

**August 2021 Longshore/Maritime Update (No. 267)**

**Notes from your Updater**:

On July 2, 2021, the Fifth Circuit agreed to en banc rehearing of its decision in *Douglass v. Nippon Yusen Kabushiki Kaisha*, No. 20-30382 (5th Cir. Apr. 30, 2021) (per curiam). (*See* June 2021 Update). This case arises from the collision between the ACX CRYSTAL, chartered by Nippon Yusen Kabushiki Kaisha (NYK Line), and the U.S. Navy destroyer USS FITZGERALD in Japanese territorial waters, killing seven sailors and injuring at least forty others. Two suits were filed against NYK Line in federal court in Louisiana on behalf of injured and deceased sailors, and Judge Africk dismissed the cases for lack of personal jurisdiction, holding that NYK Line was not subject to general jurisdiction in the United States. (*See* July 2020 Update). On appeal, the Fifth Circuit panel began by analyzing Fed. R. Civ. P. 4(k)(2), which provides that in cases arising under federal law, federal courts have personal jurisdiction to the constitutional limit, provided that no state could exercise jurisdiction. That rule was drafted in response to the 1987 decision of the Supreme Court in *Omni Capital*, in which the Court affirmed the decision of the Fifth Circuit that the district court lacked jurisdiction over the defendants in a case arising under federal law when the federal law was silent as to service of process and the state long-arm statute did not reach the defendants. Thus, litigants were unable to bring an action under federal law against a foreign defendant who was outside the reach of the state long-arm statute. The effect of the amendment to the federal rule is that state courts remain subject to the 14th Amendment Due Process Clause in determining whether defendants are subject to personal jurisdiction in state courts and the constitutional limits of personal jurisdiction in federal courts in cases arising under federal law are limited by the Fifth Amendment’s Due Process Clause. In the latter case, the court looks to the contacts of the defendant with the United States. As maritime law is federal law for purposes of Rule 4(k)(2) [but not, ironically, for purposes of federal question jurisdiction], the Fifth Circuit noted that the Fifth Amendment’s due process inquiry was applicable to the suits against NYK Line. The plaintiffs argued that the requirements of due process under the 14th Amendment differ from those in the Fifth Amendment, and they proposed a national jurisdiction test. They argued that the court should look to a defendant’s national contacts with the inquiry whether a foreign (non-U.S.) defendant who is not amenable to jurisdiction in any state court, was doing systematic and continuous business in the United States, and whether the claim in suit was related to that business. The plaintiffs reasoned that concerns over federalism, which have been critical in recent 14th Amendment due process cases such as *Daimler AG v. Bauman*, are not applicable in cases brought in federal court under federal law under Fifth Amendment due process, and the Fifth Circuit panel added that a distinction between the two due process clauses was supported by the limited constitutional rights of foreign defendants. Although the judges on the Fifth Circuit panel found the plaintiffs’ arguments to be persuasive, the Fifth Circuit had previously applied *Daimler*’s due process analysis for general jurisdiction to a case in which jurisdiction was based on Rule 4(k)(2). Following the Fifth Circuit’s rule of orderliness, the panel was bound by the prior decision. As Judge Africk had correctly applied the Fifth Circuit’s existing application of *Daimler*’s due process analysis for general jurisdiction, the panel affirmed that NYK Line was not subject to personal jurisdiction in this case. However, two of the members of the panel (Judges Elrod and Willett) concurred to state that the case presented “a good vehicle” for the court to grant en banc consideration of the due process standard for personal jurisdiction in cases under Rule 4(k)(2). The full court has now agreed to hear the case.

After the decision of the Supreme Court in *Parker Drilling Management Services v. Newton* that there was no gap in federal wage laws for outer Continental Shelf Lands Act worker that would allow application of state law (*see* July 2019 Update), Parker argued he was still entitled to recover for his meal and rest-period claims under state law because federal law does not address these periods. On remand from the Supreme Court, Judge Klausner dismissed the claims on the basis that federal law does address these claims, and the Ninth Circuit agreed that Newton’s claims based on state law should be dismissed. *See* *Newton v. Parker Drilling Management Services*, No. 20-55146, 2021 U.S. App. LEXIS 20964 (9th Cir. July 15, 2021) (per curiam); *see also Mauia v. Petrochem Insulation, Inc.*, No. 20-15810, 2021 U.S. App. LEXIS 21410 (9th Cir. July 20, 2021) (Christen) (reaching the same result, reversing the decision of the district and ordering the dismissal of the state-law claims).

The Ninth Circuit held that Congress did not intend to create a private cause of action in the Rivers and Harbors Act that would permit a commercial charter business to contest landing fees charged by the City and County of San Francisco for South Beach Harbor. *See Lil’ Man in the Boat, Inc. v. City and County of San Francisco*, No. 19-17596, 2021 U.S. App. LEXIS 20953 (9th Cir. July 15, 2021) (Christen).

In our July 2021 Update we advised that Judge Merryday of the United States District Court for the Southern District of Florida ruled that Florida had standing to challenge the Centers for Disease Control’s conditional sailing order, concluded that Florida was highly likely to prevail on its claim that the order exceeded the authority delegated to the CDC, and issued a preliminary injunction, enjoining the CDC from enforcing the order against cruise ships arriving in or departing from a port in Florida (giving the CDC until July 2, 2021, to propose a narrower injunction. *See Florida v. Becerra*, No. 8:21-cv-839 (M.D. Fla. June 18, 2021). On July 17, 2021, a panel of the Eleventh Circuit stayed that decision pending appeal. *Florida v. Secretary, Department of Health and Human Services*, No. 21-12243-D (July 17, 2021). A week later, on July 23, 2021, the panel sua sponte vacated its order of July 17, 2021, and denied the request for a stay pending appeal because the appellants failed to demonstrate an entitlement to a stay pending appeal.

**On the LHWCA Front** . . .

**From the federal appellate courts:**

**Exclusive remedy of day engineer who performed repair and maintenance work on ships in port was the LHWCA;** *Fetter v. Maersk Line Ltd.*, No. 20-1426 (3d Cir. July 15, 2021) (Jordan).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateFetterv.MaerskLine.pdf)

Jason Fetter was injured while removing a stuck injector on the main engine of the MAERSK MONTANA, owned by Maersk Line. The vessel’s captain requested five “day engineers” to perform maintenance on the vessel while it was in port in Newark, New Jersey, and Maersk hired the engineers through its collective bargaining agreement with the seafarer’s union, the Marine Engineers Beneficial Association. The Union paid the day engineers and billed Maersk for their wages. Maersk also hired an outside company, 3MC, to supervise the work of the day engineers. 3MC’s employee, Greg Higgs, performed the supervisory work. Fetter bid on the job through the Union with the understanding that the work was for one day and that he would not sail with the vessel. Fetter, a resident of New York, filed a common-law negligence suit against Maersk in state court in Houston, Texas, and Maersk removed the matter to federal court in Houston. The case was transferred to the federal court in New Jersey, and Fetter added a Jones Act claim against Maersk Line and added 3MC as a defendant. The defendants moved for summary judgment on the grounds that Fetter was not a seaman and his negligence claims were barred by the exclusive-remedy provision of the LHWCA. Judge Hayden granted the motion (*see* February 2020 Update), and Fetter appealed to the Third Circuit. The first question addressed by the Third Circuit was whether Fetter, who was hired through the Union and paid by the Union, was a borrowed servant of Maersk Line. Applying the *Ruiz* factors enunciated by the Fifth Circuit, Judge Jordan, writing for the Third Circuit, focused on whether Maersk was responsible for Fetter’s working conditions and whether his employment was of such duration that Fetter could be presumed to have acquiesced in the risks of his new employment. Judge Jordan noted that only Maersk, not 3MC or Higgs, had the authority to dismiss Fetter, and that Higgs did exercise some control over Fetter, but Maersk retained ultimate control over the engine room and those working in it. Judge Jordan added that Fetter’s experience and the nature of the assignment allowed him to understand and acquiesce to the risks of work on the vessel. Judge Jordan agreed that the duration of the work was a factor in the borrowed servant analysis, but he affirmed that a worker can be a borrowed servant from a brief assignment. As Higgs was a borrowed servant of Maersk, Fetter was barred by the LHWCA from suing 3MC for negligence. Finally, Judge Jordan addressed whether Fetter was covered under the Jones Act. Citing the fact that Fetter was not scheduled to go to sea with the MAERSK MONTANA and was hired solely to work on the ship while it was in port, Judge Jordan held that Fetter was not a seaman.

**From the federal district courts:**

**Worker injured on OCS platform did not sufficiently allege an intentional tort to overcome the exclusive remedy provision in the LHWCA;** *Parkman v. W&T Offshore, Inc.*, No. 20-883, 2021 U.S. Dist. LEXIS 126432 (M.D. La. July 7, 2021) (deGravelles).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateParkmanv.WT_.pdf)

Jason Parkman was injured on August 25, 2018, while working for Helmerich & Payne on a fixed platform on the outer Continental Shelf off the Louisiana coast. He received LHWCA compensation within a month of his accident and continued to receive LHWCA benefits. More than a year after the accident, on November 20, 2020, Parkman filed suit against Helmerich & Payne, W&T Offshore, Baker Hughes, and Halliburton, asserting claims under Louisiana law (through the Outer Continental Shelf Lands Act) and, alternatively, under the Jones Act and general maritime law as a seaman. Parkman claimed to be assigned to a vessel, but he did not name the vessel, give its location, state his position on the vessel, or state how the vessel contributed to the accident. The case was removed to the federal court for the Middle District of Louisiana, where Parkman filed a motion to declare that his claims were timely. Judge deGravelles did not find any factual support for the claims under the Jones Act and general maritime law and then determined whether the state claims were barred by the one-year prescription period for torts under Louisiana law. Citing the *Cormier* decision from the Fifth Circuit, holding that the voluntary payment of benefits under the LHWCA interrupts prescription against all solidary obligors, Judge deGravelles rejected the defendants’ efforts to distinguish the case or to overturn it as wrongly decided and held that Parkman’s claims were timely filed. (*See* July 2021 Update). Judge deGravelles then addressed the arguments of the Helmerich & Payne defendants that Parkman’s “substantial certainty” claim under Louisiana law was barred by the exclusive remedy provision of the LHWCA. Judge deGravelles noted that the Fifth Circuit has never held that there is an exception to the exclusive remedy for intentional torts, but several district courts in the Fifth Circuit and Louisiana state courts have held that an employee may maintain an intentional tort claim against the LHWCA employer as long as there is a specific intent to injure the worker. Judge deGravelles then reasoned that if the court were to consider such an exception, the allegations would have to be far more specific than the conclusory allegations alleged by Parkman in this case. Consequently, Judge deGravelles dismissed the state claim against the employer defendants for failure to state a claim.

**And on the maritime front . . .**

**From the federal appellate courts:**

**Contractor hired by On-Scene Coordinator to contain, clean up, and mitigate the effects of an oil spill was entitled to a *Yearsley* government-contractor immunity defense to suit by the Responsible Party for the spill;** *Taylor Energy Co. v. Luttrell*, No. 20-30552 (5th Cir. June 30, 2021) (Stewart).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateTaylorEnergyv.Captain.pdf)

Taylor Energy leased and operated oil wells and production platforms, including its MC20 Platform on the outer Continental Shelf off the coast of Louisiana. Hurricane Ivan hit the Gulf Coast in 2004 and collapsed the seafloor, resulting in the platform’s toppling and the leakage of oil for 16 years. Taylor was designated as the Responsible Party under the Oil Pollution Act, and Captain Kristi Luttrell of the Coast Guard was named as the On-Scene Coordinator for the response pursuant to the Clean Water Act. Taylor spent more than $480 million to address the leak, including drilling nine interventional wells. In 2018, the Coast Guard issued a new administrative order requiring the installation of a containment system to capture, contain, and remove oil from an erosional pit, and Taylor submitted proposals for Taylor to install the system. Captain Luttrell solicited proposals from other contractors and selected Couvillion Group for the installation. Taylor then filed an action against Captain Luttrell, arguing that her actions violated the Administrative Procedure Act and due process, and a declaratory judgment action against Couvillion, seeking tort damages and equitable relief for trespass and unauthorized activities. Couvillion asserted a defense of government-contractor immunity under *Yearsley v.* *W.A. Ross Construction Co.*, and Judge Guidry granted summary judgment for Couvillion, holding that Couvillion was immune. Taylor sought to avoid the immunity defense on the grounds that Couvillion’s actions were not authorized or directed by the United States and because Couvillion exceeded the bounds of the Coast Guard’s authority, but the Fifth Circuit agreed with Judge Guidry. Writing for the Fifth Circuit, Judge Stewart found no material fact dispute about the authorization by the Coast Guard (including the Coordinator’s authority to hire Couvillion) or Couvillion’s adherence to the Coast Guard’s directives.

