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# MAINBRACE

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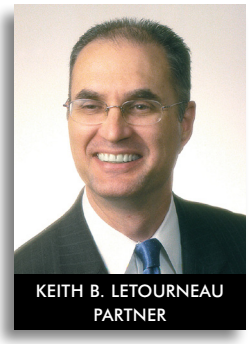
## The $750,000,000 Missing Comma?

**BY KEITH B. LETOURNEAU**



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In April 2010, the mobile offshore drilling unit ("MODU") *Deepwater Horizon* suffered an explosion and catastrophic fire that led to the rig's sinking, the loss of eleven lives, and the largest oil spill disaster in U.S. history. The event sparked an onslaught of litigation, which was consolidated in a multi-district litigation ("MDL") proceeding in New Orleans. Transocean Offshore Deepwater Drilling Inc. ("Transocean") owned the rig and insured it through Ranger Insurance Co. Ranger provided $50 million in general liability coverage, and underwriters from London market syndicates provided four layers of excess coverage worth $700 million. The Ranger and excess policies contained materially equivalent terms. BP America Production Company ("BP") had entered a Drilling Contract with Transocean to employ the rig to exploit the Macondo well. Various BP companies were included as additional insureds under Transocean's policy.

In a short-lived decision, *In re Deepwater Horizon (Ranger Insurance, Limited v. Transocean Offshore Deepwater Drilling, Inc.)*, 710 F.3d 338 (5th Cir. 2013), the Fifth Circuit held that the umbrella insurance policy, and not the indemnity provisions in the Drilling Contract, controlled the extent to which BP was covered for operations under the Drilling Contract.

The Drilling Contract required Transocean to maintain insurance covering its operations per Exhibit C to the contract, which obligated Transocean to name BP and its affiliated companies "as additional insureds in each of [Transocean's] policies, except Worker's Compensation for liabilities assumed by [Transocean] under the terms of this Contract." While the parties agreed that the Drilling Contract constituted an "Insured Contract" under the policy, the insurers sought declaratory judgment that they owed no additional insured obligation to BP with respect to pollution claims emanating from the Macondo well. BP argued that it was an additional insured under the policies, and that the policies alone—and not the Drilling Contract's indemnity obligations—governed the scope of BP's additional insured coverage.

But for a missing comma, the world was lost? The insurers argued that their additional insured obligation was limited to liabilities assumed by Transocean under the Drilling Contract's terms. Because the Drilling Contract did not impose indemnity obligations upon Transocean with respect to pollution-related liabilities, the lower court found that BP was not covered under Transocean's policies for such liabilities. The Fifth Circuit, however, found that the phraseology in the highlighted language above only applied to the Workers Compensation policy because no comma followed the word "Compensation."

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Nonetheless, the Fifth Circuit noted that under Texas law *(Evanston Ins. Co. v. ATOFINA Petrochems., Inc.,* 256 S.W.3d 660 (Tex. 2008)), so long as the indemnity agreement and insurance provisions are separate and independent, the court looks to the applicable insurance policy, not the underlying service contract, to ascertain whether additional insurance coverage exists.

The Fifth Circuit also considered its earlier decision in *Aubris Resources LP v. St. Paul Fire & Marine Ins. Co.,* 566 F.3d 483 (5th Cir. 2009), which, relying upon *ATOFINA,* similarly held that a separate indemnity clause does not apply to limit the scope of insurance coverage. In the final analysis, the Fifth Circuit held that it does not matter how the indemnity provision reads, for it is the language in the policy itself that dictates the extent of additional insured coverage, and because the policy did not exclude pollution-related liabilities from such coverage, BP was entitled to that coverage under Transocean's policies.


