, analogy or inference."[18] In defining which transactions will give rise to maritime liens, it has been noted that federal courts "have full authority to update old doctrines and recognize new forms of liens if warranted by new conditions."[19] However, nothing in modern jurisprudence suggests a rationale for further extending the reach of maritime liens beyond the offending maritime property; *i.e.*, beyond the vessel itself.

Appurtenances

As noted above, a maritime lien attaches to those things deemed to be "appurtenances" of the offending vessel.

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[10] *Id*. *See also* Thomas J. Schoenbaum, admiralty and maritime law, § 9-1, at 683–84 (5th ed. 2011) ("The theoretical basis of the maritime lien goes to the heart of all that is distinctive about admiralty law: it is a right based upon the legal fiction that the ship is the wrongdoer—the ship itself caused the loss and can be called to the bar to make good the loss.").

[11] Schoenbaum, *supra* note 10, at 683.

[12] *See*, *e.g.*, *In re Muma Services, Inc.*, 322 B.R. 541 (Bankr. D. De. 2005).

[13] 46 U.S.C. §§ 31301–31343. Unlike maritime liens, preferred mortgage liens are statutory liens bearing little resemblance to maritime liens and the two should not be confused. *See* Glen T. Oxton, *Ship Mortgages in Favor of "Owners"*, 7 Benedict's Mar. Bull. 16 (2009). Preferred mortgage liens must be recorded and are subject to traditional rules of priority. These distinctions are reflected in the Maritime Lien Act and have been recognized by the courts. *See* 46 U.S.C. §§ 31301–31310 (referring to liens arising from preferred mortgages as a "preferred mortgage lien" or a "mortgage lien"); 46 U.S.C. § 31326(a) ("When a vessel is sold by order of a district court. . .to enforce a preferred mortgage lien *or* a maritime lien. . . .") (emphasis added). *See also*, *e.g., Custom Fuel Servs., Inc. v. Lombas Indus., Inc.*, 805 F.2d 561 (5th Cir. 1986).

[14] 46 U.S.C. § 31326(b)(1). *See*, *e.g.*, *In re Muma Services, Inc.*, 322 B.R. 541, 546 (Bankr. D. De. 2005). The Maritime Lien Act defines a preferred maritime lien as "a maritime lien on a vessel—(A) arising before a preferred mortgage was filed [in accordance with the Maritime Lien Act]; (B) for damage arising out of maritime tort; (C) for wages of a stevedore when employed directly by a person listed in [46 U.S.C. § 31341]; (D) for wages of the crew of the vessel; (E) for general average; or (F) for salvage, including contract salvage." 46 U.S.C. § 31301(5)(A)–(F).

[15] *See* Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty, § 9-1, at 586–88 (2d ed. 1975) (acknowledging a plague of "inept terminology" in the law of maritime liens, noting that a maritime lien "is not a lien at all in the common-law sense of the term" and positing that "[c]larity of thought is not promoted when, by an accident of linguistic history, two unlike things are called by the same name").

[16] *Muma Services*, 322 B.R. at 546.

[17] *See* Schoenbaum, *supra* note 10, at 693; Zapf, *supra* note 2, at 1348–49.

[18] *Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 11–12 (1920).

[19] Schoenbaum, *supra* note 10, at 690–91 (citing *Exxon Corp. v Central Gulf Lines, Inc.*, 500 U.S. 603 (1991)). *Exxon Corp*. overruled *Minturn v. Maynard*, 17 How. 477 (1855), in part based on the "trend in modern admiralty case law. . .to focus the jurisdictional inquiry upon whether the nature of the transaction was maritime," and held that "there is no *per se* exception of agency contracts from admiralty jurisdiction" and, therefore, a maritime lien may arise from advances made by a ship's agent. *Exxon Corp. v Central Gulf Lines, Inc.*, 500 U.S. 603, 607–08, 611–13 (1991). *See also Equilease Corp. v. M/V Sampson*, 793 F.2d 598 (5th Cir. 1986) (en banc).

Black's Law Dictionary defines an "appurtenance" as "[s]omething that belongs or is attached to something else."[20] To be "appurtenant" is to be "[a]nnexed to a more important thing."[21] As illustrated by *Gowen*, because maritime liens extend to a vessel's appurtenances, the characterization of an asset as an appurtenance to a vessel can have significant consequences. For the commercial fishing industry, where the value of limited entry permits is often greater than the value of the vessel operating under the authority of the permit, and where limited entry permits increasingly serve as important collateral for loans to fishing enterprises, these consequences affect the entire industry.

There is an extensive body of case law addressing what is and is not an appurtenance. Courts have acknowledged that " '[t]he determination [whether something is an appurtenance] is commonly made on a case-by-case basis without great consistency of results.' "[22] In *The Witch Queen*, a case from the latter-half of the nineteenth century, a federal district court in California stated that the "enumeration of 'tackle, sails, apparel, furniture and boats,' " set forth in the eighth rule in admiralty of the Supreme Court "includes everything belonging to the vessel as a 'navigating ship.' "[23] The court cited *The Dundee*, which held "whatever is on board a ship for the objects of the voyage and adventure on which she is engaged, *belonging to the ship*, and not being cargo, constitutes a part of the ship and 'her appurtenances,' " and therefore that the value of fishing stores aboard a vessel should be considered appurtenances.[24] Although typically decided on a case-by-case basis, a fundamental attribute of an appurtenance is that it must be something "essential to the vessel's navigation, operation, or mission."[25] Even leased property aboard a vessel used for a specific voyage may be an appurtenance.[26]

Intangible assets do not readily fit within the definition of an "appurtenance." Although *Gowen* asserted that "[t]here is no general objection to treating an intangible as an appurtenance," there is little, if any, case law in support of this statement.[27] Although freights earned and pending for a particular voyage prior to payment have been deemed part of the vessel for purposes of maritime liens arising during the voyage, this anomaly is associated with the personification of the vessel upon which maritime lien law is based; *i.e.*, the vessel's pending freights are considered an asset of the vessel itself until paid.[28]

Accordingly, prior to *Gowen*, with the sole exception of pending freights, appurtenances were generally understood to include only those tangible assets that were necessary to a vessel's navigation, operation, or mission. If there was, in fact, no "general objection" to treating an intangible as an appurtenance, it was only because the question had not been seriously considered.

Federal Fishing Permits

In the 37 years since the enactment of the Magnuson-Stevens Fishery Conservation and Management Act (the "Magnuson-Stevens Act"),[29] the commercial fishing industry has gradually transformed from an open

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[20] BLACK'S LAW DICTIONARY 118 (9th ed. 2009).

[21] *Id*.

[22] *Gowen*, 244 F.3d at 68 (alteration in original) (quoting THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW, § 9-1, at 489 (2d ed. 1994)).

[23] The Witch Queen, 30 F. Cas. 396, 397 (D. Calif. 1874).

[24] *Id*. (emphasis added) (citing *The Dundee*, 1 Hagg. 109). Notably, *The Dundee* drew a distinction between appurtenances and cargo that was "intended to be disposed of at the foreign port," and thus had "a merely transitory connection with the ship," whereas appurtenances included "those accompaniments that were indispensable instruments without which the ship could not perform its functions." *The Manila Prize Cases*, 188 U.S. 254, 269 (1903) (citing *The Dundee* 1 Hagg. 109).

[25] *Gonzalez v. M/V Destiny Panama*, 102 F. Supp. 2d 1352, 1356 (S.D. Fla. 2000) (citing *Stewart & Stevenson Servs., Inc. v. M/V Chris Way MacMillan*, 890 F. Supp. 552, 561-62 (N.D. Miss. 1995); *Payne v. SS Tropic Breeze*, 274 F. Supp. 324, 330 (D.P.R. 1967), *rev'd on other grounds*, 412 F.2d 707 (1st Cir. 1969); *United States v. F/V Sylvester F. Whalen*, 217 F. Supp. 916, 917 (D. Maine 1963); *The Witch Queen*, 30 F. Cas. at 397.

[26] *See generally* King, *supra* note 2, at 1302–06.

[27] *See id*. at 1320 ("The difficulty of the question of the attachment of maritime liens. . .to fishing rights stems from the fact that we are dealing for the first time with the contention that maritime liens. . .can attach to them, and these intangibles are quite different from the other two categories of assets, other than the vessels themselves, to which maritime liens. . .can attach—appurtenances and freights.").

[28] *See* SCHOENBAUM, *supra* note 10, at 693 ("Maritime liens may only attach to maritime property such as vessels (including their appurtenances and equipment), cargo, freights, and subfreights.")

[29] 16 U.S.C. § 1801 et seq.

access, "Olympic" style derby system to a system characterized by a variety of fishery specific limited entry systems. The Magnuson-Stevens Act assigns authority to the Secretary of Commerce to manage and conserve fisheries in the "exclusive economic zone" extending from three to 200 nautical miles off the coast of the United States, and provides for a comprehensive management program for the nation's fisheries.[30] The Magnuson-Stevens Act authorized the creation of eight Regional Fishery Management Councils ("Councils"), which were charged with the development of management plans for each of the fisheries within their respective geographic areas, and given the discretionary authority to establish limited entry systems for fisheries and to allocate fishing privileges within those limited entry systems.[31] As part of National Standard 5, which was adopted pursuant to the Magnuson-Stevens Act and takes into account the "efficiency in the utilization of fishery resources," the Councils may allocate fishing privileges through the "licensing of vessels, gear, or fishermen to reduce the number of units of effort, and dividing the total allowable catch into fishermen's quotas. . . ."[32] In adopting limited entry systems, the Councils must consider the factors listed in 16 U.S.C. § 1853(b)(6) and those in 50 C.F.R. § 600.325(c)(3), and should consider the criteria to qualify for a permit, the nature of the interest represented by the permit, whether to make the permit transferable, and the limitations on returning economic rent to the public set forth in 16 U.S.C. § 1854(d).[33]

Perhaps by virtue of the fact that each Council consists of state and federal officials and interested individuals having appropriate knowledge regarding the fishery resources in the relevant Council's geographic area, the limited entry schemes adopted by the Councils are not uniform in their approach to the allocation of fishing rights.[34] Because of the considerable variety of the limited entry schemes, a comprehensive overview of each is beyond the scope of this article. An overview of three of them, however, illustrates how the variations in these permitting schemes could impact the analysis of whether those permits are appurtenances of a vessel and properly the subject of a vessel's maritime liens.

Gowen involved a fishing permit granted pursuant to a system that issued permits to a particular vessel, rather than its owner or operator, on an annual basis based upon the qualifying history of the vessel's participation in the fishery.[35] These permits are essentially tied to the vessel, and when a vessel is "bought, sold, or otherwise transferred," the vessel's "fishing and permit history. . .is presumed to transfer with the vessel" in the absence of a written agreement signed by the parties to the sale or "other credible written evidence" that establishes the transferor retained "the vessel's fishing and permit history for purposes of replacing the vessel."[36] The particular permit issued to the vessel may not be transferred, and when a vessel is sold, it is the vessel's "fishing and permit history" and the right to receive reissuance of the permit that is transferred with it.[37]

A similar system was created by the American Fisheries Act ("AFA") with respect to the Alaska pollock fishery.[38] Pursuant to the AFA, participation in the Alaska pollock fishery was limited to a list of specifically identified vessels and certain vessels that satisfied a historical participation test.[39] All other vessels were barred from participating in the fishery. The right to participate in the Alaska pollock fishery was transferable only by transfer of AFA-qualified vessel itself. Only in the event of total loss, could that right be transferred to a replacement vessel.[40] "AFA Permits" were issued to the qualifying vessels to evidence this right. Accordingly, under the AFA, like the system at issue in *Gowen*, the fishing permit and related rights are uniquely tied to a specific vessel.

Unlike the limited entry permits in *Gowen*, the federal limited entry systems adopted for the groundfish and crab, and halibut and sablefish fisheries in the waters off Alaska allocate limited entry rights to vessel owners not vessels.[41] Under the license limitation program ("LLP") for groundfish and crab species,

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[30] 16 U.S.C. §§ 1811, 1851, 1861.

[31] 16 U.S.C. §§ 1852, 1853(b)(6).

[32] 50 C.F.R. § 600.330(a), (c)(1).

[33] 50 C.F.R. § 300.330(c)(1).

[34] 16 U.S.C. § 1852(b); King, *supra* note 2, at 1318.

[35] *Gowen*, 244 F.3d at 68; *F/V Miss Laura*, 381 F.3d at 185. *See* 50 C.F.R. § 684.4.

[36] 50 C.F.R. § 648.4(a)(1)(i)(D).

[37] *Id*. *See also id*. at § 648.4(k); King, *supra* note 2, at 1319.

[38] American Fisheries Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-616, 2681-625 to -626.

[39] *Id*. at § 208.

[40] *Id*. at § 208(g).

[41] *See* 50 C.F.R. Part 679.

LLP licenses were initially issued to qualified vessel owners based on their past participation in these fisheries. Although these licenses were initially issued based on the landings of particular vessels during the qualifying period, LLP licenses authorize "the license holder to deploy *a vessel* to conduct directed fishing" in accordance with the terms of the LLP license and the regulations.[42] LLP licenses may be deployed sequentially with different vessels and are not tied permanently to any particular vessel. LLP licenses are bought and sold and are freely transferable by the holder, subject to compliance with regulatory transfer procedures.[43]

Similarly, fishing permits for halibut and sablefish in the North Pacific are allocated to qualified persons, rather than vessels.[44] Under this system, Quota Share ("QS") for a particular species within a particular geographic area was initially issued to individual participants in the fishery. The QS represents a permanent right to harvest a percentage of the total allowable catch ("TAC") for a particular species in a particular geographic area. The TAC is determined on an annual basis. Each year, QS holders are issued individual fishing quota ("IFQ"), which entitles them to harvest a particular quantity of halibut or sablefish during that year.[45] With limited exceptions, both QS and IFQ are freely transferable, subject to compliance with regulatory transfer procedures.[46] Thus, although the ownership or leasing of a vessel that was active in the fishery during the qualifying period was among the criteria for being a "qualified person" able to receive an initial allocation of QS, QS was assigned to the qualified person, and not to the vessel.[47] Because the QS and IFQ are freely transferrable and may be fished with any qualified vessel, current operations under any particular QS/IFQ permit have no necessary connection with the vessel whose operating history gave rise to the initial QS allocation.

Gowen and the Cases Arising in its Wake

Gowen, Inc. v. F/V Quality One

The *Gowen* court was faced with the novel question of whether the fishing permits and fishing history associated with the vessel *F/V Quality One* were appurtenances to the vessel and, therefore, subject to a maritime lien on the vessel.[48] The maritime lien in *Gowen* arose from wharfage and repair services provided to the vessel. The provider of those services, Gowen, Inc., sought relief *in rem* against the *F/V Quality One* and *in personam* against its owner, Nunya, Inc.[49] A warrant was issued for the arrest of the *F/V Quality One* and "her equipment, engines, and appurtenances."[50] Gowen secured a default judgment, and moved for the sale of the *F/V Quality One*, specifically requesting that her fishing permits and history be included in the sale on the ground that these were appurtenances of the vessel.[51] The federal district court ordered a public sale of the vessel, including "any valid fishing permits and history to the extent permitted by applicable law."[52] The vessel sold for $17,000, and Gowen then moved for confirmation of the sale, at which point Nunya, for the first time, appeared and opposed the motion, disputing both the fairness of the price and the inclusion of the fishing permits and history in the sale.[53] The district court confirmed the sale, and Nunya appealed.[54]

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[42] 50 C.F.R. § 679.4(k)(1)(ii) (emphasis added). *See also* 50 C.F.R. § 679.4(k)(6) ("The Regional Administrator will issue a groundfish license. . .to *an applicant* if a complete application is submitted by or on behalf of *the applicant* during the specified application period, and if *that applicant* meets all the criteria for eligibility in paragraph (k) of this section.") (emphasis added throughout).

[43] 50 C.F.R. § 679.4(k)(7).

[44] 50 C.F.R. §§ 679.40. *See* King, *supra* note 2, at 1319–20. A similar permitting system applies to the BSAI king and Tanner crab fisheries. *See* 50 C.F.R. Part 680. Under 50 C.F.R. § 680.21, individual quota share holders may voluntarily form crab harvesting cooperatives for the purpose of obtaining and fishing under a crab harvesting cooperative IFQ permit. The cooperative IFQ permit is issued for the IFQ amounts generated by the aggregate quota share holdings of all members of the cooperative, and the IFQ may be harvested by hired masters operating vessels in which at least a 10 percent ownership interest is held by a member of the individual cooperative to which the IFQ was issued. 50 C.F.R. § 680.21(c).

[45] *Id*. The regulations define quota share as a "permit, the face amount of which is used as a basis for the annual calculation of a person's IFQ." 50 C.F.R. § 679.2.

[46] 50 C.F.R. § 679.41.

[47] 50 C.F.R. 679.40(a), (a)(2).

[48] *Gowen*, 244 F.3d 64.

[49] *Gowen*, 244 F.3d at 65.

[50] *Id*.

[51] *Id*.

[52] *Id*.

[53] *Id*. at 65–66.

[54] *Id*. at 66.