**Failure to request itemized verdict between past and future damages resulted in denial of prejudgment interest;** *Lebron v. Royal Caribbean Cruises, Ltd.*, No. 20-14449 (11th Cir. July 12, 2021) (per curiam).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/08/LongshoreUpdateLebronv.RoyalCaribbean.pdf)

Edgardo Lebron was injured while ice skating on the cruise ship ADVENTURE OF THE SEAS. After a six-day jury trial before Judge Seitz, the jury returned a verdict in favor of Lebron, awarding him past medical expenses and $625,000 in pain and suffering (reduced by 35% for Lebron’s comparative fault). Judge Seitz granted the cruise line’s motion for a directed verdict, but the Eleventh Circuit reversed and ordered reinstatement of the jury verdict. (*See* July 2020 Update). On remand, Judge Seitz declined to award any prejudgment interest on the lump sum award for pain and suffering as Lebron did not request an itemized jury award and there was no objective basis to determine how much of the lump sum award for past and future pain and suffering was attributable to past pain and suffering. (*See* October 2020 Update). The Eleventh Circuit recognized that prejudgment interest was inappropriate for future damages but that the district court had discretion to undertake a calculation of the portion of an award attributable to past pain and suffering. However, the district court was not required to make such an allocation, and Lebron’s arbitrary figure of 75% was speculation rather than an objective basis for the determination. The Eleventh Circuit affirmed that there was no abuse of discretion in declining to break down a jury’s award after the fact so as to award prejudgment interest.

**Notice requirement does not extend to claims based on vicarious liability;** *Yusko v. NCL (Bahamas), Ltd.*, No. 20-10452 (11th Cir. July 12, 2021) (Brasher).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateYuskov.NCLBahamas.pdf)

Joann Yusko, a passenger on the NORWEGIAN GEM, participated in a dance competition on the vessel. She was paired with Michael Kaskie, a professional dancer employed by the cruise line. After dancing with Kaskie for less than a minute, she fell and hit her head. She brought suit against the cruise line, alleging that Kaskie’s method of dancing was unreasonably dangerous as he flung her around the dance floor. The cruise line moved for summary judgment on the ground that the danger of falling while dancing is open and obvious. After rejecting Yusko’s argument that the open and obvious defense only applies to a premises liability claim, Chief Judge Moore denied the summary judgment on the ground that the danger would not be open and obvious if Kaskie’s manner of dancing was unreasonable, and there was a fact question from Yusko’s complaint on that issue. The cruise line also moved for summary judgment on the ground that it had no notice of the risk-creating condition. Yusko argued that notice should be presumed where the injury is caused by the defendant’s own direct action. However, Chief Judge Moore noted that the Eleventh Circuit has held that notice is a prerequisite to liability even when the risk-creating condition is of the defendant’s own creation. Yusko then sought to establish notice by arguing that Kaskie surely had notice of the risk of his own actions—flinging Yusko around the dance floor. However, without any evidence of similar accidents involving Kaskie or other crewmembers, there was insufficient evidence of notice to the cruise line, and Chief Judge Moore granted summary judgment to the cruise line. (*See* February 2020 Update). On appeal, Yusko argued that he asserted a claim of vicarious liability of the cruise line for Kaskie’s negligence so that the cruise line was liable for his actions and omissions regardless of whether there was notice to the cruise line of the danger of his actions. The Eleventh Circuit distinguished cases in which the passenger asserted claims that the cruise line was negligent for the negligent creation or maintenance of its premises. In those situations, the notice requirement applied because the passengers alleged wrongdoing by the shipowner. In contrast, vicarious liability has nothing to do with the conduct of the shipowner. If a passenger can identify an employee whose negligence caused the injury, then the cruise line is vicariously liable regardless of whether it had notice. However, if a passenger cannot identify a specific employee who acted negligently, then the passenger will have to establish notice to the shipowner. As Yusko’s claim was based on the vicarious liability of the cruise line for the negligence of Kaskie, Judge Brasher reversed the summary judgment that was based on the lack of notice to the cruise line.

**Florida law on recovery of attorney fees was applied to a dispute over a marine insurance policy based on delivery of the policy to the insured’s broker in Florida;** *RMI Holdings v. Aspen American Insurance Co.*, No. 20-14525 (11th Cir. July 15, 2021) (per curiam).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateRMIHoldingsv.AspenAmericanInsurance.pdf)

RMI Holdings, a Georgia corporation, insured its vessel, the LEELANAU, with Aspen, a Texas insurer headquartered in Connecticut. The vessel was kept in Port St. Joe, Florida, and the vessel was limited to navigation in the waters of the Gulf of Mexico, Florida, and the Bahamas. Communications were by email between USI, RMI’s broker, Offshore Risk Management, wholesale broker for RMI, and Yachtinsure, Aspen’s underwriting agent. The vessel suffered damage from Hurricane Michael while moored in Port St. Joe, and Aspen denied coverage. RMI filed suit against Aspen for breach of the insurance policy in the Northern District of Florida, and the district court had to determine what law applied to the question whether RMI could recover attorney fees (based on *Wilburn Boat*). Judge Wetherell applied the Restatement (Second) Conflict of Laws and held that Florida law applied rather than Georgia law (requiring bad faith for an award of fees). The Eleventh Circuit agreed that the factors enumerated in Restatement (Second) Section 188(2) governed for the determination of which state had the most significant relationship to the transaction, and that some of those factors favored application of Georgia law and some favored application of Florida law. Weighing the factors, the Eleventh Circuit held that the most important contacts were that the contract was negotiated in Florida, was finalized by delivery to a Florida insurance broker, and the parties expected that the vessel would be moored in Florida. As the Florida statute (Section 627.428(1)) applies to policies delivered in Florida, and as the policy was delivered to a Florida broker for the insured, the Eleventh Circuit held that the insured was entitled to recover attorney fees under Florida law.

**Adding defendants to the complaint without specifying which defendants are liable for which acts is not a permissible pleading;** *Wells v. Royal Caribbean International Cruises Ltd.*, No. 20-13378 (11th Cir. July 20, 2021) (per curiam).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateWellsv.RoyalCaribbean.pdf)

Lawrence Wells brought this suit pro se against his employer cruise line for discrimination on multiple grounds. He moved to amend the complaint to add as defendants two union representatives and the Norwegian Seafarers’ Union. Instead of adding allegations applicable to the new defendants, however, Wells filed an identical copy of the original complaint with a motion to add three defendants. Two of the defendants moved to dismiss the amended complaint on the ground that it did not state which claims related to which defendants. The court gave Wells an opportunity to file a second amended complaint, but instead of correcting the allegations in the original and first amended complaints, he added 19 defendants with allegations that did not seem to correspond to any claims for relief and which did not explain which allegations pertained to which defendant. Magistrate Judge Torres recommended the dismissal of the case with prejudice, and Judge Williams accepted his recommendation. As the district court had afforded Wells ample opportunity to rectify the defects in his pleadings, the Eleventh Circuit affirmed the dismissal of the second amended complaint with prejudice.

**Dismissal (for lack of subject matter jurisdiction) of passengers’ negligent infliction of emotional distress claims from cancellation of cruise because of a hurricane was reversed for reconsideration of the amount in controversy for diversity jurisdiction and for reconsideration whether there was admiralty jurisdiction;** *McIntosh v. Royal Caribbean Cruises, Ltd.*, No. 19-10562 (11th Cir. July 27, 2021) (Jordan).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateMcIntoshv.RoyalCaribbean.pdf)

Nikki McIntosh filed a class action suit for passengers who were scheduled for a cruise on the LIBERTY OF THE SEAS from Galveston on August 27, 2017. McIntosh complained that the cruise line did not cancel the cruise on account of Hurricane Harvey, which made landfall in Texas and Louisiana, until the day the vessel was scheduled to depart, forcing the passengers to travel to Galveston and surrounding areas as the storm approached, causing them physical and emotional injuries when they were forced to endure hurricane-force conditions. Judge King held that the cases could not proceed as a class action in light of the class-action waiver in the tickets, and he then held that the individual plaintiffs had not individually satisfied the requirement of $75,000 in controversy for diversity jurisdiction and that the claims did not fall within the admiralty jurisdiction. He therefore dismissed the case with prejudice for lack of subject matter jurisdiction. The Eleventh Circuit was not convinced that all of the plaintiffs failed to plead damages in excess of $75,000, noting that many passengers were trapped by a devastating storm, without power and with limited water and food, sustaining injuries to their bodies, impairment, and physical and mental pain and suffering. However, that alone was not enough to establish diversity. Alienage diversity must be complete so that there is no alien on both sides of the dispute. Thus, there would be no diversity between a corporation incorporated in a foreign state and another alien, regardless of the corporation’s principal place of business. It appeared that the cruise line is a citizen of Liberia (where it is incorporated), and some of the passengers were residents of Canada, Mexico, and the Philippines. Writing for the Eleventh Circuit, Judge Jordan remanded the case to reconsider whether the requirements for diversity jurisdiction were satisfied, noting that a dismissal for lack of jurisdiction should be without prejudice. Regardless of whether there was diversity, Judge Jordan instructed Judge King to consider on remand whether the claims satisfied the locality/connection test for admiralty jurisdiction as the outcome of that decision would determine whether state law or maritime law applied. Judge Jordan noted that the Eleventh Circuit had recognized a claim for negligent infliction of emotional distress under the maritime law (under different circumstances), but the plaintiffs never embarked on a cruise in this case and the district court would have to determine whether to apply that maritime cause of action in this situation.

**When the vessel owner waited for a year to assert that a claimant in its limitation action was not the real party in interest to pursue its claim, the court should have given the claimant leave to amend to name the correct party in interest;** *In re RLB Contracting, Inc.*, No. 20-20540 (5th Cir. July 30, 2021) (per curiam).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/08/LongshoreUpdateInreRLBContracting.pdf)

After RLB Contracting’s dredging barge allided with a submerged pipeline, RLB Contracting filed an action seeking limitation of liability. Genesis Energy, L.P. filed a negligence claim in the capacity as owner of the pipeline, and a year and a half later, RLB Contracting moved to dismiss the claim under Rule 12(b)(1) on the ground that subsidiaries of Genesis Energy, L.P. owned and operated the pipeline. Genesis moved for leave to amend its claim to join the subsidiaries as co-claimants under Rule 17(a)(3) (addressing real parties in interest), and Judge Miller held that RLB Contracting’s motion to dismiss, judged under Rule 17 and not Rule 12(b)(1), was timely. Judge Miller also held that Genesis lacked a reasonable basis for failing to name the correct parties and denied its motion to amend. He then dismissed Genesis’s claims with prejudice. RLB Contracting appealed, and the Fifth Circuit reversed, holding that Judge Miller should not have found the motion to dismiss timely while simultaneously denying Genesis the right to amend. The appellate court noted that RLB Contracting had “offered little explanation for why it waited so long to file the motion to dismiss despite having the documents it claimed supported the argument for about a year.” The court reasoned that the district court abuses its discretion when it denies a motion to name the correct party and the error was due to an “understandable mistake.” In this case, Genesis believed that its position as a parent, its debtor status, and the Coast Guard’s assertion that Genesis itself was liable for the cost of removing the pollution caused by the allision gave it status as a proper party to assert the claim. As its position was taken in good faith and did not prejudice RLB Contracting, the court remanded the case to permit joinder of the Genesis subsidiaries.

**From the federal district courts:**

**Judges dismissed BELO suits for failure to answer discovery requests and for the untimely designation of an expert on invisible oil to support causation;** *In re: DEEPWATER HORIZON BELO Cases*, No. 3:19-cv-963 (N.D. Fla. June 23, 2021) (Rodgers); *Faerber v. BP Exploration & Production Inc.*, No. 1:20-cv-328, 2021 U.S. Dist. LEXIS 122371 (S.D. Miss. June 29, 2021) (Guirola).

[Opinion DEEPWATER HORIZON BELO Cases](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateDeepwaterHorizonBELOcases.pdf)

[Opinion Faerber](https://www.brownsims.com/wp-content/uploads/2021/08/LongshoreUpdateFaerberv.BP_.pdf)

When a group of plaintiffs asserting Back-End-Litigation-Option claims for exposure to oil and hazardous substances from the DEEPWATER HORIZON/Macondo spill failed to respond to BP’s discovery requests in the cases consolidated in the Pensacola Division of the Northern District of Florida, the court entered an order directing the plaintiffs to show cause for their failure to respond. After the time passed to respond and the plaintiffs did not respond, Judge Rodgers dismissed the cases with prejudice.

The *Faerber* case presents a similar situation to *Salmons v. BP Exploration & Production*, discussed in the July 2021 Update. A Back-End-Litigation-Option claim was brought on behalf of Zone A resident (a minor) who allegedly developed cancer from exposure to oil and chemical dispersants from the DEEPWATER HORIZON/Macondo spill and cleanup and died from the cancer. His beneficiary, who brought this suit, was required to designate experts by April 16, 2021, and on April 15, 2021, the beneficiary filed a motion to modify the deadline to designate Dr. Natalie Perlin to give opinions on the extent and toxicity of “invisible oil,” applying a new combination of technologies to detect large quantities of toxic and invisible oil. On April 27, 2021, after the deadline passed to designate experts, BP moved for summary judgment that there was no expert testimony for the plaintiff on causation. The plaintiff replied to the motion for summary judgment that he had moved to modify the deadline for designating experts, but Magistrate Judge Myers declined to extend the deadline and Judge Guirola upheld Magistrate Judge Myers’ decision. Without expert support for causation on the claim, Judge Guirola granted summary judgment and dismissed the case with prejudice.

