



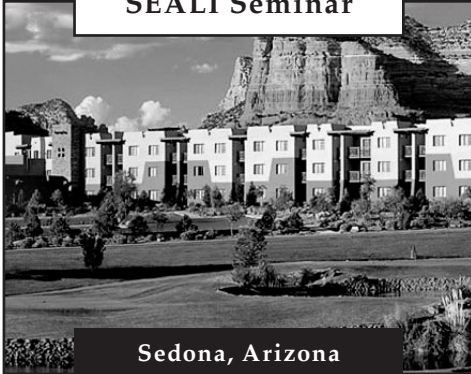
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SOUTHEASTERN ADMIRALTY LAW INSTITUTE NEWSLETTER

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SEALI Seminar



September 29–October 2, 2011
Hilton Sedona Resort & Spa
Sedona, Arizona

The 2011 SEALI annual meeting will be held at the Hilton Sedona Resort & Spa in beautiful Sedona, Arizona on September 29–October 2, 2011. SEALI Chairman Geoff Losee is putting together an exceptional schedule of events for the meeting. Several SEALI members are planning to arrive early to spend extra time

at the Grand Canyon. Additional information will be available on the SEALI web site:

www.iclega.org/seali/.

NEW MEMBERS

B. Jason Barlow
Thomas S. Berkley
Christopher E. Halkitis
Cameron A. Hatzel
Kenneth J. Milne



Dustin M. Paul
Buford Boyd Pollett
Christine Raborn
Stephen A. Richter
Kelly T. Scalise

DATABASE OF MARITIME EXPERT WITNESSES

Please continue to use and update the SEALI On-Line Database of Maritime Expert Witnesses. This members only database can be found at: <http://www.iclega.org/SEALI/expert>.

This site is for information purposes only and is only as good as the input we receive. If you have additions, corrections or deletions, please forward them to SEALI Chairman, Geoffrey A. Losee at glosee@rlblawfirm.com. Persons or entities to be listed must be recommended by a SEALI member (i.e., no self-listing of members or experts forwarding their own name for submission.) If you have an expert that you have used and would like to have listed in a category not yet listed, please suggest the new category.

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COURT CASES

BILLS OF LADING MUST BE SIGNED PER MASTER'S INSTRUCTIONS

QT Trading v. M/V Saga Morus, No. 10-20524, 2011 WL 1792071 (5th Cir., May 11, 2011)

This Fifth Circuit case involved the recurrent issue of whether a charterer's agent has authority to issue bills of lading which bind other parties. The plaintiff had ordered a shipment of steel pipe from a Chinese company. The Chinese seller contracted with Daewoo Logistics to arrange transportation to Houston. Daewoo time chartered the M/V SAGA MORUS from Saga Forest Carriers, itself a time charterer from Attic Forest AS. The charter between Daewoo and Saga stated that the master would, if requested by Daewoo, sign bills of lading in conformity with mate's receipts. The master in turn had authorized Daewoo and its agent to sign bills of lading on his behalf, again provided they were in conformity with the mate's receipts.

The actual "mate's receipts" took something of an unorthodox form, namely that of a "shipping order" issued by the Chinese shipper but incorporating a report prepared by the surveyor appointed by the vessel owner's P&I club. Evidence to the effect that the shipping order was the functional equivalent of a mate's receipt seems to have gone undisputed. Daewoo's bills of lading described the shipment as "clean on board," with no reference to the P&I surveyor's many damage remarks.

On review of the lower court's grant of summary judgment for the defendants, the Fifth Circuit quickly concluded that Attic and the ship's separate technical manager (which employed the officers and crew) had no liability. All references to "the master" in the charter documents were in the context of Saga's status as disponent owner and were not applicable to the head owner. The plaintiff had offered no evidence that the master was the agent of Attic or the ship's technical manager. While the master did have authority to sign for Saga, the bills of lading had actually been signed on behalf of Daewoo. That distinguished the case from others in which an agent signed "for the master." Furthermore, the bills of lading exceeded Saga's and the master's authority because they failed to conform with the mate's receipt (in so holding, the Fifth Circuit endorsed the reasoning of several district court decisions which had reached that conclusion). Since Saga was not a party to a valid bill of lading, it was not a carrier for purposes of COGSA liability.