The missing comma, as it turns out, was just that after all, except that on August 29, 2013, the Fifth Circuit panel thought better of its decision, unanimously withdrew it, and asked the Texas Supreme Court to weigh in. *In re Deepwater Horizon (Ranger Insurance Limited v. Transocean Deepwater, Inc.),* No. 12-30230, 2013 WL 4606533 (5th Cir. Aug. 29, 2013). On petition for rehearing, the panel decided that no controlling Texas Supreme Court precedent existed. The court noted that uncertainty over the scope of the Texas Supreme Court's opinion in *ATOFINA* precipitated its decision to certify two questions for that court's consideration:

(1) Whether *[ATOFINA]* compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?

(2) Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under *[ATOFINA]* given the facts of this case?

While BP argued that the additional insured and indemnity provisions were separate and independent, the insurers and Transocean argued that the Drilling Contract's indemnity clause differed markedly from the one in *ATOFINA*. Specifically, while the *ATOFINA* indemnity clause broadly required ATOFINA to be named as an additional insured, the Drilling Contract's indemnity clause only required BP to be named as an additional insured to the extent of liabilities assumed in the Drilling Contract. Thus, the indemnity clause and additional insured provisions were not separate and independent, but inextricably intertwined. Moreover, the policy at issue required the existence of an "insured contract," where none was required in *ATOFINA*.

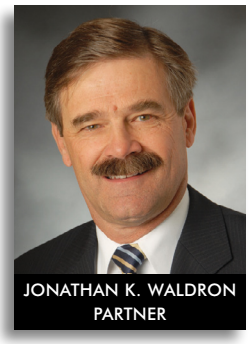
The Fifth Circuit concluded that "[b]ecause there are potentially important distinctions between the facts of the instant case and *ATOFINA,* the outcome is not entirely clear."

Not forgetting about the missing comma in the Drilling Contract's additional insured clause, the court next addressed whether a longstanding Texas interpretative rule governing insurance policies applies to sophisticated parties. In Texas, when an insurance provision susceptible to more than one reasonable interpretation exists, the court must choose the one that benefits the insured, even if the more reasonable interpretation favors the insurer. The court noted that the Texas Supreme Court has never recognized a sophisticated insured exception to the foregoing rule, but perhaps it should given that the parties here were all "highly capable contractors." However, the insurers were not involved in drafting the Drilling Contract, and thus construing ambiguities in that contract might not be appropriate, though they were involved in drafting the insurance policy's additional insured clause.

The answers to these questions posed to the Texas Supreme Court promise to illuminate how contractual indemnity and additional insurance clauses in separate contracts and policies will be construed and crafted in the years to come, and whether a missing comma is worth $750,000,000. ■

## Another Offshore Safety Management System

**BY JONATHAN K. WALDRON AND PATRICIA M. O'NEILL**



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On September 10, 2013, the Coast Guard issued an Advance Notice of Proposed Rule Making ("ANPRM") outlining its intent to promulgate regulations that will require all domestic and foreign-flag vessels engaged in Outer Continental Shelf ("OCS") activities to develop, implement, and maintain a vessel-specific Safety and Environmental Management System ("SEMS"). This proposal would be in addition to the SEMS requirements implemented under Bureau of Safety and Environmental Enforcement ("BSEE") regulations by expressly requiring SEMS for vessels engaged in OCS activities, and proposing a vessel-specific safety standard based on the American Petroleum Institute's *Recommended Practice for Development of a Safety and Environmental Management Program for Offshore Operations and Facilities, Third Edition,* May 2004 ("API RP 75"). Comments are due on December 9, 2013. (To view the ANPRM, please visit www.gpo.gov/fdsys/pkg/FR-2013-09-10/pdf/2013-21938.pdf.)

### Background

On October 15, 2010, the successor agency to the BSEE published a SEMS final rule entitled, ''Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Safety and Environmental Management Systems.'' That rule established and required all OCS operators to have a SEMS program in place by November 15, 2011. On April 5, 2013, the BSEE published another final rule revising and adding several new requirements to its SEMS program ("SEMS II"). This new rule became effective on June 4, 2013. Compliance with these new requirements comes into effect on June 4, 2014, except for specified auditing requirements. Now, the Coast Guard has entered the foray on the OCS and is seeking comments on a plan to implement another SEMS program. (To view the SEMS II, please visit www.gpo.gov/fdsys/pkg/FR-2013-04-05/pdf/2013-07738.pdf; to view BSEE fact sheets, please visit www.bsee.gov/BSEE-Newsroom/BSEE-Fact-Sheets.aspx.)

