



SOUTHEASTERN ADMIRALTY LAW INSTITUTE NEWSLETTER

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REGISTER NOW FOR THE 2007 SEALI SEMINAR

Registration is now open for the annual SEALI seminar coming in June. This year, the program will be held June 22-23 at the Amelia Island Plantation in Amelia Island, Florida. This year's seminar chair, Jim Hurley, and the Planning Committee have put together an outstanding program. In addition to current topics of interest to the admiralty bar, the seminar also contains both an Ethics hour and a Professionalism hour, as well as updates from all SEALI circuits. For a complete brochure and to register online, go to www.iclega.org/seali/. Join your SEALI colleagues on Amelia Island this June and bring your family. The brochure for the seminar is enclosed.



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SEALI ANNUAL MEETING

OCTOBER 4-7, 2007

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GEOFFREY BIRKHEAD MEMORIAL SCHOLARSHIP FUND

In 2004, a Scholarship Fund was established in memory of SEALI member Geoffrey Birkhead, Norfolk, Virginia. Later that year, your Officers and Advisory Committee deemed it appropriate for SEALI to make a contribution to this Scholarship Fund. It was also felt that this contribution would most appropriately be made through canvassing the SEALI membership for individual contributions. A goal of \$2,500 was set. SEALI is pleased to announce that our goal has been reached and exceeded. To date, SEALI members have together contributed the total sum of \$2,900 towards the Geoffrey Birkhead Memorial Scholarship Fund. Geoff's brother, Bill Birkhead, has advised that the Birkhead family is very appreciative of your efforts and contributions. Bill further advises that the Scholarship Fund has grown sufficiently and they have already awarded two \$1,500 scholarships in 2006, one for James Madison University and the other for the University of Virginia. Thanks to all who contributed. If any member has not yet made a contribution but wants to, please contact Hodge Alves.

COURT CASES

American Roll-On Roll-Off Carrier, LLC v. P&O Ports Baltimore, ____ F.3d ____, 2007 WL 572150 (4th Cir. 2007). American Roll-On Roll-Off Carrier (“ARC”) filed suit against P & O Ports Baltimore, Inc. (“P & O”), a stevedoring company, after a piece of equipment loaded on an ARC-operated ship broke free of its lashings and damaged the ship and other cargo. ARC’s complaint included a claim alleging negligence on the part of P & O and a claim seeking indemnification for the amounts ARC paid to the owners of the damaged cargo. The district court granted summary judgment in favor of P & O, concluding that a one-year statute of limitations period that would have applied to a suit by the cargo interests against ARC also barred ARC’s action against P & O. The Fourth Circuit found that ARC’s claim for indemnification accrued when it paid the first of the claims of the POV owners. Since the action was commenced within the three-year limitation period established under the stevedoring agreement with P & O, the claim for indemnification was timely filed.

Altadis U.S.A., Inc. v. Sea Star Line, LLC, 458 F.3d 1288 (11th Cir. 2006), *cert. granted*, 127 S.Ct. 853 (2007), *cert. dismissed*, ____ S.Ct. ____, 2007 U.S. LEXIS 1328 (February 12, 2007).

Cargo owner Altadis sued the inland carrier and the freight company for loss of cargo. Each defendant filed a motion for summary judgment claiming that Altadis had failed to timely file suit within one year of the date the container should have been delivered as provided in both the bill of lading and COGSA. The district court granted defendants summary judgment. Altadis appealed, arguing that the Carmack Amendment, which states that a carrier cannot provide for a statute of limitation of less than two years for bringing a civil action, governed the case, and that the one-year statute of limitation which formed the basis for the summary judgments was inapplicable.

The Eleventh Circuit rejected Altadis’s argument that the cases do not require a separate bill of lading for the Carmack Amendment to be applicable, but only a domestic bill of lading. In addition, the Eleventh Circuit opined that Altadis’s position was in tension with *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14 (2004), in that it would introduce uncertainty and lack of uniformity into the process of contracting for carriage by sea, upsetting contractual expectations expressed in through bills of lading. Accordingly, the Eleventh Circuit held that the district court correctly concluded that the one-year statute of limitation provided in the bill of lading and in COGSA was applicable. While the U.S. Supreme Court granted *certiorari* in the case, the writ was dismissed pursuant to the written request of the parties. Thus, the maritime bar will have to await another case to clarify these issues.