The First Circuit acknowledged the issue presented as one of first impression, and noted that, traditionally, maritime liens attach to the bare vessel and equipment used aboard the vessel that is essential to its navigation, operation, or mission.[55] The court concluded that there was no "general objection to treating an intangible as an appurtenance", but recognized that there was "no authoritative answer as to how fishing permits should be classed"[56] and determined that, therefore, the appropriate course of inquiry was to "ask whether treating such permits as subject to maritime liens advances the objectives for which such liens were created and, if so, whether there are overriding objections to the contrary."[57] Noting that one purpose of maritime liens is to facilitate the extension of credit to vessels, the court placed primary importance on the fact that "vessels like the *F/V Quality One* are valuable significantly, and sometimes almost entirely, because of their permits."[58] Satisfying itself that no obvious policy arguments countered against treating fishing permits as being subject to maritime liens, and that "settled expectations" would not be upset by a determination that fishing permits were subject to maritime liens, the court upheld the judgment of the district court, affirming that the *F/V Quality One's* fishing rights and history were appurtenances to the vessel and properly included in the public sale.[59]

Patenaude v. F/V Miss Jenna

The United States District Court for the District of Massachusetts followed *Gowen* in *Patenaude v. F/V Miss Jenna*.[60] Miss Jenna, LLC purchased the *F/V Miss Jenna* (called the *F/V Weymouth* at the time of purchase). At the time of the sale, a NMFS fishing permit for scallops and summer flounder was posted on board the vessel and referenced in the purchase agreement, and Miss Jenna, LLC understood that the assets transferred in the sale included the fishing history and rights associated with the vessel.[61] Following the sale, Francis Patenaude filed an *in rem* action against the vessel to enforce a maritime lien for supplies he had alleged supplied to the vessel before it was sold to Miss Jenna, LLC.[62] After the vessel's arrest, Miss Jenna, LLC applied to the National Marine Fisheries Service to transfer the fishing permit and history from *F/V Miss Jenna* to a replacement vessel, the *F/V Top Flight*. NMFS authorized the transfer and issued a new permit.[63]

Patenaude then purchased the *F/V Miss Jenna* at the marshal's sale and discovered that the fishing permit and history had been transferred to the *F/V Top Flight*. Patenaude filed a complaint with the district court seeking to invalidate the transfer, and the district court concluded that "the appurtenances. . .transferred in the sale. . .included [the vessel's] fishing history and associated fishing permit, subject to generally applicable regulatory provisions."[64] Miss Jenna, LLC appealed the district court's decision to the First Circuit Court of Appeals. While the appeal was pending, the First Circuit issued its decision in *Gowen*, and the First Circuit summarily affirmed the district court's decision on the basis of *Gowen*.[65]

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[55] *Id*. at 68 (quoting *Gonzales v. M/V Destiny Panama*, 102 F. Supp. 2d 1352, 1356 (S.D. Fla. 2002)).

[56] *Id*. As discussed below, the case on which *Gowen* primarily relied, *United States v. Freights, Etc., of the S.S. Mount Shasta*, 274 U.S. 466 (1927), did not hold that an intangible could be treated as an appurtenance to a vessel, but instead held that, in certain circumstances, subfreights could be the appropriate subject of a maritime lien. *See* note 81, *infra*, and related discussion.

[57] *Id*. at 68.

[58] *Id*. As discussed below, the value of a vessel's fishing permits relative to the value of the vessel itself should not be relevant to the inquiry of whether the permits are essential to the vessel's navigation, operation, or mission.

[59] *Id*. at 71.

[60] Patenaude v. F/V Miss Jenna, No. 98-12351-DPW (D. Mass. Oct. 21, 2000). The district court's decision is unreported, and the case was summarily affirmed on appeal. This summary is taken from a brief filed by the National Marine Fisheries Services in opposition to a petition for writ of certiorari. *See* Brief for the Federal Respondents in Opposition, Daniels and F/V Miss Jenna, LLC v. Patenaude (No. 01-126).

[61] Brief for the Federal Respondents in Opposition, *supra* note 60, at 4.

[62] *Id*. at 5.

[63] *Id*.

[64] *Id*. at 6 (alternations in original) (internal quotations omitted). In the district court proceeding, NMFS did not take a position regarding Patenaude's requested relief, but did note "that no precedent established that federal fishing privileges generally are appurtenances of the fishing vessel." *Id*.

[65] *Id*. at 7.

PNC Bank Delaware v. F/V Miss Laura

In *PNC Bank Delaware v. F/V Miss Laura*, the Third Circuit considered the question of whether a maritime lien on a vessel's fishing permits and history followed the transfer of those permits and history to a replacement vessel after the total loss of the original vessel.[66] The original vessel, the *F/V Miss Penelope*, sank and its owner transferred its fishing rights and history to the replacement vessel, the *F/V Miss Laura*.[67] The owner financed the purchase of the *F/V Miss Laura* through a loan from PNC Bank Delaware, Inc., and granted the bank a preferred ship mortgage as security for the loan.[68] When the owner defaulted on the loan, PNC sought to foreclose on its security interest by forcing the judicial sale of the *F/V Miss Laura*, and asserted that it held a mortgage lien on the fishing permits and history that had been transferred from the *F/V Miss Penelope*.[69]

Maine Shipyard & Marine Railway, Inc., contested the inclusion of the fishing permits and history on the grounds that it had provided services to the *F/V Miss Penelope* prior to the loss of the vessel and the transfer of the fishing permits and history to the *F/V Miss Laura*, and that it therefore held a maritime lien with priority over any security interest held by PNC. Maine Shipyard relied primarily on *Gowen*, whereas PNC argued that *Gowen* was inapplicable since the fishing permits and history at issue in that case were still attached to the original vessel.[70]

The district court held that vessel's fishing history could not be salvaged from a sunken vessel and that any maritime lien in favor of Maine Shipyard was extinguished upon the sinking of the *F/V Miss Laura*.[71] The Court of Appeals affirmed the district court's judgment, but refused to follow its rationale.[72] Instead, the court based its holding on the principle that "a maritime lien attaches only to the specific vessel to which services are provided" and that Maine Shipyard's attempt enforce a lien over the *F/V Miss Laura*, to which it had never provided services, violated this principle.[73] In doing so, the court took care to avoid any endorsement of *Gowen* and did not adopt its holding. Rather, "mindful of [its] obligation to avoid a circuit conflict," the court proceeded on the assumption that a vessel's fishing permits and history may be the subject of a maritime lien, and noted that "even if [it] were to follow *Gowen* and hold that a vessel's fishing permits may be the subject of a maritime lien" there would still need to be some legal basis to extend the lien to a replacement vessel following the transfer of the permits.[74]

Offenbacher v. Ahart

Offenbacher v. Ahart, the most recent case to follow *Gowen*, came out of the United States District Court for the District of Oregon, and involved an attempt to assert a maritime lien against a vessel and two crab permits associated with the vessel.[75] A crewmember of the *F/V Migrator* was injured after falling through an open hatch on the vessel.[76] At the time of the injury, one crab permit ("Permit #96270") was assigned to the *F/V Migrator*. Following the injury, but prior to the crewmember's assertion of the maritime lien, the owner of the *F/V Migrator* sold the vessel and Permit #96270 to F/V Stillwater, LLC, which then transferred Permit #96270 from the *F/V Migrator* to the *F/V Stillwater* and assigned a different crab permit ("Permit #96338") to the *F/V Migrator*.[77] The court concluded that the lien extended to the vessel and the permit assigned to it at the time the lien was asserted, rather than at the time of injury.[78] Accordingly, Permit #96338 was the only permit subject to the lien, notwithstanding

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[66] *PNC Bank Delaware v. F/V Miss Laura*, 381 F.3d 183 (3d Cir. 2004).

[67] *Id*. at 185.

[68] *Id*.

[69] *Id*.

[70] *Id*.

[71] *Id*. at 184.

[72] *Id*.

[73] *Id*. at 185–86.

[74] *Id*. at 184–86. *See also Leonardo v. Nancy-Christine, Inc.*, 345 F. Sup. 2d 60 (D. Mass. 2004) (refusing to enforce a lien asserted against a sunken vessel and its fishing licenses on the basis that a lien "with respect to property related to the vessel, such as the fishing licenses and permits" is not appropriate "if a lien on the vessel itself is not appropriate").

[75] Offenbacher v. Ahart, 2009 U.S. Dist. LEXIS 16231 (D. Or. Feb. 25, 2009). The decision does not specify whether the permits at issue were federal or state permits.

[76] *Id*. at *1.

[77] *Id*. at *8–*9.

[78] *Id*. at *16.

the fact that it was not associated with the vessel at the time of the injury.

In reaching its conclusion, the court expressly adopted the reasoning of *Gowen*, though failed to examine the nature of the crab permits at issue or the limited entry system under which they were created and issued.[79] Furthermore, the court's treatment of the transferred permit is arguably more consistent with the logic of *F/V Miss Laura* than *Gowen*.

Discussion

The fact that *Gowen* has been reflexively followed by several courts faced with the question of whether maritime liens attach to fishing permits, while facing consistent (if not universal) criticism from commentators and practitioners, is a testament to the tension that has arisen from its holding.[80] As discussed below, there are strong arguments that *Gowen* was incorrectly decided, as the analogy of limited entry permits to freights is misplaced. Even if *Gowen's* rationale is accepted as correct based on the specific type of limited entry permit at issue in that case, the extension of maritime liens to intangible fishing rights generally reflects a distortion of maritime lien principles. Accordingly, *Gowen* should be confined to its facts. The fishing industry as a whole will benefit if maritime liens are confined to their traditional reach.

There are strong arguments that *Gowen* was incorrectly decided. Notwithstanding the court's statements to the contrary, *Gowen* represents a significant departure from the settled understanding of maritime liens, and is in derogation of the principle that maritime liens not be extended by construction, analogy, or inference. Under the traditional test for identifying an appurtenance—whether the particular item is essential to a vessel's navigation, operation, or mission—appurtenances were limited to tangible items fundamentally connected to the vessel. *Gowen* sidestepped this point by drawing an analogy to freights—an intangible right to payment generated by the employment of a vessel. However, freights are treated as a special category of maritime property and, as noted above, are a limited exception to the traditional understanding that maritime liens attach only to a vessel and its physical attributes.[81] Accordingly, the freights analogy does not support the *Gowen* court's broad statement that there is "no general objection" to treating an intangible as an appurtenance.

The fact that the court in *F/V Miss Laura* took pains to distinguish *Gowen* and avoid any semblance of endorsement of its holding evidences the Third Circuit's skepticism of *Gowen*. Despite being faced with limited entry permits issued under the same type of allocation system as in *Gowen*, the *F/V Miss Laura* opinion leaves the distinct impression that the Third Circuit may have split with the First Circuit had the same issue presented in *Gowen* been before it. Even the Department of Justice went out of its way to criticize *Gowen* in its Brief in Opposition to Petition for Certiorari (the "Opposition Brief") in the *F/V Miss Jenna* case.[82] Arguing that "[t]reating federal fishing privileges as an appurtenance—particularly in an unqualified or categorical fashion—would expand the traditional concept of an appurtenance subject to a maritime lien," the Opposition Brief notes that federal fishing privileges are not "essential" to a vessel's navigation or operation, since the vessel could still be used to fish in unrestricted waters.[83] *Gowen's* reliance on the economic value of the limited entry permit is also suspect, since although the ability to fish in restricted fisheries may increase a vessel's economic value, this does not "enhance its physical utility to perform its intended purpose."[84] As discussed below, although there may be an argument in

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[79] *Id*. at *16-*17.

[80] *See, e.g.*, SCHOENBAUM, *supra* note 10, at 694 n.34 (describing *Gowen* as "a highly questionable ruling").

[81] *United States v. Freights, Etc., of the S.S. Mount Shasta*, the case that *Gowen* relied on to support its assertion that there was no "general objection" to treating intangibles as appurtenances, held that subfreights could be subject to maritime liens because they are "a right of the creditor's capable of being attached and appropriated by the law to the creditor's duties." *United States v. Freights, Etc., of the S.S. Mount Shasta*, 274 U.S. 466, 470 (1927). The separate opinion of Justice McReynolds in *Mount Shasta* illustrates the tension between that decision and accepted principles of maritime law at the time. He wrote that *in rem* jurisdiction "is founded upon physical power of a *res* within the district upon the theory that it is 'a contracting of offending entity,' a 'debtor' or 'offending thing,' *something that can be arrested or taken into custody, or which can be fairly designated as tangible property*." 274 U.S. at 471–72 (emphasis added) (citations omitted).

[82] Brief for the Federal Respondents in Opposition, *supra* note 60, at 9–13.

[83] *Id*. at 10.

[84] *Id*. at 11.

favor of treating certain types of limited entry permits as appurtenances, the Opposition Brief succinctly points out that there is no obvious reason to allow the "mechanics of a particular region's permit scheme" to dictate whether limited entry permits should be deemed to be appurtenant to a vessel.[85]

Even if *Gowen's* rationale is accepted as correct based on the nature of the limited entry permit at issue in that case, it does not withstand scrutiny when applied to permitting systems that encourage free transferability and that involve permits issued directly to persons with a history of participation in the fishery, rather than to vessels. As discussed above, certain permitting systems tie the ability to participate in a fishery to a particular vessel. The AFA Permit is the most obvious example of this, as it implements a statutory designation of specific vessels eligible to participate in the Alaska pollock fishery. The ability of such a vessel to participate in the fishery is a characteristic of the particular vessel itself, and the limited entry permit that embodies that right is inherently tied to the particular vessel. The limited entry permit in *Gowen* is perhaps a similar example, in that it was issued to a particular vessel based on that vessel's fishing history and was generally not transferable apart from the vessel.

Freely transferable limited entry permits issued to persons, such as LLP licenses issued for the Alaska groundfish and crab fisheries and QS and IFQ permits issued for the halibut and sablefish fisheries, have no necessary relationship to any particular vessel. The rights represented by these limited entry permits are personal to the individual holder, and have been wholly detached from any particular vessel. The assertion that these limited entry permits are "necessary" to a fishing vessel's operation breaks down when applied to other intangible assets held by vessel owners and operators. For example, cruise ship operators rely on preferential berthing agreements with port authorities and liquor licenses to ensure their passengers can embark and disembark the vessel and (if they are inclined) better enjoy themselves while aboard. Operators may also rely on concession agreements with the National Park Service to authorize access to restricted waters located within national parks.[86] Are the rights embodied by these agreements and permits subject to maritime liens? Simply put, "[a] privilege that can be exercised in connection with different vessels is difficult to characterize as 'appurtenant' to a particular vessel."[87]

The distinction based on a permit's transferability is also supported by *Gowen's* analogy to freights. Until paid, freights are a characteristic or attribute of a vessel in that they represent the right to payment generated by the vessel and, as such, are uniquely associated with the vessel. Upon payment, the right to payment is converted to proceeds personal to the vessel owner, all association with the particular vessel terminates, and the proceeds are not subject to the vessel's maritime liens. Similarly, the history of a particular vessel's participation in a fishery is uniquely associated with that vessel. Unless transferred, the fishing history and the right to a limited entry permit based on that history is a characteristic of the vessel. Once the fishing history is detached from the vessel—either in connection with a transfer to a replacement vessel or pursuant to a regulatory regime that issues permits to individual participants rather than vessels—the association with the vessel is terminated. Freely transferable permits issued to individual participants and personal to the holder are no more a characteristic of a particular vessel than the proceeds of freights and, accordingly, should not be subject to maritime liens. Accordingly, *Gowen* should be confined to its particular facts and in future cases courts should be exceedingly careful in their analysis of the limited entry permits at issue to ensure that *Gowen's* narrow holding is not expanded.[88]

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[85] *Id*.

[86] In considering the nature of certain quota rights as property and the ownership rights of quota recipients, at least one court has drawn an analogy to airline industry's equivalent of berthing agreements, stating "[t]he new quotas do not become permanent possessions of those who hold them, any more than landing rights at slot-constrained airports become the property of airlines, or radio frequencies become the property of broadcasters. These interests remain subject to the control of the federal government which, in the exercise of its regulatory authority, can alter and revise such schemes. . . ." *Sea Watch Int'l. v. Mosbacher*, 762 F. Supp. 370, 379 (D.D.C. 1991).

[87] Brief for the Federal Respondents in Opposition, *supra* note 60, at 11.

[88] As noted in King, *supra* note 2, at 1324, *Gowen's* precise holding was that "a maritime lien extended to the right of the owner to use the catch history for the issuance of permits to the vessel and to the outstanding permit."

This distinction based on a permit's transferability is consistent with the outcomes of *F/V Miss Laura* and *F/V Miss Jenna*. In *F/V Miss Laura*, the court viewed the transfer of the limited entry permit to a replacement vessel as the critical event that severed the limited entry permit's association with the original vessel and put it beyond the reach of that vessel's maritime liens.[89] Although the court in *F/V Miss Jenna* invalidated the transfer of a limited entry permit from a vessel subject to a maritime lien, that transfer took place after the vessel's arrest. If the particular limited entry permit at issue in *F/V Miss Jenna* was appurtenant to the vessel at the time of arrest, a post-arrest transfer would not defeat a pre-existing lien any more than if it were a post-arrest transfer of a vessel's engine or navigation equipment.

Offenbacher is perhaps the most problematic of the post-*Gowen* cases and arguably wrongly decided, in that it recognizes that the transfer of a permit prior to the assertion of a maritime lien places the transferred permit beyond the reach of the lien, but also suggests that any transfer or assignment of a permit to a vessel subjects that permit to the vessel's maritime liens regardless of when those liens arose. The court could have avoided this anomalous result by recognizing that the crab permits at issue in the case were personal to the vessel owner and, as such, not appurtenances of the vessel.

In addition, there are strong policy arguments in favor of confining appurtenances to tangible items necessary to a vessel's navigation, operation or mission. Chief among these is that the economic health of the commercial fishing industry benefits all of its participants—from crewmembers to suppliers of necessaries to vessel owners and their lenders alike. One of the principle achievements of the limited entry systems adopted under the Magnuson-Stevens Act is the economic stability and viability that it has brought and is bringing to the commercial fishing industry. There is significant value in limited entry permits, which has facilitated better capitalization of vessel owners and encouraged the participation of commercial lenders in the industry. In the North Pacific, this has translated into fleets of large vessels held by well-managed business enterprises that are well-known in their communities, credit-worthy and capable of carrying insurance to protect their crewmembers and others.

