RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW

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I. INTRODUCTION

This article discusses noteworthy and interesting admiralty and maritime decisions issued by federal and state courts in the United States between October 1, 2017, and September 30, 2018. The selection includes cases involving seamen, longshoremen, passengers, maritime liens and attachments, oil pollution, salvage, marine insurance, marine contracts, and many cases addressing other issues that arise in the practice of maritime law. Of particular note, the Ninth Circuit affirmed the availability of punitive damages to seamen in unseaworthiness actions in a case that is now pending before the U.S. Supreme Court. In *In re: Larry Doiron, Inc.*,[1] the Fifth Circuit set forth a new two-prong test to determine whether a contract is maritime in nature.

1. 879 F.3d 568, 575-76 (5th Cir. 2018) (en banc); *writ denied* 138 S. Ct. 2033 (May 21, 2018) (Mem).

II. SEAMEN'S CLAIMS

A. *Jones Act*[2] *and Unseaworthiness*[3]

In an issue "of considerable importance in maritime law," the Ninth Circuit addressed the availability of punitive damages for unseaworthiness in *Batterton v. Dutra*.[4] The Ninth Circuit held that punitive damages are awardable to seamen for injuries in general maritime unseaworthiness actions.[5] The Ninth Circuit determined that not only did *Miles v. Apex Marine Corp.*[6] not implicitly overrule the its previous decision in *Evich v. Morris*,[7] which permitted punitive damages for unseaworthiness in death cases, but also that *Atlantic Sounding Co. v. Townsend*[8] made clear that the statutes which restricted compensation for pecuniary losses did not apply to punitive damages claims.[9]

In *Knudson v. M/V AMERICAN SPIRIT*, the Eastern District of Michigan likewise held that a seaman plaintiff can be awarded punitive damages in an unseaworthiness claim against the vessel owner.[10] The court reasoned that since Congress has not legislated to limit recovery of nonpecuniary loss in a seaman's action for non-fatal injuries, the plaintiff could seek punitive damages for personal injuries in his unseaworthiness claim.[11]

B. *Maintenance and Cure*[12]

In *Joyce v. Maersk Line Ltd*, the Third Circuit, sitting en banc, broke with its own precedent and adopted the majority position regarding the

2. The Jones Act, originally passed in 1920, grants seamen who suffered personal injury in the course of their employment the right to seek damages in a jury trial against their employers. Thomas J. Schoenbaum, Admiralty and Maritime Law § 6-21 (5th ed. 2017 Update) (citing The Jones Act, formerly codified at 46 U.S.C. § 688, since 2008 the Jones Act is codified in 46 U.S.C. § 30104). The elements of a Jones Act claim are (1) that the claimant is a seaman; (2) that he or she suffered injury or death in the courts of his or her employment; (3) that the seaman's employer was negligent; and (4) that the employer's negligence caused the injury at least in part. *Id.*

3. Unseaworthiness is the concept "that the vessel and her owner are . . . liable . . . for injuries received by a seaman in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." Schoenbaum, *supra*, at § 6-25 (citing *The Osceola*, 189 U.S. 158 (1903)). In order to state a cause of action for unseaworthiness, a plaintiff must allege his injury was caused by a defective condition of the ship, its equipment or appurtenances. *Id.*

4. 880 F.3d 1089, 1090 (9th Cir. 2018).

5. *Id*. at 1096.

6. 498 U.S. 19 (1990).

7. 819 F.2d 256 (9th Cir. 1987).

8. 557 U.S. 404 (2009).

9. *Id.* at 1096.

10. Knudson v. M/V AMERICAN SPIRIT, 14-14854, 2017 WL 4786135, at *2 (E.D. Mich. Oct. 24, 2017), *reconsideration denied sub nom.* Knudson v. M/V Am. Spirit, 14-14854, 2017 WL 5499710 (E.D. Mich. Nov. 16, 2017).

11. *Id.*

12. Maintenance and cure is the obligation of a shipowner who employs seamen to care for them if they are injured or become ill while in the service of the ship. Schoenbaum, *supra*, at

enforceability of maintenance rates in collective bargaining agreements.[13] Every other circuit to consider the issue has held that a union contract including rates of maintenance, cure, and unearned wages that is freely entered into by a seafarer will not be reviewed piecemeal by courts unless there is evidence of unfairness in the collective bargaining process.[14] The Third Circuit split with its sister circuits in *Barnes v. Andover Co. L.P.*, [15] when it held that an injured seaman was not bound by the fixed maintenance rate in a union contract, which was subject to change by court order to conform with traditional maritime law.[16] In *Barnes*, the court reasoned that binding an injured seaman to a less than adequate rate of maintenance set forth in a union contract was inconsistent with the long-standing maritime rule that actual expenses can be recovered and that, absent legislation to the contrary, the common law remedy must remain in full force.[17] In re-examining *Barnes*, the Third Circuit found that it "would be hard-pressed to say that courts have no power to modify unearned wage rates established by collective bargaining agreements" if *Barnes* remained valid law.[18] Instead of extending the *Barnes* ruling to unearned wages, the Third Circuit overruled its decision in *Barnes* in light of "the 'modern reality' of unionized seafarers who negotiate for comprehensive contracts" and enforced the rate of unearned wages set forth in the collective bargaining agreement at issue.[19]

In *Kalyna v. City of New York*, the Eastern District of New York considered whether a shipowner's rules and procedures for reimbursement of medical expenses, including its refusal to communicate directly with the plaintiff's physicians, were so onerous as to amount to a willful and wanton disregard of its maintenance and cure obligations.[20] The court reasoned that the employer's imposition of a procedure, which must be followed by all individuals seeking maintenance and cure, demonstrated its mindfulness

§ 6-28. "Maintenance" is the right of a seaman to food and lodging if he falls ill or becomes injured while in the service of the ship. *Id.* (citing Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938)). "Cure" is the right to necessary medical services. *Id.*

13. Joyce v. Maersk Line Ltd, 876 F.3d 502, 503 (3d Cir. 2017).

14. *Id.* (citing Macedo v. F/V Paul & Michelle, 868 F.2d 519 (1st Cir. 1989); Ammar v. United States, 342 F.3d 133 (2d Cir. 2003); Baldassaro v. United States, 64 F.3d 206 (5th Cir. 1995); Al-Zawkari v. Am. S.S. Co., 871 F.2d 585 (6th Cir. 1989); Gardiner v. Sea-Land Serv., Inc., 786 F.2d 943 (9th Cir. 1986); Frederick v. Kirby Tankships, Inc., 205 F.3d 1277 (11th Cir. 2000)).

15. Barnes v. Andover Co., L.P., 900 F.2d 630, 632 (3d Cir. 1990), *overruled by* Joyce v. Maersk Line Ltd, 876 F.3d 502 (3d Cir. 2017).

16. *Id.*

17. *Id.* at 640.

18. *Id.*

19. *Id.* at 510.

20. No. 16-cv-00273 (ADM)(CLP), 2018 WL 1342488 (E.D.N.Y. Feb. 28, 2018); *report and recommendation adopted* No. 16-cv-00273 (ADM)(CLP), 2018 WL WL1335353 (E.D.N.Y. Mar. 15, 2018).

of its obligations.[21] The court found no precedent for imposing an affirmative duty upon ship owners to seek out a seaman's medical records and contact his provider.[22] The court further reasoned that in light of *Hicks v. Vane Line Bunkering, Inc.*,[23] in which "the ship owner's active interference with the doctor-patient relationship was held to be evidence of the ship owner's inappropriate and egregious conduct," vessel owners must be cautious in dealing with Plaintiff's medical providers.[24] Ultimately, the court held that the seaman's attempt to amend his complaint to assert claims for punitive damages was futile.[25]

The Southern District of Illinois awarded a seaman maintenance and cure in *Williams v. Central Contracting & Marine, Inc.*, despite that the seaman failed to disclose his history of back problems prior to his employment.[26] The record showed that the seaman made at least two claims for back injuries while working for previous employers, and failed to disclose these prior injuries before beginning work for the defendant.[27] The defendant failed to ask the seaman any questions regarding his health or physical condition before hiring him, and the seaman believed he was physically capable of performing the work at the time.[28] The court held that the seaman's omission did not compromise his entitlement to maintenance and cure.[29]

C. *Seamen Status and Other Issues*

In the *Matter of Buchanan Marine, L.P.*, the Second Circuit considered whether a barge maintainer, who was injured when he slipped on wet stone along the margin deck of a barge he was inspecting, was a seaman under the Jones Act.[30] The court considered that, as a barge maintainer, the claimant was not a crew member, was not assigned to any vessel, and never operated a barge.[31] The claimant only worked aboard barges and only when they were secured to the dock in order to inspect them for cargo loading and cargo transport.[32] The claimant reported directly to the dock foreman,

21. *Id.* at *5-7.
22. *Id.*
23. 2013 AMC 1350, 1359 (S.D.N.Y. Apr. 16, 2013).
24. *Id.* at *6 (citing Vaughan v. Atkinson, 369 U.S. 527, 528-31 (1962)).
25. *Kalyna*, 2018 WL 132488 at *7.
26. No. 15-CV-867-SMY-RJD, 2018 WL 1612019 (S.D. III. Apr. 3, 2018).
27. *Id.* at *1.
28. *Id.* at *2.
29. *Id.* at *13.
30. 874 F.3d 356, 361 (2d. Cir. 2017) (The claimant asserted claims against the barge company, barge owner, and rock processing facility under the Jones Act, 46 U.S.C. 30101-30106, the Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 U.S.C. 901-950, general maritime, and New York state law.).
31. *Buchanan Marine*, 874 F.3d at 366.
32. *Id.*

belonged to a union for equipment operators, and did not have a maritime license.[33] Weighing the total circumstances of the claimant's employment, the court found that "none of [his] work was of a seagoing nature [and] he was not exposed to the 'perils of the sea' in the manner associated with seaman status."[34] Based on these facts, the Second Circuit upheld the district court's determination that the claimant was not a Jones Act seaman.[35]

In *Dziennik v. Sealift, Inc.*, plaintiff seafarers aboard U.S. flagged vessels under the control of the defendants brought a class action alleging violations of §§ 10313 and 11107 of the Seamen's Wage Act, 46 U.S.C. §10301, *et seq.*, and sought recovery of alleged unpaid wages, overtime wages, and statutory penalties from defendants under employment contracts and federal maritime law.[36] Defendants moved for partial summary judgment on the meanings of the terms "engaged" and "engagement," as used in 46 U.S.C. §11107.[37] The "highest rate of wages" under §11107 is determined by reference to "the port from which the seaman was engaged."[38] Although the vessels were engaged in trading in the United States, the class plaintiffs were hired and signed employment contracts at two foreign ports: Gdynia, Poland, and Manila, Republic of the Philippines.[39] In an apparent issue of first impression, the district court found that terms "engaged" and "engagement" were not defined in the statute, and applying their plain and ordinary meaning, the terms as used in 46 U.S.C. §11107 did in fact refer to engagement at the port of hire, and not the port of embarkation.[40]

III. LONGSHOREMEN CLAIMS

In *Parfait v. Director, Office of Workers' Compensation Programs*, the Fifth Circuit held that a longshoreman's failure to comply with the approval and notice requirements under §33(g) of the Longshore and Harbor Workers' Compensation Act ("LHWCA") terminates his right to compensation or medical benefits.[41] The Fifth Circuit held that "if an employee makes a settlement with or obtains a judgment against a third party, at a bare

33. *Id.* at 367.