**Motion to dismiss based on liability waiver and release that was not attached to the complaint was not proper; plaintiff’s claims for nonpecuniary damages for death in international waters were dismissed; breach of contract claim based on the wrongful death allegations was dismissed; defendants failed to establish that additional parties were indispensable;** *O’Neill v. Open Water Adventures, Inc.*, No. 3:20-cv-00476, 2021 U.S. Dist. LEXIS 119564 (W.D.N.C. June 28, 2021) (Mullen).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateONeillv.OpenWaterAdventures.pdf)

Randolph Michael O’Neill died during an open water scuba dive in international waters off the coast of the Commonwealth of Dominica. His widow brought this suit alleging that the dive trip was booked through the defendants so that O’Neill could complete his scuba training with the defendants. The defendants filed a motion to dismiss based on a releases and liability waivers signed by O’Neill. Although the complaint asserted that the defendants entered into an agreement with O’Neill to provide scuba diving instruction, the agreement was not attached to the complaint. As the waiver/release was not part of the plaintiff’s complaint, it was an affirmative defense that was not appropriate for consideration in a motion to dismiss. The defendants also moved to dismiss the plaintiff’s claims for nonpecuniary damages, including loss of consortium, society, affection and companionship, and punitive damages based on the limitation to pecuniary damages in the Death on the High Seas Act. Judge Mullen agreed and dismissed the claims but he declined to dismiss the plaintiffs’ claim for attorney’s fees as there is an exception to the general rule that attorney’s fees are not recoverable in the event there are acts of bad faith in the litigation. The defendants moved to dismiss the claim for breach of contract, and Judge Mullen agreed that the claim was based on the same facts as the wrongful death claims and was preempted by DOHSA. Finally, the defendants sought to dismiss the complaint for failing to join Dominican parties that organized and controlled the dive. Judge Mullen held that these parties may be joint tortfeasors, but that did not make them indispensable. Therefore, he declined to dismiss the complaint.

**Judges bifurcated limitation actions, but the judges differed on the question whether the federal limitation trial would include allocation of fault with third parties;** *In re Chester J. Marine, LLC*, No. 20-214, 20-252, 2021 U.S. Dist. LEXIS 121163 (M.D. La. June 29, 2021) (deGravelles); *In re Orion Marine Construction, Inc.*, No. 2:21-cv-4, 2021 U.S. Dist. LEXIS 124168 (S.D. Tex. July 2, 2021) (Ramos).

[Order Chester J. Marine](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateChesterJ.MarineopinionChesterJ.Marine.pdf)

[Order Orion Marine](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateOrionMarineConstruction.pdf)

The *Chester J. Marine* limitation action arose from a collision that allegedly involved the M/V CECILE A. FITCH, owned by Chester J. Marine, and the MELVIN L. KING, owned by Yazoo River Towing (although Chester J. Marine argued that the accident involved an allision between the MELVIN L. KING’s skiff and an underwater object or the swamping of the skiff). Lloyd Standridge and Norsalus N.C. Jackson, crewmembers on the MELVIN L. KING, were killed. Beneficiaries of Standridge brought suit in state court against the vessel owners and other parties; the vessel owners brought limitation actions in federal court; there were cross claims among the owners and third parties; and the beneficiaries of Standridge and Jackson brought claims in the limitation actions. The Standridge beneficiaries moved to bifurcate the limitation actions so that only the exoneration-limitation actions were decided in federal court and they could then try their damage claims and actions against third parties in state court. Evaluating the rights of the parties under the limitation act and the saving-to-suitors clause in the context of judicial efficiency, Judge deGravelles held that the court would bifurcate proceedings and try exoneration, limitation, and apportionment of fault in one proceeding. That trial would include the fault of all of the parties from whom Standridge sought to recover in order to avoid separate, duplicative, and expensive liability trials. If the first trial were to result in the denial of limitation and Standridge were entitled to recovery, the limitation stay would be dissolved so that Standridge could proceed with trial of damages in state court.

The *Orion Marine* decision arose from the limitation action filed by Orion Marine as owner of DREDGE WAYMON L BOYD and other vessels working in a flotilla in connection with the rupture of a pipeline in the ship channel in Corpus Christi, Texas, resulting in eleven claims, including injury and death claims. The claims were presented against Orion Marine and other parties, and, in contrast with the decision of Judge deGravelles, Judge Ramos held that the court would first try the case of exoneration or limitation only, without deciding comparative responsibility of the third parties. The damages phase will proceed separately, after the exoneration/limitation phase, in the state or federal proceedings of the claimants’ preference. The litigation in the state courts will then decide the fault of the other parties, while the fault of Orion Marine will be decided in the federal proceeding (rejected the argument that trial of liability of all parties in the limitation action would avoid separate, duplicative, and expensive liability trials).

**Insurance company’s declaratory judgment action as to unasserted property damage and liability claims was dismissed for lack of a case or controversy; liability claims asserted by claimants did present a case or controversy, and the insurer was entitled to a judgment of no coverage based on breach of the policy warranties;** *Hanover Insurance Co. v. J&S Promotions, LLC*, No. 2:19-cv-835, 2021 U.S. Dist. LEXIS 120663 (M.D. Fla. June 29, 2021) (Steele).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateHanoverInsurancev.JSPromotions.pdf)

J&S Promotions’ yacht QUALITY TIME grounded on a coral reef, resulting in property damage and personal injuries, and the yacht’s insurer, Hanover, brought this action seeking a declaration that no coverage was available under the policy for the damage and injuries. The president and sole owner of J&S, James F. Smith, was piloting the yacht at the time of the incident. With respect to the damage to the yacht, Hanover asserted that J&S breached its obligations to timely report the loss, submit a proof of loss, and permit Hanover to inspect the damage prior to repairing the damage. However, as J&S had not made a claim for property damage under the policy and the one-year period to make a claim under the policy had expired, Judge Steele held that there was no case or controversy and dismissed that portion of the declaratory judgment action for lack of subject matter jurisdiction. Hanover identified two potential third-party claimants, (1) the National Park Service, which sent letters to Smith asserting that the grounding damaged the coral reef habitat and demanding more than $85,000 in damages, and (2) correspondence from counsel for a passenger seeking damages of $150,000 for a traumatic brain injury. The National Park Service had not filed any legal action, so Judge Steele held that there was no case or controversy with respect to a possible claim by the NPS. The situation with Parks was different as Parks was named as a defendant in Hanover’s action, and Parks’ answer stated that she had made a claim for damages. Although Parks had not filed a suit against J&S, the statute of limitations had not run, and Judge Steele held that there was a case or controversy over coverage for Parks’ claim. As there was a case or controversy as to the Parks’ claim, Judge Steele addressed Hanover’s argument that the breach of the policy’s captain warranty (that J&S would employ a captain on a full-time basis and the captain would be in command of the yacht at all times when it was under weigh) voided coverage under the policy. As the language of the warranty was clear, Judge Steele did not have to decide whether state or federal law applied under *Wilburn Boat* and held that there was no coverage for claims by third parties arising from the grounding.

**Judge held that crew/employee exclusion in P&I policy was not ambiguous and excluded additional insured coverage for the injury to an employee of the named insured, but the MSA was ambiguous about its insurance requirements;** *Barrios v. Centaur, LLC*, No. 17-585 (E.D. La. June 30, 2021) (Milazzo).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateBarriosv.Centaur.pdf)

The insurance and contractual issues in this case arise from the claims of Devin Barrios, an employee of Centaur, who was injured while offloading a generator from River Ventures’ vessel in connection with the construction of a concrete rail by Centaur on United Bulk Terminals’ Dock in the Mississippi River. Barrios brought suit against River Ventures and Centaur, resulting in a judgment in favor of Barrios against River Ventures under Section 905(b) of the LHWCA. River Ventures sought indemnity and additional insurance (as a contractor of UBT) from Centaur pursuant to the Master Service Agreement between Centaur and UBT that applied to the construction of the rail. The dispute raised the question whether the contract was maritime or subject to Louisiana law. In the wake of the decisions of the Supreme Court in *Kirby* and the en banc Fifth Circuit in *Doiron*, Judge Milazzo applied a three-part test (first enunciated by Judge Rosenthal in Texas) to determine if a non-oilfield contract is maritime: did the work performed under the contract involve maritime commerce, did it involve work from a vessel, and did the contract provide or did the parties expect that a vessel would play a substantial role in completing the contract. Applying the first prong of that test, Judge Milazzo held that the contract was a land-based contract so Louisiana law applied and the indemnity and additional insured provisions were invalid under the Louisiana Construction Anti-Indemnity Act. The Fifth Circuit disagreed with the three-prong test applied by Judge Milazzo and adopted the test proffered by River Ventures that in order to determine if a mixed-services contract is maritime, the “contract (1) must be for services to facilitate activity on navigable waters and (2) must provide, or the parties must expect, that a vessel will play a substantial role in the completion of the contract.” Judge Smith rejected a separate initial test whether the contract involved maritime commerce as that is what the two prongs of *Doiron*, as extrapolated in *Barrios*, were designed to determine. Judge Smith then determined that the test was satisfied in this case as the dock was over the Mississippi River, and the vessels involved in the construction (and the accident) were on navigable waters. The contract also required substantial use of vessels as Centaur’s bid expressed that the price for the work was “significantly higher” because of the necessity of vessels in the project, and Centaur’s project manager admitted that the work could not have been done properly without a crane barge. The fact that Centaur’s workers, like Barrios, may have performed a majority of their work on the dock did not alter the conclusion that the parties expected a substantial role for vessels in the construction. (*See* December 2019 Update). On remand, River Ventures and its insurer, XL Specialty, and Centaur and its insurer, Travelers, disputed the insurance coverage for River Ventures under the Travelers P&I policy and whether Centaur breached the contract if the Travelers’ policy did not afford coverage to River Ventures. Travelers argued that the P&I policy contained a crew/employee exclusion for “injury of any crew, seaman or other employee of the Assured regardless of whether they be employees of the Assured or any Additional Assured named in the Policy.” River Ventures argued that “the Assured” referred to the particular insured against whom a claim has been asserted and did not apply to Barrios’ claim against River Ventures. Travelers argued that “the Assured” referred to Centaur so that the exclusion excluded claims for injuries to Centaur employees against River Ventures. Judge Milazzo agreed with Travelers that the exclusion unambiguously excluded Barrios’ claim against River Ventures as he was an employee of Centaur. With that ruling, River Ventures argued that Centaur had breached the MSA because it was required to obtain a P&I policy of “not less than the P&I SP-23 (revised 1/56) form of policy or its equivalent” and that form insures the crew with a crew/employee exclusion. Despite that language, Centaur argued that the MSA required Centaur to obtain a maritime employers liability endorsement to its workers’ compensation policy that would cover the crew. Considering the MEL requirement to evince an intent not to transfer employee-related liability to Centaur (which the required SP-23 would do), Judge Milazzo held that the MSA provisions were ambiguous and that summary judgment was not proper.

**Court declined to enforce forum-selection clauses in bills of lading as they would lessen the carrier’s liability under COGSA;** *In re Hapag-Lloyd Aktiengesellschaft*, No. 19-cv-5731, 2021 U.S. Dist. LEXIS 123150 (June 30, 2021) (Lehrburger).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateHapagLloydAktiengesellschaft.pdf)

After a fire on the containership M/V YANTIAN EXPRESS caused damage to a number of cargo containers, Hapag-Lloyd brought this limitation action in the Southern District of New York. The vessel was carrying cargo from Asian ports to ports on the East Coast of the United States for slot charterers Ocean Network Express and Yang Ming Marine. As a vessel-owning common carrier, Ocean Network entered into service contracts and bills of lading with most of its customers for the carriage of its customers’ cargoes. The bills of lading contained a Singapore forum-selection clause, and the service contracts contained a New York arbitration clause. Cargo claimants and non-vessel-operating common carriers filed claims in the limitation action and brought third-party actions against Ocean Network. Ocean Network then moved to dismiss the third-party complaints based on the forum-selection clauses. Magistrate Judge Lehrburger first addressed the situation in which there was only a bill of lading with a Singapore forum-selection clause. He concluded that the clause was mandatory and binding on the cargo claimants. However, he also noted that if the clause were enforced, the court in Singapore would apply the limitation on liability in the 1976 Limitation Convention (to which the United States is not a party) that would limit the recovery to an amount substantially less than the recovery under the Carriage of Goods by Sea Act. As there was no dispute that litigation in Singapore would reduce the carrier’s liability for damage to the cargo, which would violate Section 3(8) of COGSA, Magistrate Judge Lehrburger recommended that Ocean Network’s motion to dismiss the third-party actions be denied. Magistrate Judge Lehrburger also considered the argument that the forum-selection clauses should not be enforced because it would frustrate the purpose of the Limitation Act to resolve all issues in a single proceeding. Magistrate Judge Lehrburger recognized that refusing to enforce the clauses on the basis of judicial economy would undermine the certainly that these clauses bring to international transactions, and he did not conclude that the complexity of the limitation proceedings was sufficient to render the clauses unenforceable. However, he noted that where the clauses were unenforceable under COGSA, the purposes of the Limitation Act were an additional basis against enforcement. Finally, with respect to the shipments in which there were both bills of lading (with forum-selection clauses) and service contracts (with arbitration clauses), Magistrate Judge Lehrburger did not have to address whether there was a conflict in the forum selection. The claimants had not sought to enforce the arbitration agreement and the clauses in the bills of lading were unenforceable. Therefore, the same result was reached for those cases as was reached in the cases in which there was only a bill of lading.