A viable fishing industry's access to capital requires predictability. To preserve the health of the industry and encourage the kind of modernization that is now taking place in many fisheries, vessel owners require access to large-scale financing. When the value of the limited entry permits accounts for a significant portion of vessel owner's assets, any injection of uncertainty can increase the cost of, or limit access to, credit. A system that allows secret liens to defeat the priority of recorded security interests in limited entry permits does not benefit the commercial fishing industry or any of its constituencies.[90] Simply put, the "industry and, in the long run, its creditors are not well served by a legal regime that renders the industry less financeable."[91]

Furthermore, the historical rationale for maritime liens—that they are necessary as a "rough security device…to keep ships moving in commerce while preventing them from escaping their debts by sailing away''—is essentially inapplicable to the modern commercial fishing industry and does not support an unprincipled extension of maritime liens beyond their historical reach.[92] Suppliers of necessaries are not left to blindly rely on the credit of itinerant vessels when providing goods and services to fishing enterprises. Fishing enterprises involved in limited access fisheries are typically stable, long-term participants in the economic lives of the communities where they operate. In most cases, the supplier can easily protect itself by evaluating the credit of the enterprise prior to providing services.[93] Crewmembers perhaps stand in a unique position, particularly with regard to injuries suffered at sea, but these unique concerns are more effectively addressed by measures that promote the economic viability of fishing enterprises than by arguing for an extension of maritime liens beyond their traditional reach. Viable, successful fishing

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[89] *See F/V Miss Laura*, 381 F.3d at 186–87.

[90] King, *supra* note 2, at 1329 (noting that "[l]enders to ocean cargo lines are sometimes cautious about extending lines of credit secured by freight receivables due to the fact that some of the maritime liens on the vessels will take priority over the lender's security interest and the fact that the lender has no reliable way to verify the priority of its security").

[91] *Id*.

[92] SCHOENBAUM, *supra* note 10, at 684–85.

[93] In most cases, UCC lien searches are quick and either free or only a nominal expense, making it easy to evaluate the creditworthiness of a particular vessel owner.

prises pay their crewmembers and insure their vessels and operations.[94] It is an ancient cliché that hard cases make bad law but hard cases should not lead to abandonment of the traditional rule that the reach of maritime liens should not be extended by construction, analogy or inference.

Conclusion

Notwithstanding assertions to the contrary, limited entry permits are not, as a matter of general maritime law, appurtenances to a vessel. *Gowen* dealt with particular facts and its reach should be confined to those facts.

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[94] To the extent further protection of crewmembers injured in fishing operations may be desirable, this can be efficiently addressed by requiring vessel owners to maintain appropriate insurance.

Choppy Waters: Requesting Discovery and Depositions in England in Support of Proceedings in the United States

By Jonathan Cohen

An attorney trying a case in the United States needs to obtain orders for discovery and depositions to support that litigation from an individual (or corporation) in the United Kingdom who is not a party to the United States litigation.

Our attorney might be surprised to learn that there is no treaty between the United Kingdom and the United States providing for the automatic mutual recognition and enforcement of each other's court orders. After all, there are such treaties between the United Kingdom and members of the European Union and European Free Trade Association;[1] and between the United Kingdom and various members and past members of the Commonwealth of Nations.[2]

If the "third-party" refuses a written request to provide documents or to attend a deposition in England, the only course which our trial attorney can chart is to seek from the judge presiding over the United States litigation a Letter Rogatory, or Letter of Request, or to put it more formally, a "Request for International Judicial Assistance Pursuant to the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters" to ask the English courts to facilitate the production of the required documents or the deposition of the witness.

The Letter of Request is granted and it sets out the documents required and if required the witnesses to be deposed. It is then sent to the Senior Master of the Queen's Bench Division at the High Court in London as part of an application (motion) by a firm of English solicitors for an order requiring the production of the documents and/or the attendance of a witness to give the deposition in England.

At that stage it would be perfectly reasonable for our attorney to start booking a hotel in London for the deposition, to welcome shopping lists from relatives, and to make arrangements for the review of the documents, satisfied that he or she has complied with what appears to be a quaint, historic, and actually quite interesting procedure.

Unfortunately, such an assumption of compliance could turn out to be sorely misplaced.

Whilst:

> *It is the duty and the pleasure of the English court to do all it can to assist the foreign court, just as it would expect the foreign court to help it in like circumstances,*[3]

the reality is that the conceptual gulf between the United States and the English notions of discovery, which is expressed and enshrined in the English statute permitting the provision of the judicial assistance, all too often prevents the Senior Master ordering the production of the documents or the attendance of the deponent.

In *Refco*, one of leading cases on Letters of Request for the production of documents to come before the Court of Appeal, Lord Justice Waller prefaced the court's judgment with the following dire forecast:

> *Once again time and money is being spent in the English courts over Letters Rogatory requesting the English court to order the production of documents and oral deposition from third parties to litigation in the United States of America. That time and money would be unnecessary if those seeking the request from the United States Court appreciated the difference between the attitude of the United States Courts to the making of "discovery" orders against non-parties and the attitude of the English courts to the making of such orders.*[4]

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[1] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, and the Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1/01/2010.

[2] The Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933.

[3] Lord Denning MR in *RTZ v. Westinghouse [1978]* A.C. 547 at 560.

[4] Refco Companies v. CS First Boston & Standard Bank (London) Limited sub nom (1) Genira Trade & Finance Inc (2) Binzer Enterprises Corporation v. (1) Refco Capital Markets Limited (2) Refco Group Limited, LTL 21.11.01 TLR 7.11.01.

In this article, I highlight the relevant English rules of civil procedure on disclosure (discovery) and deposition orders against third parties to litigation. I then consider the statutory rules under which English judges operate when faced with letters of request. After assessing two case decisions in which English courts were forced to refuse to comply with Letters of Request for production of documents and depositions respectively, I summarise the essential principles extracted from the court decisions. It is hoped that this might assist our attorney seeking discovery and depositions in England to chart a smoother course and so avoid a similar rebuke to that given by Lord Justice Waller.

1. The English Civil Procedure Rules

In April 1999, the civil litigation system in England and Wales underwent a major reform with the promulgation of the new Civil Procedural Rules ("CPR").

The CPR were designed by Lord Woolf (then the Master of the Rolls, who heads the Civil Division of Court of Appeal) to streamline the litigation process and thereby to reduce its delay and its costs. One of the most controversial aspects of the CPR was to modernise the procedural language of litigation. The most obvious example was the replacement of Norman-French terms which had been in use for eight hundred years with what were considered more modern, user-friendly equivalents. So "Plaintiff" and "ex parte applications" (motions) were replaced by "Claimant" and "without notice applications." By the same metamorphosis the term "discovery" became "disclosure."

Subsequently new CPR rules were introduced on 1 April 2013 which contain some equally far-reaching provisions.

2. Disclosure Between The Parties To Litigation In English Courts

A summary of the disclosure rules which apply as between the litigation parties in England serves to underscore the more restrictive rules for obtaining disclosure under the CPR against a non-party, and then the even more restrictive rules where the non-party is being asked to provide documents for litigation outside the jurisdiction of the English courts.

Under the changes implemented on 1 April 2013, the disclosure process commences with each party filing a report describing briefly what documents exist or might exist that are or that might be relevant to the matters in issue and other matters. The report must also estimate what legal costs would be involved in giving standard disclosure.

The parties then attempt to agree on a proposal for the scope of disclosure in their litigation. The court can then accept, reject, or amend the proposal in making its order on how disclosure is to be effected. Whilst the new rules retain the concept of "standard disclosure" as the basic obligation:

> *31.6 Standard disclosure requires a party to disclose only*
>
> *(a) the documents on which he relies; and*
>
> *(b) the documents which-*
>
> *(i) adversely affect his own case;*
>
> *(ii) adversely affect another party's case;*
>
> *(iii) support another party's case;. . .,*

they also resurrect the court's jurisdiction to order the disclosure of what English lawyers know as "train of enquiry" documents," namely

> *31(7)(d) . . .that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences.*

Rule 31(7)(d) is quite a sea change. That is because solicitors carrying out English litigation had been disclosing "train of enquiry" type documents from 1882,[5] right up to the introduction of the CPR in 1999, when they were excluded from the ambit of standard disclosure.

Our American trial attorney might consider that Rule 31(7)(d) is perfectly workable in the context of the Letter of Request given the wide-ranging nature of discovery in the State and Federal court jurisdictions there.

Unhappily though, Rule 31(7)(d) has not even been implemented for English applications for disclosure from non-parties to English litigation, let alone for the

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[5] *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co.* (Peruvian Guano) 1882 11 QBD 55 (Peruvian Guano).

production of documents in response to Letters of Request from foreign courts.

3. The CPR Rules On Seeking Disclosure From Non-Parties In English Proceedings.

For applications for disclosure from third parties to English litigation (CPR rule 31.17), there is no provision akin to Rule 31(7)(d) to enable the Court to order production of documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party.

That is because conceptually, a non-party to the proceedings should not be placed under the same level of onerous obligation to search for and produce documents as a party to litigation should. For that reason the Court's discretion on what it can order is restricted. It can only make an Order where the party seeking the order has established that the documents sought:

> *are likely to support its case, or adversely to affect the case of another party to the proceeding.*

The Court must also be satisfied that there are actually documents falling within the specified classes. The applicant will also need to show that those documents actually exist, not just that they might exist,[6] and that their production is likely to lead to a saving in litigation costs. If the Court makes an Order, then it must specify the documents or the classes of document which the respondent is asked to disclose. In addition the respondent must list those documents which are no longer in his control.

4. Depositions.

The answer to the question of what the equivalent English procedure is to the United States depositions procedure is very short and very simple: there is no equivalent English civil procedure on depositions, neither as part of the discovery process nor as part of the trial process.

In English proceedings, a party who considers that the other party to the litigation has not given full disclosure can apply to the court for an order for specific disclosure, which could require the party in default to disclose documents or classes of documents and to carry out a search to the extent stated in the order and disclose documents located as a result of that search. If the court does not accept that the party has complied with its order then it can make an order striking out that party's pleading. That is very rare. More often than not, the disclosure ends with the production of documents by each party.

The parties then follow their disclosure with witness statements of fact which form the basis of a witness's examination in chief and cross examination when the case comes to trial. The parties might also serve expert witness statements on which their experts will likewise be examined in chief and in cross examination.

Whilst a judge hearing an interim application might conceivably order cross examination of a defendant, for example on an application for the disclosure of assets as part of an asset freezing injunction, there is no general opportunity to examine witnesses in advance of trial in England. It is only where a witness is unable to attend the trial itself on account of illness that an application for a deposition might succeed.

That absence of the concept of depositions is a critical distinction between the two legal systems. However, our American attorney will be relieved to learn that his quest has not been blown completely off course by the lack of depositions in English Civil procedure. That is because there is a statutory provision to enable an English judge to order a deposition by a non-party in response to a Letter of Request. But, as we shall see, that provision extends only to questions of evidence at trial; it does not provide for discovery depositions.

5. The Evidence (Proceedings In Other Jurisdictions) Act 1975 ("the Act").

The Act was the United Kingdom's legislative response to its ratification of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters.

Section 2(1) accords jurisdiction to the English, Scots, and Northern Irish courts to enable them to make such provision for obtaining evidence in response to a request from outside their jurisdictions as appears appropriate to give effect to the request. It also empowers the courts to require a person to take such steps as they consider appropriate for that purpose.

Section 2(2) enables the court to make orders for the examination of witnesses; the production of documents; the inspection, photographing, preservation, custody, or

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[6] *In Re Howglen Ltd.* [2001] 1 All ER 376.

detention of property; and the taking of samples of any property and the carrying out of any experiments on it. However the court's powers are always subject to the limitations which are listed in section 2. In particular Section 2(3) provides that:

> *An order under this section shall not require any particular steps to be taken unless they are steps which can be required to be taken by way of obtaining evidence for the purposes of civil proceedings in the court making the order. . .*

That is the provision which prevents oral examination of a deponent on discovery issues in England where a deposition is ordered under the Act.

In furtherance of the policy of protecting non-parties to the litigation, and in this case especially to protect non-parties to litigation before foreign courts, the limits of the English court's discretion to order to the production of documents are set out at Section 2(4).

Those limits are considerably more restrictive than the rules for disclosure between parties to litigation before the English courts, and more restrictive than the rules for disclosure by a non-party to litigation before the English courts:

> *(4) An order under this section shall not require a person:*
>
> *(a) to state what documents relevant to the proceedings to which the application for the order relates are or have been in his possession, custody or power; or*
>
> *(b) to produce any documents other than* ***particular documents*** *specified in the order as being documents appearing to the courts making the order to be, or to be likely to be, in his possession* (emphasis added).

Note that parties making standard disclosure are always obliged to provide the information at (a), as are non-parties to English litigation who are ordered to give disclosure.

So there is no provision in the Act to enable the English courts to order the non-party to disclose any train of enquiry documents; indeed the Act expressly prohibits such an order.

The failure to appreciate that distinction was one of the reasons for the rejection of the application for discovery in *Refco*. I set out a brief synopsis of the facts of that case before considering the attitude of the English High Court in a recent case on the ambit of its jurisdiction to respond to a Letter of Request for a deposition.

6. The English High Court's Refusal To Order Production Of Documents In Response To A Letter of Request: The *Refco* Decision

The defendants to the proceedings in the New York Supreme Court faced allegations of breach of contract and fraud arising out of bond and equities security transactions. The Hon. Charles E. Ramos issued a Letter of Request for production of a schedule of documents by, and the taking of depositions from, the officials of two London banks.

The defendants wished to establish that their transaction arrangements with the London banks were on the same footing as their arrangements with the Plaintiffs and were therefore entirely legitimate. The application came before the High Court practice master in London. He granted the orders sought by the Letter of Request. His Order was then overturned by a Judge. The Defendants appealed to the Court of Appeal against that decision.

The Court of Appeal upheld the judge's ruling and refused to give effect to the Letter of Request. It did so on a number of grounds.

The first was that the request for discovery and taking depositions from witnesses was a request for pre-trial discovery, something which the Act prohibits. The second ground was that the applicants had failed to list "particular documents" in their schedule. The list attached to the Letter of Request comprised documents which were merely conjectural rather than being "particular." In the words of Waller LJ:

> *The suggestion is that the schedule compendiously describes actual documents as found permissible in Asbestos.*[7] *For that to be so, however, the various categories would have to describe documents that existed rather than conjectural documents. It seems to us plain that they do not. For example, in relation to the first category, "Specific agreements" between the Banks and a variety of different entities or persons "relating to*

[7] *In Re Asbestos Coverage Cases* [1985] 1 WLR.

> *payment of fees or commission" requested from the Banks and Melwanies alike, is a request to search for documents and disclose; it is not an identification of particular documents which are known to exist and which should be produced. To put it another way, it is not a request for "the" agreements, it is a request for "any" or "all."*

The third reason was that the applicants had not produced any evidence to identify any documents as existing documents.

Once it had refused to order the production of the documents requested, the Court of Appeal rejected the application for the deposition of witnesses. This was because the applicants had wished to depose the witnesses on those very same documents whose production the Court refused to order.

In addition, the Court was unable to identify any evidence which the witnesses could give which would be relevant to the issues in the litigation in New York

7. The English High Court's Refusal To Order A Deposition In Response To A Letter of Request: The *Daric Smith* Decision

In *Daric Smith v. Phillip Morris Companies Inc. & Ors,*[8] Mr. Justice Andrew Smith set aside an Order for the deposition of the Claimant (Plaintiff). Mr. Daric Smith obtained an order for the deposition of Mr. Dunt, the former Managing Director of British American Tobacco Co. Ltd., whose evidence was expected to reveal that he had exchanged information on the pricing of cigarettes between the Defendants to litigation in Kansas which alleged price fixing amongst the Defendants leading in higher cigarette prices from 1993 to 2000.

Andrew Smith, J considered the list of 17 proposed topics for the examination of Mr. Dunt in the context both of the breadth of the lines of questioning and of the Respondent's submission that the Plaintiff was seeking to depose Mr. Dunt to uncover possible new lines of enquiry instead of for obtaining evidence for use at trial. The first purpose, which English judges characterise as an *"impermisable investigatory purpose,"* is wholly outside the bounds of the Act. It is only an order for deposition for cross examination of the witness, instead of his attending and being cross-examined at the trial, that is permitted. The Respondent also submitted that the proposed examination would be unfairly oppressive for Mr. Dunt.

Andrew Smith, J accepted that Mr. Dunt had some knowledge of matters which would be at issue at the trial in Kansas from which he assumed jurisdiction to consider whether to order the deposition. Had he found that Mr. Dunt did not have such knowledge then he would have ruled immediately that the deposition was for impermissable investigatory purposes.

However, the fact that he assumed jurisdiction was not sufficient for him to permit the deposition. That was because he found that the topics in the Letter of Request were drafted too broadly, thereby raising an inference that the Letter of Request was designed to elicit information which might lead to the obtaining of evidence rather than to establish allegations of fact. The Letter of Request sought an impermissable explanation which he refused to accept. He ruled further that the Letter of Request could not be sufficiently amended to bring it within the confines of the Act.

8. Helpful Pointers From The Case Law On What Is Permissable In Letters Of Request.

On a general level the English courts should accede to Letters of Request as far as they can.

As far as Letters of Request seeking the production of documents are concerned, the schedule listing the documents or various categories of documents requested can, in order to qualify as "particular" documents, be described compendiously (that is concisely and comprehensively). Even then, the exact documents must be clearly indicated and they must be shown to exist or to have existed as opposed to being conjectural documents.