34. *Id.* at 368 (quoting Denson v. Ingram Barge Co., No. 5:07-cv-00084-R, 2009 WL 1033817, at *3 (W.D. Ky. Apr. 16, 2009)); *see also* O'Hara v. Weeks Marine, Inc. 294 F.3d 55 (2d Cir. 2002).

35. *Buchanan Marine*, 874 F.3d at 368.

36. No. 05-cv-4659, 2018 WL 1725623, 2018 AMC 837 (E.D.N.Y. Mar. 30, 2018).

37. *See id.* at *1. §11107 states: "An engagement of a seaman contrary to a law of the United States is void. A seaman so engaged may leave the service of the vessel at any time and is entitled to recover the highest rate of wages at the port from which the seaman was engaged or the amount agreed to be given the seaman at the time of engagement, whichever is higher."

38. *Id.* (quoting 46 U.S.C. § 11107).

39. *Dziennik*, 2018 WL 1725623, at *2.

40. *See id.* at *4.

41. 903 F.3d 505, 506-07 (5th Cir. 2018).

minimum, the employee must give notice of the settlement or judgment to his employer."[42] Failure to do so terminates the longshoreman's right to compensation.[43] The longshoreman failed to comply with the notice requirements required by the LHWCA, thereby terminating his right to compensation or medical benefits, and the Fifth Circuit dismissed the appeal.[44]

In *Christie v. Georgia-Pacific Co.*,[45] the Ninth Circuit followed the lead of the Fourth Circuit in clarifying when a person is entitled to permanent total disability benefits under §21 of the LHWCA.[46] The Ninth Circuit found that a longshoreman is not automatically precluded from entitlement to those benefits when the worker voluntarily retires early so long as the worker is able to demonstrate disability, the attainment of maximum medical improvement, and the inability to return to prior employment.[47] To avoid an award of benefits, the employer must then establish that a suitable alternative exists.[48]

IV. PASSENGER CLAIMS

In *Sawyer Brothers, Inc. v. Island Transporter, LLC*, as an issue of first impression, the First Circuit considered whether a plaintiff in the "zone of danger" can recover under a negligent infliction of emotional distress claim under general maritime law.[49] There, a vessel was transporting construction trucks to a nearby island and the plaintiffs were seated inside their trucks during the voyage.[50] When the vessel encountered rough seas, two construction trucks tipped over, causing the plaintiffs' to fear that the trucks would topple overboard.[51] The First Circuit had yet to consider whether a plaintiff in the "zone of danger" satisfies the "physical impact" prong of the negligent infliction of emotional distress analysis.[52] A passenger is considered in the "zone of danger" if he or she "sustains a physical impact, or is placed in immediate risk of physical harm."[53] The First Circuit held that

42. *Id.* at 511.
43. *Id.*
44. *Id.* at 512.
45. 898 F.3d 952 (9th Cir. 2018).
46. 33 U.S.C.A. § 921(c).
47. 898 F.3d at 959.
48. *Id.* at 960.
49. 887 F.3d 23, 37-39 (1st Cir. 2018).
50. *Id.* at 27.
51. *Id.* at 28-29.
52. *Id.* at 36-37 (citing Petition of the U.S., 418 F.2d 264, 269 (1st Cir. 1969)). *See id.* at 37 (summarizing the requirements of an NIED claim as "First, the plaintiff had to experience a physical impact from the defendant's negligence during the incident in question. Second, the plaintiff's emotional distress had to have a physical consequences that is susceptible of objective determination.").
53. *Id.* at 38 (quoting Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 548 (1994)).

the plaintiffs were clearly within the "zone of danger" as they "reasonably feared that the vehicles would go overboard, or that the vessel . . . would capsize."[54]

Kressly v. Oceania Cruises, Inc.[55] involved a claim by the plaintiff for negligence for damages resulting from an injury onboard an Oceania Cruises' vessel. The plaintiff argued that the court should adopt a heightened standard of care for passengers in tumultuous weather conditions rather than merely a standard of reasonable care. [56] The Eleventh Circuit disagreed and held that the defendant owed passengers a reasonable standard of care and the plaintiff must demonstrate that the defendant had the requisite notice of the dangerous conditions to the vessel and its passengers. [57] The Eleventh Circuit concluded that Oceania Cruises did not have the requisite actual and constructive notice that the severity of the weather would cause a risk-creating condition in the plaintiff's cabin.[58]

Following an accident between a speedboat and a passenger ferry, the Ninth Circuit decided an issue of first impression within the circuit regarding the duties owed by vessel owner passengers. In *Holzhauer v. Rhoades*,[59] the Ninth Circuit held that a vessel owner who is a passenger on his own vessel has no duty to keep a lookout unless the owner-passenger knows that the person operating the vessel is likely to be inattentive or careless or the vessel owner-passenger was jointly operating the vessel at the time of the accident.[60] In considering what constitutes joint operation, the Ninth Circuit held that viewing "joint operation" over the course of the entire trip would be "artificial"; rather, the "joint operation" inquiry should focus on the time immediately preceding and concurrent with the accident.[61] The Ninth Circuit expressly stated that its decision was not in conflict with the Supreme Court's mandate that vessel owners owe duties of reasonable care under the circumstances.[62]

V. SALVAGE

In *Odyssey Marine Exploration, Inc. v. Shipwrecked and Abandoned SS Mantola*, the Southern District of New York considered whether a plaintiff-salvor's maritime lien on a historic shipwreck was voided because all or a significant

54. *Id.* at 39.
55. 718 Fed. Appx. 870 (11th Cir. 2017) (per curiam).
56. *Id.*
57. *Id.* at 872.
58. *Id.* at 872.
59. 899 F.3d 844 (9th Cir. 2018).
60. *Id.* at 846.
61. 899 F.3d at 814 (citing Weissman v. Boating Magazine, 946 F.2d 811 (11th Cir. 1991)).
62. *Id.* at 848 (citing Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 632 (1959)).

portion of the vessel's valuable cargo was removed by an unnamed third-party prior to attachment.[63] Having produced a piece of silk cloth and the ship's bell, which were voluntarily salvaged from the shipwrecked vessel, the salvor sufficiently pled a valid claim for salvage.[64] Further, the court found that the evidence presented, i.e. second-hand statements that an unnamed salvor recovered silver bars from the vessel on an unknown date, was insufficient to defeat the court's *in rem* jurisdiction over the shipwreck by virtue of its constructive jurisdiction over the property salvaged from the vessel.[65] Ultimately, the court found that the claimant's allegation that valuable cargo had been removed from the wreck prior to the court's attachment did not affect the merits of the plaintiff's lien, only the value of the potential award.[66]

VI. OIL POLLUTION ACT (OPA)

As a "responsible party" under the Oil Pollution Act ("OPA")[67], Frescati Shipping Co. Ltd. paid approximately $143 million to clean up an estimated 264,000 gallons of the crude oil that spilled into the Delaware River when one of its oil tankers, the *M/T Athos I*, chartered to Citgo Asphalt Refining Co., Citgo Petroleum Corp. and Citgo East Coast Oil Corp. ("CARCO"), allided with an abandoned anchor on the river bottom, only 900 feet from its intended berth.[68] Pursuant to OPA, Frescati's liability for the cost of cleaning up the spill was limited to approximately $45 million and the United States, by way of the Oil Spill Liability Trust Fund ("OSLTF"), reimbursed Frescati for $88 million of the remaining clean-up costs.[69] Frescati and the United States, as Frescati's subrogee, then sought recovery from CARCO for the costs incurred in the clean-up and other damage caused by CARCO's failure to protect *Athos I* from the damage caused by the abandoned anchor.[70]

On appeal from the Eastern District of Pennsylvania, the Third Circuit addressed the question of how to apportion responsibility for that cost between these three parties. The Third Circuit affirmed the district court's

63. 333 F. Supp. 3d 292 (S.D.N.Y. 2018).
64. *Id.* at 304–05.
65. *Id.* at 301 (citing R.M.S. Titanic, 171 F.3d 943, 963–64 (4th Cir. 1999)).
66. *Id.*
67. *See* 33 U.S.C. § 2702(a).
68. In re Frescati Shipping Co., Ltd., 886 F.3d 291, 295 (3d Cir. 2018).
69. *Id.* at 300 n.8 ("Frescati also incurred roughly $10 million in damages that fell outside the scope of the OPA's liability cap—third-party claims; cleanup expenses for recreational boats; the cost of removing the anchor and the pump casing from the riverbed; a settlement with a nearby nuclear power plant that had to shut down; unrepaired hull damage to the Athos I, and other miscellaneous expenses. Frescati's contract recovery of $55 million was based on both its OPA and non-OPA damages.").
70. *Id.* at 309.

holding that CARCO's contract included a Safe Berth Warranty; that Frescati was a third-party beneficiary of that contract; that Frescati met the conditions for the safe berth warranty to apply; that CARCO had breached its warranty because the allision occurred within the covered geographic area; and that CARCO was liable to both Frescati and the United States (Frescati's subrogee) for the clean-up costs and losses associated with that breach of that contract.[71]