Other plaintiffs in this same predicament have argued maritime bailment as an alternative to COGSA. The Fifth Circuit rejected this argument because the cargo was (as it had held in a prior case) in the joint possession of the charterer and shipowner, whereas exclusive possession is a requisite of bailment liability. Missing from SAGA MORUS is any consideration of whether the master might qualify as the owner's agent merely by virtue of his office. Some cases have held that a bill of lading properly signed by or on behalf of the master binds the vessel owner.

FOURTH CIRCUIT HOLDS ONLY ONE CAUSE OF ACTION FOR THE BREACH OF AN INDIVISIBLE CONTRACT

Johnson & Assocs., LLC v Port Sec. Int'l, LLC, No. 09-1499, 2011 WL 1831565 (4th Cir., May 13, 2011)

Plaintiff Allen F. Johnson and Associates, LLC ("Johnson") entered into a consulting agreement with Port Security International ("PSI") under which Johnson agreed to help market PSI's cargo scanning business to

various ports in Central America. The agreement provided that PSI would pay Johnson a 20% commission on the fees collected for each port that signed a contract with PSI. Subsequently, PSI entered into a 10 year contract with Cobigua, the operators of a Guatemalan port, which provided for PSI to handle cargo inspections at the port. PSI, however, refused to pay Johnson the 20% commission provided in the contract and instead placed 10% of the money received from Cobigua in escrow in order to entice Johnson into a renegotiation of its commission, in response to which Johnson filed a breach of contract and declaratory judgment action. After a bench trial, the district court awarded Johnson \$230,400.00 on its breach of contract action but denied Johnson's request for declaratory relief on the issue of its ability to bring successive suits for future damages arising from PSI's breach, finding that the agreement was an indivisible contract, not an installment contract. Johnson appealed to the Fourth Circuit.

The Court of Appeals noted that "[u]nder Virginia law, rights of action generally do not arise upon future periodic obligations until they are due, even though there has been a default in the performance of one of the earlier periodic obligations." *Wiglesworth v. Taylor*, 391 S.E. 2d 299, 303 (Va. 1990). However, if a contract is represented by "one single and indivisible contract and the breach gives rise to one single cause of action, it cannot be split into distinct parts and separate actions maintained for each." *Jones v. Morris Plan Bank*, 191 S.E. 608, 609 (Va. 1937). Since PSI's payments to Johnson under the agreement were not due at specified times and were tied to PSI's actions in obtaining a contract with a third party, the Court found that the agreement was indivisible, and therefore affirmed.

BOAT MANUFACTURER LIABLE FOR FAILING TO GUARD PROPELLER BLADE

Brochtrup v. Mercury Marine, No. 10-50534, 2011 WL 2118644 (5th Cir., May 27, 2011)

After his leg was injured by a ski boat propeller on Lake Austin, Texas, Jacob Brochtrup sued Mercury Marine and SeaRay, the respective manufacturers of the 135-hp MerCruiser inboard/outboard engine and the 17.6-foot ski boat. Brochtrup brought suit in Texas state court alleging the vessel's unguarded propeller constituted a design defect. After removal to federal court, the jury ultimately found a design defect existed and awarded Brochtrup \$3.8 million.

On appeal to the Fifth Circuit, Mercury first argued that Plaintiff failed to present sufficient evidence at trial that the product was defectively designed (in a way that was unreasonably dangerous). The Court determined the evidence presented by Plaintiff was sufficient and dismissed Mercury's first appellate issue holding that a reasonable jury could find that the Mercury engine was unreasonably dangerous. Mercury's second argument asserted that Brochtrup presented insufficient evidence of a safer alternative design. As the Texas Supreme Court has not addressed whether a plaintiff is required to present evidence of the economic feasibility of an alternative design, the Fifth Circuit was forced to make an 'Erie guess' as to how the court would apply state law. After reviewing the limited appellate cases addressing the issue, the Fifth Circuit held that sufficient evidence of the economic feasibility of alternative design had been presented to avoid judgment as a matter of law in favor of defendants. Accordingly, the Fifth Circuit affirmed the lower court's denial of defendants' motions for judgment as a matter of law and affirmed Brochtrup's favorable jury verdict.