As for the ordering of depositions, the English courts cannot and will not grant requests for the examination of a witness who is not a party to the action for the purpose of seeking information which is inadmissable at trial but appears to be reasonably calculated to lead to the discovery of admissable evidence. The Letter of Request will be rejected if it is of an investigatory character. Quite simply, there can be no order for oral discovery. The application for an order will also be rejected if it is unfairly oppressive on the witness to order the deposition.

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[8] *Daric Smith v. Phillip Morris Companies Inc. & Ors* [2006] EWHC 916 (QB).

Hopefully our American attorney can now have a smooth crossing to London, possibly with some confidence that the Senior Master will make the order for the deposition and production in accordance with the Letter of Request from the presiding judge in the United States litigation.

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The Libellant's Dilemma in Rule C Arrests and Rule B Attachments

By Daniel J. Cragg and Gregory Singleton

I. Introduction

> *Maritime law deals primarily with ships that sail the seven seas. A ship may be here today and gone tomorrow, not to return for an indefinite period, perhaps never.*[1]

The words of Judge Duniway of the 9th Circuit highlight the transient characteristics of maritime property that its practitioners must grapple with. Much like any other civil action in federal court, a maritime claim may be brought *in personam* – directly against an individual or company. However, unlike the normal civil case, and because of the unique challenges posed by naturally elusive defendants, maritime practitioners often bring *in rem* and pre-judgment *quasi in-rem* attachment claims against parties not otherwise subject to *in personam* jurisdiction, to facilitate bringing a party to court.

In rem jurisdiction, codified in Rule C of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, is based on the "legal fiction that the [res] itself caused the loss and may be called into court to make good,"[2] whereas the process of maritime attachment and garnishment sequesters a defendant's property, and in order to defend or reclaim such property, the owner must appear in court, thus perfecting the court's *in personam* jurisdiction.[3] *In rem* jurisdiction bypasses the owner of the res altogether, allowing a plaintiff to bring a claim directly against the res itself, but only after arresting the res by way of Rule C.[4]

On the one hand, Rule B attachment and Rule C arrest address the unique challenges inherent in maritime law. By using the res as either a mechanism to force *in personam* jurisdiction or by ignoring *in personam* jurisdiction altogether, the difficulties posed by the transient nature of maritime property can be overcome.

On the other hand, both attachment and arrest are imperfect remedies. Under both procedures, in order to perfect its jurisdiction the court needs to have physical control of the res.[5] In other words, until the res is seized by arrest, an *in rem* claim is not initiated under Rule C,[6] and unless the res is properly attached, no jurisdiction is ever obtained under Rule B.[7] The control requirement is not without sense. In *in rem* cases, the *situs* (place of injury) travels with the res; as such, in order to identify the proper district in which to bring a claim, the *situs* must be firmly established.[8] Additionally, both Rule C Arrest and Rule B Attachment actions allow a plaintiff to satisfy a claim directly from the sale of the res. It would be nothing more than lip service to find in favor of a plaintiff and order satisfaction of a lien by sale of a vessel if it has already sailed off into the sunset.[9]

It is behind this prerequisite of control that the remedies' imperfections lie. Both Rule B and Rule C mandate that "[i]f the property is a vessel or tangible property on board a vessel" then delivery of the summons or process (in the case of attachment), any warrant (in the case of arrest), and any supplemental process "*must* be delivered to the marshal for service."[10] On its face, the

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[1] Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627, 637 (9th Cir. 1982).

[2] Ventura Packers v. F/V Jeanine Kathleen, 305 F.3d 913, 919 (9th Cir. 2002).

[3] East Asiatic Co., Ltd. v. Indomat, Ltd., 422 F. Supp. 1335, 1342 n.4 (S.D.N.Y. 1976) (quoting Atkins v. Fibre Disintegrating Co., 85 U.S. 272, 298 (1873)).

[4] *See generally*, Fed. R. Civ. P. Supp. AMC Rule C.

[5] "If tangible property is to be attached or arrested, the marshal or other person or organization having the warrant *shall* take it into the marshal's possession for safe custody." Fed. R. Civ. P. Supp. AMC Rule E(4)(b) (emphasis added).

[6] *See* Republic Nat'l Bank of Miami v. United States, 506 U.S. 80, 84 (1992) (citations omitted) ("Certainly, it has long been understood that a valid seizure of the res is a prerequisite to the *initiation* of an *in rem* civil forfeiture proceeding.").

[7] *See* Blueye Navigation, Inc. v. Oltenia Navigation, Inc., No. 94 Civ. 1500 (LAP), 1995 U.S. Dist. LEXIS 1844, at *15 (S.D.N.Y. Feb. 17, 1995) (citations omitted) (holding that in a quasi-*in rem* action, if the property was never attached, "then no jurisdiction was ever obtained under Supplemental Rule B.").

[8] *The Ann*, 13 U.S. 289, 291 (1815). *See also Republic Nat'l Bank of Miami*, 506 U.S. at 87 ("[T]he court must have actual or constructive control of the res when an *in rem* forfeiture suit is initiated.").

[9] *See* Manro v. Almeida, 23 U.S. 473, 498 (1825); Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co., 743 F.2d 956, 960-61 (5th Cir. 1984) (quasi-*in rem* jurisdiction); Belcher Co. of Ala., Inc. v. M/V Maratha Mariner, 724 F.2d 1161, 1165 (5th Cir. 1984) (*in rem* jurisdiction).

[10] Fed. R. Civ. P. Supp. AMC Rules B(1)(d)(i) and C(2)(b)(i) (emphasis added).

procedure should work. Federal marshals are no strangers to serving warrants and other process. However, unlike service in civil actions, courts in admiralty have no option but to have service provided by the U.S. Marshall.

However, with both budget cuts and the expansion of the U.S. Marshall's mission from its historical role, many practitioners find that service of warrants and writs pursuant to Rules B and C lack priority. Certainly, it is the expectation of the courts that federal marshals expeditiously effect service of process.[11] However the only statutory mandate is that service be "forthwith,"[12] a vague term that the courts have defined to mean, at best "as soon as by reasonable exertion, confined to the object, it may be accomplished."[13] At worst, the courts have offered such guidance as to say that "a two month delay would surely not be compliance."[14] Whether service is effected in one week or one month from delivery of process, when the relevant timeframe is defined by "a ship's ability to dock, unload cargo, and fill its hold with goods intended for another destination–all within twenty four hours,"[15] "forthwith" becomes more of an impediment than a guideline. And when the only avenue for service of process is by a federal marshal who is lacking resources and time, "forthwith" just may not be good enough.

As a stop gap measure, some courts have been issuing temporary restraining orders that enjoin pilots from piloting vessels that are awaiting service of a writ of attachment or arrest. Because the pilots have a monopoly over a given port, and because vessels are unable to depart without the services of the local pilot, the solution is effective. However, are there legal grounds for issuing such a writ? Until the court has control of the vessel, it would seem to have no jurisdiction to issue process beyond those provided for in Rule B and Rule C. Even if the court had jurisdiction, Fed. R. Civ. P. 65 does not contemplate the issuance of a TRO against a third party, like a pilot.

Hence, the "Libellant's Dilemma": jurisdiction requires control, control requires service, service requires catching the vessel while in port, but catching the vessel while in port requires procedures that mandate established jurisdiction, the establishment of which requires control .... TROs issued as described have yet to be challenged by the pilots; with monopolies over each port and generally a queue of vessels awaiting their services, the pilots have no reason to care, let alone devote the time and resources to challenge the writ. Without doubt, these TROs will eventually be challenged or courts will deny a request for one where an explanation of its authority to enjoin a third party under these circumstances is lacking.

Fortunately, the Libellant's Dilemma is not without remedy. Oddly enough, it does not require the courts to do anything different. It does, however, require an unconventional explanation. In the event that a TRO enjoining a pilot from taking a vessel subject to arrest or attachment out of port is issued, or a request for a court to issue such a TRO is challenged, the following is a framework justifying the court's authority for the issuance. The basis for the argument lies in the All Writs Act, a law enacted less than seven months after the United States Constitution became effective.

II. The All Writs Act

Originally included in the Judiciary Act of 1789, and amended several times since, the All Writs Act authorizes the federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."[16] This authority allows federal courts to issue writs when called for by extraordinary circumstances, providing "the tools necessary to implement their jurisdictional grants."[17] Under the auspices of the Act federal courts have issued writs, for example, to aid in conducting factual inquiries,[18] to permit the use of discovery tools in habeas corpus proceedings,[19] and to enjoin a state court from entertaining an action over a res parallel to one concurrently brought in federal court.[20]

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[11] Henderson v. United States, 1996 A.M.C. 1521, 1526 (1996).

[12] Fed. R. Civ. P. Supp. AMC Rule E(4)(a).

[13] Dickerman v. Notherthern Trust Co., 176 U.S. 181, 193 (1900).

[14] City of New York v. McAllister Brothers, Inc., 278 F.2d 708, 710 (2d Cir. 1960).

[15] Shipping Corp. of India Ltd. v. Jaldhi Overseas PTE LTD., 585 F.3d 58, 70 (2d Cir. 2009).

[16] 28 U.S.C.S. § 1651(a) (1949).

[17] ITT Cmty. Dev. Corp. v. Barton, 569 F.2d 1351, 1359 (5th Cir. 1978).

[18] Am. Lithographic Co. v. Werckmeister, 221 U.S. 603, 609-610 (1911).

[19] Harris v. Nelson, 394 U.S. 286, 298-300 (1969).

[20] *In re* Baldwin-United Corp., 770 F.2d 328, 336 (2d Cir. 1985).

Invoking the authority of the All Writs Act to resolve the Libellant's Dilemma raises two questions. First, if jurisdiction has not been perfected, how does the court have authority to issue a writ in the first place? The very reason a TRO would be issued in the Libellant's Dilemma is because the court is unable to establish jurisdiction. Facially, it would appear that the Act does nothing to resolve this Catch 22. Second, if the court does have authority to issue a writ, what writs may actually be issued? Resolution of the Libellant's Dilemma calls for issuing a TRO to the local pilots, who are not party to the case. Not only are they non-parties to the case, but the pilots are truly neutral with no presumed allegiance to either side.

Fortunately, the All Writs Act's nearly two and a quarter centuries of legal interpretation, has shown it as indispensable to the basic functioning of the justice system and a flexible and fundamental tool for the courts.

III. Prospective Jurisdiction

It is a fundamental principle of law that the federal courts are courts of limited jurisdiction: the powers and authority of the lower federal courts only exist when expressly granted by Congress.[21] The All Writs Act was necessary to provide the federal courts with the means to exercise their limited jurisdiction.[22] However, as explicitly intended by Congress, the Act does not create jurisdiction. Rather, the Act is limited to "empower[ing the federal courts] only to issue writs in aid of jurisdiction previously acquired on some other ground."[23]

Under this precedent, resolution of the Libellant's Dilemma would appear to be run into the same Catch 22 as issuing a TRO without the authority of the Act: because admiralty jurisdiction is not perfected in a Rule B or Rule C action until arrest or attachment, it would seem to follow that writs issued to facilitate the arrest or attachment are unavailable. However, the realities of the justice system have compelled the courts to refine this limitation.

In the early 19th century, the courts found that in the realm of appellate jurisdiction, the scope of the Act needed to be broader. The appellate courts, lacking jurisdiction until an appeal was filed, were powerless to prevent actions of the lower courts that would frustrate or make appellate review meaningless. For example, if a court were to sentence someone to death, an appeal would be rather pointless after the sentence was carried out. As such, the authority granted by the All Writs Act was interpreted to "extend[] to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected."[24] No act of Congress explicitly granted such power, but the courts found it authorized by the Act because issuing such writs was "in the nature of appellate jurisdiction."[25]

While this "prospective jurisdiction" has only been applied to appellate review, there is no express statutory basis for the distinction or congressional direction supporting such a limitation. Instead of interpreting the trend as a reflection of a hard limitation to the application of prospective jurisdiction, the better interpretation is that the limited application only reflects the extent to which prospective jurisdiction has been successfully applied.

It would be a question of first impression for the courts as to whether employing the All Writs Act in aid of prospective jurisdiction in admiralty is proper. However, in comparison, *in rem* jurisdiction and appellate jurisdiction bear some similarities. Both lack jurisdiction but for the completion of a procedural step (arrest or attachment and filing of the petition for an extraordinary writ). Both are contingent on another governmental agent satisfying its duty (service of the writ and the clerk accepting the petition for filing). Both have established subject matter jurisdiction (maritime and appellate).

Moreover, the trend in the interpretation of the All Writs Act is to favor empowering the federal courts to act:

> *Unless appropriately confined by Congress*, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated

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[21] *See ex parte* Bollman, 8 U.S. 75, 93 (1807).

[22] Harris v. Nelson, 394 U.S. 286, 299-300 (1969).

[23] Brittingham v. U.S. C. I. R., 451 F.2d 315, 317 (5th Cir. 1971). *See also* Covington & C. Bridge Co. v. Hager, 203 U.S. 109, 110 (1906) (Federal courts are limited to the "power to issue such writs in aid of their jurisdiction in cases already pending, wherein jurisdiction has been acquired by other means and by other processes.").

[24] F.T.C. v. Dean Foods Co., 384 U.S. 597, 603 (1966) (citing *ex parte* Bradstreet, 32 U.S. 634 (1833)).

[25] *Ex parte* Crane, 5 U.S. 190, 193 (1932).

> in its sound judgment to achieve the ends of justice entrusted to it.[26]

In other words, the Act has already granted a general authority to the courts which remains until taken away. In light of this broad grant, a district court sitting in admiralty should not assume it is without power to issue a writ in aid of its prospective jurisdiction.

IV. The All Writs Act Provides Authority to Enjoin Third Parties

Under the authority of the All Writs Act, federal courts may issue writs that were traditionally available in actions at law and suits in equity.[27] While a TRO is certainly an equitable remedy, resolving the Libellant's Dilemma requires the court to issue a TRO to a neutral third party. Indeed, under Rule 65, the court does have authority to issue a TRO binding a non-party who is not "in active concert or participation" with a party, or with the party's "officers, agents, servants, employees, and attorneys."[28] However, this assumes the third parties are "identified with [the parties] in interest, in 'privity' with them, represented by them or subject to their control."

While an argument that the pilots share an interest or are in privity with the res could be made, the simpler argument is that the authority of the All Writs Act extends even to issuing writs to neutral third parties under settled U.S. Supreme Court precedent. In the 1977 U.S. Supreme Court case *United States v. New York Telephone*, before the Court was the question of whether a district court had the authority under the All Writs Act to enjoin a utility company (the "Company") to provide technical assistance for an FBI investigation.[29] The utility company refused to fully comply. Arguing, *inter alia*, that the All Writs Act did not grant authority for the writ, the Company moved to vacate the order.[30]

When the writ was first issued, the District Court's rationale was that since authority to issue the warrant for the pen registers was authorized by statute, and the writ enjoining the Company to assist was necessary to effectuate the warrant, the court had authority to issue the writ. The Company argued that because there was no express grant of authority to enjoin third parties, the District Court had exceeded its powers under the All Writs Act.

The *New York Telephone* Court held that the writ was properly issued because the purpose of the All Writs Act was to facilitate efficient justice. Justice Stevens' dissent rejected this reasoning: "The fact that a party may be better able to effectuate its rights or duties if a writ is issued never has been, and under the language of the statute cannot be, a sufficient basis for issuance of the writ."[31] He argued that by justifying the writ as necessary to prevent "obstruction of an investigation"[32] the majority comingled the District Court's interest in jurisdiction with the executive interest in a successful investigation.[33]

Despite Justice Stevens's emphatic dissent, the majority dismissed his arguments, and the "attempt to draw a distinction between orders in aid of a court's own duties and jurisdiction and orders designed to better enable a party to effectuate his rights and duties . . .," calling the distinction "specious."[34] Instead, the majority justified the writ as necessary to protect a party's right to effectuate legal action, finding that the writ merely "prevent[ed] nullification of the court's warrant and the frustration of the Government's right under the warrant to conduct a pen register surveillance."[35]

Having established that the Act grants federal courts power over "persons who, though not parties to the original actions or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice,"[36] the majority then turned to determining whether issuing the writ was an abuse of discretion – just because the writ could be issued does not mean that it should be. While a fiery

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[26] Adams v. U.S. *ex rel.* McCann, 317 U.S. 269, 273 (1942) (emphasis added). The majority opinion in New York Telephone, discussed *infra* §§ IV and V, relied on this interpretation to justify upholding a district court's authority to issue writs to neutral third-parties.

[27] Wisconsin Right to Life, Inc. v. Fed. Election Comm'n, 542 U.S. 1305, 1306 (2004) (Injunctions may be issued under authority of All Writs Act) (Rehnquist, C.J., in chambers); United States v. Sawyer, 239 F.3d 31, 37 (1st Cir. 2001) (All Writs Act provides authority to issue writs available at common law).

[28] Fed. R. Civ. P. 65(d)(2).

[29] United States v. N.Y. Tel. Co. (*New York Telephone)*, 434 U.S. 159, 161 (1977).

[30] *New York Telephone*, 434 U.S. at 162-163.

[31] *Id.* (citations omitted).

[32] *New York Telephone*, 434 U.S. at 189-190 (dissent, Stevens).

[33] *Id.*

[34] *New York Telephone*, 434 U.S. at 175 n.23.