The Third Circuit reversed the district court's reduction in the United States' recovery to half of its payment to Frescati out of the OSLTF.[72] The court concluded that CARCO had failed to meet its burden of establishing an equitable recoupment defense, and, accordingly, CARCO was liable to the United States in full.[73] Further, Third Circuit affirmed that CARCO could no longer limit its liability under OPA because CARCO had waived the limitation of liability defense by failing to raise it with sufficient clarity until almost a decade after the litigation commenced.[74]

In *United States v. Nature's Way Marine, L.L.C.*, the Fifth Circuit defined what it means to be a vessel "operator" under Oil Pollution Act of 1990 ("OPA 90").[75] The case involved claims brought by the federal government against Nature's Way for the recovery of monies spent by various agencies to clean up an oil spill in the Mississippi River following an allision between two oil-laden "dumb" barges and a bridge.[76] The two barges, owned by Third Coast Towing, were in the process of being moved by a tugboat owned by Nature's Way when the allision ruptured one the barge's hull causing more than 7,000 gallons of oil to spill into the River.[77] After settling the claims between itself and Third Coast Towing, Nature's Way submitted a claim to the National Pollution Funds Center ("NPFC") seeking reimbursement on the grounds that its liability should be limited to the tonnage of its tugboat rather than the tonnage of the barges.[78] Nature's Way also requested that it be relieved of any obligation to reimburse the federal government for the costs associated with the cleanup efforts.[79]

71. 886 F.3d 291 (3d Cir. 2018).
72. *Id.*
73. *Id.* at 299 ("CARCO argued that the conduct of three federal agencies—the Coast Guard, NOAA, and the Army Corps of Engineers—misled CARCO into believing that the United States was maintaining the anchorage free of obstructions. In addition, CARCO argued that equity requires the United States to bear the cost of the cleanup rather than CARCO. The District Court ultimately reduced the United States' recovery against CARCO by 50%, rather than acceding to CARCO's request to eliminate its liability entirely").
74. *Id.* at 313 (CARCO argued that OPA, 33 U.S.C. § 2702(d)(2)(B) limited its liability to the same extent to which Frescati's liability was limited).
75. 904 F.3d 416 (5th Cir. 2018).
76. *Id.* at 418.
77. *Id.*
78. *Id.*
79. *Id.*

The NPFC denied Nature's Way's claims, finding that it was an "operator" of the ruptured barge at the time of the allision.[80] Later, the United States sued both Nature's Way and Third Coast seeking reimbursement of the remediation costs.[81] Nature's Way answered by denying all liability and counterclaimed that the NPFC had violated the Administrative Procedure Act ("APA") by finding that it was an "operator" of the barge in its tow.[82] The government moved for partial summary judgment seeking dismissal of Nature's Way counterclaims, which was granted by the district court.[83] On appeal, the Fifth Circuit affirmed, holding that Nature's Way was the "operator" of the barges because that term includes "someone who directs, manages, or conducts the affairs of the vessel."[84] The court further noted that the meaning of the term "operating" a vessel under OPA 90 necessarily includes the act of piloting or moving the vessel and Nature's Way had exclusive control and direction of the barge at the time of the allision.[85]

VII. CONTRACT

The Fifth Circuit set forth a new test to determine whether a contract is maritime in nature in its unanimous en banc decision, *In re: Larry Doiron, Inc.*[86] The two-prong test replaces the six-factor test announced in the Fifth Circuit's 1990 decision, *Davis & Sons, Inc. v. Gulf Oil Corp.*,[87] in an effort to "adopt a simpler, more straightforward test consistent with the Supreme Court's decision in *Norfolk Southern Railway Co. v. Kirby*."[88] The new test is as follows: "First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters?"[89] If the answer is "yes," the court asks, "[D]oes the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract? If so, the contract is maritime in nature."[90] The new test aims to place the focus on the contract and the expectations of the parties, rather than the type of work performed at the time of the incident or injury giving rise to the underlying suit.[91] This is important because the obligation to defend and indemnify regularly turns on whether maritime law or state

80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at 421.
85. *Id.*
86. 879 F.3d 568, 575-76 (5th Cir. 2018) (en banc); *writ denied*, 138 S. Ct. 2033 (May 21, 2018) (mem).
87. 919 F.2d 313, 316 (5th Cir. 1990).
88. 879 F.3d at 569 (citing Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14 (2004)).
89. *Id.* at 576.
90. *Id.*
91. *Id.*

law governs the underlying contract due to the anti-indemnity statutes in Texas and Louisiana.[92]

The facts of *Doiron* are instructive. Apache, a platform owner, contracted with Specialty Rental Tools & Supply ("STS") to perform flow-back services on Apache's fixed platform in Louisiana waters.[93] STS was unsuccessful in performing the work and a crane barge, owned by Larry Doiron, Inc. ("LDI"), was brought in to complete the work[94] One of STS's employees was injured performing the work.[95] LDI demanded that STS defend and indemnify against claims made by the injured worker pursuant to the underlying master service contract.[96]

LDI and STS filed cross-motions for summary judgment; at issue was whether maritime law or Louisiana law governed the contract.[97] If Louisiana law governed, then the Louisiana Oilfield Anti-Indemnity Act[98] would invalidate the indemnity provision in the contract.[99] If maritime law applied, then the indemnity provision would hold.[100] The district court held that the contract was maritime in nature due to the necessity of a crane barge to complete the work, and therefore, the indemnity provision was enforceable.[101] On appeal, the Fifth Circuit analyzed the *Davis* factors as applied to this case and affirmed.[102] Judge Davis concurred in the decision, but urged the court to take up the issue en banc to revisit the test and bring it in line with the Supreme Court precedent in *Kirby* by placing the focus on the nature of the contract, rather than tort principles.[103] Changing the test altered the outcome of the case. The en banc court held that because the use of a vessel was not contemplated by the parties and was an insubstantial part of the job, the contract was not maritime in nature, thereby invalidating the indemnity provision under Louisiana law.[104]

The Fifth Circuit applied the new *Doiron* test in *In re: Crescent Energy Servs., L.L.C.* to determine whether a contract to perform plug and abandonment work in the coastal waters of Louisiana between a barge owner, Crescent Energy Services, L.L.C., and a well owner, Carrizo Oil & Gas,

92. *See id.* at 576-77.
93. Larry Doiron, Inc. v. Specialty Rental Tools & Supply, L.L.P., 869 F.3d 338, 340 (5th Cir. 2017), *rev'd en banc*, 879 F.3d 568 (5th Cir. 2018).
94. *Id.* at 340–41.
95. *Id.* at 341.
96. *Id.*
97. *Id.*
98. La. R.S. 9:2780
99. *Doiron*, 869 F.3d at 341–42.
100. *Id.*
101. *Id.*
102. *Id.* at 344, 347.
103. *Id.* at 348–49.
104. *In re Larry Doiron, Inc.*, 879 F.3d at 577.

Inc., was maritime in nature.[105] A Crescent employee was injured while performing the work and the well owner sought indemnity from Crescent for that personal injury claim pursuant to the underlying contract.[106] Because the contract "anticipated the constant and substantial use of multiple vessels," the Fifth Circuit held that the contract was a maritime contract, so the Louisiana Oilfield Anti-Indemnity Act did not apply and the indemnity provision was enforced against Crescent.[107] The court reasoned that the bid documents for the work to be performed included the use of three vessels, a quarters barge, a tug boat, and a cargo barge; therefore, the parties contemplated that the use of these vessels would be required to perform the work.[108] Crescent's insurers have petitioned for a writ of certiorari to the Supreme Court arguing that the Sixth, Ninth, and Eleventh Circuits consider whether a contract is maritime based on its subject matter, not whether a vessel is involved.[109]

The first lower courts to apply the test announced in *Doiron* examined two different contracts arising in different contexts. In the first, *Lightering LLC v. Teichman Group, LLC*, the Southern District of Texas analyzed whether *Doiron* applies in a non-oil and gas context.[110] That case concerned a contract for wharfage and dockside services for loading and unloading vessels.[111] The court applied the principles of *Doiron* and *Kirby* to determine whether the contract was maritime in nature, finding that: "(1) the activity must be maritime commerce; (2) the activity must involve work from a vessel; and (3) the contract must provide or the parties must expect that a vessel will play a substantial role in completing the contract."[112] Because the "parties characterized the Agreement as a lease of property, not as a contract with a principal objective of maritime commerce" and the use of a vessel was insubstantial, the court held that the contract was non-maritime in nature and dismissed the case for lack of jurisdiction.[113] An appeal was filed to the Fifth Circuit on August 20, 2018.

The second case, *Mays v. C-Dive LLC*, involved a contract to perform plug and abandonment work in the Gulf of Mexico that resulted in a pipeline explosion.[114] The Eastern District of Louisiana applied the *Doiron* test: the contract was one to provide services to facilitate the production of oil

105. 896 F.3d 350, 352 (5th Cir. 2018).
106. *Id.* at 353.
107. *Id.* at 361–62.
108. *Id.* at 352-53, 361-62.
109. Petition for a Writ of Certiorari of Liberty Mutual Ins. Co. and Starr Indem. & Liab. Co.; Case No. 18-436.
110. 328 F. Supp. 3d 625 (S.D. Tex. 2018).
111. *Id.* at 638–39.
112. *Id.* at 636.
113. *Id.* at 642.
114. No. 16-13139, at *1, 2018 WL 3642005 (E.D. La. Aug. 1, 2018).

and gas on navigable waters and the parties anticipated that a vessel would play a substantial role in the project because the work required the use of a diver support vessel.[115] Therefore, the court held that the contract was maritime in nature and the indemnity, defense, and additional insured provisions were enforceable.[116]

VIII. MARINE INSURANCE

In *QBE Seguros v. Morales-Vazquez*, the District Court for the District of Puerto Rico considered whether a marine insurance policy was *void ab initio* under the doctrine of *uberrimae fidei* and the warranty of truthfulness, on the basis that the insured failed to disclose his prior loss and boating history on his marine insurance application.[117] Specifically, the insured failed to disclose his prior ownership of five (5) vessels and that he had grounded a vessel in 2010.[118] After the marine insurance policy was issued, the vessel suffered damages as a result of a fire.[119] While investigating the casualty, the insurer learned of the insured's misrepresentations on his application and, thereafter, voided the marine insurance policy.[120]