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SUPREME COURT UPHOLDS FELA CAUSATION STANDARD

CSX Transportation Inc. v. McBride, No. 10-235, 2011 U.S. LEXIS 4795 (U.S. Supreme Court, June 23, 2011)

A divided United States Supreme Court held that courts are not required in cases arising under the Federal Employers' Liability Act ("FELA") to give a "stock" jury charge on proximate cause. FELA imposes liability on railroad employers whenever an employee suffers death or injury "resulting in whole or in part" from the railroad's negligence. This language, the Court held, reflects a relaxed standard of causation distinct from that applied under common law. Thus, a court properly charges the jury that the defendant may be held liable if its negligence played any part, even the "slightest" or "smallest," in causing the plaintiff's injury. Justice Ginsberg wrote all but a portion of the majority opinion; Chief Justice Roberts and three others dissented, arguing that FELA's language reflected the abolition of the harsh contributory negligence rule rather than the abandonment of traditional proximate cause principles.

Liability under the Jones Act is of course patterned on FELA liability, so the Court's holding that conventional proximate cause charges need not be given in FELA cases presumably also applies in Jones Act cases for death or injury to a seaman.

RULE 10B-5 APPLIES TO TRANSFERS OF FOREIGN SECURITIES THAT CLOSE IN THE U.S.

Quail Cruises Ship Management Ltd. v. Agencia de Viagens CVC Tur Limiada, No. 10-14129, 2011 WL 2654004 (11th Cir. July 8, 2011)

The "Love Boat," which rose to fame in the 1970s and 1980s in the television series of that name, made an appearance in a recent Eleventh Circuit decision. In *Quail Cruises Ship Management Ltd. v. Agencia de Viagens CVC tur Limiada*, a cruise ship operator alleged that defendants conspired to induce the purchase of a cruise ship by misrepresenting its deplorable condition. The deal having been structured as a purchase of stock in the corporation which owned the vessel, the cruise ship operator brought claims under Section 10(b) of the Securities and Exchange Act and Securities and Exchange Commission Rule 10(b)(5). The district court, relying on a decision in *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. (2010), that held that Section 10(b) does not apply extraterritorially, dismissed the case due to lack of subject matter jurisdiction because the fraudulent misrepresentations occurred overseas. However, the Eleventh Circuit vacated the district court's decision, finding that the transaction for the purchase and sale of the stock closed within the United States and gave rise to Section 10(b) jurisdiction.

US ARMY CORPS NOT LIABLE FOR FAILURE TO WARN OF SHOAL

MS Tabea Schiffahrtsgesellschaft MBH v. Board of Commissioners of the Port of New Orleans, No. 10-31093 (5th Cir., July 20, 2011)

As previously reported in this newsletter, in *MS Tabea Schiffahrtsgesellschaft MBH v. Board of Commissioners of the Port of New Orleans*, No. 10-30259 (5th Cir., March 18, 2011), the Fifth Circuit Court of Appeals ruled that the US Army Corps of Engineers were immune from liability for damages allegedly caused by their failure to properly dredge the Mississippi River under the discretionary function exception. In *MS Tabea*

Schiffahrtsgesellschaft MBH v. Board of Commissioners of the Port of New Orleans, No. 10-31093 (5th Cir., July 20, 2011), the Fifth Circuit affirmed the district court's finding that the Corps was not liable for allegedly failing to warn the New Orleans Board of Commissioners about the presence of a shoal which caused the M/V MSC TURCHIA to ground and then allide with the Napoleon Avenue Wharf. The district court's findings that the Corps did not necessarily have knowledge of the shoal in question, and had in any case used due care to disseminate its information about water depths off the face of the wharf, were not clearly erroneous.