[35] *Id.*

[36] *New York Telephone*, 434 U.S. at 174.

dissent argued that authority to order neutral third parties to affirmatively act is nothing short of unraveling the very foundations of the United States,[37] the majority focused on an interpretation that allowed procedural versatility, wherein the Act would be a means to effective and efficient justice.[38]

Strikingly, instead of recognizing the limits set forth in other similar procedures (*e.g.* Rule 65's requirements of shared interest, privity, or agency for enjoining a third party with a TRO[39]), the Court's holding proclaimed a new doctrine that recognized a federal court's power to bind completely neutral and uninvolved parties under the authority granted by the Act.[40] Similar to the relationship between the pilots and the vessels, the Company was not working in concert with the intended defendants, attempting to thwart the investigation, nor affirmatively acting in any role other than as a vendor. The Company simply refused to be pressed into service against its will.

As a basis for its review of the lower court's discretion, the *New York Telephone* Court started with the principle that "unreasonable burdens may not be imposed" on third parties.[41] Notably, the Act requires that a writ be either "necessary *or* appropriate," not both.[42] While the Court did add that "without the Company's assistance there was no conceivable way in which the surveillance authorized by the District Court could have been successfully accomplished,"[43] it was by no means the thrust of the majority's holding. Instead, the Court focused on weighing whether the burden imposed on the Company was outweighed by the value to the ends of justice.[44]

In lieu of a bright-line test, the Court weighed certain factors critical to the case in a burden-to-benefit balancing test. Perhaps the balancing test was best framed eight years later in another dissent by Justice Stevens, as "whether the . . . court's order is reasonably related to the administration of justice and is a sound exercise of judicial discretion."[45] However stated, the factors used by the Court in *New York Telephone* are highly instructive in resolving the Libellant's Dilemma.

In its review of the burden imposed on the Company, the Court found the imposition to be "meager."[46] In this regard, the Court addressed the burden on the Company in two ways. The first was an analysis of whether it was appropriate to enjoin the Company to affirmatively act. To this end the Court found that even though the Company was a third party, it was not "so far removed from the underlying controversy that its assistance could not be permissibly compelled."[47] Rather, it was inherently entwined in the action as its facilities were being used, continually, to enable the criminal activity.[48] Moreover, the Court reasoned that as a public utility the Company had a duty to serve the public, and therefore could not argue that it "had a substantial interest in not providing assistance."[49]

In the circumstances of the Libellant's Dilemma, a vessel may not enter or leave port without engaging the services of the local pilots. Similar to a utility company, pilots have a government approved monopoly on an essential service. Pilots are inherently entwined

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[37] If the All Writs Act confers authority to order persons to aid the Government in the performance of its duties, and is no longer to be confined to orders which must be entered to enable the court to carry out its functions, it provides a sweeping grant of authority entirely without precedent in our Nation's history. Of course, there is precedent for such authority in the common law-the writ of assistance. The use of that writ by the judges appointed by King George III was one British practice that the Revolution was specifically intended to terminate.

New York Telephone, 434 U.S. at 190 (Stevens, J., dissenting).

[38] *See New York Telephone*, 434 U.S. at 172 (citing Harris v. Nelson, 394 U.S. 286, 299 (1969), Price v. Johnston, 334 U.S. 266, 282 (1948)) (internal quotations omitted).

[39] *See* Fed. R. Civ. P. 65(d)(2) *supra* note 28.

[40] *Id.*

[41] *New York Telephone*, 434 U.S. at 172.

[42] A federal court "is not limited to issuing a writ (under the All Writs Act) only when it finds that it is 'necessary' in the sense that the court could not otherwise physically discharge its . . . duties." Adams v. U.S. *ex rel.* McCann, 317 U.S. 269, 273 (1942).

[43] *Id.*

[44] *See* Adams v. U.S. *ex rel.* McCann, 317 U.S. 269 (1942); Harris v. Nelson, 394 U.S. 286, 299 (1969) (The All Writs Act "has served since its inclusion, in substance, in the original Judiciary Act as a legislatively approved source of procedural instruments designed to achieve the rational ends of law.") (internal quotations omitted).

[45] Pa. Bureau of Corr. v. U.S. Marshals Service, 474 U.S. 34, 48 (1985) (J. Stevens, dissent).

[46] *New York Telephone*, 434 U.S. at 174 (emphasis added).

[47] *Id.*

[48] *Id.*

[49] *Id.*

with the operation of the ports. Just as the phone lines enabled the criminal enterprise to operate, the pilots' services allow a vessel to escape the service of an arrest warrant or writ of attachment.

Further, the burden imposed by the writ is much lighter in the Libellant's Dilemma than that which was faced by the Company. In *New York Telephone*, the Company was being ordered to act affirmatively to assist the government with facilities and services. In contrast, pilots here would only be restrained from action. As such, the dissent's primary arguments do not even apply to the Libellant's Dilemma.

The second burden reviewed by the Court was whether the Company would be overly encumbered operationally or financially. The Court held that it was not, as the Company was compensated for its services. In the Libellant's Dilemma, there is of course no reason that a requirement to post cash or a bond to secure compensation for the pilot could not be a condition for issuance of the TRO. However, given the monopoly status that the pilots' hold, there is no reason to believe that any financial burden on the pilots would be more than trivial or temporary. If the pilots are restrained for the moment, they will still be able to earn their fee, as the vessel will eventually leave port at some time. It may be after the proceeding has concluded, but it is extraordinarily unrealistic that at the conclusion of a proceeding (or a judicial sale) the vessel will not leave port.

Even without a bright-line test, the Libellant's Dilemma far exceeds the standard for enjoining a third party under the All Writs Act. The circumstances of the Libellant's Dilemma parallel those considered in *New York Telephone*, with any variations tending to favor issuance of the TRO.

V. Conclusion

So, the next time your defendant-vessel is set to leave port, and the Marshall is unable or unwilling to arrest the vessel in time, remember, all is not lost. The All Writs Act allows for a remedy against the pilot, to allow the Marshall enough time to effectuate the arrest or attachment and perfect the district court's jurisdiction.

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Fishing Permits Must Be an Appurtenance to a Fishing Vessel in Order to Support an Otherwise Unfairly Burdened Industry

By David S. Smith

I. Introduction

Many meetings of The Maritime Law Association of the United States Fisheries Committee have discussed whether limited access fishing permits are appurtenances to a vessel.[1] Admittedly, most of the attendees take the position that these intangible limited access fishing permits should not be considered an appurtenance. Other attendees that have voiced an opinion, who believe permits should be appurtenances, are primarily from the Northeast and represent vessel owners from that region. Like family owned farms, small fishing operations and such a way of life are on the brink of extinction.[2] By recognizing limited access fishing permits as an appurtenance to a fishing vessel, small operators can obtain credit based upon the value of the vessel and her permits for repairs and necessities that cannot be obtained from a bank or regulated lender.

II. The Fishing Grounds

Commercial fishing in North America began in the early sixteenth century. By the time of the American Revolution, fisheries were the engine of economic growth and driving the Northeast Region's prosperity. In 1976, Congress enacted The Magnuson Fisheries Conservation and Management Act ("MFCMA" or "Magnuson"). Since then, fisheries management in the eight regions of the country has been evolving with the creation of limited access fishing permits based upon a fishermen or a vessels' historical participation.[3] Historical participation in a limited access fishery creates substantial value to the fishing permits themselves.[4]

Like so many others, the seafood industry depends on a long chain of buying and selling to carry out its business. Processors and dealers buy from fishermen, who then sell to wholesalers, who sell to retailers, and so on. A line of credit between those businesses is standard and has been a large part of the traditional fishing business.[5] If any of these businesses encounter a problem it substantially delays the entire process. As the financial crisis of 2008 hit, businesses had problems obtaining credit from banks, which postponed the process of extending credit between businesses.

The First Circuit recognized that fishermen seeking repairs and supplies on credit are likely to benefit from treating a vessel's permits as appurtenances.[6] The *Gowen* court concluded that a fishing permit was an appurtenance.[7] Accurately stated in dicta, the Court said:

> *No one offering credit for supplies or repairs can be certain just how many higher priority creditors will be standing in line when collection is sought. But presumably common knowledge may supply the equivalent of a credit rating for a fisherman based for years in, or regularly visiting, the same community.*[8]

The Third Circuit, on the other hand, side stepped this issue in *PNC Bank Delaware v. F/V MISS LAURA*.[9] The F/V MISS LAURA obtained fishing permits that once belonged to the F/V MISS PENELOPE, which previously sank. The creditors in that action sought to arrest the permits on the F/V MISS LAURA based upon the fact that those permits were once on the F/V MISS PENELOPE. The Third Circuit held that since MISS PENELOPE's creditors had not worked on the MISS LAURA, their "lien ceased to exist once the MISS PENELOPE sank and the fishing history was

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[1] Fishing permits are a privilege not a true right. Statutory and regulatory provisions avoid due process claims if a permit is limited or revoked. *See* 16 U.S.C. § 1853(d); 50 CFR § 635.4(a)(3).

[2] Richard Gaines, *[U.S. Senator Elizabeth] Warren Hears Fishermen's Fears*, Gloucester Times, Feb. 20, 2013.

[3] 16 U.S.C. § 1852; *See, e.g.*, 50 CFR §§ 622, 635, 648, 665, 679.

[4] Gowen, Inc. v. F/V Quality One, 244 F.3d 64, 68 (1st Cir. 2001).

[5] Laine Welch, *Credit Woes Trickle Into Fisheries*, Anchorage Daily News, Dec. 20, 2008.

[6] *See* Gowen, Inc. v. F/V Quality One, 244 F.3d 64, 68-69 (1st Cir. 2001).

[7] *Id.*

[8] *Gowen*, 244 F.3d at 69.

[9] PNC Bank Delaware v. F/V Miss Laura, 381 F.3d 183 (2004).

incorporated into the MISS LAURA."[10] This distinction is important because creditors presumably can enforce a lien on a vessel's permits after the vessel has sunk as long as the permit has not been incorporated into a new vessel. As the *Gowen* court said case law has to form expectations on new issues rather than reflect them.[11]

III. The Importance of Good Fishing Gear in One Region

According to the National Oceanic and Atmospheric Administration ("NOAA"), from 2001 to 2011, the number of federally licensed groundfishing boats working in the Northeast plummeted from 1,019 to 344.[12] In September of 2012, Acting Secretary of Commerce, Rebecca Blank issued a fishery disaster declaration for the Northeast groundfish fishery. This declaration is due to an unprecedented reduction of up to 78 percent in the amount of groundfish fishermen are able to harvest, despite the fishermen's adherence to strict catch limits. The New England Fishery Management Council voted to reduce cod landings by 77 percent beginning May 1, 2013. This has been the most drastic catch reduction by fishing regulators.[13] Imagine, a fisherman with an allocation of 108,000 pounds of cod reduced to 17,000 pounds as a result of this vote. To make matters worse for the fishermen, the Commonwealth of Massachusetts reduced state water cod allocation to 122,000 pounds divided amongst 21 full-timers and 40 more part timers.[14] After being labeled an industry in disaster, one year later there is still no aid from Congress, presumably because Congress is busy trying to avoid the fiscal cliff.

Today, banks are more cautious to lend money, thus lines of credit between fishermen and suppliers of necessaries and repairs are much more important; necessitating the inclusion of the value of the limited access fishing permits into the value of the vessel. Without some economic help, the small time fishermen will leave and they will not coming back.[15]

IV. The Gurry

No matter what the economy is like, or sustainability of a fishery, banks and larger businesses find it offensive to extend a vessel's appurtenances to fishing permits for a myriad of reasons. First, fishing permits are an intangible right to a public resource and not really a traditional appurtenance.[16] Second, large businesses do not want to unnecessarily expose their assets to a risk of loss, while lenders want to perfect a security interest in the intangible fishing right that is superior to all others. A preferred ship's mortgage secures that lender's interest in the vessel and its appurtenances. However, salvage liens and personal injury claims would have priority over a preferred vessel mortgage and thus the lenders would not have a perfect, secure interest in the value of the fishing permits.[17] Finally, if a vessel is a total loss, the lender's security would be effectively destroyed.[18]

Banks need certainty in their security interests, especially in this post economic crisis time. Unfortunately, the small fishermen often do not have the ability to obtain credit from a traditional lending institution due to the economic crisis. The banks' desire for absolute certainty and strength in security in the permits themselves are not a sufficient justification to eradicate the smaller struggling commercial fishermen's last way to obtain credit.

V. The Catch Of The Day

There are three basic resolutions to the debate amongst industry lawyers, bankers, and large fishing businesses. First, let the Circuits fillet the permits as there are important differences regarding the transferability of fishing permits in the various regions. Second, wait for Congress (good luck) to make changes to Magnuson to allow permits to be registered and secured outside of the vessel itself. Third, we, as the small commercial fishermen, wait to sink into the canyons of the deep blue sea, which would allow big business to lobby for changes more swiftly.

Gowen is still good law since *Miss Laura* side-stepped the potential of addressing the same issue. Until Congress says otherwise, the courts will have to

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[10] *Id.* at 187 (emphasis added).

[11] *Gowen*, 244 F.3d at 69.

[12] Jenna Russell, *Last of their kind. As fish stocks dwindle and catch limits tighten, a way of life is disappearing too*, Boston Globe, June 16, 2013.

[13] *Id.*

[14] Richard Gaines, *[U.S. Senator Elizabeth] Warren Hears Fishermen's Fears*, Gloucester Times, Feb. 20, 2013.

[15] Jenna Russell, *Last of their kind. As fish stocks dwindle and catch limits tighten, a way of life is* disappearing too, Boston Globe, June 16, 2013.

[16] David J. Farrell, Jr., *Maritime Liens on Fishing Privileges: Towards a Congressional Resolution*, 2 Benedict's Maritime Bulletin 339 (Fourth Quarter 2004).

[17] 46 U.S.C. §§ 31326(b), 31301(5).

[18] Farrell, *supra* note 16, at 339.

continue to evaluate a maritime lien holder's claim to a fishing permit on a case-by-case basis.[19] Theoretically, the *Miss Laura* court would have followed *Gowen* if the facts were similar.[20] Permits as appurtenances must continue to be the norm to allow those that are struggling to obtain the credit they need to survive.

There is, however, an important distinction that needs to be identified, which might help calm the waters for banks and big fishing businesses. The *Gowen* case involved the court ordered sale "of the vessel, including 'any valid fishing permits and history to the extent permitted by applicable law.' "[21] The permits involved in *Gowan* as well as the permits provided to the MISS LAURA were limited access groundfish permits issued by the Northeast Region of the National Marine Fisheries Service. The Northeast Region states:

> *The fishing and permit history of a vessel is presumed to transfer with the vessel whenever it is bought, sold, or otherwise transferred, unless there is a written agreement, signed by the transferor/seller and trasnferee/buyer, or other credible written evidence, verifying that the transferor/seller is retaining the vessel's fishing and permit history for purposes of replacing the vessel.*[22]

Thus in *Gowen*, the fishing permits that were offered at the sale were offered to the extent they were transferrable under applicable law. It so happened that the permits were presumed to transfer with the sale of the vessel. This presumption does not exist in the other regions or other fisheries.

Most regions allow the transfer of fishing permits, but none of the transfer requirements work as a *presumption* like the limited access groundfish permit. Some Regions require the actual permit turned in before a new permit is issued, in addition to other certifications, to participate in the fishery.[23] Alternatively, other regions state that the permit *may* transfer with the vessel, but it is not *presumed* and usually requires additional documentation acknowledging the transfer.[24] Another Region states that the person is the holder of the permit and not the vessel.[25] Some permits cannot be transferred at all.[26] The success of the transferable permits is all subject to a Regional Administrator's approval.[27]

The various other region's requirements are entirely different from the Northeast Region's requirements and more importantly its presumption. It is quite possible that if someone purchased a permit from one of the other Regions at a U.S. Marshal sale, the permit may not actually be issued by NMFS because said purchaser lacks some eligibility requirement that does not exist in the Northeast Region.[28] So, perhaps *Gowen* is only applicable to Northeast Region permits as the other permits are not automatically transferable by applicable law.

VI. Conclusion

Unfortunately, drastic changes to fishing regulations force fishermen to target healthy, but less valuable, stocks.[29] Others cannot survive. Those changes result in fleet shrinkage, related job loss, and disappearing infrastructures.[30] The pressure put on the small fishermen is driven by environmental groups, free-market advocates, food retailers, seafood companies, and

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[19] Gowen, Inc. v. F/V Quality One, 244 F.3d 64, 68 (1st Cir. 2001).

[20] To avoid a conflict, the Third Circuit based its holding on the fact that the lien holder had not provided services to MISS LAURA. PNC Bank Delaware v. F/V Miss Laura, 381 F.3d 183, 186 (2004).

[21] *Gowen*, 244 F.3d at 65 (emphasis added).

[22] 50 CFR § 648.4(a)(i)(D) (emphasis added).

[23] *See, e.g.*, 50 CFR § 622.50(b)(2) (explaining the requirements for Gulf Shrimp permits); 50 CFR 622.241(c) (explaining the requirements for Golden Crab permits).

[24] *See, e.g.*, 50 CFR § 622.20(a)(i) (explaining the requirements for Gulf Reef Fish permits); 50 CFR § 622.171(b) (explaining the requirements for Snapper Grouper permits); 50 CFR § 622.201(b) (explaining the requirements for Rock Shrimp permits); 50 CFR § 622.371(b) (explaining the requirements for King Mackerel permits); 50 CFR § 635.4(1)-(2) (explaining the requirements for Shark Swordfish and Tuna Longline permits); 50 CFR § 665.801(1) (explaining the requirements for Hawaii Longline permits).

[25] *See* 50 CFR §§ 660.25(b)(4)(iv), 665.801(1).

[26] *See* 50 CFR § 665.203(c).

[27] *See* 50 CFR §§ 679.4(b), 679.41(b).

[28] Arguably, the same would be true for a secured creditor under a UCC filing. This discussion goes beyond the scope of this article.

[29] *New England Fishermen Say New Regulations May Lead to Collapse of the Industry*, Fox News (Jan. 31, 2013), http://www.foxnews.com/us/2013/01/31/new-england-fishermen-say-new-regulations-may-lead-to-collapse-industry.