The court first considered the "strict maritime rule" of *uberrimae fidei*, which places a "high burden" on the insured "to make full disclosure of all material facts of which the insured has, or ought to have, knowledge . . ."[121] When the insured fails to make such a disclosure, the insurer may void the marine insurance policy.[122] The Court rejected the idea that the doctrine of *uberrimae fidei*, in and of itself, requires the insurer to rely on the misrepresentation in issuing the policy.[123] In considering the language of the application, the Court acknowledged that unambiguous language could supplement the doctrine of *uberrimea fidei*; however, a mere mention of the term "reliance" in a boilerplate "knowledge and belief" certification, without any correlation to voiding a policy, is not enough.[124]

The Court stated that the only requirement under the doctrine of *uberrimea fidei* is that the misrepresentation be material.[125] In considering whether the insured's misrepresentations were material, the Court noted

115. *Id.* at *3.
116. *Id.*
117. 2018 WL 3763305, at *5-6 (D.P.R. Aug. 7, 2018).
118. *Id.* at *2.
119. *Id.* at *3.
120. *Id.* at *4.
121. *Id.* at *6 (quoting Catlin (Syndicate 2003) at Lloyd's v. San Juan Towing & Marine Servs., Inc., 974 F. Supp. 2d 64, 78 (D.P.R. 2013)).
122. *Id.* (citing Catlin (Syndicate 2003) at Lloyd's, 974 F. Supp. 2d at 83).
123. *Id.* at *6.
124. *Id.* (quoting State Nat'l Ins. Co. v. Anzhela Explorer, L.L.C., 812 F. Supp. 2d 1326, 1352 n.3 (S.D. Fla. 2011)).
125. *Id.*

that a grounding is a significant factor in evaluating the risk of issuing a policy.[126] Although written underwriting guidelines may be relevant in determining whether a particular misrepresentation is material to the issuance of a policy, the omission of a particular risk factor is not conclusive of materiality, especially when it is logical for the risk to have been considered.[127] Lastly, the Court considered whether the broker's knowledge of the grounding could be imputed to the insurer based on agency principles.[128] Applying Puerto Rico law, the Court held that a marine insurance broker that "negotiates with different insurance companies to get . . . the best deal possible" is not agent of a marine insurer and, thus, knowledge is not imputable.[129] The insured was not able to assert the equitable defense of waiver because *uberrimae fidei* does not incorporate affirmative defenses.[130]

The Court next considered whether the warranty of truthfulness excused the insurer from providing coverage, finding that the phrase "warranted to you to be true and correct in all respects" incorporated the warranty of truthfulness.[131] The Court held that the warranty was material to the risk of issuing the policy because the insurer specifically stated that responses were material and that it relied upon the truthfulness and completeness of the responses.[132] Finally, the Court held that the insurer was not estopped from voiding the marine insurance policy on the basis that the insurer also made material misrepresentations on an earlier application with the insured's predecessor or that the insurer continued to adjust the claim while it investigated the grounding in 2010.[133]

At issue in *Galilea, LLC v. AGCS Marine Insurance Co.*, was whether an arbitration provision in a maritime insurance policy was enforceable despite law in the forum state precluding its application. [134] The dispute concerned an arbitration provision contained in a yacht's insurance policy that covered both collisions and repairs of the yacht.[135] The court found that the policy was clearly subject to the Federal Arbitration Act ("FAA"), which specifically applies to "maritime transactions," such as "agreements relating to. . .repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction."[136] Galilea attempted to circumvent the FAA's application, however, by citing

126. *Id.* at *7–8.
127. *Id.* at *8.
128. *Id.* at *9–10.
129. *Id.*
130. *Id.* at *10.
131. *Id.* at *11.
132. *Id.* at *12.
133. *Id.* at *12–14.
134. 879 F.3d 1052, 1053 (9th Cir. 2018).
135. *Id.*
136. *Id.* at 1058 (citing 9 U.S.C. §1).

the McCarran-Ferguson Act ("MFA"), 15 U.S.C. §1011, *et seq*., which precludes the application of federal statutes if (1) a state law is "enacted. . .for the purpose of regulating the business of insurance;" (2) the federal law does not "specifically relat[e] to the business of insurance;" and (3) the federal statute's application would "invalidate, impair, or supersede" state insurance law.[137] The court found the MFA inapplicable since applying an established federal maritime law rule—such as the provision of the FAA directly mandating enforcement or arbitration clauses in maritime transactions—did not "invalidate, impair, or supersede" any state law because any applicable maritime rule is primary, and state law applies only if maritime law does not.[138]

IX. CARGO

In *Royal SMIT Transformers BV v. Onego Shipping & Chartering, BV*, the Fifth Circuit addressed the enforceability of the immunity provisions contained in the Himalaya Clause of a multimodal through bill of lading.[139] Royal sold three transformers to Entergy Louisiana and then contracted with Central Oceans USA, a NVOCC, to facilitate the carriage of the transformers from the Port of Rotterdam to St. Gabriel, Louisiana.[140] Central Oceans contracted with Onego Shipping & Chartering, B.V. for the ocean carriage to New Orleans, Illinois Central Railroad Company for the rail carriage to St. Gabriel, and Berard Transportation, Inc. for the truck carriage to the transformers' final destination.[141] After the transformers arrived at their destination it was discovered that they had sustained damage due to excessive vibration at some point during transit.[142] Royal sued Central Oceans and each of its subcontractors for breach of contract, fault, and negligence seeking over $1,600,000 in damages.[143] At issue was whether the immunity provision contained in the Royal-Central Oceans bill of lading, which completely precluded Royal from bringing claims against any of Central Oceans' sub-contractors, was enforceable.[144] Onego, Illinois Central, and Berard moved for summary judgment seeking protection under the bill's Himalaya Clause.[145] The district court granted summary judgment.[146] Noting that the issue was one of first impression within the Fifth Circuit, the court affirmed, holding that the immunity provision was enforceable, as the purpose of the Himalaya Clause was to create "a

137. *Id*.
138. *Id*. at 1059
139. 898 F.3d 543 (5th Cir. 2018).
140. *Id.* at 545.
141. *Id.*
142. *Id.* at 547.
143. *Id.*
144. *Id.*at 548.
145. *Id.* at 547.
146. *Id.*

barrier between the cargo owner and downstream carriers that can neither be scaled nor circumvented."[147]

In *In re M/V MSC Flaminia*, the long-running litigation arising from the July 2012 fire and explosion aboard the M/V MSC FLAMINIA (the "*Flaminia*"), the district court issued two substantial opinions setting forth its findings of fact and conclusions of law, following a "Phase I" trial concerning the cause of the explosion, and a "Phase II" trial concerning liability.[148] In Phase I, the court made factual findings relating to the cause of the explosion aboard the *Flaminia*.[149] The court found that auto-polymerized DVB80 ("DVB"), a chemical contained in a container aboard the *Flaminia*, ignited by a spark, caused the explosion and fire, and identified factors that substantially contributed thereto as to the decisions how and where to ship that chemical, the placement of the DVB in the ship's holds and the ventilation conditions, all of which contributed to higher ambient temperatures which caused the DVB to overheat and ultimately catch fire.[150]

In Phase II, the court determined that two parties were liable, the manufacturer of the DVB that caused fire (the "DVB Manufacturer"), and the non-vessel operating common carrier ("NVOOC") that had booked transport aboard the vessel and was responsible for trucking the DVB to port.[151] By contrast, the court found that the ocean carrier, the vessel's owner and its operators, and the manufacturer of adjacent high-temperature cargo did not bear responsibility.[152] The court also found that with respect to indemnification and contribution claims asserted amongst the parties, the ocean carrier, the vessel owner and its operators were entitled to full indemnification from the DVB Manufacturer and the NVOOC.[153] The Court ordered the parties to mediation to resolve the remaining issues in the case, including the quantum of damages.[154] On October 9, 2018, the DVB Manufacturer and the NVOOC also filed interlocutory appeals to the Second Circuit from the court's findings of fact, conclusions of law, and certain evidentiary rulings.[155]

147. *Id.* at 548.

148. In re M/V MSC Flaminia, No. 12-cv-8892, 2017 WL 5514525, 2017 AMC 2850 (S.D.N.Y. Nov. 17, 2017) (findings of fact and conclusions of law with respect to Phase 1 trial on causation) [hereinafter *Flaminia I*]; In re M/V MSC Flaminia, No. 12-cv-8892, 2018 WL 4301368 (S.D.N.Y. Sept. 10, 2018) (findings of fact and conclusions of law concerning liability issues) [hereinafter *Flaminia II*].

149. *Id.*

150. *See Flaminia I*, 2017 WL 5514525, at *30-31; *Flaminia II*, 2018 WL 4301368, at *1–2 (summarizing Phase I findings).

151. *See Flaminia II*, 2018 WL 4301368, at *4–6 (summarizing Phase II findings).

152. *Id.*

153. *Id.* at *36.

154. *Id.* at *52.

155. In re M/V MSC Flaminia, No. 12-cv-8892, Notice of Appeal (Dkt. 1623) (Oct. 9, 2018); In re M/V MSC Flaminia, No. 12-cv-8892, Notice of Interlocutory Appeal (Dkt. 1624) (Oct. 9, 2018).