### The BSEE SEMS Regime

The BSEE SEMS program has caused great confusion with respect to its applicability to vessels engaged in OCS activities. The SEMS rule requires operators to have a SEMS program. An offshore operator is the lessee, owner, or holder of operating rights, or the designated operator or agent of the lessee(s) of a pipeline right-of-way holder or a state lessee granted a right-of-use easement. The SEMS rule also requires an operator, when selecting a contractor, to obtain and evaluate the contractor's safety and environmental performance prior to that contractor performing work for the operator. A contractor is anyone performing work for the lessee. However, as we understand it, although the BSEE did not intend to exercise its jurisdiction over vessels typically under the Coast Guard's jurisdiction, due to the confusion in interpreting the rule, many of the major operators on the OCS are requiring all non-facility contractors to have work practices consistent with the operator's SEMS, and in some cases are insisting that contractors adopt certain portions of the operator's SEMS.

### Discussion of the Coast Guard Request for Comments

According to the Coast Guard, it is proposing the implementation of SEMS for vessels engaged in OCS activities that will complement existing vessel design and equipment specifications, be compatible with current safety regulations, be subject to periodic safety audits, and include procedures for emergency response and company internal incident investigations to help mitigate risk and prevent future mistakes.

In considering an appropriate safety management standard, the Coast Guard's proposal recognizes that while certain categories of vessels engaged in OCS activities—such as self-propelled mobile offshore drill units, drill ships, heavy lift vessels, and offshore supply vessels—currently operate under a Safety Management System ("SMS") as required by the International Safety Management ("ISM") Code, these standards do not

address the specific risks to vessels engaged in OCS activities because the ISM Code is focused on international voyages. The Coast Guard's proposal would therefore increase the scope of the current regulations by requiring these vessels and all other vessels involved in OCS activities, including floating production, storage and offloading units, well stimulation vessels, and shuttle tankers, to implement SEMS. The Coast Guard also

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Another Offshore Safety Management System (continued from page 3)
notes that some vessels have voluntarily adopted a SMS based on frameworks other than the API RP 75 or ISM Code. These may include the International Association of Drilling Contractors Health Safety and Environmental Case or the International Standards Organization 9001 (ISO 9001:2008). The Coast Guard is currently researching whether compliance with these management programs would be appropriate alternatives to the API RP 75.

According to the Coast Guard, although the designated lease operator's SEMS program required by the BSEE includes elements of the API RP75, this program is too broad in that it is focused on overall lease activities and the offshore oil, gas, and sulphur operations of facilities on the lease; it is also not vessel-specific. In addition, the proposal noted that although many lease operators require their contractors to implement their own safe working procedures, this does not address the personnel and environmental concerns specific to vessel operations on the OCS. As a result, there is a gap where the facility is also a vessel, as the BSEE does not focus on the unique nature of those vessel operations. The Coast Guard's proposal requiring a vessel-specific SEMS attempts to fill this gap by merging the vessel owner and operator's proposed requirements under the API RP 75 with those of the designated lease operator's requirements under BSEE regulations.

Ultimately, according to the Coast Guard, its goal is to align current Coast Guard regulations with current BSEE SEMS requirements by requiring vessel owners and operators, as the entity that manages day-to-day personnel, vessel operations, and equipment maintenance, to be responsible for developing, implementing, and managing a vessel-specific SEMS. However, as discussed above, whether a SMS approach based on the API RP 75 is compatible with the lease operators SEMS remains to be seen.