[30] *Id.*

private equity firms that wage a broad and sophisticated campaign to transform the nation's fisheries.[31] Until these groups drive out the small fishermen, recognizing some permits as an appurtenance is the best bait for the small fishermen to catch credit for the necessities needed for his or her vessel.

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[31] Environmental Reporter: System Turns US Fishing Rights Into Commodity, Squeezes Small Fishermen By Susanne Rust March 12, 2013.

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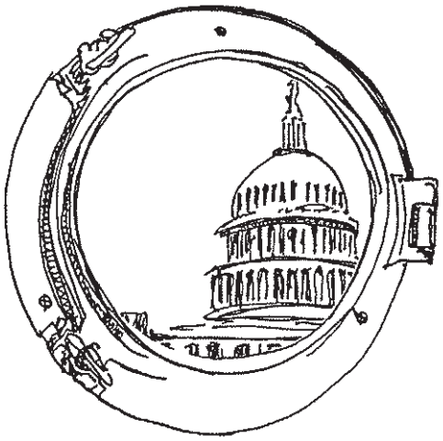

Fracking Maritime Policy

By Bryant E. Gardner

Oil politics in Washington often intersect with maritime policy, and the sea change spurred by hydraulic fracturing ("fracking") technology, horizontal drilling, shale gas, and oil sands development is sure to be an area of developing interest in the coming years. Movements of oil have generated new challenges in the application of the Jones Act cabotage law, and brought new scrutiny to vintage petroleum export control regulations, many of which date back to the 1970s oil embargo and a time of simpler energy markets. In recent months, the debate on the surface has primarily focused upon the Department of Energy ("DOE") Office of Fossil Energy's failure to process applications to export LNG in a timely manner. However, crude export issues are also bubbling up in and around the beltway.

LNG Export

Rising U.S. natural gas reserves and low domestic prices by comparison to other regions have raised the prospect of significant natural gas exports, requiring new liquefied natural gas infrastructure and tankers to get it to market. However, section 3 of the Natural Gas Act ("NGA")[1] prohibits import or export of natural gas, including LNG, without approval from DOE.[2] Under the NGA, DOE approval shall issue unless it finds that the proposed exportation "will not be consistent with the public interest."[3] As a practical matter, export applications for countries with which the U.S. has a free trade agreement are granted as a matter of course, and the NGA provides that such exports are deemed to be consistent with the public interest, requiring that such applications be granted without modification or delay.[4] And still-applicable Reagan-era DOE policy guidance implementing the NGA provides that free market principles and limited government intervention should be the norm with respect to natural gas approvals.[5] Furthermore, there is also the possibility that the Energy Policy

[1] 15 U.S.C. § 717b.

[2] *See also* 10 C.F.R. Part 590.

[3] 15 U.S.C. § 171b(a).

[4] 15 U.S.C. § 171b(c).

[5] Policy Guidelines and Delegation Orders Relating to the Regulation of Imported Natural Gas, 49 Fed. Reg. 6,684 (Feb. 22, 1984).

Conservation Act of 1975 could be used to revoke or modify licenses.[6]

As of this writing, DOE has only cleared four applications, and 21 additional applications pend with DOE for permits to export domestically produced natural gas to non-FTA countries, representing a cumulative capacity of almost 50 percent of current U.S. production.[7] Each of the approved applications took several years to process, and some of the requests have been awaiting approval for almost two years in a first-come, first served queue administered by DOE. These delays have become a source of controversy. On one side are energy interests who want to develop these resources, and their political champions who see new energy exports as a way to stimulate the economy, create jobs, and foster energy security. On the other side are some environmental groups and also a group of energy-intensive domestic manufacturers who maintain that they benefit from a captive energy resource kept below global prices, which in turn helps provide lower cost goods and manufacturing jobs.[8]

In March 2013, a consortium of the major environmental groups, including Sierra Club and Earthjustice, among others, wrote to President Obama urging caution and an "informed assessment" of the environmental impacts of exporting LNG. In so doing, the groups leveraged the economic arguments made by the manufacturers about increased energy prices which will be harmful to the middle class and manufacturers.[9] Moreover, they expressed concern that the export market will lead to more fracking and to increased methane emissions and therefore global warming since the warming effect of methane is 25-times that of carbon dioxide.[10] Similarly, these groups have expressed concern that liquefying and transporting natural gas is an energy-intensive process which itself will generate significant carbon pollution. They challenged the largely pro-development economic assessment produced by DOE's contractor, NERA consulting, as biased and inaccurate, and further called for a full environmental impact statement for LNG export pursuant to the National Environmental Policy Act., which would likely add significant delay.[11]

Congressional support for LNG exports has been mixed, although generally Republican members have viewed it more favorably and Democrats have tended to encourage slowing down the process for more thorough review without actually coming out and opposing the exports. The Subcommittee on Energy Policy, Health Care, and Entitlements, House Committee on Oversight and Government Reform, held a hearing in March to probe DOE's failure to approve the export applications in the face of statutory standards requiring approval absent adverse public interest findings.[12] Opening the hearing, Subcommittee Chairman Jim Lankford (R-OK), expressed concern with the delay, noting that there is a limited demand window, and that the Department's delays risk depriving applicants of the opportunity to participate in the market.

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[6] Pub. L. No. 94-163, § 103, 89 Stat. 871, 877(1975), codified as amended at 42 U.S.C. §§ 6201 *et seq*. *See also* section 7 of the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), codified as amended through Pub. L. No. 112-120, 126 Stat. 343 (2012), at 50 U.S.C. §§ 2401 *et seq.* (providing broad powers to the President to restrict the export of domestically produced crude oil, petroleum products, and certain petroleum products). Although the Export Administration Act expired March 30, 1984, the export controls in effect under that Act were maintained pursuant to a declaration of national emergency by the President under the International Emergency Economic Powers Act found in 50 U.S.C. §§ 1701 *et seq*. Pub. L. No. 94-163, n.1, 89 Stat. 871 (1975).

[7] Department of Energy, Office of Fossil Energy, Summary of LNG Export Applications (Aug. 7, 2013), *available at* http://energy.gov/sites/prod/files/2013/08/f2/Summary_of_Export_Applications.pdf (Dominion Cove Point LNG, LP permission granted September 11, 2013); Michael Ratner et al., U.S. Cong. Research Serv., R42074, U.S. Natural Gas Exports: New Opportunities, Uncertain Outcomes (2013).

[8] *See, e.g.*, Lake Charles Exports LLC, DOE/FE Order No. 3324, Order Conditionally Granting Long-Term Multi-Contract Authorization to Export Liquefied Natural Gas By Vessel From The Lake Charles Terminal To Non-Free Trade Agreement Nations, (Aug. 7, 2013), *available at* http://energy.gov/fe/downloads/fe-docket-no-11-59-lng.

[9] Letter from Center for Int'l Environmental Law et al. to President Obama, Mar. 11, 2013, *available at* http://www.ciel.org/Publications/LNG_Letter_Mar2013.pdf.

[10] *See also* U.S. Energy Abundance: Exports and the Changing Global Energy Landscape, Hearing Before the H. Subcomm. on Energy and Power, 113th Cong. (2013) (statement of James Bradbury, Senior Associate Climate and Energy Program, World Resources Institute) (citing the U.S. Environmental Protection Agency for projections that the scale of leaked methane from global natural gas and oil systems will be ten times greater than any carbon dioxide reductions resulting from a future with more abundant natural gas.).

[11] The Keystone XL Pipeline, which would bring Bakken crude down to the U.S. for refining or export, remains hung-up on environmental impact reviews encompassing over 1.5 million public comments.

[12] The Department of Energy's Strategy for Exporting Liquefied Natural Gas, Hearing Before H. Subcomm. on Energy Policy, Health Care, and Entitlements, 113th Cong. (2013).

More specifically, he cited concern that exporting countries with more efficient bureaucracy will beat U.S. producers to lock-up lucrative import contracts notwithstanding our country's head-start in new production technology. Chairman of the full Committee, Darrell Issa (R-CA) expressed support for LNG exports as an alternative to the hundreds of millions of tons of coal exported to China, and as a means for helping balance the U.S. trade deficit while also helping replace coal with a more environmentally friendly fuel. Ranking member of the full Committee, Elijah Cummings (D-MD), expressed a tentative optimism and interest in further investigating the benefits of LNG export, balanced with concern for domestic manufacturing jobs buoyed by low natural gas costs and the need to ensure environmental concerns are addressed.

During the hearing testimony, the chief opponent to surface in opposition was the Industrial Energy Consumers of America ("IECA"), which represents U.S. manufacturers who claim to consume approximately 40% of all natural gas. Although IECA's position was not to oppose LNG exports, they encouraged slowing down the process for further analysis. And the witness from the Office of Fossil Fuels, DOE, stated that DOE is "committed to moving this process forward as expeditiously as possible," whatever that may mean. Notably, the DOE witness indicated that the "public interest" determination would have to consider the "cumulative impact" of each of the pending applications building up into the queue—suggesting that those who did not arrive first may find themselves blocked from consideration because of the number of facilities already granted export authority. Moreover, the DOE witness asserted the Department's view that it has "considerable latitude" under the statute to determine what is in the public interest.

Then, during an April budget hearing before the Senate Committee on Energy and Natural Resources last Spring, ranking member Sen. Lisa Murkowski (R-AK) questioned these delays. The Administration witness, Deputy Secretary Daniel B. Poneman, pointed to the 200,000 comments they received regarding the requests.[13] Senator Barrasso (R-WY), also expressed concern that investors in capital-intensive LNG infrastructure would interpret the Administration's ongoing delays as a decision against LNG exports, undermining an important opportunity to shore-up energy security and much-needed employment for middle class families.

Rep. Ted. Poe (R-TX), Chairman of the Subcommittee on Terrorism, Nonproliferation, and Trade, House Committee on Foreign Affairs, also held a hearing on LNG exports in April. Not surprisingly, Rep. Poe took the opportunity to bash the Administration for its delay, citing to the lost jobs and economic opportunities for one project which would purportedly create 30,000 jobs and add $10 billion to the economy if DOE would only give it the green light. He also noted that U.S. allies, especially those in Eastern Europe and India, would benefit enormously from cost-effective, reliable U.S. gas imports, and even suggested that without U.S. gas, India might have to tap into the Iran-Pakistan gas pipeline. In other words, he suggested that the U.S. would no longer be beholden to states such as Russia, Venezuela, and the Middle East for its energy needs, but may be able to stand upon its own two feet and even assist allies in escaping the grip of countries which may not always have interests aligned with our own. Finally, he pointed out that restricting exports may run afoul of World Trade Organization rules—a point supported by the witness from the Congressional Research Service.

Although Rep. Kinzinger (R-IL) generally supported the Chairman's statements, he also expressed a note of caution that exports not be permitted to sap the nascent resurgence of American manufacturing in the heartland. Several witnesses, including one from NERA, expressed a real sense of urgency to get into limited demand markets, most notably Japan and Korea, before they enter into long-term contracts with other suppliers, or before additional LNG supplies come on line and further depress the global export price.

The House Subcommittee on Energy and Power, Subcommittee on Energy and Commerce, also held hearings last May to examine the changing landscape caused by new domestic hydrocarbon energy sources.[14] Although the members, including full Committee Chairman Fred Upton (R-MI) and Subcommittee Chairman Ed Whitfield (R-KY), generally expressed optimism regarding increased LNG and other energy exports for its economic and geopolitical benefits,

[13] Department of Energy Fiscal Year 2014 Budget, Hearing Before S. Comm. on Energy and Natural Resources, 113th Cong. (2013).

[14] U.S. Energy Abundance: Exports and the Changing Global Energy Landscape, Hearing Before the H. Subcomm. on Energy and Power, 113th Cong. (2013).

others such as Rep. Henry Waxman (D-CA) remained cautious, adopting many of the arguments put forward by the environmental groups. Powerfully apparent, however, was the growing reach of energy production to the local constituent and congressional district. While states such as Texas, Louisiana, and Alaska have long had reason to support energy interests, the new production technologies have begun to draw support from the Dakotas, Montana, Illinois, Ohio, Oklahoma, Pennsylvania, Michigan, and even California, among others, who are looking at exciting new economic opportunities, creating a very different political landscape for the energy debates.

An outlier concern among Members of Congress has been that expressed by Rep. Ed Markey (D-MA) in his August 8, 2013 letter to President Obama regarding the importation and exportation of LNG, particularly with respect to the Everett, Massachusetts terminal, which is situated in an unusually densely populated area, requiring LNG tankers to sail through Boston Harbor and dock close to residential neighborhoods. In his letter, Rep. Markey questioned the wisdom of permitting the export of domestic LNG when we are still importing LNG from terrorist-harboring states such as Yemen, citing to a Yemeni terrorist who stowed away on an Everett LNG tanker in 1995 and was subsequently convicted of a plot to blow up Los Angeles International Airport.

By August, Democratic congressional resistance to the LNG export plan, which has been generally embraced by congressional Republicans, began to gel in the form of proposals issued by the Bicameral Task Force on Climate Change.[15] In that document, the task force recommended that "DOE conduct a thorough analysis of the climate change impacts of proposed LNG exports, including the effects of both domestic and overseas emissions." However, Democrats have also been conflicted since new energy resources have been cropping up in Democratic-controlled districts, providing much-needed economic stimulus and jobs. Even labor organizations have come out strongly in favor of new fossil-energy related jobs connected to fracking and horizontal drilling. Moreover, a bipartisan letter from the Chair and Ranking members of the Senate Committee on Energy and Natural Resources to President Obama called upon the Administration to provide greater clarity as to when and how it believed it could revoke or modify existing licenses.

Increased LNG exports, primarily by ocean vessel, could be a significant event for the maritime industry in the United States, and globally. While export permit applications pend before DOE for an amount of LNG equal to half of current annual production, the consensus is that only a few of these are likely to be economically sustainable. However, LNG exports are a sea change which will require major infrastructure build-out in shore-side terminals, pipelines, and vessels. Already, some observers are looking at LNG exports as a way to breathe new life into the U.S.-flag Merchant Marine, by possibly including U.S.-build requirements or U.S.-mariner, U.S.-flag requirements upon LNG exports.[16]

Supporters have suggested that such an approach may help strike a balance between manufacturing and environmental interests looking to curb exports, while also opening up the export market, building bridges to the United States' gas-consuming allies. The proposal would also garner active political support from the U.S.-flag maritime industry, which has in recent years been buffeted by the Administration's push to dismantle the P.L. 480 Food for Peace program, attacks on cargo preference and the Jones Act, possible sequestration of Maritime Security Program funding, and the looming draw-down in Afghanistan. Questioned about the Administration's plans to salvage the U.S.-flag in the face of these challenges, Deputy Secretary of Transportation John Porcari testified in May 2013 that the Administration wanted to focus on "things like energy transport where we believe in the future, there are growth opportunities in the industry for the U.S. flag fleet and U.S. mariners." While Mr. Porcari's

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[15] U.S. Cong. Bicameral Task Force on Climate Change, Implementing the President's Climate Action Plan: U.S. Department of Energy (Aug. 6, 2013), *available at* http://democrats.energycommerce.house.gov/sites/default/files/documents/Bicameral-Task-Force-DOE-Climate-Report-2013-8-6.pdf.

[16] John A. C. Cartner, White Paper, Ten Points to Rationalize and Revitalize the United States Maritime Industry, Sept. 7, 2013, at 2,; Denise Krepp, Exporting LNG: Are U.S. Mariners Included?, Maritime Executive, June 25, 2013; Maritime Transportation: The Role of U.S. Ships and Mariners, Hearing Before the H. Subcomm. on Coast Guard and Maritime Transportation, 113th Cong. (2013) (testimony of Mike Jewell, President, Marine Engineers' Beneficial Association). Former Maritime Administrator Sean Connaugton, a Bush era political appointee and subsequently Virginia Secretary of Transportation, made approval of LNG facility siting applications contingent upon the employment of U.S. mariners to service the facilities.

comment may have been focused on Jones Act (domestic) trade, the door appears to be at least ajar, if not open, to explore LNG export participation for U.S. mariners if the Administration wants to get serious about revitalizing the industry.[17]

Crude Export

New domestic and Canadian oil supplies associated with revolutionary drilling technologies are also stirring changes in the movement of crude oil, including potentially exports. Although Washington has been less focused on the crude exports question so far, when it does float to the surface there are sure to be some nuanced differences from the LNG debate.

It's popular around town to think of and talk about the U.S. being oil dependent, primarily upon Saudi Arabia and other countries in the Persian Gulf, but it's a lot more complicated than that. Foreign source crude now composes 51% of the refinery slate, down from 67% in 2008.[18] And of that 51%, the largest foreign source of oil is Canada and the Western Hemisphere which provide 65%. Net imports of oil have fallen to less than 45% of U.S. oil consumption,[19] and U.S. oil production is at its highest level since 1992, with production doubling in Texas and tripling in North Dakota.[20] And production is accelerating.

More so than LNG, oil is characterized by well-integrated markets and a global price, due to better developed infrastructure and generally high competition among refiners.[21] So, even though U.S. and Canadian supplies might help increase global supply and thereby help keep the global price down, it is unlikely to have a dramatic impact upon U.S. consumer prices specifically. Given this global market, observes have opined that "energy independence" for fortress America is a chimera, since attempting to satisfy domestic oil demand in every corner of the country exclusively with domestic sources will be inherently inefficient.[22] The kinds of oil that U.S. refiners need are often not aligned with the type of oil that U.S. fields are producing, insofar as U.S. Gulf refining capacity is geared to heavy sour crude, and the light sweet crude coming out of the country may be more economically processed at less sophisticated refineries overseas.[23] In many cases, the infrastructure isn't in place to get the domestically produced crude to the domestic consumer in a cost-effective way. Moreover, new crude exports probably have even greater potential to benefit local economies and strengthen the United States' geopolitical advantage, and oil exports do not require the massively expensive retooling of LNG regasification plants to liquefaction plants. Therefore, the capital risk associated with moving to export will be much less. Nevertheless environmental advocates and domestic energy consumer interests are likely to raise some of the same concerns with respect to crude exports as they have raised in response to LNG export licensing. And there will surely be a louder din of concern about the national security implications of shipping our oil overseas, especially while the United States continues importing from a global source pool that includes some of the most unsavory national actors.