**Ship repairer that arrested vessel was entitled to custodia legis expenses and a lien for dockage and repairs; captain failed to support most of his claims for necessaries; crew was entitled to a lien for wages and repatriation expenses, but the evidence was insufficient as to the amount of the wages;** *Rybovich Boat Co. v. M/Y BLUE STAR*, No. 20-80136, 2021 U.S. Dist. LEXIS 121944 (S.D. Fla. June 30, 2021) (Altman).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateRybovichBoatv.MYBlueStar.pdf)

This case involves the claims of a yacht repairer that arrested the 143-foot yacht BLUE STAR for repairs and dockage. The captain and crew intervened, seeking wages, repatriation expenses, and expenses advanced on behalf of the yacht. The parties agreed to the sale of the yacht but disagreed on distribution of the sales proceeds. Judge Altman agreed that the ship repairer’s expenses for the custody of the yacht as well as its tenders and personal watercraft, the expenses to remove, store, and insure the yacht’s artwork, and the costs for the Marshal’s arrest were proper custodial services. Judge Altman also held that the ship repairer established a lien for the necessaries that were authorized by the captain and manager of the yacht and established by invoices detailing the services. Judge Altman agreed that the captain had a maritime lien for necessaries for his continued care for the yacht after its crew and employer disappeared, but his evidence was insufficient to support the claim except for one expense. Therefore, Judge Altman held that the captain would have to establish the expenses at trial. Similarly, Judge Altman held that the crew were entitled to a lien for their wages, but the evidence was insufficient to establish the amount that was owed. Finally, reasoning that the owner has a general obligation to repatriate seamen who find themselves adrift without a passage home, Judge Altman granted summary judgment to the seamen for their repatriation expenses.

**Judge allowed late claim in limitation proceedings;** *In re Bellaire Vessel Management, LLC*, Nos. 5:18-cv-115, 5:18-cv-137, 5:18-cv-138, 5:20-cv-4 (N.D. W. Va. July 1, 2021) (Bailey).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateBellaireVessel.pdf)

This case involves limitation actions filed on behalf of barges that broke away from a vessel fleeting facility on the Ohio River near Boggs Island, resulting in sinking or damage to the barges and third-party property damage. After the deadline for filing claims in the limitation actions, the owner and operator of a recreational boat marina, which was damaged by the breakaway, sought leave to file claims in the limitation actions. Although the claimant did not provide a compelling reason for late filing, the case remained pending and unresolved and the case had not progressed to the point where the other claimants would be prejudiced by the late joinder. Therefore, Judge Bailey granted leave to the marina owner/operator to file the claims.

**Companies that owned and supplied the crew for a vessel were not subject to in personam jurisdiction in dock damage case in Massachusetts;** *American Home Assurance Co. v. M/V ONE HELSINKI*, No. 20-12153, 2021 U.S. Dist. LEXIS 123501 (D. Mass. July 1, 2021) (Saris).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateAmericanHomev.MVOneHelsinki.pdf)

The ONE HELSINKI broke free from its moorings in Boston and caused damage to a nearby terminal. The terminal’s insurer paid for the damage and brought this subrogation action in federal court in Massachusetts against the vessel, in rem, and various entities in personam. The owner of the vessel and the entity that supplied the crew moved to dismiss the in personam claims against them on the ground that the vessel was bareboat chartered and these entities did not direct the ship to Massachusetts or take any steps to purposefully avail themselves of the privilege of conducting activities in Massachusetts. Agreeing that the purposeful availment condition was not satisfied for these parties, Judge Saris dismissed the case against them (Judge Saris also held that the contacts were insufficient even if the court were to consider the contacts with the United States under Rule 4(k)(2). (*See* the Note above with respect to *Douglass v. Nippon Yusen Kabushiki Kaisha*).

**Magistrate Judge declined to strike experts in damage claim arising from marine construction projects;** *Rhoads Industries, Inc. v. Shoreline Foundation, Inc.*, No. 15-921, 2021 U.S. Dist. LEXIS 124066 (E.D. Pa. July 2, 2021) (Strawbridge).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateRhoadsIndustriiesv.ShorelineFoundation.pdf)

The use of experts is important in maritime cases, and Magistrate Judge Strawbridge addressed motions to strike experts in this case arising out of pile driving work in the Philadelphia Navy Yard, which allegedly caused damage to neighboring properties and structures. Magistrate Judge Strawbridge denied the motions with two limited exceptions: declining the motions with respect to Mark Kilgore on the standard of care for engineers on maritime projects, Edward Garbin, David Wilshaw (except with respect to an opinion that Wilshaw did not actually offer, Bryan Strohman, Bengt Fellenius, and Benjamin Irwin (except as to his analysis that was incomplete at the time of his deposition) as to the pile driving or other factors causing the damage; James Schofield on the age, maintenance, and repair of the plaintiff’s dry dock; and Wesley Grover, Greg Cowhey, and Charles Boland on the damage claims. Magistrate Judge Strawbridge did exclude the expert testimony of John Vitzthum as the expert disclosures with respect to Vitzthum failed to comply with Rule 26(a).

**Mother of deceased operator of Sea-Doo was the only proper claimant for the federal and state claims brought in the limitation action filed by the owner of the Sea-Doo;** *In re Gilfix*, No.21-cv-10330, 2021 U.S. Dist. LEXIS 125070 (E.D. Mich. July 6, 2021) (Friedman).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateGilfix.pdf)

Barry Gilfix, owner of a Sea-Doo personal watercraft, brought this limitation action after the operator of the Sea-Doo, Robert Cottingham, Jr., was killed in a collision with a 31-foot Silverton pleasure craft owned and operated by Jonathan Brown on Lake St. Clair near the mouth of Muscamoot Bay in Michigan. Cottingham’s mother, Sherry Zunk, filed a claim in the limitation action on behalf of Cottingham’s estate and Cottingham’s sisters and grandmother. They alleged that Gilfix was negligent for supplying Cottingham with large quantities of alcohol and allowing him to operate the Sea-Doo in an intoxicated condition. Gilfix moved to dismiss several counts in the claim, and Judge Friedman held that the count under the general maritime law for a negligently caused death did state a claim, but could only be prosecuted by Sherry Zunk, the personal representative of Cottingham’s estate. The wrongful death claim for the beneficiaries under Michigan law had to be dismissed, however, as the Michigan Wrongful Death Statute provides the exclusive remedy under Michigan law, and it does not permit claims by Sherry Zunk or the other family members. The claim allowed under Michigan law was in a separate count brought by Ms. Zunk as the representative of the estate. Consequently, Judge Friedman held that only Sherry Zunk could bring the claims under maritime law and state law. Finally, Judge Friedman declined to dismiss the count that Gilfix had wrongfully invoked the Limitation Act as it went to the merits of the case to be decided on a motion for summary judgment or at trial.

**Liability expert’s opinions were stricken as they would not assist the jury; rehabilitation physician could provide opinions based on his review of records but not from his examination of the seaman after the expert deadline passed; vocational and economic experts could not opine about losses based on the seaman achieving wages as a captain or pilot;** *Riha v. Offshore Service Vessels, LLC*, No. 20-2234, 2021 U.S. Dist. LEXIS 125086 (E.D. La. July 6, 2021) (Ashe).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateRihav.OffshoreService.pdf)

James Riha brought this suit under the Jones Act and general maritime law against his employer for an injury he sustained while working on the M/V TIMBALEER ISLAND (spelling from Riha’s complaint). His employer moved to strike the opinions of Riha’s experts, and Judge Ashe held that the testimony of Captain Jay Rivera as a liability expert would not assist the jury in this case as this was a simple case about a door slamming on the finger of a seaman, “an event entirely within the purview of the jury who can apply common sense to the facts adduced at trial and the law as instructed by the Court.” Judge Ashe held that the testimony of Dr. Craig Lichtblau, a physical medicine and rehabilitation physician was admissible based on his review of the records of the seaman’s treatment; however, his testimony from his examination of the seaman after the expert deadline passed would not be allowed (rejecting the argument that Riha could not see Lichtblau prior the deadline based on the COVID-19 pandemic, as Riha was able to travel and had traveled before the deadline). Judge Ashe held that the testimony of vocational expert Wallace Stanfill and economist Dr. Kenneth Lehrer would not be allowed based on Riha testifying that he intended to work his way up to a master and harbor pilot as Stanfill failed to offer analysis of the industry that would demonstrate the likelihood that Riha would rise through the ranks in the time frame necessary for such an ascent.

**Claimants in limitation actions did not have to assert or establish proper status as a claimant in order to request the lifting of the stay based on the single-claimant exception;** *In re Osage Marine Services, Inc.*, No. 4:21-cv-347, 2021 U.S. Dist. LEXIS 125219 (E.D. Mo. July 6, 2021) (Sippel); *In re Gateway Dredging & Contracting LLC*, No. 4:21-cv-337, 2021 U.S. Dist. LEXIS 127348 (E.D. Mo. July 8, 2021) (Hamilton).

[Opinion Osage Marine](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateOsageMarine.pdf)

[Opinion Gateway Dredging](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateGatewayDredging.pdf)

Two judges from the Eastern District of Missouri reached similar conclusions two days apart with respect to standing to assert the single-claimant exception to the concursus of claims in limitation of liability proceedings. Osage Marine filed a limitation action after it was presented with a death certificate from Candace Love, the only surviving parent of its employee Casey Redmond, who fell from the M/V RAIN MAN into the Mississippi River and drowned. Love filed a claim in the limitation action as Redmond’s parent and sought to lift the stay as the single claimant. Osage Marine objected that Love did not have standing to bring the claim because the only person entitled to assert the claim is the personal representative of the seaman. Therefore, she lacked standing to lift the limitation stay. Judge Sippel disagreed, stating that Osage Marine’s argument was addressed to the merits. As there was only one claim, Judge Sippel dissolved the stay and held that the entitlement of the claimant and the nature of relief to which she may be entitled could be addressed in the forum of her choosing.

John Castloo suffered a fatal injury while working on Gateway Dredging’s barge BV1 in the Missouri River, and Gateway Dredging filed the limitation action five days later. His surviving spouse, Amanda Castloo, filed a claim in the limitation action on her behalf and on behalf of the decedent’s surviving children. Gateway Dredging opposed her motion to lift the stay on the ground that she had not established that she was the personal representative of the decedent’s estate. Noting that Amanda Castloo had not had time to seek personal representative status in the short time between her husband’s death and the filing of the claim, Judge Hamilton allowed her to seek to dissolve the stay in the circumstances of this case. As her stipulations were inadequate to protect Gateway Dredging’s limitation rights, Judge Hamilton denied the motion to lift the stay without prejudice to filing revised stipulations.

**United States court declined to give effect to foreign bankruptcy proceeding until the foreign bankruptcy was recognized by a bankruptcy court in the United States;** *HFOTCO, LLC v. Zenia Special Maritime Enterprise*, No. H-19-3595, 2021 U.S. Dist. LEXIS 126127 (S.D. Tex. July 7, 2021) (Miller).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateHFOTCOv.ZeniaSpecial.pdf)

Houston terminal owner HFOTCO brought this action against the interests of the MINERVA ZENIA, which was docked at the terminal and damaged the dock when the X-PRESS MACHU PICCHU, formerly the CONSTANTIN S, passed the docked vessel at an allegedly unsafe speed. The interests of the MINERVA ZENIA brought a third-party action against the interests of the CONSTANTIN S, and the owner of the CONSTANTIN S responded by asserting that the Houston federal court should recognize and give comity to the owner’s German bankruptcy proceeding. Judge Miller declined to grant relief to the interests of the CONSTANTIN S, however, until the appointed representative in its German insolvency proceeding applied for recognition in a bankruptcy court in the United States. Similarly, Judge Miller declined to require that security be posted on behalf of the CONSTANTIN S pending the petition for recognition of the foreign insolvency proceeding.