Apache Bohai Corp. LDC, et al. v. Texaco China BV, No. 05-20413, ____ F.3d ____ (5TH Cir. February 27, 2007).

The issue was whether an arbitrator exceeded his power by invalidating an exculpatory clause in the parties’ agreement and manifestly disregarding the law by awarding consequential and cost of drilling damages and by failing to apply mitigation principles to reduce the award. The Fifth Circuit affirmed the judgment confirming the arbitration award because the arbitration clause granted the arbitrator sufficient authority to consider the validity of the exculpatory clause and because the arbitrator did not ignore any plainly governing principles of applicable law.

Atlantic Capes Fisheries, Inc. v. Gutierrez, ____ F.Supp.2d ____, 2007 WL 534056 (E.D.N.C. 2007).

In two related actions involving issue of ownership of limited access fishing permits, purchaser of foreclosed fishing vessel which had licensed permits moved to stay, pending appeal, order directing return of fishing permits to licensor. The court denied the motion because (1) purchaser failed to show that it would likely prevail on merits of appeal, as required for stay of order pending appeal under “useless judgment” exception to appellate jurisdiction; (2) purchaser failed to make requisite showing that it would suffer irreparable injury if order were not stayed pending appeal; (3) purchaser failed to make requisite showing that third-party to whom it licensed fishing permits would suffer irreparable injury if order were not stayed pending appeal; and (4) purchaser failed to make requisite showing that public interest would be best served by staying order pending appeal.

Carnival Corp. v. Booth, 31 Fla. L.Weekly D 3115, 2006 Fla. App. LEXIS 20780 (Fla. 3rd DCA, December 13, 2006).

The state appellate court reversed the trial court and directed entry of an order dismissing the state court action on grounds of improper venue. The claim concerned the death of a cruise passenger during a shore excursion. The cruise ticket contained a forum selection clause requiring suit to be filed in federal court. Plaintiff filed the action in state court, and the cruise line moved to dismiss for improper venue based on the ticket provision. The appellate

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court held that the cruise line had not waived the ticket forum selection provision by affirmatively engaging in discovery, and ordered the dismissal.

Carnival Corp. v. Carlisle, 32 Fla. L. Weekly S 81, 2007 Fla. LEXIS 287 (Fla. February 15, 2007).

The issue was whether a cruise line is vicariously liable for the medical malpractice of the shipboard doctor. In reaching its decision, the Florida Supreme Court had to determine whether the Third District Court of Appeal could follow the holding in *Nietes v. American President Lines, Ltd.*, 188 F.Supp. 219 (N.D. Cal. 1959), or whether it was bound by the precedent of *Barbetta v. SS Bermuda Star*, 848 F.2d 1364 (5th Cir. 1988). In *Barbetta*, the court held that the doctrine of *respondeat superior* did not impose liability on the cruise line and that the carrier was only liable for its own negligence in hiring the physician. Although the Florida Supreme Court concluded that there was merit in the plaintiff's argument and the reasoning of the district court, it had to adhere to federal principles of harmony and uniformity when applying federal maritime law, and held that the shipowner was not liable under the *respondeat superior* doctrine.

Hyman v. Transocean Offshore USA, Inc., No. 05-30823, ____ F.Appx. ____ (5th Cir. December 5, 2006) (*per curiam*, unpublished).

Plaintiff Hyman was employed by Transocean as a sub-sea engineer and was assigned to the construction of the M/V CAJUN EXPRESS, a mobile offshore drilling unit ("MODU"). It was partially constructed in Singapore where it successfully underwent sea trials and was later towed to the Gulf of Mexico where construction was to be completed. During the second phase of construction, Hyman was injured. He ultimately sued his employer under the Jones Act and general maritime law and later amended his complaint to add a claim for retaliatory discharge. Transocean moved for summary judgment on the grounds that (1) the CAJUN EXPRESS was not a vessel in navigation at the time of the injury and (2) Hyman presented no evidence that his suit played a substantial part in the decision to terminate his employment. Summary judgment was granted on both grounds, which judgment was affirmed.

Inland Dredging Co., Inc. v. Sanchez, 468 F.3d 864 (5th Cir. 2006).