In any event, the Coast Guard is doing the right thing by seeking comments from the public at this early stage before it commits to any particular language. Specifically, among other things, it is seeking comments regarding the feasibility of the proposal and whether SEMS based on the principles of the API RP 75 is appropriate for vessels engaged in OCS activities. In that regard, the Coast Guard has listed a series of sixteen questions to which it is asking the public to respond to in order to assist it with moving this rulemaking to the next stage.

## Conclusion

Owners/operators of vessels engaged in OCS activities and other parties with interests on the OCS, including those parties with experience with the BSEE SEMS program, are encouraged to review the ANPRM and consider the potential future effects the Coast Guard's implementation of a SEMS program. In particular, parties should review and provide comments, among other things, on the sixteen questions asked by the Coast Guard by December 9, 2013. ■

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## BIMCO's 2013 Laytime Definitions—A Model for Reducing Charter Party Disputes?

**BY MITCHELL R. MACHANN**

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BIMCO recently promulgated a new document, *Laytime Definitions for Charter Parties ("Laytime Definitions") 2013*, which defines various terms used in conjunction with calculating the running of laytime and demurrage for the purpose of reducing tramp shipping (voyage charter) disputes. *Laytime Definitions* was generated through the joint effort of BIMCO, the Baltic Exchange, the Comité Maritime International, and the Federation of National Associations of Shipbrokers and Agents.

Typical voyage charters (ExxonMobilVOY, ASBATANKVOY, and BPVOY) do not expressly define terms such as laytime, demurrage, berth, or port. Instead, courts construe the meaning of these terms from the context used in the charters and as construed by the common law.

In its *Laytime Definitions,* BIMCO refrained from altering the definition of laytime from BIMCO's previous iteration, *Voyage Charter Party Laytime Interpretation Rules ("Voylayrules") 1993*. The term still means: "The period of time agreed between the parties during which the owner will make and keep the vessel available for loading and discharging without payment additional to the freight." Courts have generally construed laytime as the "time allowed for the charterer to load or unload," which closely approximates the BIMCO definition.

BIMCO still defines demurrage as "an agreed amount payable to the owner in respect of delay to the vessel once the laytime has expired, for which the owner is not responsible." However, the term has been refined to allow exceptions specifically set forth in the charter agreement, whereas in its earlier form no laytime exceptions were permitted, which likely contributed to the industry's general failure to employ the *Voylayrules*. In contrast to laytime, the courts have construed demurrage in a variety of ways, such as:

(a) liquidated penalty or stipulated damages for delay;
(b) "extended freight and the amount payable for delays by the receiver in loading and unloading cargo;"
(c) the "sum which is fixed by the contract of carriage…as remuneration to the owner of a ship for the detention of his vessel, beyond the number of days allowed by the charter-party for loading and unloading;"
(d) "[t]he charge assessed under the charter party to the charterer for detaining a vessel beyond the free time stipulated for loading and unloading;" and
(e) "[a] fine or payment made by the shipper to the vessel owner if the shipper fails to complete the loading of his cargo within an allowed period of time."

BIMCO hopes its *Laytime Definitions*, if employed in the marketplace, will serve to narrow the scope of vessel delay disputes by defining "demurrage" and other terms at the heart of such disputes. "These provisions bring much needed clarity to the shipping markets and iron out a good deal of uncertainty," said BIMCO's Jean-Pierre Laffaye (*see* www.tradewindsnews.com/drycargo/323408/laytime-language-revised). Mr. Laffaye continued: "In a tough market, the amount of time a vessel spends unloading or loading cargo is under great scrutiny, and it is therefore vital that imprecise laytime definitions and subtleties of interpretation do not provide grounds for expensive legal disputes when an interpretation is tested in the courts." (*See* www.tradewindsnews.com/drycargo/323408/laytime-language-revised.)