Relative to LNG, crude oil exports are governed by an onerous maze of statutory and regulatory restrictions that can be a trap for the unwary. Crude oil exports are generally prohibited by statute,[24] and there are additional restrictions on oil moving through pipelines benefitting from Federal rights of way,[25] originating on the Outer Continental Shelf, or drawn from the Naval Petroleum Reserve.[26] In order to export

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[17] Maritime Transportation: The Role of U.S. Ships and Mariners, Hearing Before the H. Subcomm. on Coast Guard and Maritime Transportation, 113th Cong. (2013) (testimony of John Porcari, Deputy Secretary of Transportation, President, Marine Engineers' Beneficial Association). Notably, there is precedent for linking LNG to the U.S. flag.

[18] The Swinging Pendulum: U.S. Oil, Hydrocarbon Eng'g, Mar. 9, 2013.

[19] Neelesh Nerurkar, U.S. Cong. Research Serv., U.S. Oil Imports and Exports (2012), at 1.

[20] Domestic Oil Production, Hearing Before the S. Comm. on Energy and Natural Resources, 113th Cong. (2013) (testimony of Adam Sieminski, Administrator, Energy Information Agency).

[21] *Id.*; Domestic Oil Production, Hearing Before the S. Comm. on Energy and Natural Resources, 113th Cong. (2013) (testimony of Faisel Khan, Managing Director, Citigroup).

[22] The Swinging Pendulum: U.S. Oil, Hydrocarbon Eng'g, Mar. 9, 2013.

[23] Sieminski testimony, *supra* n. 20;; Domestic Oil Production, Hearing Before the S. Comm. on Energy and Natural Resources, 113th Cong. (2013) (testimony of Jeff Hume, Vice Chairman, Continental Resources).

[24] 41 U.S.C. § 6212. *See also* Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, 89 Stat. 877 (1975).

[25] 30 U.S.C. § 185(u).

[26] 10 U.S.C. § 7430.

crude, a license must be obtained from the Department of Commerce, Bureau of Industry and Security ("BIS").[27] However, licenses are generally available in a limited variety of instances which themselves can be very difficult to navigate.[28] For example, export to Canada is permitted if it can be shown that the export is for use in Canada, except that if the oil moved through the Trans-Alaska Pipeline the quantity will be limited and any ocean transportation must be by Jones Act qualified vessel. Canadian source crude, which must cross into the U.S. due to limited available pipeline routing and then back into Canada for loading on vessel to be shipped to the U.S. for refining, would then have to declare and enter through Customs when entering the United States (even though it should be duty-free under the North American Free Trade Agreement). However, as it flows back to Canada a license must be obtained from BIS, which will require a showing that it has not been intermingled with U.S.-source crude while in transit.[29] To say the least, there are regulatory and infrastructure challenges to the movement of the vast newly accessible hydrocarbon deposits.

As interest in crude export grows, like LNG export, a close look will have to be taken at regulatory reform to simply the process and to recognize the cross-border nature of the production infrastructure, refining capacity, and consumption markets. The opaque nature of the current regulatory regime governing crude oil exports and related uncertainty presents a significant barrier to getting the oil out of the ground and to market. Furthermore, exporters will have to clear the political hurdles to oil export which have shown up in the LNG permitting process. Reform of the export regime will likely require statutory changes—and passing any legislation has been a major challenge in the 113th Congress. Given the very tentative approach to LNG exports by the President and many congressional Democrats, it appears unlikely that the President can be expected to lead the charge forward in either crude or LNG export. Nevertheless, continued production increases will likely spark new oil and LNG movements, both domestically and with respect to exports. The U.S. maritime industry would be well-advised to keep abreast of these developments and explore ways to get out in front of them, even as long-established markets like inland waterways coal transportation are displaced by these new energy sources.

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[27] 15 C.F.R. § 754.2.

[28] *Id.*

[29] 15 C.F.R. § 754.2(b)(vii).

RECENT DEVELOPMENTS

Admiralty Jurisdiction

Cabasug v. Crane Co., et. al., 2013 U.S. Dist. Lexis 106660 (D. Haw. July 25, 2013).

The United States District Court for the District of Hawaii denied Plaintiff's Motion to Apply the Substantive Law of Hawaii in relation to his tort claims stemming from his exposure to asbestos while working at a shipyard. In determining whether admiralty law applied, as opposed to the Law of Hawaii, Defendants had to meet two tests: (1) the location of the wrong (i.e., the "location test"), being "whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water"; *Jerome B. Grubart v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) and (2) whether the wrong bears a significant relationship to traditional maritime activity (i.e., the "connection test"), being an assessment of whether (a) the general features of the type of incident involved, to determine whether the incident has "a potentially disruptive impact on maritime commerce" and (b) the general character of the activity giving rise to the incident shows a "substantial relationship to traditional maritime activity"; *Sisson v. Ruby*, 497 U.S. 358, 363-365, 364 n.2 (1990). In applying the *Grubart/Sisson* framework, the Court held that admiralty law governed Plaintiff's tort claims as vessels in drydock are still on navigable waters (the "location test" met) and injuries to ship workers from defective parts has the potential to disrupt maritime commerce and the manufacture of products for use on vessels was a traditional maritime activity (the "connection test" met).

Submitted by JAM

Charts

Contango Operators, Inc. v. United States, 2013 U.S. Dist. LEXIS 116763 (S.D. Tex. Aug. 15, 2013).

Contango Operators sought permission from the U.S. Army Corps of Engineers to construct a natural gas pipeline off the coast of Louisiana. Authority was granted, but the Corps did not forward the information about the proposed pipeline to the division responsible for providing the locations of pipelines to engineers preparing dredging contracts for certain channels. The pipeline was subsequently completed. Thereafter, the Corps began soliciting bids for the dredging of the channel where the Contango pipeline was installed. The Corps' bid specifications noted the presence of other pipelines but said nothing about the Contango pipeline. Weeks Marine subsequently provided the winning bid on the dredge contract.

The National Oceanic and Atmospheric Administration and the Coast Guard published nautical information and charts for local mariners noting the existence of the Contango pipeline. This information was not released until after Weeks Marine had received the dredging contract and commenced operations.

During dredging operations, Weeks Marine's vessel struck the Contango pipeline resulting in losses to Contango. Contango filed suit against Weeks Marine and the United States. The parties thereafter filed various motions regarding liability.

The United States argued that its liability was discharged when the navigational charts or the notice to mariners were issued. The court held that the United States' duty was broader than just preparing the charts. The court found that its duty arose out of the omission of the pipeline in the dredging contract and that the proper duty was one to warn Weeks Marine of the error in failing to include the pipeline in the dredging contract. The issue, then, was whether that duty was satisfied when updated charts and the notice to mariners were issued. The court found a fact issue precluding summary judgment as to whether it was a normal practice for Weeks Marine to update their charts. If that was not a normal practice, then the United States may not have been reasonable in relying on the release of an updated chart. For similar reasons, the court found that it could not release Weeks Marine from liability because it had to determine the reasonableness of Weeks Marine's failure to obtain updated charts. The court also refused to recognize the

government contractor's defense because there was no evidence that both the government and Weeks Marine were acting without negligence.

Submitted by KMM

COGSA

Pt. Jawanis Rafinasi v. Coastal Cargo Co., 2013 U.S. App. LEXIS 15046 (5th Cir. July 24, 2013).

Plaintiff purchased a boiler and arranged for it to be shipped to the defendant stevedore in New Orleans where the stevedore would be responsible for loading the boiler on a vessel for passage to Indonesia. The stevedore was retained by the plaintiff's agent to unload the boiler from a railcar, store the boiler until the ship arrived, and move the boiler shipside for loading. The defendant was also the vessel owner's exclusive stevedore. While attempting to move the boiler shipside, the stevedore negligently damaged the boiler. The plaintiff filed suit to recoup the costs of the boiler. The district court held that the stevedore was negligent and concluded that it could not limit its liability under COGSA because it was not an agent of the vessel owner at the time of the damage. The stevedore appealed the district court's ruling that it could not limit its liability.

The Fifth Circuit noted that the bill of lading with the vessel extends the COGSA package limitation to the time before the goods were loaded on the vessel if they were in the custody of the "carrier or servant or agent." "Agent" was defined to include stevedores retained by the carrier. The Fifth Circuit concluded that it was immaterial that the stevedore was fulfilling its obligation to the plaintiff at the time of the damage because the bill of lading clearly extended the limitation to the vessel's stevedore. The court further concluded that the fact that the bill of lading had not issued did not bind the parties to the terms of the bill of lading and that there was no evidence that another bill of lading would have been used with a different scope of the package limitation. Thus, the Fifth Circuit reversed the trial court's judgment that the per package limitation applied.

Submitted by KMM

OOO GARANT-S v. Empire United Lines, 2013 U.S. Dist. LEXIS 46329 (E.D.N.Y., March 29, 2013).

Under the "Fair Opportunity" doctrine of the U.S. Carriage of Goods by Sea Act, COGSA's $500 package limitation is not available to the Carrier unless the Shipper has been given a fair opportunity to declare a higher value for his goods. The Carrier has the initial burden of providing prime facie evidence that opportunity was given. The bill of lading usually contains a clause on the back providing that unless the Shipper declares a higher value and pays higher freight rate, the COGSA limitation will apply to any cargo loss. Some bills of lading also contain a specific box on the face of the contract in which to declare the value. The burden then shifts to the shipper to show it was not given a fair opportunity to declare a higher value and to pay ad valorem freight. The shipper's claim that he did not see the bill of lading until after the ship sailed usually does not get very far. Carriers customarily do not issue bills of lading until after cargo is loaded, and the Dock Receipt or similar document issued when the cargo is received at the dock usually incorporates the bill of lading by reference. Usually the Carrier is able to show the Shipper is an old customer. Finally, COGSA is U.S. law, and applies to all shippers as well as to all carriers.

Submitted by MED

Jones Act

Pitre v. Custom Fab of Louisiana, LLC, 2013 U.S. Dist. LEXIS 117813 (E.D. La. Aug. 20, 2013).

Plaintiff was assigned by his employer, Custom Fab, to work as a welder/ pipefitter aboard a drill ship owned by Transocean. Custom Fab had been retained by Oceaneering to perform the work. He was injured while working on a scaffold located on the drillship and brought suit under the Jones Act against his employer. Oceaneering filed a claim for defense and indemnity against Custom Fab.

Before the court were several motions for summary judgment. Oceaneering and Custom Fab filed cross-motions for summary judgment on the enforceability of the indemnification provision in their contract. The issue for the court was whether the contract was governed by maritime law, in which case it would be upheld, or state law, in which case it would be struck down. The court applied the six factor test of *Davis and Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990), and held that the contract was maritime.

The court noted that the work order at issue called for supplying labor to a drillship and that plaintiff was injured while performing repairs on a vessel, both indisputably maritime activities. Third, the court observed that the work was being performed on a vessel on navigable waters and that the work related to the mission of the vessel. The court rejected Custom Fab's argument that the work had to relate to the actual navigation of the vessel, but the court said that all that was required was that the work was related to the vessel's mission. Finally, the court noted that the plaintiff's principal work related to the vessel's mission. The court concluded that the contract was maritime in nature. Thus, the indemnity agreement was valid.

Custom Fab also sought summary judgment on the issue of plaintiff's seaman status. The court found that plaintiff's work in repairing the vessel contributed to its mission, thus satisfying the first prong of the status test. On the second prong, Custom Fab argued that plaintiff did not have a substantial connection to the vessel because he was injured on his second or third day on the job. However, the court noted that plaintiff had accepted the position on the vessel for a two or three month hitch and that this constituted a change in his assignment. Thus, the court found that issues of fact precluded a finding that he was not a seaman.

Submitted by KMM

Wilcox v. Max Welders, LLC, 2013 U.S. Dist. LEXIS 123874 (Aug. 28, 2013).

Plaintiff was injured while performing welding services on a fixed platform located on the Outer Continental Shelf in the Gulf of Mexico. The assignment required him to live aboard a barge owed by the company that had hired plaintiff's employer to provide a welder. Plaintiff claimed he was a Jones Act seaman, and his employer sought summary judgment on that claim.

Plaintiff's Jones Act claim was tied to his connection to the barge on which he ate and slept while working on the platform. Evidence showed that plaintiff did more than just eat or sleep on the barge. Evidence indicated that he made repairs on the vessel, changed out water lines, and helped crew members. Thus, the court found that plaintiff contributed to the function of the vessel.

The court concluded, however, that plaintiff could not satisfy the substantial connection prong of the Jones Act test. The court found that plaintiff's overall employment history showed that he has worked for numerous customers in the shipyard, inland waters, and offshore. He worked on various vessels owned by different third parties. The court found no evidence that plaintiff spent at least 30% of his time working on a vessel or identifiable fleet of vessels under common ownership or control. The court further concluded that plaintiff was not permanently assigned to a vessel each time he was required to work offshore because his essential job duties or work location did not permanently change. Accordingly, the court granted summary judgment in favor of the employer.

Submitted by KMM

LHWCA

New Orleans Depot Services, Inc. v. Director, 718 F.3d 384 (5th Cir. 2013).

The Fifth Circuit granted a petition to hear this case *en banc* to consider the definition of "other adjoining areas" for purpose of the situs test under the Longshore and Harbor Workers Compensation Act. Petitioner was engaged in the repair and maintenance of shipping containers, some of which were used to transport ocean cargo. The facility where the work was performed was in a small industrial park 300 yards away from the Intracostal Canal and surrounded by other businesses having nothing to do with marine business. There was no access to water from the yard, and employees worked only within the boundaries of the yard.

The Administrative Law Judge concluded that the situs test was satisfied, and the Benefits Review Board affirmed. The Fifth Circuit initially affirmed the decision of the BRB, but then agreed to hear the case *en banc*. By a 12-3 vote, the court reversed the ALJ and the BRB and concluded that situs was not satisfied.

The court overruled its previous decision in *Textports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (en banc) on the definition of "other adjoining area" in the LHWCA. The *Winchester* court concluded that a situs test was a fact-intensive inquiry that was satisfied if the facility was close to or near navigable waters. In the present case, the Fifth Circuit surveyed the interpretations offered by other federal appellate circuits and adopted the interpretation of "adjoining area" offered by the Fourth Circuit Court of Appeals in

Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir. 1995).

In *Sidwell*, the court applied a literal definition of "other adjoining area" and stated that it must be like a pier, wharf, or dry dock and must be a "discrete shoreside structure or facility." The Fifth Circuit adopted this test and held that a covered situs must "border on" or "be contiguous with" navigable waters. As the situs test was not satisfied, the claimant was not eligible for benefits, and the court did not discuss whether the "status" test on the nature of the claimant's work was also satisfied. Judge Clement's concurring opinion, however, argued that "status" was not satisfied under the facts of the case because the work was not essential or integral to longshoring operations.

Submitted by KMM

Pipia v. Turner Constr. Co., 2013 N.Y. Misc. LEXIS 3295 (N.Y. Sup. Ct. July 29, 2013).

Plaintiff, a plumber, was injured when he fell off a float stage. At the time of the incident, plaintiff was standing on the float stage, which was located underneath the pier, installing insulation around piping supported from the bottom of the pier, when a wave caused him to lose his balance and fall on top of the float stage, causing his injury.

Plaintiff alleged that the defendants were negligent and that they had a duty to provide him with a safe working environment under New York Labor Law §§ 220, 240 and 241(6). Plaintiff moved for summary judgment against certain defendants, and those defendants cross-moved for summary judgment. The Court denied the plaintiff's motion for summary judgment and granted the defendants' motion for summary judgment.

Plaintiff made a motion to for re-argument, wherein he contended that the Court erroneously referred to the float stage as a barge and misapplied the Longshore and Harbor Workers Compensation Act ("LHWCA"), which permits claims against non-employer tortfeasors under federal law and under New York's Labor Laws. Specifically, plaintiff argued that construction workers who received LHWCA benefits injured while constructing land based structures, while working on floating stages, are entitled to bring Labor Law claims against property owners and general contractors.

The Court held that, regardless of whether the float stage could be classified as a barge, it could surely be classified as a vessel pursuant to § 902(3) of the LHWCA and the U.S. Supreme Court's holding in *Stewart v. Dutra*, 543 U.S. 481 (2005) because the float stage was a watercraft capable of being used as a means of transportation. The Court held that it did not matter that the float stage was not being used primarily for transportation or in motion, it was a vessel because plaintiff "was on the float stage, in navigable waters, while installing insulation."

The Court concluded that because the float stage can be classified as a vessel, the action could only be brought within the confines of the LHWCA, and not under New York's Labor Laws.

Submitted by SPB

Limitation of Liability

In re Bertucci Contracting Co., 712 F.3d 245 (5th Cir. 2013).

Petitioner's vessel struck a bridge spanning the Intracoastal Waterway closing the bridge to traffic for several days. The vessel filed a petition for limitation of liability. Numerous claimants answered the petition, including residents of one of the communities affected by the bridge closure seeking recovery of the loss of property, income, and revenue. The district court dismissed these claims under the *Robins Dry Dock* rule for lack of physical injury. The claimants appealed.