The district court enjoined a Jones Act seaman from proceeding with his Jones Act suit in a different federal court after the shipowner filed a limitation of liability action in the enjoining federal court and obtained an injunction. The Fifth Circuit vacated the district court's injunction. Sanchez claims he suffered injury while working as a seaman aboard the M/V MS. PAULA, owned by Inland. Inland filed a petition for limitation of liability in the U.S. District Court for the Northern District of Mississippi, which restrained and enjoined all claims and proceedings against the MS. PAULA and/or Inland in any other court. Sanchez then asked the court to dissolve the injunction, arguing that he should be allowed to proceed in the U.S. District Court in Galveston and stipulated that the Mississippi court has exclusive jurisdiction to determine Inland's right to limitation and the value of the limitation fund. In addition, Sanchez agreed not to seek execution of any judgment obtained in the Galveston court in excess of the value of the MS. PAULA and her then-pending freight as determined by the Mississippi court. The district court held that Sanchez was restricted to litigating all issues before it, but the Fifth Circuit disagreed, and followed a couple of Second Circuit decisions, including Judge Learned Hand's decision in *Curtis Bay Towing Co. v. Tug Kevin Moran*, 159 F.2d 273, 276 (2d Cir. 1947), to the effect that "every claimant has a legally protected interest in choosing his forum. . ." Accordingly, the injunction was dissolved.

Jordan v. Shell Offshore Inc., 2007 U.S. Dist. LEXIS 2192, 2007 WL 128313 (S.D. Tex. January 10, 2007).

U.S. District Judge Sam Kent, in considering defendant's motion to transfer venue, determined that a tension leg platform owned by Shell was in fact a vessel because it was towed to its current location over 1500 miles. Although the defendant urged that it would remain where it was anchored for the remainder of the well's life, the court presumed that it would then be moved to another well. Accordingly, "[the] inherent mobility of a tension leg platform combined with the actual mobility URSA has undergone and is likely to undergo at some point in the future leads to the conclusion that URSA is *practically* capable of being used for transportation on navigable waters. Accordingly, it is a Jones Act vessel." Once that issue was decided, the court addressed and denied Shell's motion to transfer venue to the Eastern District of Louisiana.

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Kyoei Fire & Marine Ins. Co., Ltd. v. M/V MARITIME ANTALYA, 2006 U.S. Dist. LEXIS 85229, 2006 WL 3378683 (S.D.N.Y. November 20, 2006).

This case involved a question concerning the application of COGSA to a shipment of grain destroyed during transit on the vessel M/V MARITIME ANTALYA. Plaintiff Zen-Noh executed a voyage charter with SK Shipping to ship the grain from the Gulf of Mexico to Japan. An addendum nominated the M/V MARITIME ANTALYA to carry the grain. When the grain was loaded onto the vessel, bills of lading were issued for corn and sorghum aboard but never transmitted to a third party. In transit, sea water leaked into the holds of the vessel, seriously damaging the cargo. Zen-Noh's insurer paid on its policy for the shipment and moved for summary judgment on the grounds that COGSA did not apply. The vessel owner claimed that COGSA did apply, even though the bills of lading were not transmitted to third parties.

The court addressed and disposed of the vessel owner's arguments either on factual or legal grounds. Accordingly, the court granted the cargo insurer's motion

Mahony v. Lowcountry Boatworks, LLC, 465 F.Supp.2d 547 (D.S.C. 2006).

Vessel owners brought action alleging that marine service provider failed to properly service and inspect vessel before launching it into navigable waters and was negligent for damaging the vessel during her launch. Launching vessel into navigable waters bore substantial relationship to traditional maritime activity, and thus marine service provider's alleged negligence during vessel's launch fell within federal district court's admiralty jurisdiction, even though provider's alleged failure to inspect vessel, to install drain plug, or to properly supervise its employees occurred before vessel was placed in water.

Newport News Shipbuilding and Dry Dock Co. v. Office of Director, ___ F.3d ___, 2007 WL 403893 (4 Cir. 2007).

Employer petitioned for review of a decision and order of the Benefits Review Board (BRB), which granted attorney fees to claimant under the Longshore and Harbor Workers' Compensation Act (LHWCA). The employer claimed that it was not liable to the Claimant for attorney fees under the LHWCA, because the Department of Labor's district director did not conduct an informal conference. The court of appeals held that letters between employer and claimant and to Department of Labor's district director served as the functional equivalent of an informal conference for purposes of attorney fees provision of LHWCA, and district director's letter stating the position of the Office of Workers' Compensation Programs could be treated as a written recommendation. Employer failed to make a valid tender. Thus, the employer was responsible for the fees.