FIFTH CIRCUIT HOLDS THAT CLAUSES CONTAINED IN MARITIME CONTRACT POSTED ON WEBSITE ARE ENFORCEABLE

One Beacon Insurance Co. v. Crowley Marine Services, No. 10-20417 (5th Cir., July 28, 2011)

This suit arises out of a dispute between ship repair contractor Tubal-Cain Marine Services, Inc. ("Tubal-Cain"), barge owner Crowley Marine Services, Inc. ("Crowley"), and insurance company One Beacon Insurance Company ("One Beacon") over the terms of a ship repair service contract and a maritime insurance policy. In March 2007, Crowley hired Tubal-Cain to perform work on one of its barges. Tubal-Cain in turn hired Rio Marine, Inc. as a subcontractor to perform lighting and electrical work on the barge. On or about April 23, 2007, an employee of Rio Marine was injured while performing repairs to the barge and subsequently filed suit against Tubal-Cain and Crowley in Texas state court alleging that their negligence caused his injuries. Crowley subsequently made a formal demand for defense and indemnity from Tubal-Cain as a result of the personal injury suit and sought defense and coverage from One Beacon as an additional insured under the Maritime Comprehensive Liability Policy that One Beacon issued to Tubal-Cain. One Beacon denied coverage for Crowley and subsequently filed a declaratory judgment action in the District Court for the Southern District of Texas seeking a declaration that Crowley was not entitled to coverage as an additional insured under the Policy, asserting that it never received a request from Tubal-Cain to add Crowley as an additional insured on the policy, and that there was no "insured contract" between Tubal-Cain and Crowley that would entitle Crowley to coverage under the Policy's terms. Crowley filed a third-party complaint against Tubal-Cain alleging that the terms and conditions referred to in the repair service order ("RSO") issued by Crowley required Tubal-Cain to defend and indemnify Crowley against any claim brought by Tubal-Cain employees and contractors against Crowley, that the terms and conditions required Tubal-Cain to carry various insurance policies naming Crowley as an additional insured, and that Tubal-Cain falsely led Crowley to believe that it had obtained the requested insurance coverage. The district court found in favor of Crowley on its claim against Tubal-Cain for contractual defense and indemnity and its claim that Tubal-Cain breached its contractual obligation to obtain insurance coverage. The district court further held that Crowley did not qualify as an additional insured under Tubal-Cain's policy and entered judgment in favor of One Beacon on its declaratory judgment claim. Tubal-Cain appealed the judgment while Crowley cross-appealed.

The RSO issued by Crowley to Tubal-Cain, which was not signed by either party, contained a notice prominently displayed on the first page that it was issued in accordance with the purchase order terms and conditions on Crowley's website, which required contractors to defend and indemnify Crowley for any claim that may be brought against Crowley. Further, the terms and conditions mandate that contractors procure a

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commercial general liability policy covering the work being conducted and name Crowley as an additional insured. Tubal-Cain argued that the parties entered into a binding oral agreement regarding the scope and price of the repair work in March 2007, and that Crowley's subsequently-issued RSO was merely a confirmation of that oral agreement. Because the oral agreement was silent with regard to defense, indemnity, and insurance requirements, Tubal-Cain contends that the RSO did not and could not confirm more than what the parties orally agreed to. Further, Tubal-Cain asserts that the RSO was sent to Tubal-Cain after work began on the barge, and therefore Tubal-Cain had no opportunity to review and assent to the terms prior to beginning performance.

The Fifth Circuit held that the district court did not err in concluding that the RSO terms and conditions supplemented the oral agreement between the parties because notice of the terms and conditions was clearly and conspicuously displayed in every RSO that Crowley sent to Tubal-Cain, the terms and conditions were at all times reasonably accessible and available to Tubal-Cain, and Tubal-Cain manifested assent by accepting the RSOs without objection to the terms and conditions. Under ordinary contract principles, Tubal-Cain was therefore bound by those terms and conditions, even if no one at Tubal-Cain ever visited Crowley's website in order to familiarize themselves with those terms and conditions. The Court opined that Tubal-Cain cannot avoid contractual terms by pleading ignorance of their existence, if the contract was clear on its face that such terms were intended to be incorporated, Tubal-Cain had knowledge of and an opportunity to review those terms, and manifested assent thereto. The Court affirmed the district court's holding that there was a written agreement between Tubal-Cain and Crowley which obligated Tubal-Cain to defend, indemnify, and procure insurance for Crowley. Regarding Crowley's claim for additional insured status, Crowley argued that the endorsement provides blanket additional insured coverage for those parties with an "insured contract" with Tubal-Cain, even if they are not specifically named in the policy. The Court agreed with One Beacon that Crowley's reading of the endorsement as providing coverage for any party that has an "insured contract" with Tubal-Cain renders meaningless other language in the endorsement. Section 1 of the endorsement read: "Section IV of the policy (Who is an Insured) is amended to include the persons(s) or organization(s) shown below as an Insured hereunder to the extent that you are obligated by an "insured contract" to include them as Additional Insured . . ." (emphases added). Moreover, the Court held Section 2 also clearly applied "only to the person(s) or organization(s) shown below." The language of the endorsement unambiguously required an additional insured to be named in the endorsement. Therefore, the Court affirmed the district court's holding that Crowley—which was not named in the Policy—was not an additional insured under the Policy.