**Fully loaded liquified gas carrier that collided with a tug and tow was found 100% liable based on its excessive speed for its poor handling ability;** *Kirby Inland Marine v. FPG Shipholding Co.*, No. 3:19-cv-207 (S.D. Tex. July 8, 2021) (Brown).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateKirbyInland-v.FPGShipholding.pdf)

The liquified-gas carrier, GENESIS RIVER, was proceeding outbound in the Houston Ship Channel, full loaded, and down by the bow, rendering it sluggish and difficult to handle. The vessel’s captain did not advise the two pilots that the vessel would be difficult to handle and that the voyage plan called for a maximum safe speed of 6 to 8 knots. The pilots noted that the vessel was difficult to handle and required “lots of rudder” to break sheers, but Captain Charpentier ordered the engines to full sea speed (12 knots) about halfway through the transit. The vessel began sheering after passing an inbound vessel, the BW OAK, using the Texas chicken passing arrangement for which the Houston Ship Channel is known, and struck one of the tank barges in tow of Kirby’s tug VOYAGER. The barge leaked reformate into Galveston Bay, leading to a large number of damage claims. Kirby filed a petition for exoneration under the Oil Pollution Act and general maritime law, asserting that the owner and manager of the GENESIS RIVER were solely at fault for the collision. The GENESIS RIVER defendants blamed the VOYAGER and BW OAK, and the case was presented in a bench trial to Judge Brown. Judge Brown found that the GENESIS RIVER was solely at fault for excessive speed for a vessel that was experiencing difficulty in handling. Because the GENESIS RIVER was found to have violated the Inland Navigation Rules, Judge Brown held that the liability limits of the Oil Pollution Act did not apply.

**Beneficiaries of Navy sailor failed to satisfy the requirement of the bare metal defense that the turbines required the incorporation of asbestos insulation;** *In re Asbestos Products Liability Litigation (No. VI), DeVries v. General Electric Co.*, No. 5:13-cv-00474, 2021 U.S. Dist. LEXIS 127023 (E.D. Pa. July 8, 2021) (Robreno).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateAsbestosProductsLiabilityLitigation.pdf)

Beneficiaries of John DeVries, who served as a sailor on Navy destroyer U.S.S. TURNER, claimed that DeVries was exposed to asbestos dust from insulation attached to the turbines which were delivered by GE to the shipyard “bare metal” (without insulation). The district court originally granted GE a bare metal defense, holding that GE was not liable for injuries caused by asbestos parts that were not supplied by that manufacturer. The Supreme Court remanded the case after announcing the test for the bare metal defense under maritime law in *Air & Liquid v. DeVries*, and Judge Robreno applied the newly formulated test. The first prong of the test enunciated by the Supreme Court is whether the product requires incorporation of the part. The beneficiaries produced evidence that some land-based turbines were manufactured by GE with asbestos insulation, and, in some cases, GE chose or specified asbestos insulation. However, the beneficiaries were unable to produce evidence that GE specified or directed the incorporation of asbestos insulation for the turbines used on the TURNER. As other functionally equivalent insulation types were available that would have allowed the turbines to function properly, the turbines would not have been useless without asbestos insulation. Consequently, Judge Robreno granted summary judgment to GE.

**Sexual assault victim on cruise ship adequately pleaded negligent security, negligent failure to warn, and intentional infliction of emotional distress but would have to replead her claims of negligent hiring, negligent misrepresentation, and negligent infliction of emotional distress; pleading legal arguments was impermissible;** *Doe v. Royal Caribbean Cruises Ltd.*, No. 20-25152, 2021 U.S. Dist. LEXIS 127790 (S.D. Fla. July 8, 2021) (Scola).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateDoev.royalCaribbean.pdf)

A passenger on the LIBERTY OF THE SEAS brought this action against the cruise line asserting that she was sexually assaulted by a crewmember of the vessel. The cruise line moved to dismiss the various counts of her complaint, and Judge Scola addressed the sufficiency of her pleading. As the passenger failed to plead facts establishing that the cruise line was put on notice of the harmful propensities of the employee, Judge Scola dismissed the counts of negligent hiring, retention, and supervision. Although Judge Scola was skeptical that a failure to warn of the risk of sexual assault on its vessel was a proximate cause of the sexual assault in this case, he did not dismiss the failure-to-warn count on the ground that it was duplicative of the passenger’s count of strict liability for sexual assault. Judge Scola dismissed the claim of negligent misrepresentation under the heightened pleading standard of Rule 9(b) for lack of allegations of the timing of the purportedly false statements and lack of allegations that the cruise line should have known it made materially false statements. As Judge Scola could not conclude that the cruise line’s alleged negligent warning of the risk of crime on the vessel put the passenger in immediate risk of physical harm, Judge Scola dismissed the count of negligent infliction of emotional distress. Judge Scola declined to dismiss the count alleging negligent security. The cruise line argued that the count was duplicative of the count of strict liability for an assault on a passenger, but Judge Scola held that the pleading alleged negligence separate from the assault, such as failure to have sufficient cameras, failure to enforce training on sexual harassment, and failure to thoroughly investigate reports of sexual harassment. With respect to the count alleging intentional infliction of emotional distress, Judge Scola noted that the cruise line could be held strictly liable for the sexual assault. Therefore, he reviewed the allegations asserted by the passenger of the conduct of the crewmember and held that the claims for the crewmember’s actions were sufficient to constitute intentional infliction of emotional distress. Consequently, he held that the count could stand against the cruise line. Finally, Judge Scola ruled that citations in the complaint to the Pennsylvania Rule were legal arguments that did not have any place in a complaint and he ordered that they be struck. He permitted the passenger to file an amended pleading in accordance with his order.

**Court awarded attorney fees for marina’s successful damage claim (based on breach of contract) at $300 per hour and reduced the time and expenses to the extent of the marina’s unsuccessful tort claim;** *Crown Bay Marina, L.P. v. Subbase Drydock, Inc.*, No. 2018-68, 2021 U.S. Dist. LEXIS 129178 (D.V.I. July 12, 2021) (Miller).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateCrownBayMarinav.SubbaseDrydock.pdf)

This case involves trials of damage to a marina’s docks during Hurricane Irma. Reef secured its vessels MORNING STAR and EVENING STAR at Crown Bay Marina docks in anticipation of the Hurricane making landfall on St. Thomas. Both vessels remained tied to the dock during the storm, but the dock sustained damage and the marina brought this action seeking to recover for the cost to repair and restore the facility. Reef moved for summary judgment on the claims, and the marina filed a cross-motion for summary judgment. Reef’s motion was based on the fact that the vessels did not sustain significant damage and remained securely moored in their slips. The marina asserted that Reef was liable for the damage to the dock pursuant to the provision in the License Agreement for Dockage, which provided that Reef would be liable for all damages to facilities caused by the vessels. The parties presented substantially different versions of what caused the damage, resulting in Magistrate Judge Miller concluding that negligence and causation were disputed so that the case could not be decided on summary judgment. *See* November 2020 Update. Subbase Drydock, a marine repair and maintenance company, was agent and custodian of the vessels M/V CULEBRA II and M/V CARIBENA. When the Hurricane approached St. Thomas, Subbase secured the vessels at Crown Bay Marina and signed the marina’s License Agreement for Dockage for the vessels. Both vessels broke free during the storm, and the marina brought this suit seeking to recover from Subbase for the damage sustained by the marina. Subbase moved for summary judgment that it was not the party that was responsible under the agreement and that the marina’s negligence claim was precluded by the gist of the action doctrine. The marina argued in its cross motion for summary judgment that Subbase was liable under the contracts to the same extent as the vessels’ owner. Concluding that the contract was ambiguous with respect to the responsibility of Subbase, Judge Miller declined to grant summary judgment to either party on the contract claim. With respect to the marina’s tort claim, Subbase argued that the duties asserted by the marina flowed from the contract, which addressed the responsibility for the breach of those duties. Thus, the tort claim could not stand apart from the contract claim (gist of the action doctrine). The marina argued that Subbase could be liable in tort regardless of whether there was a contract, and that it could certainly have sued Subbase for its alleged negligence if there had not been a contract. However, Magistrate Judge Miller held that the tort and contract claims would have to be resolved at trial. *See* November 2020 Update. Magistrate Judge Miller reached different results in trial of the two cases. With respect to the marina’s claims against Reef, she concluded that the evidence did not establish that the vessels made contact with the docks and that the condition of the docks before the Hurricane was inconclusive so that causation for damages could not be established even if there were contact. Additionally, Magistrate Judge Miller did not find that Reef failed to exercise reasonable care in its tying off of the vessels. Consequently, she held that the marina failed to establish the elements of a maritime negligence claim. Finally, the absence of evidence that the Reef vessels caused damage to the dock was fatal to the claim for breach of contract. In contrast, Magistrate Judge Miller found that the Subbase vessels did cause some of the damage to the marina dock facilities. However, she concluded that Subbase did not act unreasonably and was not liable for maritime negligence. Nonetheless, the contract provided that Subbase, which signed as “Owner” of the vessels, was liable for damages caused by the vessels. Therefore, Magistrate Judge Miller entered judgment in favor of the marina for the damages she found to have been caused by the Subbase vessels, together with prejudgment interest and attorney fees (as provided by the contract). (*See* May 2021 Update). The marina then sought to recover attorney fees and costs against Subbase based on the provision in the contract. As the agreement provided that the laws of the Virgin Islands and the United States governed the agreement, Magistrate Judge Miller applied the law of the Virgin Islands. The marina requested fees at the hourly rate of $400 based on the more than 20 years of experience of its attorney, but Magistrate Judge Miller responded that the courts in the Virgin Islands had been awarding rates from $125 to $300 an hour for many years and that those figures continued to be recognized as the prevailing rates. She rejected the marina’s argument that this was an admiralty case with unique aspects and agreed with Subbase that the case was just a tort and contract claim for property damage that was not particularly complicated. Consequently, she awarded fees of $300 per hour after reducing the hours for time spent specifically on the unsuccessful negligence claim and for other items she did not consider reasonable. Magistrate Judge Miller next addressed the marina’s request for a contingency multiplier of 50% of the lodestar (because the attorney agreed to handle the case on a one-third contingency) plus a delay multiplier of 10% of the lodestar. Concluding that the marina failed to establish the elements for a multiplier of the lodestar, she rejected the arguments. Finally, Magistrate Judge Miller reduced a number of the expenses sought by the marina to the extent they were incurred for the unsuccessful negligence claim.

**Judge reconsidered ruling that material barges were necessaries for vessel involved in decommissioning of an offshore platform and denied attorney fees for lienors absent a contract or statutory provision;** *Arc Controls, Inc. v. M/V NOR GOLIATH*, No. 1:19-cv-391 c/w No. 1:19-cv-935, 2021 U.S. Dist. LEXIS 129025 (S.D. Miss. July 12, 2021) (Guirola).

[Opinion Reconsideration](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateArcControlsv.GoliathReconsideration.pdf)

[Opinion Attorney Fees](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateArcControlsv.GoliathOpinionattorneyfees.pdf)

These decisions arise from services performed in connection with a vessel used in the decommissioning and salvaging of an offshore platform are necessaries. Epic Companies sought to decommission an abandoned oil platform and chartered the M/V NOR GOLIATH, a ship equipped with a crane, to perform heavy lifts for the construction/deconstruction work. The vessel was arrested by a company that had not been paid for necessaries, and other parties filed interventions asserting liens for necessaries on the NOR GOLIATH. Entier provided catering services for the vessel and filed a motion for summary judgment that included the invoices specifying the catering services for the vessel, including its crew and visitors and guests on the vessel. That raised the question whether catering for those who were required for the decommissioning project (but were not members of the crew of the vessel) contributed to the mission of the vessel to perform heavy lifts. As that question could not be answered from mere submission of the invoices, Judge Guirola declined to grant summary judgment to Entier for the total amount of its invoices. MARMAC sought to enforce a lien for supplying material barges to the project, claiming that the barges were necessary to the NOR GOLIATH because it could not complete a lift and move on to the next lift without a barge for the lifted material. Judge Guirola agreed and held that MARMAC was entitled to partial summary judgment, but he drew the line with the contention that the services of the tugs that moved the barges were necessaries. Although the claim was “seductive,” Judge Guirola held that the beneficiaries of the services of the tugs were the material barges, not the NOR GOLIATH. (See June 2021 Update). The NOR GOLIATH sought reconsideration of the ruling that MARMAC had a lien for necessaries, attaching an affidavit stating that the NOR GOLIATH could perform its function without the use of material barges. Concluding that the affidavit created a fact question whether the material barges provided necessary services for the NOR GOLIATH to perform its work, Judge Guirola denied MARMAC’s motion for summary judgment. The NOR GOLIATH also sought to dismiss the requests of the lienors for attorney fees for the lien claims against the NOR GOLIATH. As attorney fees are not recoverable absent a statutory or contractual provision, Judge Guirola dismissed the claims, noting that the claimants could seek attorney fees as a sanction if they were able to demonstrate bad conduct on the part of the NOR GOLIATH.

**Judges addressed jurisdiction, pleading, and damages in cruise line COVID-19 cases;** *Landivar v. Celebrity Cruises Inc.*, No. 21-20815, 2021 U.S. Dist. LEXIS 129754 (S.D. Fla. July 12, 2021) (Altonaga); *Paul v. Celebrity Cruises, Inc*., No. 21-20814, 2021 U.S. Dist. LEXIS 133037 (S.D. Fla. July 15, 2021) (Lenard).