In *Liberty Woods International, Inc. v. Motor Vessel Ocean Quartz*, the Third Circuit contemplated the validity of a bill of lading's forum selection clause, requiring suit to be brought in a jurisdiction that did not recognize *in rem* suits, under the Carriage of Goods by Sea Act ("COGSA").[156] The Third Circuit rejected the District Court's misinterpretation of COGSA, but affirmed the district court's dismissal of the *in rem* suit against the Vessel for improper venue based on the validity of the forum selection clause requiring suit be brought in South Korea.[157] The court rejected the appellant's arguments that: (1) COGSA created a substantive right to *in rem* suits; and (2) even if *in rem* suits are not a substantive right, the forum selection clause effectively relieves or lessens ship liability in violation of COGSA because South Korea does not allow *in rem* suits.[158] The Third Circuit reasoned that COGSA protects ship liability and is not procedural means for enforcing liability or any particular vehicle for imposing it.[159] The court noted the existence of other avenues for imposing liability in situations where *in rem* suits are prohibited, such as a letter of undertaking ("LOU") providing security for an *in personam* suit in South Korea.[160]

X. MARITIME LIENS, ATTACHMENT, AND SHIP MORTGAGE ACT

A. *Maritime Liens*

In *Portland Pilots, Inc. v. NOVA STAR M/V*, the First Circuit was tasked with determining whether a pre-established rental cost of linens, napkins, and uniforms by a charterer, pursuant to a rental and services contract, could be included in a maritime lien claim.[161] The rental and service contract included a termination fee that stated that the charterer was required to purchase all of the rental items if the contract was terminated early.[162] To start, the First Circuit recognized the two-fold purpose of a maritime lien: "first, to allow ships to continue to function for their intended purpose, and second to hold the ship—rather than its owner—liable for its debts."[163] To establish a maritime lien, the claimant must show that it provided "necessaries" to the vessel, which include "repairs, supplies, towage, . . . the use of a dry dock or marine railway . . . as well as most goods or services that are useful to the vessel, keep her out of danger and enable her to perform her

156. 889 F.3d 127, 129 (3d Cir. 2018).
157. *Id.* at 128–29.
158. *Id.* at 130–31.
159. *Id.* at 130; Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528 (1995).
160. *Id.* at 130–32; Thyssen, Inc. v. Calypso Shipping Corp., S.A., 310 F.3d 102, 107 (2d Cir. 2002).
161. 875 F.3d 38, 41 (1st Cir. 2017).
162. *Id.*
163. *Id.* at 42.

particular function."[164] Comparing the charterer to a sailing hotel, the First Circuit held that the rental items were clearly necessaries because hotels require clean linens to function for its intended purpose.[165] However, the court distinguished between rental items that were provided when the ship was operating and when it ceased operations.[166] The court held that once the ship ceased operating, the rental items were no longer necessaries to fulfill the charterer's intended purpose.

The First Circuit further held that the charterer did not have a maritime lien in the rental items that were stored in the supplier's warehouse once the contract was terminated (for which the charterer was required to purchase under the contract) because they were neither actually nor constructively delivered to the charterer.[167] Although the entire stock of the rental items had, at some point, been delivered to the charterer for use, those rental items were still owned by supplier.[168] Dovetailing off of this argument, the court rejected the idea that the rental items were purchased by the supplier exclusively for the charterer, finding no evidence of exclusivity.[169] In summary, the supplier had a maritime lien for only services rendered while the charterer was operating and rental items that remained unrecoverable on the ship.[170]

In *Minott v. M/Y Brunello*, the Eleventh Circuit addressed an appeal of the district court's denial of a warrant in rem for the arrest of a motor yacht for injuries allegedly sustained by a marine engineer while boarding the yacht.[171] During boarding, the gangway failed and allegedly caused the plaintiff's personal injuries.[172] The Eleventh Circuit held that the claim gave rise to a maritime lien supporting an in rem action through operation of the general maritime law, thereby reversing the district court's decision.[173]

In *ING Bank N.V. v. M/V Temara*, part of the ongoing litigations arising out of the O.W. Bunker group bankruptcy, the Second Circuit addressed the question of which parties are entitled to a maritime lien under the Commercial Instruments and Maritime Liens Act ("CIMLA"), 46 U.S.C. § 31301 *et seq*.[174] The court affirmed that the subcontractor physical supplier

164. *Id*. at 44 (quoting 45 U.S.C. § 31301(4); Trico Marine Operators, Inc. v. Falcon Drilling Co., 116 F.3d 159, 162 (5th Cir. 1997)).
165. *Id.* at 45.
166. *Id.* at 45–46.
167. *Id.* at 46–47.
168. *Id.* at 47.
169. *Id.* at 48–49.
170. *Id.* at 49.
171. 891 F.3d 1277, 1281 (11th Cir. 2018).
172. *Id.*
173. *Id.*
174. 892 F.3d 511 (2d Cir. 2018). This case was heard in tandem with several other cases that issued similar orders on the same legal questions: ING Bank N.V. v. Jawor *M/V*, 730 F. App'x 94 (2d Cir. 2018); Aegean Bunkering (USA) LLC v. *M/T* Amazon, 730 F. App'x 87 (2d

was not entitled to a maritime lien because it did not provide the bunkers on the order of the owner or a person authorized by the owner as specified in CIMLA.[175] However, the court vacated the district court's ruling that the bunker contract supplier—and, thus, its assignee—was not entitled to seek a maritime lien.[176] Instead, the Second Circuit held that "a contractor is entitled to assert a maritime lien under CIMLA when it contracts with an entity specified in the statute for the delivery of necessaries and those necessaries are delivered pursuant to that arrangement, even if by a subcontractor."[177] The Court also concluded that the District Court's *sua sponte* entry of summary judgment in favor of the defendant vessel was error, where that party had not moved for such relief.[178]

In *Leopard Marine & Trading, Ltd. v. Easy Street Ltd.*, the Second Circuit affirmed a judgment of the district court ruling that a maritime lien was unenforceable due to laches, and, in a divided opinion, found that there was subject matter jurisdiction to declare a maritime lien unenforceable, even where the vessel was not present in the district, so long as its owner consented to adjudication of rights in the lien.[179] The vessel owner had sought a declaratory judgment under the Declaratory Judgment Act, 28 U.S.C.S. § 2201, that a maritime lien asserted by a fuel supply company was unenforceable due to laches.[180] The district court, sitting in admiralty, ruled that the lien was unenforceable on that basis.[181] The Second Circuit panel affirmed that determination, but was divided on whether there was subject matter jurisdiction to hear a declaratory judgment action about the enforceability of the lien in the absence of the *res*.[182]

In *Valero Marketing & Supply Company v. M/V ALMI SUN*, the Fifth Circuit considered whether a bunker supplier, having entered into a contract with a bunker trader that later went bankrupt, was entitled to assert a maritime lien against the vessel that received the fuel.[183] The M/V ALMI SUN (the "Vessel") was at port in Corpus Christi, Texas and needed bunkers.[184] Almi Tankers S.A. ("Almi Tankers"), agent for the Vessel's owner, Verna Marine Co. Ltd. ("Verna"), contracted with O.W. Bunker Malta,

Cir. 2018); ING Bank, N.V. v. M/V Voge Fiesta, No. 16-4023-cv, 2018 WL 3359610 (2d Cir. July 10, 2018); Chemoil Adani Pvt. Ltd. v. M/V Mar. King, No. 16-3944, 2018 WL 3359609 (2d Cir. July 10, 2018); O'Rourke Marine Servs. L.P., L.L.P. v. M/V COSCO HAIFA, 730 F. App'x 89 (2d Cir. July 10, 2018).

175. *Id.* at 521.
176. *Id.* at 515.
177. *Id.*
178. *Id.*
179. 896 F.3d 174, 183–89 (2d Cir. 2018).
180. *See id.* at 178–79.
181. *See id.* at 179.
182. *See id.* at 179, 199–200 (dissent).
183. 893 F.3d 290 (5th Cir. 2018).
184. *Id.* at 291.

Ltd. ("O.W. Malta") to procure the fuel.[185] Almi Tankers requested the name of the physical supplier and O.W. Malta named Valero Marketing & Supply Company ("Valero").[186] Then, another O.W. Bunker entity, O.W. Bunker USA, Inc., contracted with Valero to purchase the fuel.[187] Valero coordinated directly with the Vessel and Almi Tankers to test and verify the bunkers' quality.[188]

After learning of the financial troubles faced by O.W. Bunkers and its inability to pay for the fuel, Valero brought an *in rem* action against the Vessel, seeking the cost of the bunkers plus interest and fees.[189] Verna appeared in the action to defend the Vessel.[190] Both Verna and Valero moved for summary judgment, which was granted in Verna's favor.[191] Applying the provisions of the Commercial Instruments and Maritime Liens Act ("CIMLA") *stricti juris*, the court found that only persons providing necessaries to a vessel "on the order of the owner or a person authorized by the owner" were entitled to a maritime lien.[192] The court affirmed summary judgment in favor of Verna, holding that Valero did not furnish bunkers to the Vessel "on the order of the owner or a person authorized by the owner."[193] Rather, the bunkers were provided at O.W.'s request, and O.W. was not an entity presumed to have Verna's authority to procure the necessaries.[194] Further, the record evidence merely indicated that Verna was aware that Valero was the bunker's physical supplier, not that Verna controlled the selection or performance of Valero.[195]

In *Martin Energy Servs., LLC v. M/V Bravante IX*,[196] Boldini contacted O.W. Bunker Brasil to have fuel provided to M/V Bravante VIII in Panama City, FL.[197] O.W. Bunker Brasil, Middle East and USA arranged for Martin Energy Services to provide the fuel to M/V Bravante VIII.[198] O.W. Bunker Brasil functioned as a broker.[199] Martin Energy delivered the fuel on credit and believed it would have a maritime lien against the ship.[200] The district court held that Martin Energy had a valid quantum meruit claim

185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 291–92.
189. *Id.* at 292.
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.* at 294.
194. *Id.*
195. *Id.* at 295.
196. 733 Fed. App. 503 (11th Cir. 2018) (per curiam).
197. *Id.* at 504.
198. *Id.*
199. *Id.* at 507 n.3.
200. *Id.* at 505.

against Boldini that was satisfied by Boldini's tender into the court's registry, and that Martin Energy had a valid maritime lien against the Bravante VIII that was discharged by Boldini's tender into the court's registry.[201] The Eleventh Circuit affirmed and found that under Florida law, a contractor could recover in quantum meruit from the shipowner even though the subcontractor had a contract with the general contractor, if the shipowner received a benefit from the subcontractor's work and the shipowner had not paid for that work under the shipowner's own contract with the general contractor.[202] Thus, the court held that in the absence of a valid contract claim against Boldini and O.W. Bunker, Martin Energy could recover in quantum meruit from Boldini.[203]

In *Barcliffe, LLC, d.b.a. Radcliff/Economy Marine Services v. M/V Deep Blue*, M/V Deep Blue's shipowner contacted O.W. Bunker UK, which agreed to sell and deliver the fuel to the vessel in Mobile, Alabama. [204] The supplier purchased the fuel from O.W. Bunker USA, which subcontracted with Radcliff to supply and deliver the fuel on credit.[205] Radcliff asserted a maritime lien on the vessel after O.W. Bunker collapsed into bankruptcy.[206] The district court held that Radcliff did not have a lien on the vessel but that a lien had arisen in favor of O.W. Bunker, which was assigned to ING.[207]