The Fifth Circuit upheld dismissal of the claims, noting that *Robins Dry Dock* and Fifth Circuit precedent precluded claims whether brought under maritime law or state law. Claimants argued that they had no connection to maritime commerce and that state law should govern their claims, but the court refused to allow recovery under state law where the case was clearly within the admiralty jurisdiction of the court and maritime law foreclosed a right of recovery.

Submitted by KMM

In re BOPCO, L.P., 2013 U.S. Dist. LEXIS 128991 (E.D. La. Sept. 9, 2013).

Petitioner's vessel struck the claimant's vessel at the intersection of two canals in Louisiana waters. Claimant sustained personal injuries, and petitioner sought limitation of liability. The issue of negligence and damages were tried to the jury, and the issue of limitation was tried to the court. The jury found that the petitioner was negligent, and the trial court issued its opinion on limitation and whether the incident giving rise to the accident was within the owner's privity and knowledge.

Evidence showed that, at the time of the accident, the petitioner's captain was not using his radar in response to a company policy that radar not be used in daytime. The vessel owner contended that the accident was the result of navigational pilot error and, thus, could not be a matter within the owner's privity and knowledge. The court disagreed. The court found that the failure to use radar was a violation of the Rules of the Road and was not mere operational negligence because it failed to train the captain and had a policy prohibiting the use of radar in daylight. The court found that the pilot was not given sufficient training and that the owner impermissibly instructed its captains on the use of radar. The court concluded that the use of radar may have prevented the collision. Given that these matters were within the privity and knowledge of the vessel owner, the vessel owner was not entitled to limit its liability.

Submitted by KMM

Maintenance & Cure

Boudreaux v. Transocean Deepwater, Inc., 721 F.3d 723 (5th Cir. 2013).

When the plaintiff seaman was hired by the defendant, he failed to disclose a prior history of back problems. Plaintiff later injured his back, and defendant began paying maintenance and cure and continued to pay maintenance and cure for about five years. Plaintiff later sued to recover for his injury, and, in discovery, defendant discovered the plaintiff's failure to disclose his prior medical condition. Defendant moved the district court for a partial summary judgment terminating maintenance and cure payments for the plaintiff's failure to disclose under *McCorpen*. The trial court granted the motion as unopposed. Defendant then filed a counterclaim against the plaintiff to recover for past maintenance and cure payments made to the plaintiff. The district court allowed the counterclaim, and the plaintiff appealed.

This was a matter of first impression for the court. The Fifth Circuit reversed the district court's allowance of the counterclaim finding the employer had no right as a matter of law to seek recoupment of maintenance and cure payments. The Fifth Circuit noted that a seaman's dishonesty did not terminate the employment relationship and foreclose a seaman's right to recovery under the Jones Act. While *McCorpen* allowed the employer an affirmative defense to terminate maintenance and cure benefits, the court found that a new cause of action was not permitted. The court found that the threat of damages recoverable against a seaman would stand as an impediment to recovery and affect a seaman's ability to settle his claim. The court concluded that the employer's only remedy to recoup maintenance and cure payments was to seek an offset against the seaman's damage award.

Submitted by KMM

Personal Injury

Messier v. U.S., 2013 U.S. Dist. LEXIS 97279 (D. Conn. July 12, 2013).

A passenger ferry collided with a United States Coast Guard Cutter in Block Island Sound. A passenger aboard the ferry brought an action against the owner and operator of the ferry under the general maritime law and against the federal government, as owner and operator of the Cutter, under the Suits in Admiralty Act and the Public Vessels Act seeking recovery for injuries allegedly sustained during the collision.

Prior to trial, the defendants stipulated to equal liability for collision, but reserved their rights to contest medical causation and the extent of plaintiff's injuries. The defendants argued that the plaintiff could not prove a causal connection demonstrating that the collision between the vessels caused her an injury.

As a result of "ample objective findings" by doctors supporting the claim that the collision was medically related to her severe shoulder pain, the District Court found that the collision was the proximate cause of plaintiff's injuries.

In awarding damages for pain and suffering, the District Court was careful to discount the award for pain and suffering in an amount appropriately reflecting the fact that plaintiff's pain and suffering as a result of the collision was inevitably intermingled with the pain and suffering resulting from pre-existing conditions.

Submitted by SPB

Ramirez v. Carolina Dream, Inc., 2013 U.S. Dist. LEXIS 109554 (D. Mass. August 5, 2013).

Plaintiff was a mate aboard the F/V DEVIANT. Three days into a fishing trip off the coast of New Jersey, plaintiff alleged he was in his bunk bed when the vessel was struck by a "large sea," which allegedly caused him to hit the side of his jaw against the bulkhead. Plaintiff sustained a laceration inside his mouth, and three days later began to feel weak and sick to his stomach.

Plaintiff asked to be taken ashore, but the Captain refused and instructed him to run the boat until the end of the trip. The vessel fished for several more days before coming ashore at her home port. Plaintiff's wife immediately brought plaintiff to the emergency room, where he was admitted for one month due to a severe infection. Plaintiff was subsequently diagnosed with aplastic anemia.

Defendant filed a motion for summary judgment arguing that plaintiff had failed to offer admissible evidence on the issue of causation, which would allow him recovery.

Plaintiff only claimed negligence and unseaworthiness as a result of the Captain's failure to properly address his medical situation after the initial jaw injury. Plaintiff claimed that it was this delay that led to the development of a serious infection and, ultimately, aplastic anemia.

Defendant countered by arguing that even assuming that the captain's conduct amounted to negligence or unseaworthiness, plaintiff failed to provide any admissible evidence of: (1) the alleged infection; (2) any causal connection between the incident on the ship, the alleged infection, and aplastic anemia; and (3) any causal connection between the Captain's delay in returning to port and the development of aplastic anemia.

The Court held that the lack of any expert or medical evidence supporting the contention that plaintiff's infection and illness were a direct consequence of any incident onboard the vessel supported a finding for the defendant. The Court rejected plaintiff's contention that a reasonable inference of causation could be drawn from the fact that plaintiff was in good health prior to the fishing trip and that he suddenly developed a serious illness at the trip's conclusion. The Court further stated that such unsupported speculation, conclusory allegations and improbable inferences are insufficient to defeat summary judgment.

The Court also dismissed plaintiff's claim that he was entitled to recover any further maintenance and cure because plaintiff did not produce any evidence that aplastic anemia manifested itself during plaintiff's service aboard the vessel.

Submitted by SPB

Spilt v. United States, 2013 U.S. Dist. Lexis 109821 (E.D. CA., August 2, 2013).

[Editor's Note: The language in the case report is confusing in that the Court frequently refers to the issue as whether the "defendant had a right to indemnify him [the injured spouse] for the plaintiff's loss of consortium award." The context of the case suggests, however, that the issue was whether the tortfeasor defendant had a right to equitable indemnity or contribution from the injured spouse when the latter is found contributorily negligent in causing his own injuries. In such a situation, the court held that the tortfeasor defendant did not have a right to such equitable indemnity or contribution.]

Plaintiffs Ryan Spilt and Tiffany Spilt sued the United States for personal injuries and loss of consortium, respectively. The United States counterclaimed against Plaintiff Ryan Spilt seeking indemnity for any liability it may have had to Plaintiff Tiffany Spilt on the loss of consortium claim.

The District Court for the Eastern District of California dismissed Defendant United States' counterclaim against Plaintiff Ryan Spilt, holding that, under the general maritime law and/or California law, a defendant cannot [obtain indemnity from] a plaintiff [on his spouse's] loss of consortium claim because such a claim can only be maintained against third-party tortfeasors. Here, Plaintiff Tiffany Spilt can only maintain loss of consortium claims against third-party tortfeasors and thus she cannot pursue a loss of consortium claim against her

spouse because he cannot be considered a joint tort-feasor on that claim. As such, the counterclaim was dismissed as, even if the Court found Plaintiff Ryan Spilt partially liable for the accident which causes his injuries, Defendant United States [could not obtain indemnity from] him for Plaintiff Tiffany Spilt's loss of consortium claim.

Submitted by JAM

Piracy

USA v. Mohammad Saaili Shibin, 722 F.2d 233 (4th Cir. May 12, 2013).

Pirates are subject to "Universal Jurisdiction" because they are common enemies of all mankind. A foreign individual who did not personally take part in the capture by pirates of a German vessel and an American vessel on the high seas but acted as a negotiator for the pirates in obtaining ransom could be prosecuted in a U.S. court under U.S. law as a conspirator, aider and abettor of the pirates. He was convicted under U.S. piracy laws for acts committed overseas although he was removed involuntarily by the FBI and one of the ships was not American. The Fourth Circuit upheld the conviction because "universal jurisdiction" over pirates allows any nation to prescribe punishment for certain offenses recognized by the community of nations.

Submitted by MED

Practice and Procedure

Best Industries (PVT), Ltd. v. Pegasus Maritime, Inc., 2013 U.S. Dist. LEXIS 80563 (S.D.N.Y. June 7, 2013).

Plaintiff filed an admiralty claim making a Fed. R. Civ. P. 9(h) election. Pursuant to Fed. R. Civ. P. 14(c), the defendant/third-party plaintiff demanded judgment against certain third-party defendants in favor of the plaintiff. The plaintiff and third-party defendants attempted to stipulate to the dismissal of the claims between them. The third-party plaintiff objected to this proposed stipulation on the grounds that it demanded judgment against the third-party defendants in favor of the original plaintiff, and that it could continue to prosecute that claim even if the plaintiff wished to dismiss its claims against the third-party defendants.

The District Court held that both the plain text and the purposes of Fed. R. Civ. P. 14(c)(2) suggest that such third-party claims may not be dismissed by stipulation without the consent of the third-party plaintiff.

The District Court further held that the proposed stipulation did not meet the requirements of Fed. R. Civ. P. 41(a)(1)(A)(ii) because it was not signed by the third-party plaintiff, and was thus not signed by all parties who have appeared as required by the rule.

Submitted by SPB

Blue Whale Corp. v. Grand China Shipping Development Co. Ltd., et al.., 2013 U.S. App. LEXIS 14339 (2d Cir. July 16, 2013).

Plaintiff claimed that defendant breached a charter party. Plaintiff and defendant were engaged in arbitration in London regarding that dispute. Anticipating an arbitration award against defendant in London, plaintiff brought a claim pursuant to Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure ("Rule B") seeking to attach $1.3 million dollars of the assets of HNA Group Company, Ltd ("HNA"). Plaintiff claimed that HNA was an alter ego of defendant.

The District Court vacated that Rule B attachment order after defendant challenged the sufficiency of plaintiff's alter ego allegations. In evaluating the sufficiency of the alter ego allegations, the District Court relied upon English law as a result of the choice of law provision in the charter party.

The Second Circuit reversed the District Court on the grounds that it failed to apply a federal maritime choice of law analysis in order to determine which law applied to evaluate the alter ego claims brought pursuant to Rule B. The Second Circuit, relying upon the maritime choice of law analysis as set forth in *Lauritzen v. Larsen*, 345 U.S. 571 (1953), held that United States federal maritime law should govern the analysis as no other source of law had a strong connection to the transaction at issue. As a result, the Second Circuit vacated the district court's order and remanded the matter so that the district judge could

evaluate the alter ego allegations under United States federal maritime law.

The Second Circuit's decision in this case establishes that: (1) United States federal maritime law does not automatically apply to assess alter ego claims brought pursuant to Rule B; and (2) District Courts should always properly apply a federal maritime choice of law analysis to determine what law applies to evaluate alter ego claims brought pursuant to Rule B.

Submitted by SPB

Gonzalez-Santini v. Lucke, 2013 U.S. Dist. LEXIS 97913 (D.P.R. July 12, 2013).

The District Court held that in order to recover in both possessory and petitory actions, the party seeking possession of a vessel pursuant to Rule D of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure, which provides the procedural mechanism for enforcing these claims, must assert either legal title or a legal claim to possession. In essence, for admiralty jurisdiction to be present, the plaintiff must assert legal title or a legal claim to possession, rather than merely an equitable interest in title. The Court held that an assertion of an equitable interest in title by itself is insufficient to sustain admiralty jurisdiction absent some other separate basis.

The District Court held that plaintiff, in merely arguing that she was the "bona fide owner" and "that she ha[d] become the title holder of record" through her action in executing all of the actions required under an option contract, only demonstrated that she had an equitable interest in title. As the Court found no separate basis for admiralty jurisdiction and no assertion of a legal title or a legal claim to possession, plaintiff's petitory and possessory claims were dismissed for lack of admiralty jurisdiction.

Submitted by SPB

In re International Marine, L.L.C., 2013 U.S. Dist. LEXIS 91370 (E.D. La. June 28, 2013).

Linder Oil purchased an unmanned production platform in the Gulf of Mexico. Hurricane Rita toppled the platform, and Linder Oil installed a buoy to mark the obstruction that protruded above the waterline. The buoy was later reported missing, and a new buoy was installed, but it was much further south than the intended location.

On December 13, 2011, a vessel allided with the remaining part of the platform and sunk. The captain admitted that he knew there was an obstruction in the area, but he relied on the placement of the buoy to avoid the platform. A later investigation showed that the buoy was more than 400 feet from the remains of the platform. The vessel's owner filed a petition for limitation of liability and a claim against Linder Oil. Several crew members also filed claims against the claimant.

Linder Oil moved the court for application of the *Oregon* Rule and a presumption that the vessel was at fault for striking a stationary object. The court found there were issues of fact concerning Linder Oil's failure to properly mark or remove the obstruction that precluded application of the *Oregon* Rule.

Both parties then moved for the presumptions of the *Pennsylvania* Rule regarding failure of statutory rules designed to prevent allisions. The court found that both parties had submitted evidence of the other's statutory violations and that there was no basis for application of any presumptions of fault.

The court also considered whether the injured crew members could recover punitive damages. The court rejected the argument noting that precedent of the Fifth Circuit precluded any claim for punitive or non-pecuniary damages by a seaman, even if the claim was against a non-employer. The court refused to hold that the Fifth Circuit's case law on this issue was overruled by the Supreme Court's decision in *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009).

Finally, applying precedent from the Fifth Circuit, the court held that the vessel owner could not bring a claim against Linder Oil for loss of profits and loss of use because the vessel was a total loss and scrapped as salvage.

Submitted by KMM

Merrell v. Weeks Marine, Inc., 2013 U.S. Dist. LEXIS 107170 (D. N.J. July 31, 2013).

Plaintiff alleged that he was injured while working on the defendant's vessel. In the Complaint, plaintiff asserted claims under the Jones Act, and argued that he was a seaman. During discovery, plaintiff claimed

that he discovered that if he is not determined to be a seaman under the Jones Act, he may be entitled to recover against the defendant for negligence under § 905(b) of the Longshore and Harborworkers' Compensation Act ("LHWCA") based upon his status as a maritime employee. Plaintiff, however, did not include the § 905(b) LHWCA claim in his original Complaint.

Plaintiff moved to amend his Complaint to add a § 905(b) LHWCA claim. The deadline to amend the pleadings set forth in the Pretrial Scheduling Order, however, had passed six months previously.

The District Court held that because the Court treats motions to amend filed after scheduling deadlines have passed as motions to amend the pretrial scheduling order, plaintiff had to establish "good cause" in order to amend his pleadings.

The Court concluded that plaintiff's neglect to amend the Complaint prior to the deadline was excusable because both parties were always aware that plaintiff should be alternatively asserting a § 905(b) LHWCA claim.

The District Court did recognize that these circumstances pushed the outer limits of good cause, but held that the amendment should be allowed: (1) so as not to deprive plaintiff of his rights; (2) because of the absence of prejudice to defendant; and (3) given the plaintiff's reliance on the representations of defendant.

Submitted by SPB

Salvage

Northeast Research, LLC v. One Shipwrecked Vessel, 2013 U.S. App. LEXIS 18454 (2d Cir. September 5, 2013).

Northeast Research, LLC ("Northeast") found a historic shipwreck in the New York waters of Lake Erie. Northeast brought an *in rem* admiralty action in the Western District of New York, seeking title to the vessel under the maritime law of finds, or, in the alternative, a salvage award, and requesting a preliminary injunction prohibiting any rival salvors from diving or conducting salvage operations within two nautical miles of the wreck site. The State of New York responded by filing a claim that the vessel was the sole and exclusive property of New York pursuant the Abandoned Shipwreck Act, the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.*, and New York Education Law § 233.

New York moved for summary judgment on the grounds that the vessel was abandoned within the meaning of the Abandoned Shipwreck Act, and that as a result, title to the vessel automatically vested with New York. The District Court granted the State's motion for summary judgment, and denied Northeast's salvage award request. In granting summary judgment, the District Court identified a circuit split regarding whether abandonment under the Abandoned Shipwreck Act had to be proven by express relinquishment of title or whether it may be inferred from the surrounding circumstances. The District Court adopted the standard that abandonment could be inferred from surrounding circumstances which were proven by clear and convincing evidence.

On appeal, the Second Circuit stated that in deciding whether clear and convincing circumstantial evidence supports inferring abandonment, courts consider a variety of factors, including lapse of time, the location and circumstances of the wreck, whether parties presently claim ownership, whether such parties have attempted to locate or salvage the vessel, and the availability of technology to do so. The Court emphasized that a combination of several of these factors may provide clear and convincing evidence of abandonment.

In this case, the Second Circuit affirmed the District Court's holding and found that New York had demonstrated abandonment by clear and convincing evidence because: (1) there were no efforts to locate the vessel for over 150 years; (2) the vessel's poor working condition and spoilable contents strongly call into question the worth of the vessel and the then-owners' continued interest in recovering the vessel; and (3) the alleged owners' descendants have no proof of their ownership of the vessel.

Submitted by SPB

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