[Opinion Landivar](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateLandivarv.CelebrityCruises.pdf)

[Opinion Paul](https://www.brownsims.com/wp-content/uploads/2021/08/LongshoreUpdatePaulv.CelebrityCruises.pdf)

Alcides Landivar and his wife, Maria Gutierrez, brought this action against Celebrity Cruises, asserting that Landivar contracted COVID 19 while a passenger on the CELEBRITY ECLIPSE. The plaintiffs are citizens of Bolivia, and, in the absence of diversity, they brought the action pursuant to the court’s admiralty jurisdiction. Nonetheless, the plaintiffs sought an advisory jury trial under the saving-to-suitors clause. Judge Altonaga denied the request for an advisory jury, noting that the plaintiffs gave no reason why the court should spend the time and cost for a jury for claims that fell solely within the admiralty jurisdiction. Judge Altonaga next struck Gutierrez’s claim for loss of consortium, citing the decisions of the Eleventh Circuit that loss of consortium damages are not recoverable for personal injury claims under the general maritime law (also citing the *Parker* case from the court in California dismissing the consortium claim for the spouse of a passenger who allegedly contracted COVID-19 on the defendant’s cruise ship). Finally, Judge Altonaga held that the claims of negligent misrepresentation were sufficiently pleaded based on the statement of the ship’s captain that “all guests onboard remain healthy and happy” and statements of the cruise line about the good health of its passengers that were not merely puffery or sales talk in the midst of a global pandemic.

In the second case, Adlyn Poe Paul brought the suit alleging that her husband, Gerald Paul, died from COVID-19 that he contracted aboard the CELEBRITY ECLIPSE. Her complaint alleged that she and her husband were citizens of the United States and residents of the state of Georgia, and that the cruise line was a foreign entity with a principal place of business in Florida. As the statements as to the plaintiff’s residence did not establish citizenship in Georgia, the pleading of diversity was insufficient, and Judge Lenard therefore held that the case fell within the court’s admiralty jurisdiction. The cruise line then argued that the plaintiff’s claims for wrongful death and survival damages under Florida law should be dismissed as the decedent contracted COVID-19 on the high seas and the plaintiff could only recover pecuniary losses under the Death on the High Seas Act. The plaintiff argued that DOHSA did not apply because she alleged negligent acts, such as failure to warn, that occurred on land. However, the cruise line cited the numerous cases rejecting that argument in the case of deaths on the high seas, and Judge Lenard cited the cases holding that the place where the person contracted COVID-19 determines the applicability of DOHSA. As the complaint did not allege where the decedent contracted COVID-19, Judge Lenard dismissed the claims under state law without prejudice, allowing the plaintiff to plead the location where the decedent contracted the disease. Although Gerald Paul actually contracted COVID-19, one of the claims in the complaint sought recovery for negligent infliction of emotional distress for pre-illness fear of contracting COVID-19. Citing the cases that held that plaintiffs cannot recover based on exposure to persons with COVID-19 and their fear of contracting the disease, even then they actually contract the disease, Judge Lenard dismissed the “fear-of” negligence claim. Finally, Judge Lenard held that the plaintiff failed to plead outrageous conduct sufficiently to state a claim for intentional infliction of emotional distress.

**Employer established *McCorpen* defense for seaman’s shoulder injury but not for his neck injury; some opinions of the seaman’s liability expert were stricken;** *Wiley v. Marquette Transportation Co.*, No. 5:19-cv-00149, 2021 U.S. Dist. LEXIS 130326, 133129 (W.D. Kent. July 12, 16, 2021) (Russell).

[Opinion summary judgment](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateWileyv.Marquetteopinionsummaryjudgment.pdf)

[Opinion liability expert](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateWileyv.Marquetteopinionexpert.pdf)

Kevin Wiley sustained injuries to his neck and shoulder in incidents while working as a crewmember on the MARY KAY ECKSTEIN. His employer, Marquette, moved for partial summary judgment on Wiley’s maintenance and cure claim based on willful concealment of preexisting problems with his neck and shoulder. Applying the elements of the *McCorpen* defense, Judge Russell concluded that Marquette satisfied the requirements of intentional misrepresentation/concealment and materiality. Judge Russell also held that the pain in Wiley’s shoulder only three months prior to his employment was sufficiently causally connected to his shoulder injury and sustained the *McCorpen* defense with respect to the shoulder injury. However, Judge Russell concluded that Wiley’s neck symptoms were not substantially similar to his prior neck problems and held that Marquette had not established a *McCorpen* defense for Wiley’s claim for maintenance and cure for his neck injury. Marquette also moved to exclude the opinions of Wiley’s liability expert, John Pierce of Range Line Maritime Consulting. As Pierce had no experience that would allow him to testify as to medical causation, Judge Russell held that Pierce could not allude to or testify to the medical cause of Wiley’s injuries. Judge Russell agreed that Pierce could testify about a 52-pound lifting restriction in the maritime industry, but that Pierce was not qualified to testify to the impact of repetitive or excessive lifts on Wiley. Judge Russell held that Pierce was not qualified to testify to a causal link between the failure to perform a job safety analysis and Wiley’s injury or the likelihood of injury if a job safety analysis had been performed, although Pierce was qualified to testify about the options a job safety analysis would have revealed and how they differed from the activities Wiley was required to perform. Judge Russell agreed that Pierce could testify that the crew prematurely, and without warning, took steps that caused Wiley to rush down the tow knee steps (even though Pierce had never visited the vessel and his testimony contained an inaccuracy about the steps) based on his experience with similar vessels, pictures of the MARY KAY ECKSTEIN, and deposition testimony. Judge Russell held that Pierce could testify about stop work authority over Marquette’s objection that the testimony did not require specialized knowledge, but Pierce could not testify regarding safe lifting weight/techniques with regard to stop work authority. Finally, Judge Russell agreed to exclude statements that Marquette was trying to blame Wiley and with respect to practices in the offshore industry as they were not relevant to this inland injury.

**New York Convention, not the FAA, governed the arbitration of the estate of a deceased foreign seaman against the cruise line, and evident partiality is not a basis for challenging the arbitration award under the Convention;** *Hamilton v. Royal Caribbean Cruise Lines*, No. 21-20906, 2021 U.S. Dist. LEXIS 130684 (S.D. Fla. July 13, 2021) (Martinez).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateHamiltonv.RoyalCaribbean.pdf)

Alfonso Hamilton, a citizen of Jamaica, suffered an aortic dissection while serving as a crewmember of the ENCHANTMENT OF THE SEAS and died. His widow, Joy Hamilton, and the cruise line, arbitrated their case under the Collective Bargaining Agreement that applied to Hamilton’s employment, and the arbitrator ruled that Ms. Hamilton was not entitled to any recovery. She then sought to set aside the award under the evident partiality defense provided by the Federal Arbitration Act. Judge Martinez held, however, that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) applied to this case, and the New York Convention does not provide for the vacatur of an award based on evident partiality. However, even if the FAA applied, the plaintiff did not immediately object to the arbitrator after receiving disclosures from the arbitrator and waited until after the decision to raise the issue in her Complaint/Motion to Vacate. Consequently, Judge Martinez confirmed the award (concluding that it could not be set aside under either the New York Convention or the FAA); however, he declined to award attorney fees to the cruise line as Ms. Hamilton “marshaled some support, albeit weak,” for her position.

**Cruise line had no duty to warn passengers of the risk of holding a child over the guardrail through an open window; grandfather’s criminal act was the superseding cause of the accident;** *Wiegand v. Royal Caribbean Cruises*, No. 19-cv-25100 (S.D. Fla. July 13, 2021) (Graham).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateWiegandv.RoyalCaribbean.pdf)

The contentious litigation (arising when an 18-month old passenger on the defendant’s cruise ship died when she fell from the arms of her grandfather, Salvatore Anello, through an open window and to the dock below) reached a conclusion in the district court. The parents of the girl brought this suit against the cruise line, which asserted a number of affirmative defenses in its answer related to the fault of Anello, who was not a party to the suit. The parents moved to strike the defenses, and the cruise line sought to invoke the procedure available under Florida comparative negligence principles (also applicable in other states such as Texas) by which liability can be apportioned to non-parties. Noting that the Eleventh Circuit has held that it is erroneous to apportion fault between a party and a non-party in a maritime action [aside from cases where a tortfeasor has settled], Judge Graham struck the defense, holding that under principles of joint and several liability, the plaintiffs can obtain a judgment for the full amount of liability against any joint tortfeasor without regard to the percentage of fault. Judge Graham did agree, however, that superseding cause is applicable in admiralty cases to exculpate a defendant from liability, and the plaintiff’s assumption of risk is applicable in conjunction with the doctrine of comparative negligence. Applying those principles to the affirmative defenses asserted, Judge Graham held that the argument that the plaintiffs negligently entrusted the care of their daughter to Anello and should therefore share in his responsibility by comparative negligence should be stricken as an attempt to apportion fault to Anello, a non-party. However, the pleading that Anello’s actions constituted a superseding cause that terminated the causal relationship between the cruise line’s alleged negligence and the passenger’s death would, if successful, exculpate the defendant from liability and was not stricken. As the allegation that the parents and Anello assumed the risk of a dangerous condition had to be applied in conjunction with the comparative fault defense, Judge Graham struck that defense as it could have attributed some of the comparative fault of Anello to the parents and because it sought to completely bar recovery rather than to apportion it by percentage fault. (*See* August 2020 Update). The plaintiffs then moved for partial summary judgment on the cruise line’s comparative fault defense, and the cruise line moved for summary judgment that it owed no duty to warn because the damage of placing a child by or on an open window is open and obvious and that it had no notice of the risk-creating danger in connection with the claim of negligent failure to maintain. Starting with the notice argument, Judge Graham held that a prior incident in which a child climbed on top of furniture placed near an open window was not sufficiently similar to provide notice of the fall hazard in this case and that the cruise line’s warnings about sitting, standing, or climbing on railings did not indicate constructive notice of the risk of holding a child over a handrail. Similarly, the remedial measures taken with respect to rails and window heights did not reflect notice of the actual danger, which was lifting a child up to an open window. Noting that Anello testified that he reached his hand out to touch the window and did not feel any glass, Judge Graham held that a reasonable person would have known of the dangers associated with Anello’s conduct, so the cruise line had no duty to warn of the open and obvious danger of exposing his granddaughter to the open window and the dock below. As the cruise line did not establish that the girl’s parents were negligent, and as Anello was not a plaintiff in the suit, Judge Graham granted summary judgment to the plaintiffs dismissing the affirmative defense of comparative negligence. Finally, Judge Graham addressed the cruise line’s argument that the criminal act of Anello (he pled guilty to negligent homicide) was an intervening act and superseding cause that cut off any liability that the cruise line might have had. Although Judge Graham had denied the defense prior to discovery, he held that no evidence had been developed in discovery to establish that the cruise line knew or should have known that there was a risk of an adult lifting a child over the guardrail and through an open window. Applying the presumption that independent illegal acts of third persons are deemed unforeseeable and are therefore the sole proximate cause of the injury, Judge Graham found insufficient evidence to circumvent the presumption and concluded that no reasonable jury could find that Anello’s conduct was foreseeable.

**P&I carrier may not have had a duty to defend its insured, but its duty to indemnify the insured for defense costs gave the commercial marine insurer the right to pursue the P&I carrier for reimbursement of defense costs;** *Starr Indemnity & Liability Co. v. AGCS Marine Insurance Co.*, No. 20-cv-5321, 2021 U.S. Dist. LEXIS 131239 (S.D.N.Y. July 14, 2021) (Failla).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateStarrIndemnityv.AGCSMarine.pdf)

Daniel Lerma was injured while standing on a barge owned by R.E. Staite as a result of the negligent operation of a shoreside crane by employees of R.E. Staite. Staite’s broker tendered the defense of Lerma’s suit to Staite’s P&I carrier, AGCS, which rejected the tender. Staite’s commercial marine liability insurer, Starr Indemnity, defended the suit until the suit was discontinued, incurring $164,053.77 in defense costs. Starr then brought this action seeking to recover the defense costs from AGCS, and AGCS moved to dismiss the action. Judge Failla first had to determine what state’s law to apply to the policies under *Wilburn Boat*, and, citing the factors from *Lauritzen v. Larsen*, she held that California law should apply as the predominant hub of relevant activity [*compare* *RMI Holdings v. Aspen American Insurance Co.*, discussed above, in which the Eleventh Circuit applied the Restatement (Second) Conflict of Laws]. AGCS argued that its policy is a protection and indemnity policy, so there is no duty to defend the insured. Judge Failla agreed, but she also noted that the P&I insurer has a duty to reimburse the costs of defense as long as the insured obtained the insurer’s consent to incur defense costs, approval could not be obtained without unreasonable delay, or the costs were reasonably and properly incurred. At the stage of a motion to dismiss, this requirement was sufficient to establish a right for Starr Indemnity to seek reimbursement, subject to resolution of the conditions in subsequent proceedings. AGCS also raised a *Lanasse v. Travelers* argument that Staite’s liability did not arise out of its ownership of the barge, but Judge Failla held that the allegations of Lerma sufficiently alleged negligence as part of the repair of the crane on the barge to distinguish *Lanasse* (negligence of the operator of the crane on a platform). Judge Failla then addressed whether equitable subrogation was a proper basis for Starr Indemnity’s claim (as opposed to equitable contribution), and she agreed with Starr Indemnity that the excess “other insurance” clause in the commercial marine policy provided a basis for full recovery as the Starr Indemnity policy would not contribute until the AGCS policy was exhausted [what about the” cover elsewhere” escape clause in the SP 23 P&I form?]. Judge Failla also rejected AGCS’s argument that the term “loss” in Starr Indemnity excess other insurance clause did not apply to defense costs, holding that the term applies both to the damages and defense costs. Finally, Judge Failla held that Starr Indemnity sufficient asserted an unjust enrichment claim as, in light of the excess “other insurance” clause, Starr Indemnity paid defense costs that AGCS should have indemnified.