In affirming the district court's decision, the Eleventh Circuit held that Radcliff acted on the order of O.W. Bunker USA not the shipowner, and therefore did not have a maritime lien on the vessel.[208] Furthermore, the court explained that payment by a general contractor to a subcontracted supplier is immaterial to the general contractor's lien; rather, the lien arises the moment the subcontractor renders performance on the general contractor's behalf.[209] Thus, the Eleventh Circuit determined that O.W. Bunker UK provided the bunkers to the vessel within the meaning of CIMLA and had a lien on the vessel.[210] The court further held that O.W. Bunker UK assigned its lien to ING pursuant to a Security Agreement.[211] The court explained that under the Security Agreement, O.W. Bunker UK assigned all "rights, title and interest in respect of the Supply Receivables."[212] The court defined "Supply Receivables" to include the monetary sum due under

201. *Id.* at 504.
202. *Id.* at 506.
203. *Id.* at 506.
204. 876 F.3d 1063 (11th Cir. 2017).
205. *Id.* at 1065.
206. *Id.* at 1065–66.
207. *Id.*
208. *Id.* at 1070.
209. *Id.* at 1074.
210. *Id.*
211. *Id.*
212. *Id.* at 1075.

the supply contract, and that the lien on the vessel is a "right" or "interest" under the agreement.[213] Given that O.W. Bunker UK had a lien on the vessel and O.W. Bunker UK assigned its rights to ING, ING had a lien on the vessel.[214]

B. *Attachment*

In *DS-Rendite Fonds Nr. 108 VLCC Ashna GmbH & Cotankschiff KG v. Essar Capital Americas Inc.*, the Second Circuit affirmed the district court's denial of an *ex parte* Rule B application for a maritime attachment and garnishment order.[215] There, the vessel owner DS-Rendite Fonds Nr. 108 VLCC Ashna GmbH & Co Tankschiff KG ("DS-Rendite") had chartered the M/T Ashna to Energy Transportation International Limited ("ETIL"), whose obligations were assumed under a novation agreement with Essar Shipping Limited ("ESL") in the event of a default by ETIL. ETIL and ESL's obligations were subsequently guaranteed by Essar Shipping and Logistics Limited ("ESLL").[216] DS-Rendite alleged a breach of a maritime contract, seeking an attachment of Rule B funds against garnishee assets found within the district, naming subsidiaries and affiliates of the parties against whom DS-Rendite had asserted claims.[217] The court found that in order to maintain a Rule B application, a plaintiff must allege facts showing "that it is plausible to believe that Defendant's property will be 'in the hands of' garnishees in the Southern District of New York at the time the requested writ of attachment is served or during the time that service is effected" and that, to meet that standard, some identification of the "property" held for the specific defendant is needed, as opposed to mere references to subsidiary or affiliate relationships.[218] Because Plaintiffs could not identify property that the alleged garnishees owed to defendants that might be subject to attachment via Rule B, the Second Circuit affirmed the denial of their Rule B application.[219]

In *PSARA Energy, LTD v. SPACE Shipping, LTD*, the District of Connecticut considered whether "a debt owed by a foreign third party to a foreign defendant is within the jurisdictional reach of the Court for the purpose of maritime attachment, merely because the third party maintains

213. *Id.*
214. *Id.*
215. 882 F.3d 44 (2d Cir. 2018).
216. *Id.* at 47.
217. *Id.*
218. *Id.* at 50.
219. *Id.* at 51–52; *see also* Rana Mar. Co. v. A&E Petroleum, Ltd., No. 18 Civ. 4507, 2018 WL 513535 (S.D.N.Y. June 20, 2018) (denying a Rule B application without prejudice, in light of the standard set forth in *DS-Rendite*, because plaintiff had not plausibly alleged that the proposed garnishee was holding identifiable property of the defendant).

and office in [the district]."[220] The court applied the following inquiries: does the court have personal jurisdiction over the third-party garnishees?; and does the state's long arm statute allow the court to exercise that jurisdiction?[221] The court found that the third-party is headquartered in Singapore and is registered to do business in CT, but that none of the parties are residents of Connecticut.[222] The court further determined that the Connecticut long-arm statute did not confer long-arm jurisdiction over a nonresident garnishee and therefore, over debts the nonresident garnishee owes the nonresident defendant.[223] Ultimately, the court determined it does not exercise personal jurisdiction over the third-party and therefore does not exercise jurisdiction over its intangible property, and granted the motion to release the maritime garnishment.[224]

In *Louis Dreyfus Company Freight Asia Pte. Ltd. v. Uttar Galva Steels Ltd.*, the Southern District of New York considered whether the plaintiff's evidence was sufficient to attach a non-party-debtor's assets through the defendant, the debtor's wholly owned subsidiary, based on the defendant's assumption of the non-party's payment obligation under a separate agreement.[225] Plaintiff sought attachment of the debtor's ownership interest based on the subsidiary's principal place of business in New York, relying upon *Wirt Franklin Petroleum a*nd *Daimler*.[226] The court disagreed, reasoning that the cases proffered by the plaintiff were not instructive for maritime attachment, and further finding "no compelling reason [to] depart from the general federal rule that an ownership interest in a company is located in that company's state of incorporation".[227] The subsidiary was incorporated in Delaware, and its paper stock certificates resided in India.[228] Accordingly, the court found that the Plaintiff had not established that property may be found within the district, reasoning that although Rule B is silent on the requisite standard of proof, a plaintiff must set forth facts sufficient to render it plausible that the funds will be present in the district at some future time.[229] The court denied the application of an order of maritime attachment and granted the defendant's motion to dismiss.[230]

220. 290 F. Supp. 3d 158, 162 (D. Conn. 2017) (2017 A.M.C. 2952).
221. *Id.* at 163–64 (citing Allied Maritime, Inc. v. Descatrade SA, 620 F. 3d 70, 74 (2d Cir. 2010)(2011 A.M.C. 54); Savin v. Ranier, 898 F.2d 304, 306 (2d Cir. 1990)).
222. *PSARA*, 290 F. Supp. 3d. at 164.
223. *Id. a*t 165.
224. *Id.*
225. 17-cv-2476 (JSR), 2017 WL 5126067 (Oct. 15, 2017 S.D.N.Y.)
226. *Id.* at *3 (citing Wirt Franklin Petroleum Corp. v. Gruen, 139 F.2d 659, 660-661 (5th Cir. 1944); Daimler AG v. Bauman, 571 U.S. 117, 136–37 (2014)).
227. 2017 WL 5126067 at *3, 4.
228. Id. at *3.
229. Id. at *3 (citing Marco Polo Shipping Co. v. Supakit Prod. Co., No. 08 Civ. 10940 (JGK), 2009 WL 562254, at *1 (S.D.N.Y. Mar. 4, 2009) (2009 A.M.C. 639)).
230. *Louis Dreyfus*, 2017 WL 5126067, at *4.

XI. CRIMINAL

In *United States v. Oceanic Illsabe, Ltd.*, two Greek shipping companies appealed convictions under the Act to Prevent Pollution from Ships, including failure to make complete and accurate entries in the M/V OCEAN HOPE 's Oil Record Book.[231] In April 2015, the OCEAN HOPE embarked from Bangladesh to Wilmington, North Carolina, and during that voyage both the chief engineer and the second engineer directed crewmembers to disregard waste disposal procedures and dump large quantities of oily pollutants into the ocean via an illegal magic pipe in contravention of MARPOL and APPS.[232] The companies argued at trial that they were not vicariously criminally liable for the acts of the chief engineer and the second engineer, in whom they held the reasonable belief were qualified and could be relied upon.[233] They were convicted of all counts and the two companies were ordered to pay a combined sum over $2 million in fines and $675,000 in restitution to a nonprofit, and were enjoined from calling on American ports for five years.[234]

On appeal, the companies argued that there was insufficient evidence of vicarious criminal liability; specifically, that the chief engineer's and second engineer's acts were not within the scope of their employment.[235] The panel noted that crew members are acting within the scope of their employment when maintaining the engine room, discharging waste, and recording relevant information when they used the magic pipe.[236] The evidence at trial revealed that the companies received the Oil Record Book weekly, reviewed it weekly, and were on notice of the ridiculously high report of incinerator usage, the unsustainably lengthy abstinence from sludge offloading, and other suspicious events that occurred during this voyage.[237] Based on these facts, the panel inferred that the jury likely concluded that the companies were well aware of the systematic criminal misconduct concerning the Oil Record Book.[238]

In challenging the failure to maintain the Oil Record Book, the companies argued that the ship's master was the only person with legal obligation to maintain an Oil Record Book.[239] The companies relied on a recent Fifth Circuit opinion that held that "[c]hief engineers on foreign-flagged vessels cannot . . . be prosecuted simply for having failed to maintain an oil record

231. 889 F.3d 178, 182 (4th Cir. 2018).
232. *Id.* at 184.
233. *Id.* at 191.
234. *Id.* at 193.
235. *Id.* at 196.
236. *Id.* (quoting United States v. Ionia Mgmt., 555 F.3d 303, 309 (2d Cir. 2009)).
237. *Id.*
238. *Id.* at 197.
239. *Id.* at 198.

book once a ship enters U.S. waters, since 33 C.F.R. 151.25 assigns that duty explicitly and exclusively to the 'master or other person having charge of the ship.'"[240] The panel disregarded this argument, holding that the companies were charged and convicted of being vicariously liable for the chief engineer's aiding and abetting, and therefore upheld these convictions.[241]

XII. LIMITATION OF LIABILITY[242]

In the *Matter of the Petition of Fire Island Ferries, Inc.*, the Eastern District of New York denied the vessel owner's petition for exoneration from or limitation of liability arising out of the collision of its passenger ferry into a pleasure craft.[243] The court found that several acts of negligence occurred, including that the plaintiff's captain was texting at and before the collision and the claimant's vessel neither had its navigational lights on nor a proper lookout.[244] Because the claimant established that the captain's use of his cell phone was a proximate cause of the collision and resulting injuries, the vessel owner is not entitled to exoneration.[245] Further, despite that the cell phones are permitted as a tool within the wheelhouse, the court found that the plaintiff had knowledge of its captains' practice to use cell phones for personal use while navigating and took no steps to address the associated dangers.[246]

In *In re Matter of Parry*, the District Court for the District of Massachusetts considered the doctrine of *res ipsa loquitor* as a substitute to causation in the context of a limitation of liability action.[247] The case arose out of an explosion and fire that occurred in the vessel's engine room, which rendered the vessel a total loss.[248] The vessel owner contended that the explosion and fire were caused by repairs performed by a vessel repair facility that regularly serviced the vessel.[249] Numerous marine surveyors investigated the fire; however, none were able to determine the cause of the fire.[250] Hence, the vessel owner attempted to use the doctrine of *res ipsa loquitor* to impose