BIMCO also defined the terms berth and port. **Berth** is defined as "the specific place where the vessel is to load or discharge and shall include, but not be limited to, any wharf, anchorage, offshore facility, or other location used for that purpose." **Port** is defined as "any area where vessels load or discharge cargo and shall include, but not be limited to, berths, wharves, anchorages, buoys, and offshore facilities as places outside the legal, fiscal, or administrative area where vessels are ordered to wait for their turn no matter the distance from that area." Note the expansion of the definition of "port" to areas where the vessel is ordered to wait no matter the distance from the physical terminal, and the narrowing of "berth" to the specific place where loading or discharge is to occur. These refined terms will alter when and where laytime and demurrage run, and presumably will also bear on safe berth or port issues.

In summary, BIMCO hopes its *Laytime Definitions* will be met with acceptance by both sides of charter party transactions—owner and charterer. What remains to be seen is whether *Laytime Definitions* fares any better than the *Voylayrules* in the marketplace. A desire to limit the litigation of vessel delay disputes would presumably lead to greater use of BIMCO's *Laytime Definitions*.

For a complete copy of BIMCO's *Laytime Definitions,* please visit: www.blankrome.com/LaytimeDefinitions.pdf. ■

## Note from the Editor

**BY THOMAS H. BELKNAP, JR.**

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On the First of August of this year, we found ourselves simultaneously mourning the sudden and unexpected passing of our beloved partner **Jeremy Harwood** and celebrating the exciting and important addition of all eight attorneys from Bell, Ryniker & Letourneau to our Houston office.

Jeremy's passing was a shock, to say the least, and a terrible blow to all who knew him. Many amazing words have been said about him in the weeks since his passing. In addition to all the public thoughts, we have received literally hundreds of emails and letters from all across the globe from people who knew and loved Jeremy and who wished to extend their condolences.

I couldn't even begin to try to summarize or restate all that has already been said. But what struck me most was a theme that ran through so many of the messages we received, and that was the need to tell funny stories about Jeremy. Anyone who knew Jeremy knows there was a lot of material to work with: from his colorful socks and multitude of hats to his wide-grinned website photo to his near victory in last year's Roll on Friday Glamorous Solicitor of the Year competition, Jeremy always knew how to make a big impression. What people most wanted us to remember about Jeremy was something that we already knew very well: he was fun and funny and smart and clever, all in the same package. We will miss him greatly.

Jeremy's passing obviously greatly subdued our celebration of the addition of our new colleagues in Houston. But make no mistake, the addition of this accomplished and respected group is a big deal and we are very excited about it.

**Mike Bell, Keith Letourneau,** and **Doug Shoemaker** have joined us as partners; **Bob Ryniker** and **Jim Arnold** join us as counsel; and **Mitchell Machann, Tracy Freeman**, and **David Meyer** join us as associates. Many of you already know this team very well, and many undoubtedly have worked closely with them over the years. We certainly have, on many matters. Collectively, they bring outstanding maritime capabilities to our Houston office, and at the same time they add great strength to our national maritime litigation and transactional practices.

From an editor's perspective, I am particularly pleased that they joined our team—they have made no less than three excellent contributions to this edition of *Mainbrace!* ■


## Addition Strengthens Houston Presence for Largest U.S. Maritime Practice

**August 1, 2013**—Blank Rome LLP is pleased to announce that all eight attorneys of Bell, Ryniker & Letourneau, P.C.—a leading Houston, Texas maritime law firm—joined Blank Rome today in the Firm's Houston, Texas office. These additions further enhance Blank Rome's Houston presence and its maritime and energy practices, while expanding the depth and scope of services that Bell, Ryniker & Letourneau provides to its clients.

This group of attorneys and additional professional staff bring significant experience in maritime and energy law, in addition to the areas of insurance, transportation, government contracts and construction. Michael K. Bell, Keith B. Letourneau, and Douglas J. Shoemaker join as partners; Robert J. Ryniker and James C. Arnold join as of counsel; and Mitchell R. Machann, Tracy Freeman, and David G. Meyer join as associates.