Norfolk Southern Railway Co. v. Sorrell, No. 05-746, ___ U.S. ___ (2007).

On appeal from the Missouri Court of Appeals, the U.S. Supreme Court held that the same causation standard applies to railroad negligence under the Federal Employers' Liability Act (FELA), Section 1, as to employee contributory negligence under Section 3. Thus, jury charges in FELA cases (and by extension, in Jones Act cases, see 46 U.S.C. §688) on employee contributory negligence will have to inquire whether the negligence of the employee contributed in whole or in part to the injury. The case was remanded to the Missouri Court of Appeals to address plaintiff's argument that any error in the jury instructions was harmless and whether a new trial was required.

Old Park Investments Inc. v. Vessel LEDA, et al., 20 Fla. L. Weekly Fed. D 286, 2006 U.S. Dist. LEXIS 92529 (S.D. Fla., December 14, 2006).

The trial court's finding of fact and conclusions of law concerning the constructive total loss of a sailing vessel which broke from its moorings in a marina during the passage of the eye of Hurricane Francis over the marina cover several admiralty and maritime rules of general interest. The trial court, on the counterclaim of the vessel owner and its hull underwriter, found that negligence contributing to the loss of the vessel on the part of the marina had not been proved, even though the vessel's mooring lines had not failed, and the vessel had broken loose due to the failure of a mooring piling owned and maintained by the marina to which one of the vessel's stern lines had been tied. The trial court, although finding that the vessel owner's claims fell within maritime tort jurisdiction, adopted the Florida

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state standard for establishing a claim based on negligence, which includes a burden of proof that the claimant show the alleged negligence “more likely than not” caused the injury/damage at issue. The trial court concluded that this standard of proof had not been met and dismissed the counterclaim. In view of the court’s ruling, the marina’s affirmative defenses, which included *force majeure*, were not addressed.

Sinochem International Co. Ltd. v. Malaysia International Shipping Corp., No. 06-102, ____ S.Ct. ____ (March 5, 2007).

In this case, the district court dismissed the shipper’s suit for fraudulent misrepresentation against a Chinese purchaser of steel coils on the grounds of *forum non conveniens*. The Third Circuit vacated the dismissal, holding that the trial court had to decide whether it had personal jurisdiction before ruling on *forum non conveniens*. The Third Circuit remanded the case for determination of whether personal jurisdiction existed. The U.S. Supreme Court, in a unanimous opinion, reversed the Third Circuit and remanded the case, stating:

We hold that a district court has discretion to respond at once to a defendant’s *forum non conveniens* plea, and need not take up first any other threshold objection. In particular, a court need not resolve whether it has authority to adjudicate the cause (subject-matter jurisdiction) or personal jurisdiction over the defendant if it determines that, in any event, a foreign tribunal is plainly the more suitable arbiter of the merits of the case.

Terrebonne v. K-Sea Transportation Corp., ____ F.3d ____, 2007 U.S. App. LEXIS 1805, 2007 WL 196532 (5th Cir. January 26, 2007).

This case focused on the parties’ prior execution of a written “partial release and claims arbitration agreement,” wherein the parties partially settled the plaintiff’s claims arising out of a shipboard accident for \$2,362.56, reserving plaintiff’s right to seek recovery for damages that may develop after the date of the agreement but requiring that any further claim be arbitrated in New York. Subsequently, plaintiff reported a recurrence of a prior hernia on two separate occasions and then instituted suit against his employer in the U.S. District Court for the Eastern District of Louisiana. K-Sea moved to stay further proceedings pending completion of the arbitration pursuant to the parties’ agreement, but the plaintiff opposed the motion, arguing that the later injury was a separate injury, that the arbitration agreement was unenforceable under the FAA because it involved a seaman’s employment contract and that the Jones Act voided the agreement by virtue of its incorporation of Section 5 of FELA, 45 U.S.C. §55. The district court granted the employer’s motion and later denied plaintiff’s motion for reconsideration.

After the matter was arbitrated in New York, K-Sea moved to reopen the suit to enter a judgment confirming the award and dismissing the lawsuit with prejudice. At the same time, the seaman opposed K-Sea’s motion and asked the court to set aside its prior order. The district court dismissed the suit, with prejudice. The Fifth Circuit concluded that the settlement agreement did not constitute a “contract of employment” of a seaman (which was not subject to arbitration). It also held the arbitration agreement was sufficiently to compel arbitration of plaintiff’s claims, even though he argued that the subsequent incidents were separate injuries. The Fifth Circuit’s opinion was bolstered by the fact that the seaman’s suit sought damages stemming from both his original accident (which led to the arbitration agreement) and his April 2001 re-injury.