FIFTH CIRCUIT DENIES LONGSHOREMAN'S CLAIM FOR COST OF IN VITRO FERTILIZATION

McCuller v. Nautical Ventures, No. 09-31084 (5th Cir., July 28, 2011)

Benjamin McCuller and his wife, Miranda McCuller, sued Nautical Ventures, L.L.C., under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b), after Benjamin, who was working as a longshoreman, was injured when he fell while descending a ladder on a ship owned by Nautical which led to multiple surgeries. The district court found that Nautical was negligent in providing a damaged ladder for his use and that Benjamin was thirty percent at fault for his injuries. The court concluded that the McCullers were entitled to damages for Benjamin's lost wages, pain and suffering, medical expenses and for the loss of consortium. The McCullers had also sought damages for the loss of Benjamin's household services and

for the cost of in vitro fertilization because Benjamin sustained nerve damage during one of his surgeries which rendered him incapable of producing sperm, but the district court did not award damages for the loss of household services as well as for in vitro fertilization because it found these damages to be highly speculative. Plaintiffs appealed the district court's finding of Benjamin's comparative fault and three aspects of the district court's damages award, and Defendant cross-appealed the district court's finding of liability.

The Fifth Circuit affirmed the district court's findings of liability, stating that the evidence supported the district court's finding that the defect in the ladder was not open and obvious to a longshoreman once the ladder was deployed and that the defect should have been discovered by a crewman of the vessel upon a reasonable inspection while the ladder was laid out flat and the rungs could be examined from several angles. The Court also affirmed the district court's finding that Benjamin was thirty percent at fault for his injuries because he was negligent in carrying a clipboard while descending the ladder and this contributed to his injuries as they were able to watch Benjamin demonstrate how he held the clipboard while descending the ladder as well as hear testimony from Benjamin's supervisor that carrying the clipboard violated safety protocol. One of Benjamin's co-workers also testified that it would be unsafe to carry a clipboard while climbing a ladder. The Court also affirmed the district court's decision not to award damages for the loss of household services as surveillance video of Benjamin clearly showed him engaged in activities which demonstrated that he was still able to perform the same chores that he had performed before he was injured.

Lastly, the Court also affirmed the district court's decision not to award damages for the cost of in vitro fertilization. Plaintiffs and their doctor testified that Benjamin was no longer able to deliver sperm as the result of nerve damage that he sustained during one of his back surgeries and that prior to the surgery Benjamin banked sperm as a precaution because the McCullers planned to have more children; and the McCullers' doctor testified that he had recommended in vitro fertilization for the McCullers because it would provide a greater than fifty percent chance of pregnancy. The McCullers' doctor testified that the fact that the McCullers conceived their first child naturally before Benjamin's injury demonstrated their potential to conceive naturally if Benjamin had not been injured, and that Mrs. McCuller had a "good prognosis" of conceiving without medical assistance, absent Benjamin's injury. The district court found these damages to be highly speculative. The McCullers suffered from fertility problems before Benjamin's injury as Mrs. McCuller had had two surgeries to treat endometriosis and, per her doctor's opinion, could have redeveloped endometriosis since her last surgery, and that endometriosis causes decreased fertility. The McCullers' doctor further testified that there was no guarantee that Mrs. McCuller could become pregnant through in vitro fertilization. Accordingly, the Fifth Circuit concluded that the district court did not clearly err by finding that it was "highly speculative" that the McCullers required medical assistance to conceive another child because of Benjamin's injuries and therefore, the district court did not clearly err in refusing to award the McCullers damages for the cost of in vitro fertilization.