240. *Id.* (quoting United States v. Fafalios, 817 F.3d 155, 162 (5th Cir. 2016)).
241. *Id.* at 199.
242. The Limitation of Liability Act of 1851, 46 U.S.C. § 30501 *et s*eq., allows a vessel owner to limit its liability to the post-incident value of the vessel at issue, where any negligence or fault has occurred without the privity or knowledge of the owner.
243. No. 11-CV-3475(DRH)(ARL), 2018 WL 718396 (E.D.N.Y. Feb. 5, 2018) (2018 A.M.C. 395).
244. *Id.* at *12.
245. *Id.* at *10, 12.
246. *Id.* at *10–12.
247. In re Matter of Parry, 2018 WL 3150218, at *8 (D. Mass. June 27, 2018).
248. *Id.* at * 4.
249. *Id.* at *1, 8.
250. *Id.* at *5–7.

liability on the repair company.[251] The court acknowledged that *res ipsa loquitor* can be used to infer causation through circumstantial evidence, but that that exclusive control of the vessel is an "important factor."[252] When using the doctrine to impose liability on a repair facility, the court focused on the length of time that the vessel has been out of the facility's exclusive control.[253] The court held that *res ipsa loquitor* did not apply because the vessel had been out of the repair facility's exclusive control for a month.[254] Without the assistance of *res ipsa loquitor*'s "strong presumption," inconclusive investigations and an undetermined cause are insufficient proof of causation to overcome a motion for summary judgment.[255]

Matter of Kothe for Exoneration from or Limitation of Liability involved a limitation action arising from the drowning death of a passenger who fell from a recreational sailboat while sailing on Lake Michigan.[256] There, the decedent commissioned the vessel for personal use pursuant to a six-way timeshare agreement with the owner, who was operating the vessel when the decedent fell overboard and drowned.[257] The administrator of the decedent's estate brought a wrongful death action for gross negligence against the vessel owner in state court, and the owner responded by filing a limitation action in admiralty.[258] After the respondent moved for summary judgment, the U.S. District Court for the Eastern District of Indiana denied the respondent's motion.[259] In distinguishing the Seventh Circuit's decision in *Joyce v. Joyce*[260], the court emphasized that the mere fact that the owner was operating the vessel at the time of the incident is not enough to preclude a limitation action.[261] To the contrary, the court found that the sailboat owner highlighted evidence, specifically regarding her lack of participation and knowledge in certain negligent omissions related to the boat's maintenance and its pre-departure inspection on the day of the incident, which precluded summary judgment.[262]

251. *Id.* at *8.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at *9–10. The gaps in the casual chain were also fatal to the vessel owner's claim for breach of the implied warranty of workmanlike performance. *Id.* at *10-11 (noting that implied warranty of workmanlike performance imposes a negligence standard, not strict liability).
256. No. 15-cv-8876, 2017 WL 4535962 (N.D. Ill. Oct. 11, 2017).
257. *Id.* at *3–4.
258. *Id.* at *4.
259. *Id.* at *9.
260. 975 F.2d 379, 385 (7th Cir. 1992).
261. *Id.* at *6–7.
262. *Id.* at *7–8.

XIII. ADMIRALTY JURISDICTION

In *D'Amico Dry, Ltd. v. Primera Mar. (Hellas), Ltd.*, the Second Circuit held that a freight forward agreement made between plaintiff-appellant shipping company d'Amico Dry Limited ("d'Amico"), and defendant-appellee ship management company Primera Maritime (Hellas) Limited ("Primera") was a maritime contract and that the Court had admiralty jurisdiction.[263] The Court found that "the combination of d'Amico's identity as a market participant with the substance of the agreement establishes that the FFA was part of d'Amico's shipping business. Because the FFA's principal objective was maritime commerce, it is a maritime contract and claims arising from it fall within our admiralty jurisdiction."[264] The Second Circuit reversed the district court's conclusion to the contrary which had turned, erroneously, on whether the FFA "was made to hedge against market risks relating to the employment" of specific vessels.[265]

In *Andreau v. Palmas del Mar Homeowners Assoc., Inc.*, the District Court for the District of Puerto Rico considered whether it had original admiralty law jurisdiction over a private pleasure craft that suffered damages while docked in a private marina during a hurricane.[266] The plaintiff argued that the dispute was essentially too private in nature to confer admiralty jurisdiction.[267] It is well settled that a federal court has admiralty jurisdiction over a tort claim if the tort (1) occurs on navigable waters and (2) bears some relationship to traditional maritime activity.[268] Under First Circuit precedent, water is considered navigable if it has the "capability" of sustaining navigability.[269] "The mere fact that commercial activity is not currently occurring does not torpedo the argument that a waterway is navigable, as long as it has the capacity to be so used."[270] To be sure, a water-block or dam will render a once navigable body of water unnavigable.[271] However, the simple fact that a waterway has little to no commercial traffic does not render the waterway unnavigable, as long as it still has the capability of navigability.[272]

On the issue of whether the tort related to maritime commerce, the court stated that admiralty jurisdiction is not destroyed just because the

263. 886 F.3d 216 (2d Cir. 2018).
264. *Id.* at 218 (citing Norfolk S. Ry. Co. v. Kirby, 543 U.S. 14, 23–24 (2004)).
265. *Id.* at 221 (internal quotations omitted).
266. 311 F. Supp. 3d 456, 458-60 (D.P.R. 2018).
267. *Id.* at 461.
268. *Id.* at 459 (citing Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995)).
269. *Id.* at 460 (quoting Cunningham v. Dir., Office of Workers' Comp. Programs, 377 F.3d 98, 108 (1st Cir. 2004)).
270. *Id.*
271. *Id.*
272. *Id.*

tort involved a private vessel that was tied to a private dock.[273] The tort at bar involved the improper securing of nearby boats in the face of a hurricane.[274] The court held that "[b]oats coming loose from their moorings—or indeed, the moorings themselves coming loose—in high winds causing damage to other vessels in the area fall squarely within [the] category [of potential disruption to commercial maritime activity."[275] Finally, the court acknowledged that there is a need for both predictability and uniformity in admiralty law and, thus, both commercial and private vessels must be subject to the same rules.[276]

XIV. PRACTICE, PROCEDURE, AND UNIFORMITY

In another O.W. Bunker case, *Chemoil Adani Pvt., Ltd. v. M/V Maritime King*, the Second Circuit concluded that the district court did not abuse its discretion or commit legal error by reducing the annual interest set upon a bond at a rate other than the 6% rate mentioned in Rule E(5)(a).[277] Rule E(5)(a) requires that, upon the posting of a special bond or by stipulation of the parties, the "bond or stipulation shall be conditioned for the payment of the principal sum and interest thereon at 6 per cent per annum."[278] The plaintiff contended that the mandatory language contained in Rule E(5)(a)—that the bond or stipulation "shall" include 6% interest per annum—limited the court's discretion to reduce the amount of security given under Rule E(6).[279] The Second Circuit disagreed, stating that "Rule E(5) governs the initial setting of security. Rule E(6), on the other hand, broadly accommodates changed circumstances by affording district courts the discretion to lower or raise security for 'good cause shown.'"[280] The court found that "[a]fter security is set, the circumstances or the conditions that initially supported security at a particular level can change" and that "Rule E(6) is intended to accommodate such changes."[281] This framework allows the court to "assess the reasonableness of plaintiff's damages claim and 'weigh other equitable considerations.'"[282] The Second Circuit thus found that the district court did not commit legal error in imposing an interest rate other than the 6% rate mentioned in Rule E(5), and did not abuse its discretion

273. *Id.* at 461.
274. *Id.*
275. *Id.*
276. *Id.* (citing Foremost Ins. Co. v. Richardson, 457 U.S. 668, 675 (1982) ("There is . . . no requirement that the vessels themselves be engaged in commercial activity for there to be a substantial connection to traditional maritime activity.").
277. 894 F.3d 506, 509 (2d Cir. 2018).
278. *Id.* (citing Fed. R. Civ. P. Admiralty Supp. R. E(5)(a)).
279. *Id.* at 509.
280. *Id.*
281. *Id.* at 508.
282. *Id.* at 509.

in determining that there was "good cause shown" to reduce the interest rate on the bond the vessel defendant had posted, from 6% to 3.5%.[283]

In *Thomas v. Hercules Offshore Services, L.L.C.*, the Fifth Circuit addressed whether Coast Guard regulations preempted Occupational Safety and Health Administration (OSHA) regulations in relation to mobile offshore drilling units (MODUs).[284] The Fifth Circuit reasoned that if a vessel is inspected, Coast Guard regulations preempt OSHA regulations.[285] Yet if a vessel is uninspected, Coast Guard regulations preempt OSHA regulations only if the Coast Guard has exercised its authority "either by promulgating specific regulations or by asserting comprehensive regulatory authority over a certain category of vessels."[286] Congress has set forth a specific list of fifteen (15) vessels that are inspected, and since MODUs are not on that list, it is definitively an uninspected vessel.[287] The court examined whether the Coast Guard has exercised its authority by promulgating specific regulations with respect to MODUs or by asserting comprehensive regulatory authority over MODUs.[288] The Fifth Circuit held that the Coast Guard regulates drilling operations on the outer continental shelf and designs equipment standards for MODUs, and therefore exercised its authority over MODUs to preempt OSHA regulations.[289]

In an issue of first impression, the Ninth Circuit held in *Newton v. Parker Drilling Management Services, Ltd.* that the absence of federal law is not a prerequisite to adopting state law as surrogate federal law under the Outer Continental Shelf Lands Act (OCSLA).[290] The case presented the novel question of whether claims under state wage and hour laws may be brought by workers employed on drilling platforms fixed on the outer continental shelf.[291] The court found that the determinative question in the case was whether California's wage and hour laws are "inconsistent with" existing federal law, the Fair Labor Standards Act ("FLSA").[292] Because the FLSA explicitly permitted more protective state wage and hour laws, the court rejected the argument that California's minimum wage and overtime laws were antagonistic to the FLSA simply because