Transocean Offshore USA, Inc. v. David Catrette, No. 06-30474, ____ F.Appx. ____ (5th Cir. 2007) (unpublished).

This is another case testing whether a settlement agreement between a Jones Act seaman and his employer was binding and whether it precluded a seaman’s litigating issues relating to lack of consent and inadequate consideration in state court. After the state court action was filed, the employer filed a suit in U.S. District Court for the Eastern District of Louisiana seeking damages as a result of the seaman’s breach of the release. The employer also filed a motion for partial summary judgment in federal court, to which the employee responded by filing a motion to dismiss or alternatively a motion to stay the federal suit in favor of the state court lawsuit. The district court ultimately granted the stay, and the employee appealed. The Fifth Circuit held that the district court abused its discretion in staying the federal case, reversed the lower court’s order and remanded the case for further proceedings. Detailed discussion of the *Colorado River* doctrine.

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Wendelboe v. SeaRiver Maritime, Inc., ____ So.2d ____, 2006 La. App. LEXIS 2472 (La. App. 1st Cir. 2006).

The trial court was presented with cross motions for summary judgment on whether a Jones Act employer could offset ongoing disability benefits totaling \$460,000.00 through the onset of the litigation against any judgment the seaman might receive from the court. The trial court issued oral reasons holding that no offset would be allowed because the disability claim constituted a "fringe benefit," and the employer was therefore not entitled to reduction. SeaRiver appealed, and the Louisiana First Circuit reversed and rendered judgment in its favor.

The question before the appellate court was whether the worker disability plan provided by SeaRiver contained a provision, as contemplated by FELA, 45 U.S.C. §55. After reviewing SeaRiver's benefit package, the court held that it successfully expressed its intention to avoid double payments for both benefits and tort recovery. Moreover, the likely and logical result of finding for the employee and allowing double recovery will be employers' reluctance to continue providing such plans. Accordingly, the court reversed and rendered the trial court's ruling.

Thanks to Scott Bluestein, Jim Hurley, Larry Landry, Jim Parker, David Pope, John Unger and Tom Wagner for their submissions.

CONVICTED MASTER IN MOBILE, AL MARINE ACCIDENT SENTENCED TO TIME ALREADY SERVED AND SET FREE

The closely watched sentencing hearing of a convicted Ship Master ended on February 7, 2007 with the German national being sentenced to time already served. Captain Wolfgang Schroder, found guilty of causing the death of Mobile, Alabama dock worker in October, was ordered set free and told to leave the country within 72 hours or face deportation. The October verdict issued by a Mobile federal jury said that Captain Schroder should be held liable for the errors in judgment that led to the March 2, 2006 collision between the ZIM Mexico III and the Alabama state docks.

The case had potentially far reaching implications for mariners everywhere. In the wake of the guilty verdict, mariners from around the world worried that the case could set a precedent and thereby widen the scope of what can be considered to be not just an error in judgment, but a criminal offense. Schroder was in command of the 534-foot ZIM Mexico III when it departed the port of Mobile last March.

The February 7th sentencing hearing was watched closely by mariners from around the world. The Assistant U.S. Attorney had pushed for the maximum penalty of a 10 to 16 month prison term, but the judge ignored those recommendations and set Schroder free. He was expected to leave the country as soon as possible.

In Schroder's case, he was, up until this incident, widely considered a more-than-competent seaman, with letters of commendation for acts of heroism in a 1987 incident, where he assisted and helped save numerous survivors from a capsized ferry. A German maritime company has since paid a \$375,000 fine to US authorities under the terms of a plea agreement in the case.

BIMCO, an international shipping trade organization, has conducted many investigations into the criminalization of seafarers. In a March 2006 posting on their website, they "identified 44 cases that were evaluated for the purpose of the study. These cases took place between 1996 and 2006. Of these cases, nine involved the detainment of seafarers prior to them being found guilty of committing a deliberate act or act of negligence. The majority of cases involved detainment of punishment after the allegations had been proved. There were 28 such cases identified."

Thanks to Jim Parker for this submission from "Maritime Executive News."