**Limitation court in Louisiana ordered independent medical examinations before addressing the claimant’s motion to bifurcate to allow him to pursue his action in state court; after lifting the stay in the limitation action to allow the single claimant to pursue his injury claim in state court, the federal court in Mississippi declined to allow the federal action to proceed concurrently with the state action;** *In re Mike Hooks, LLC*, No. 2:20-cv-00959, 2021 U.S. Dist. LEXIS 131233 (W.D. La. July 14, 2021) (Kay); *In re Mike Hooks, LLC*, No. 1:18-cv-113, 2021 U.S. Dist. LEXIS 132693 (S.D. Miss. July 16, 2021) (Guirola).

[Opinion Louisiana](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateMikeHooksLouisiana-case.pdf)

[Opinion Mississippi](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateMikeHooksMississippi-case.pdf)

Charles McCoy alleged that he sustained two accidents while serving as chief cook on Mike Hooks vessel E. STROUD. He brought a suit in state court in Calcasieu Parish, Louisiana, and Mike Hooks filed this limitation in Louisiana federal court in which McCoy filed a claim. Mike Hooks moved to compel independent medical examinations with two doctors, and McCoy filed a motion to bifurcate proceedings so that he could proceed with his suit in state court. McCoy argued that the motion to compel should be denied so that a state court could address the dispute, but Magistrate Judge Kay found the argument uncompelling as medical causation could form a part of the court’s limitation analysis and because the federal court was the only forum that currently had the power to order the IMEs. Finding that Mike Hooks had shown good cause for the examinations, Magistrate Judge Kay granted the motion to compel. Mike Hooks also asked for reimbursement for the cost of an examination that McCoy did not attend before the motion to compel was filed, but Magistrate Judge Kay did not find support in Rule 37 (requiring the court to award expenses incurred in making a motion to compel) for a penalty for conduct preceding the motion to compel.

When Chet Norwood Lennie, a deckhand on Mike Hooks’ M/V CAPTAIN ARCHIE, was injured, Mike Hooks filed this action seeking limitation of liability. As Lennie was the single claimant, the parties agreed that the stay should be lifted so that he could pursue an action in Louisiana state court. After the limitation stay was lifted, Mike Hooks sought to reopen the limitation action so that it would run concurrently with the state proceeding for the sake of scheduling purposes and coordinating discovery issues in the state and federal proceedings. Finding Mike Hooks argument to be unpersuasive, Judge Guirola held that he would abstain in the limitation action pending resolution of the claims in state court.

**Daughter of decedent’s ex-boyfriend might be a dependent entitled to recover under DOHSA;** *Sexton v. Carnival Corp.*, No. 20-20990, 2021 U.S. Dist. LEXIS 131714 (S.D. Fla. July 15, 2021) (Scola).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateSextonv.Carnival.pdf)

Kimberly Sexton and 18 of her family and friends were aboard the CARNIVAL SUNSHINE when she reported to the ship’s medical center with a sore throat and shortness of breath. After she died, cruise line personnel took 36 pictures of her nude body from every angle, without consent from her next of kin. Sexton’s beneficiaries initially brought this suit complaining of the medical treatment, but after the photographs were produced in discovery, the beneficiaries amended their complaint to allege causes of action for tortious interference with a dead body and the tort of outrage. Judge Scola dismissed the outrage claim (*see* December 2020 Update) and then addressed Carnival’s argument that the survivors were not dependent on Sexton and could not recover under the Death on the High Seas Act. This opinion discusses the claim of Claire Hardy, the daughter of Sexton’s former boyfriend (Sexton and Hardy’s father were never married). Hardy continued to live with Sexton after the separation of Sexton and Hardy’s father, and Sexton provided her necessities, although Sexton did not formally foster or adopt Hardy. DOHSA permits a dependent relative to recover, and the cruise line argued that Hardy lacked status as a relative of Sexton. Judge Scola rejected that argument, however, stating that a dependent relative includes persons related to the decedent by affinity as well as consanguinity. Although the relationship was not one of consanguinity or formal affinity, Judge Scola held that a factfinder could conclude that Sexton created a voluntary dependent relative status by taking care of Hardy for three years.

**New Jersey companies that built and sold a vessel for a California company to be used in California were not subject to personal jurisdiction in California in litigation arising from an accident in California;** *In re Star & Crescent Boat Co.*, No. 3:21-cv-00169, 2021 U.S. Dist. LEXIS 132149 (S.D. Cal. July 15, 2021) (Benitez).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateStarCrescentBoatCo.pdf)

In our March 2021 Update we discussed the limitation action brought by Star & Crescent after Jade Spurr was injured on August 5, 2018, during a jet boat tour of San Diego Bay on Star & Crescent’s vessel PATRIOT. Spurr brought suit in San Diego Superior Court against Starr & Crescent, which filed this limitation action. Star & Crescent submitted an Ad Interim Stipulation for Value in the amount of $775,000 together with a letter of undertaking in the amount of $750,000 ($25,000 less than the value of the vessel). Judge Benitez found the security to be inadequate and denied the request to stay proceedings without prejudice to resubmission of the security. After Star & Crescent submitted an amended Ad Interim Stipulation and letter of undertaking, Spurr appeared in the action and filed an opposition to the amended security before filing an answer and claim. The basis of the opposition was that there was no jurisdiction over the limitation action because it had not been filed within six months of written notice of the claim. Star & Crescent argued that Spurr did not have standing to challenge the limitation action, but Judge Benitez disagreed. He reasoned that the court could examine its jurisdiction at any time, even before an answer and claim were filed. Spurr’s counsel sent written notice on October 8, 2018, advising that he would be representing Spurr. Star & Crescent responded by requesting documentation and information to support the claim for damages and liability. Spurr’s counsel sent several responses, including a letter on April 5, 2019, enclosing a report from a neurologist diagnosing Spurr with a diffuse traumatic brain injury. Star & Crescent requested medical bills, and Spurr’s counsel responded that there was insufficient billing information to send at that time. No correspondence from Spurr’s counsel provided information as to the amount of damages that Spurr was seeking. The suit in state court was filed on July 31, 2020, and the limitation action was filed on January 28, 2021, within six months of the state suit, but outside of six months from correspondence with the medical report reflecting the traumatic brain injury. Judge Benitez held that the correspondence was insufficient to trigger the six-month period to file the limitation action. He agreed that the notices did not have to include a monetary amount to trigger the filing requirement; however, it did not follow that Spurr’s suffering from a traumatic brain injury was sufficient notice that the amount of the claim would exceed the value of the vessel ($775,000). Judge Benitez did note that a demand in excess of the value of the vessel or submission of the requested medical bills would like have resulted in the case being time barred. Judge Martinez then approved the revised security and granted the limitation stay/injunction. (*See* May 2021 Update). Judge Benitez was then presented with another procedural issue. The vessel owner/petitioner, Star & Crescent, named the vessel builder/seller as defendants in the limitation action (rather than adding them as third parties). The vessel owner is a California company that contracted for the vessel to be built in New Jersey and delivered in New Jersey by New Jersey companies. The builder/seller knew that the vessel was to be used in California, which is where the accident occurred that resulted in the limitation action in California. However, the negotiations with the California owner for a vessel to be used in California were not sufficient to establish personal jurisdiction over New Jersey companies that built the vessel in New Jersey and delivered it in New Jersey. Consequently, Judge Benitez dismissed the New Jersey defendants, for want of personal jurisdiction, without prejudice.

**Federal court lacked jurisdiction for removal of passenger’s malpractice action against cruise line;** *White v. Viera*, No. 21-cv-22484, 2021 U.S. Dist. LEXIS 131710 (S.D. Fla. July 15, 2021) (Bloom).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateWhitev.Viera_.pdf)

Michele White brought a legal malpractice action in state court in Miami, Florida, against Fred Viera, Isabel Yague, and Viera Yague, PLLC for their purported failure to prosecute White’s maritime tort claim against Royal Caribbean Cruise Line. After White amended her complaint and incorporated her ticket into her pleading, the attorneys removed the action to federal court based on the mandatory forum-selection clause in the ticket. After reviewing the notice of removal, Judge Bloom sua sponte remanded the case. She held that the malpractice case did not give rise to maritime jurisdiction and the forum-selection clause did not apply to the claims against the attorneys.

**Court declined to overturn arbitration award to tankerman on barge based on manifest disregard of the law or for evident partiality based on disclosures after the hearing but eight months before the award;** *Pacelli v. Vane Line Bunkering, Inc.*, No. 2-cv-9431, 2021 U.S. Dist. LEXIS 133033 (S.D.N.Y. July 16, 2021) (Cronan).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdatePacelliv.VaneLine-Bunkering.pdf)

Daniel Pacelli was injured when he slipped on the icy deck of a barge in New York Harbor during a nor’easter. Pacelli brought an arbitration with JAMS, which assigned an arbitrator and disclosed that the arbitrator had no prior or open cases with any of the parties, but did have one open case involving counsel for the vessel owner. After the arbitration hearing, the arbitrator disclosed that he was an owner panelist of JAMS (but had not received a profit distribution of more than a tenth of a percent of JAMS total revenue in a given year) and that JAMS had one open arbitration case, four closed arbitration cases, and one closed mediation with the vessel owner in the past five years and several arbitrations and mediations with defense counsel. Pacelli did not object at that time, and more than eight months later the arbitrator issued an award of $986,750 in damages with the vessel owner liable for 30% fault ($296,025). Pacelli petitioned to vacate the award, and Judge Cronan held first that Pacelli could not meet the “high hurdle” that an award may not be vacated for manifest disregard of the law if there is a “barely colorable justification” for the outcome. Pacelli also challenged the award for evident partiality, arguing that the arbitrator created an appearance of bias when he disclosed his ownership interest in JAMS and JAMS’s involvement with other cases involving the vessel owner and its counsel. Pacelli explained his failure to object to the disclosure that was made after the hearing because he did not want to antagonize the arbitrator and it would not have been easy to start over with a new arbitrator. Judge Cronan pointed out that Pacelli was now asking to start over with a new arbitrator and that he had not objected during the eight months after the disclosure. Additionally, Pacelli failed to show that the arbitrator’s ownership in JAMS or the arbitrator’s involvement in the other arbitrations or mediations with the vessel owner and its counsel were material or connected to the ultimate outcome of Pacelli’s arbitration. Consequently, Pacelli failed to satisfy the burden to establish evident partiality in the award. Finally, the court declined to modify the award to grant Pacelli prejudgment interest, noting that courts are loath to disturb the decision of an arbitrator not to award prejudgment interest.

**Navy sailor’s beneficiary failed to elicit evidence to link his mesothelioma to Nash Engineering’s product but did defeat Foster Wheeler’s motion for summary judgment with respect to exposure from its boilers and the argument that Foster Wheeler had a duty to warn about the dangers associated with third-party replacement parts under *DeVries*;** *In re Asbestos Litigation Doris Anne Cox*, No. 19-548, 2021 U.S. Dist. LEXIS 133183, 133188 (D. Del. July 16, 2021) (Fallon).

[Opinion Nash Engineering](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateAsbestosLitigationopinionNashEngineering.pdf)

[Opinion Foster Wheeler](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateAsbestosLitigationopinionFosterWheeler.pdf)

Harold Cox died from mesothelioma that he claimed resulted from his exposure to products containing asbestos while he served as a boiler tender in the Navy on the USS CHUKAWAN. Doris Anne Cox continued the suit after his death. The plaintiff’s expert could not identify any Nash Engineering product as a cause of Cox’s harmful exposure to asbestos, and Magistrate Judge Fallon recommended that Nash Engineering be dismissed. In contrast, the plaintiff presented evidence that Cox worked directly on Foster Wheeler boilers on the vessel, removing the rope seal (believed to contain asbestos) inside the boiler’s doors, that he cleaned gaskets on the boiler door, filling the air with asbestos particles, replaced the gaskets (leading to the release of asbestos particles), cleaned out fire tubes inside one of the boilers (believed to contain asbestos), and that Cox had secondary exposure in the boiler room from others performing similar work. Magistrate Judge Fallon considered the evidence of causation to be sufficient and addressed the question under *Air & Liquid Systems Corp. v. DeVries* whether Foster Wheeler had a duty to warn because its product required replacement parts that contained asbestos in order for the boilers to function as intended. As the plaintiff cited evidence from Foster Wheeler that asbestos containing calcium silicate was specified by Foster Wheeler for use on every boiler, Magistrate Judge Fallon found a fact question and recommended the denial of Foster Wheeler’s motion for summary judgment.