283. *Id.*
284. 713 F. App'x 382, 384–85 (5th Cir. 2018).
285. *Id.* at 384.
286. *Id.* (quoting Chao v. Mallard Bay Drilling, Inc., 534 U.S. 235 (2002) (internal quotation marks omitted)).
287. *Id.*
288. *Id.*
289. *Id.* at 385.
290. 881 F.3d 1078, 1081–82 (9th Cir. 2018)
291. *Id.* at 1081.
292. *Id.* at 1093.

it established higher and more generous employee benchmarks than the floor set by the FLSA.[293] Rather, since the savings clause in the FLSA reflected Congress' express intent that states should be allowed to adopt more protective standards, the Ninth Circuit found that California's minimum wage and overtime laws are "applicable and not inconsistent" with the FLSA and held that the district court erred in dismissing the claims brought pursuant to California's minimum wage and overtime laws.[294]

In *Hearn v. Oriole Shipping*, the Eastern District of Pennsylvania held that the simple mention of "*unseaworthiness*" and "*the general maritime law*" in the plaintiff's claims, along with references in passing to his "*seaman*" status, were insufficient to constitute a designation of an admiralty or maritime claim under Fed. R. Civ. P. 9(h).[295] Since a third party claim under Fed. R. Civ. P. 14(c) can only be made with respect to admiralty claims as contemplated under Rule 9(h), the defendant argued that the complaint "*sounded, at least in part, in maritime jurisdiction*" based on the aforementioned general references to "*unseaworthiness*" and "*general maritime law*" and seaman status.[296] The Eastern District disagreed and granted the third-party defendant's motion to strike the Rule 14(c) third-party complaint as procedurally improper because the plaintiff's claims were not admiralty claims under Rule 9(h).[297]

Holder v. Interlake Steamship discussed a potentially useful evidentiary tool for those defending or prosecuting lead or asbestos exposure cases in admiralty.[298] The claimant asserted negligence claims resulting from alleged lead exposure while working aboard a vessel in navigable waters.[299] Both parties sought to introduce portions of documents produced as a result of OHSA investigations, and filed competing motions in limine related to the admissibility of those documents.[300] The court held that *neither party* could reference or offer into evidence any OHSA investigation documents or reports because OHSA did not, at any point, reach any *factual findings* as required to fit within the exception to the general rule against hearsay for public records under Rule 803(8)(A)(iii) of the Federal Rules of Evidence.[301]

293. *Id.* at 1097.
294. *Id.* at. 1099.
295. No. CV 17-2759, 2018 WL 1509331 (E.D. Pa. Mar. 27, 2018).
296. *Id.* at 4 (citing Foulk v. Donjon Marine Co., 144 F.3d 252 (3d Cir. 1998)).
297. Id. at 9.
298. No. 16-CV-343-WMC, 2018 WL 1725694 (W.D. Wis. Apr. 10, 2018).
299. *Id.* at *1.
300. *Id.* at *8–10.
301. *Id.*

XV. ARBITRATION

In *Corvo v. Carnival Corp.*, a foreign seafarer from Serbia was injured while working on the ship.[302] The plaintiff was treated by shore side physician selected by the defendant.[303] The plaintiff's employment contract with the defendant contained mandatory arbitration and forum selection clauses requiring that the place of arbitration be London, England, Monaco, Panama City, Panama or Manila, Philippines, whichever was closer to the plaintiff's home country.[304] The choice of law was that of the ship's flag, Panama.[305] The plaintiff filed an arbitration case in Monaco which included the Jones Act claim for vicarious liability.[306] The arbitrator applied Panamanian law and dismissed the Jones Act claim finding that it did not apply.[307] Additionally, the arbitrator held that Panamanian law doesn't recognize a cause of action for vicarious liability. The plaintiff sought to vacate the arbitral award claiming that the decision to not apply United States law deprived her of her Jones Act remedy in violation of public policy.[308] Although Panamanian law allows a claim for negligent hiring, this was not asserted by the plaintiff.[309] In its analysis, the Southern District of Florida was guided by the Eleventh Circuit which noted that "the Supreme Court 'announced a strong presumption in favor of enforcing such forum-selection clauses, despite the possibility that a markedly different result would be obtained if the case proceeded in English courts as opposed to American courts.'"[310] The court cited *Lipcon v. Underwriter's at Lloyd's London*[311], where the Eleventh Circuit held that "it will not invalidate choice clauses, however, simply because the remedies available in the contractually chosen forum are less favorable than those available in the courts of the United States."[312] Because the remedies available under Panamanian law are not so inadequate to be deemed unfair, and that United States policy did not outweigh the presumption of enforcing the arbitral award, the court upheld the arbitral award.[313]

302. 2018 WL 1660669 at *1 (S.D. Fla. Apr. 5, 2018).
303. *Id.*
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.*
308. *Id.*
309. *Id.* at 2.
310. *Id.* at 3.
311. 148 F.3d 1285, 1288 (11th Cir. 1998).
312. *Id.* at 5.
313. *Id.*

XVI. REGULATIONS UPDATE

A. *Revision of the America's Marine Highway Program Regulations—46 CFR Part 393.*

The Maritime Administration (MARAD) amended its America's Marine Highway Program (AMHP) regulations to conform to statutory changes[314] and to streamline the regulations for ease of use.[315] As MARAD states, congestion on U.S. roads, bridges, railways, and ports significantly impact America's economic prosperity and way of life. The regulatory updates serve to relieve congestion on roads and railways by promoting short sea shipping through designated routes called "Marine Highways."[316] Specifically, the revisions expand the purpose of the AMHP to include promoting short sea transportation, update the definition of short sea transportation, and streamline the regulation to highlight procedures and resources available to program participants.[317]

B. *Maritime Security Program—46 CFR Part 296.*

MARAD amended its regulations on the Maritime Security Program to implement various statutory changes, including a wide range of security requirements.[318] Among other things, the revisions make changes to vessel eligibility for participation in the Maritime Security Program ("MSP"), authorize the extension of current MSP Operating Agreements, amend the procedures for the award of new MSP Operating Agreements, extend the MSP through 2025, update the MSP Operating Agreement payments and schedule of payments, and eliminate the Maintenance and Repair Pilot Program.[319]

C. *Requirements to Document U.S.–Flag Fishing Industry Vessels of 100 Feet or Greater in Registered Length—46 CFR Part 356.*

MARAD amended its regulations to implement new statutory requirements regarding certain large fishing industry vessels.[320] The revisions add

314. The amendments implement provisions of the Coast Guard and Maritime Transportation Act of 2012 (CGMTA) and the National Defense Authorization Act of 2016 (NDAA), and it clarifies AMHP processes. Revision of the America's Marine Highway Program Regulations, 82 FR 56902-01.

315. *Id.*

316. *Id.*

317. *Id.*

318. The regulatory revisions implement amendments to the Maritime Security Act of 2003 by the National Defense Authorization Act for Fiscal Year 2013 ("NDAA 2013"), the Consolidated Appropriations Act, 2016 ("CAA 2016"), and the National Defense Authorization Act for Fiscal Year 2016 ("NDAA 2016"). Maritime Security Program, 82 FR 56895-01.

319. *Id.*

320. The regulations implement new requirements regarding certain large fishing industry vessels set forth in the American Fisheries Act of 1998 ("AFA"), as amended by the Coast

two new exceptions to the restrictions on the eligibility of vessels over 165 feet in registered length to be documented with fishery endorsements.[321] The revisions also eliminate the 15-day application deadline for vessels whose fishery endorsements have become invalid, limit fishery endorsement eligibility for certain large fishing industry vessels, and eliminate certain exemptions for specific vessels that were deleted in the Coast Guard and Maritime Transportation Act of 2012.[322] In addition, MARAD notes that it is revising its Large Vessel Certification form to incorporate these new requirements.[323]

D. *Consolidated Cruise Ship Security Regulations—33 CFR Parts 101, 104, 105, 120, and 128.*

The Coast Guard issued a final rule to eliminate outdated regulations that imposed unnecessary screening requirements on cruise ships and cruise ship terminals.[324] This final rule replaces the outdated regulations with simpler, consolidated regulations that provide efficient and clear requirements for the screening of baggage, personal items, and persons on a cruise ship.[325] The rule's intent is to enhance the security of cruise ship terminals and to allow terminal operators to use effective screening mechanisms with minimal impact to business operations.[326] The Coast Guard estimates that this rule will affect 137 facilities regulated by the Maritime Transportation Security Act of 2002, 131 cruise ships, and 23 cruise line companies.[327]

E. *Inland Navigation Rules; Technical Amendment—33 CFR Part 83*

This rule makes technical, non-substantive amendments to provide better clarity to the Coast Guard's navigation rule on "Maneuvering and Warning Signals."[328] Specifically, the amendment removes the word "danger" to clarify that vessels may use this signal even when "danger" is not present.[329] This rule will also align the Coast Guard's Inland Navigation Rules with the International Maritime Organization's International Regulations for Preventing Collisions at Sea, 1972 ("COLREGS"), thus alleviating potential ambiguity.[330]

Guard Authorization Act of 2010 ("CGAA") and the Coast Guard and Maritime Transportation Act of 2012 ("CGMTA"). Requirements to Document U.S.-Flag Fishing Industry Vessels of 100 Feet or Greater in Registered Length, 82 FR 56899-01.

321. *Id.*
322. *Id.*
323. *Id.*
324. Consolidated Cruise Ship Security Regulations, 83 FR 12086-01.
325. *Id.*
326. *Id.*
327. *Id.*
328. Inland Navigation Rules; Technical Amendment, 83 FR 3273-01.
329. *Id.*
330. *Id.* at II.

F. *UN Body Continues to Address Greenhouse Gas Emissions—New Regulations Effective as of March 1, 2018*

International Maritime Organization adopted mandatory requirements to MARPOL which entered into force on March 1, 2018, adding reporting of ship fuel oil consumption data and new appendices covering information to be submitted to the IMO Ship Fuel Oil Consumption Database.[331] These regulations impact U.S. Ships as the U.S. is a signatory to the applicable Annex of MARPOL that is being amended.[332] Under the new data base collection system, aggregated data will be reported to a ship's Flag State after the end of each calendar year.[333] The Flag State will evaluate the data and issue a Statement of Compliance to the ship.[334] Flag States will be required to transfer this data to the IMO Ship Fuel Oil Consumption Database.[335]

331. MARPOL Annex VI.
332. *Id.*
333. MARPOL Annex VI, Regulation 7.
334. MARPOL Annex VI.
335. *Id.*