**Owner of resort property that was operated under a license to the owner’s LLC and who opted out of the DEEPWATER HORIZON economic and property damages settlement had standing to pursue an economic loss claim for the resort;** *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010*, No. 16-05277, 2:10-md-2179, 2021 U.S. Dist. LEXIS 133698 (E.D. La. July 19, 2021) (Barbier).

John DeSilva brought this action seeking to recover economic losses from BP related to his resort property in St. Pete Beach, Florida, that was licensed under his wholly-owned company, The Bird of Paradise, LLC. BP challenged the standing of DeSilva to bring the claim on the grounds that the opt-out form from the class action settlement of economic damage claims from the DEEPWATER HORIZON/Macondo blowout was filed by The Bird of Paradise, LLC by John DeSilva, and the license to operate the resort was in the name of the LLC. Additionally, BP argued that the claim was not owned by DeSilva as the business was sold in 2017. Judge Barbier held that DeSilva did have standing to bring the claim as he had been the owner of the property and a cover letter by which the opt-out form was submitted was submitted on behalf of John DeSilva and The Bird of Paradise, LLC. With respect to the sale, DeSilva submitted evidence that the buyer had assigned the damage claim back to DeSilva. Judge Barbier did note that DeSilva and his attorney had misrepresented facts to the court with respect to the sale of the LLC, and he ordered DeSilva and his attorney to show cause why sanctions should not be awarded to BP for the expenses and fees incurred by BP and/or to the court as a fine.

**Evidence that asbestos dust could be released from the defendant’s product was insufficient to establish the amount or duration of exposure necessary to establish that the defendant’s product was a substantial factor in causing the seaman’s mesothelioma;** *Wineland v. Air & Liquid Systems Corp.*, No. C19-0793, 2021 U.S. Dist. LEXIS 134243 (W.D. Wash. July 19, 2021) (Lasnik).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateWinelandv.AirLiquid.pdf)

John Dale Wineland died from mesothelioma that he claimed was caused by exposure to asbestos contained in Alfa Laval products while he served in the engine rooms of United States Navy vessels. Wineland’s beneficiaries were able to raise an inference that asbestos dust could have been released in the engine rooms from Alfa Laval pumps and purifiers; however, Judge Lasnik noted that the activities in which the products were torn down or overhauled were rare and the beneficiaries were unable to show the duration or amount of the exposure. The evidence was therefore insufficient to satisfy the maritime requirement that the exposure be a substantial factor in causing the disease, and Judge Lasnik granted summary judgment to Alfa Laval.

**Shipowner’s suit against former insurance broker for advice in connection with coverage for asbestos claims was untimely;** *Cosmopolitan Shipping Co. v. Marsh USA, Inc.*, No. 18-cv-3167, 2021 U.S. Dist. LEXIS 139854 (S.D.N.Y. July 27, 2021) (Schofield).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateCosmopolitanShippingv.Marsh_.pdf)

Cosmopolitan Shipping entered into settlements with seamen who alleged injuries from exposure to asbestos while sailing on ships that it chartered in the 1940s. Cosmopolitan then sought insurance coverage under a Continental protection and indemnity policy issued for the period from 1946 to 1947 that covered the United Nations Relief and Rehabilitation Administration for which Cosmopolitan chartered the vessels on which the seamen were exposed to asbestos. Cosmopolitan sought to establish insurance coverage by relying on secondary evidence of the terms of the policies as Continental was not able to find any policy for the relevant time frame. Based on three endorsements that were located, Judge Schofield was able to conclude that Continental had issued an open-cover P&I policy covering injuries and deaths, and Cosmopolitan tried to provide evidence of the terms of the policy based on other policies that were issued at the time. However, there were not enough similarities in the other policies (particularly because the Continental policy was an open-cover policy) to allow Judge Schofield to ascertain policy terms (such as how much insurance Continental had agreed to provide). Consequently, Judge Schofield held that Cosmopolitan had failed to establish that it was afforded coverage for the settlement of the asbestos claims. (*See* February 2021 Update). Unsuccessful against its insurer, Cosmopolitan sought to recover against its former broker, Marsh. In 1995, the owner of Cosmopolitan had a phone conversation with the claims advocate in the New York City office of Marsh’s Marine Division, Stanley Schiff, concerning possible insurance coverage for the asbestos claims. Schiff followed up with a voicemail message and an email with recommendations that did not include efforts to locate the responsive P&I policy. More than 20 years later, in June 2018, Cosmopolitan added Marsh as a defendant, asserting that Schiff was negligent in the advice given in 1995. Concluding that the claim accrued long before 2012 (six-year statute of limitation in New Jersey; three-year statute of limitation in New York), Judge Schofield held that the case against Marsh was time-barred under either New York or New Jersey law.

**Court had admiralty jurisdiction over hurricane damage claims arising from barge allisions with bridge during bridge construction; court deferred ruling on application of the economic loss rule to damage claimants until after trial on limitation;** *In re Skanska USA Civil Southeast Inc.*, No. 3:20-cv-5980 (N.D. Fla. July 28, 2021) (Collier).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateSkanskaUSA.pdf)

Skanska was engaged by the Florida Department of Transportation to rebuild the Pensacola Bay Bridge. During Hurricane Sally in September 2020, several barges used in the construction broke free and caused damage to the bridge and to other property. Numerous businesses and property owners brought claims in the limitation proceedings brought by Skanska with respect to its barges, and we have previously addressed the scope of discovery. (*See* July 2021 Update). Several of the claimants moved to dismiss Skanska’s limitation action for lack of maritime jurisdiction and, alternatively, on the merits—asserting that Skanska could not establish that it was entitled to limitation of liability. Skanska moved to dismiss the claims of numerous businesses that sought to recover for economic loss resulting from the bridge being out of service (citing the *Robins Dry Dock* economic loss rule), as the businesses had not suffered any physical damage. The claimants conceded that the first prong of the admiralty jurisdiction test (locality) was met because the damage was caused by barges on navigable waters during the bridge construction. The claimants also did not take issue with the first part of the connection test that there was a potential to disrupt maritime commerce. The claimants argued that the general activity giving rise to the incident was not substantially related to traditional maritime activity, describing the activity as constructing a bridge. Judge Collier was persuaded by the Supreme Court’s characterization in *Grubart* (damage to buildings in downtown Chicago from work in the Chicago River driving pilings around a pier supporting a bridge). Judge Collier described the work performed by Skanska as “bridge construction and repair performed from vessels on a navigable waterway,” and he did not require that the work must result in an improvement to maritime activity. Finally, although the claimants asserted that the barges did not constitute vessels, they did so to argue that Skanska did not present a viable limitation action, not to argue that the court lacked admiralty jurisdiction over the damage to the bridge on navigable waters. Consequently, Judge Collier denied the motion to dismiss for lack of admiralty jurisdiction. Judge Collier then addressed the claimants’ motion to dismiss the complaint on the ground that Skanska could not establish that it was entitled to exoneration or limitation from liability. This argument included the contention that the barges were used as construction platforms and not vessels. Skanska countered that the barges were used for transportation purposes to and from the worksite and around the bridge area during the construction. Citing the decision of the Supreme Court in *Stewart v. Dutra*, Judge Collier noted that the primary use of the barges need not be transportation, and that the barge could lose its status as a vessel only if it were rendered incapable of transportation. He rejected the argument that the barges failed to qualify as vessels and found fact questions for trial as to the negligence and privity of Skanska. Judge Collier then addressed Skanska’s motion to dismiss the economic loss claims. Viewing the issue as relating to damages and not liability, he invoked the limitation procedure that the court would hear the liability and limitation issues first. If Skanska does not succeed on its limitation argument, then Judge Collier held that the resolution of the damages, including the application of the economic loss rule, would be addressed by the court tasked with determining damages under the saving-to-suitors clause.

**From the state courts:**

**Findings against the vessel owner in the federal limitation action were given res judicata effect in the state suit after the federal stay was lifted, but res judicata was not applicable to the claims against the marina defendant as the federal court only addressed whether the marina owner owed a duty;** *Mackay v. Paliotta*, No. 2020-04070, 2021 N.Y. App. Div. LEXIS 4470 (N.Y. Sup. Ct. App. Div. 2d Dept. July 14, 2021) (per curiam).

[Opinion](https://www.brownsims.com/wp-content/uploads/2021/07/LongshoreUpdateMacKayvPaliotta.pdf)

The plaintiff’s marina, Last Chance Boat Club, located on the Hudson River in Piermont, New York, was damaged when Chad Paliotta’s sailboat, the INVICTUS, which was moored at the Tappan Zee Marina, broke free from its moorings during Hurricane Sandy and allided with the plaintiff’s marina structures. The plaintiff commenced this action against Paliotta and Tappan Zee, and Paliotta brought a federal limitation action in which Tappan Zee was a party. The federal judge held that Tappan Zee owed a duty to Paliotta and denied limitation to Paliotta, holding that Paliotta failed to rebut the presumption of negligence for the allision. The federal judge lifted the stay, and the plaintiff then pursued Paliotta and Tappan Zee in the state action. The state judge gave res judicata effect to the finding of Paliotta’s negligence but did not hold that res judicata required a finding that Tappan Zee was negligent. The appellate court agreed with both holdings, noting that the holding that Tappan Zee owed a duty to Paliotta was not the same as holding that Tappan Zee was negligent. Therefore, a trial to determine whether Tappan Zee was negligent was necessary rather than an immediate trial on damages.

Kenneth G. Engerrand

President, Brown Sims, P.C.

|  |  |  |  |
| --- | --- | --- | --- |
| **Houston**  1177 West Loop South Tenth Floor Houston, TX 77027  **O** 713.629-1580 | **New Orleans**  1100 Poydras Street 39th Floor New Orleans, LA 70163  **O** 504.569-1007 | **Gulfport**  2304 19th Street  Suite 101 Gulfport, MS 39501  **O** 228.867-8711 | **Miami**  4000 Ponce De Leon Blvd Suite 630 Coral Gables, FL 33146  **O** 305.274-5507 |

**Quote:**

On August 31, 2019, Plaintiffs' vessel the *Conception* commenced a three-day dive trip with 33 passengers and six crewmembers on the navigable waters off the coast of California in the area of the Channel Islands. On September 2, 2019 at approximately 3:14 a.m. in the morning, a fire broke out aboard the *Conception* while it was anchored off Santa Cruz Island in Platts Harbor. Thirty-three passengers and one crewmember died. As of now, the cause and origin of the fire is unknown. ("Efforts continue to determine the source of the fire.")

On September 5, 2019, Plaintiffs brought this action for exoneration from or limitation of liability under 46 U.S.C. § 30501 *et seq.* Plaintiffs "desire to contest their liability and the liability of the *Conception* for any alleged loss or damages arising out of the aforesaid Fire."

**\*\*\***

The Court is highly sensitive to the reality that this is an emotionally-charged case. However, the Court cautions both sides that editorialized arguments and ad hominem attacks are inappropriate and distract from the merits. ("[T]he Fritzlers' decision to file this action less than thirty-six hours after the accident, while dive teams were still searching for the body of the thirty-fourth victim, raised a lot of eyebrows."); ("Counterclaimant's attorneys echo media pundits and members of the maritime law plaintiffs' bar who have been quick to criticize Petitioners for exercising their right to invoke the Limitation of Liability Act and Supplemental Rule F."); ("Like Hamlet's mother, Queen Gertrude, the Fritzlers doth protest too much."). The Court expects the parties to work cooperatively to schedule discovery and to resolve most, if not all, disputes without the intervention of the Magistrate Judge or this Court. All counsel are ordered to familiarize themselves with the District's Civility and Professionalism Guidelines.

*In re Truth Aquatics, Inc.*, No. 19-cv-7693, 2020 U.S. Dist. LEXIS 81040 (C.D. Cal. Jan. 27, 2020) (Anderson).

This is an email for anyone interested in up-to-date longshore and maritime cases and news. Please invite others to join. They may do so by sending an email message to [LongshoreUpdate+subscribe@groups.io](mailto:LongshoreUpdate+subscribe@groups.io). Content will be in the form of summaries of recent court decisions, commentary, and (where possible) links to the decisions. Generally, updates will be limited to once a month. Anyone working in the longshore/maritime environment should find this useful. To unsubscribe at any time, just send an email message to [LongshoreUpdate+unsubscribe@groups.io](mailto:LongshoreUpdate+unsubscribe@groups.io).

**© Kenneth G. Engerrand, August 2, 2021; redistribution permitted with proper attribution.**