"We are delighted to welcome Michael, Keith, Douglas and all of our new colleagues to our Houston office and to the Blank Rome team," said Alan J. Hoffman, Co-Chairman and Managing Partner. "We look forward to working with this talented and respected group of attorneys as we continue to expand in the Houston market and strengthen our well-established maritime and energy practices."

Blank Rome's maritime practice is the largest in the United States and represents publicly traded and privately owned companies throughout the world. With the addition of the Bell, Ryniker and Letourneau group, Blank Rome's maritime practice is comprised of 40 highly regarded professionals based in New York, Washington, D.C., Philadelphia, and Houston—a key market for the maritime and energy industries.

"Through our global practice, we aim to provide clients with excellence in all aspects of maritime and offshore capabilities," said John D. Kimball, Partner and International and Maritime Litigation and ADR Practice Group Leader. "The Bell, Ryniker & Letourneau team has long been recognized as one of the leading maritime law firms in Houston, and brings significant depth and capability to our maritime and energy practices."

Jonathan K. Waldron, Partner and Maritime, International Trade and Public Contracts Practice Group Leader added, "We have been eager to expand the size and scope of our maritime practice to meet growing client demand for some time, and are thrilled that we have found an outstanding group of attorneys to enhance our ability to serve our clients, both regionally in the Gulf of Mexico and nationally."

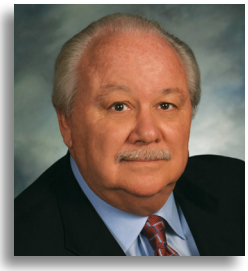
"We are excited to join Blank Rome and its notable maritime and energy practices as it expands in the Houston market," said Michael K. Bell, Partner. "Our established client base of domestic and international clients will undoubtedly benefit from the Firm's geographic reach and breadth of practice areas."

In 2011, Blank Rome combined with Abrams Scott & Bickley and officially opened its Houston office. With the addition of the Bell, Ryniker & Letourneau team, 20 attorneys now serve clients from that office in a wide variety of civil, criminal, and administrative matters in state and federal courts, at both the trial and appellate levels.

"We welcome the Bell, Ryniker & Letourneau team to our Houston office," said Barry Abrams, Partner and Administrative Partner of Blank Rome's Houston office. "In addition to having decades of legal experience, our new colleagues also recognize and value the importance of dedicating time to professional and civic endeavors, which makes them an excellent complement to both the Houston office and the entire Firm." ■

PRESS RELEASE

# Eight Attorneys of Bell, Ryniker & Letourneau Join Blank Rome LLP

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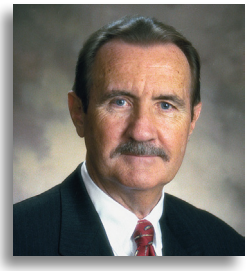


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IN MEMORIAM

# His Word Was His Bond

Blank Rome's **Jeremy Harwood**, who passed away this month at age 55, was not only one of maritime's most liked and respected attorneys, he was also a passionate advocate of a moral code in shipping that he believed was slipping away.

During his many interviews with *Fairplay* over the years, Harwood was always jovial, energetic, prescient, and intellectually focused on the arcane minutia and nuances of the law. He never appeared bitter about the negative changes he perceived in the industry. Instead, he seemed even more determined to find solutions for his clients amid a more porous moral landscape.

"He had the concept of honour—that 'your word is your bond', which was certainly the watchword when he started in London, although things have changed a bit over the years," said Blank Rome partner John Kimball.

Harwood's path to the top was not typical for Manhattan. He was born in Beirut in 1958 to English parents and attended Charterhouse School and Royal Military Academy Sandhurst in the United Kingdom.

After graduating he joined the British Army, serving as a commander in the First Royal Tank Regiment in West Germany.

JEREMY J.O. HARWOOD, BLANK ROME PARTNER

*Photo by Chris Preovolos.*

He then attended the University of North Carolina at Chapel Hill, graduating in 1980, and Oxford University, where he earned a BA degree in 1982 and a law degree in 1986. He was called to the bar in England and took his first shipping post in London as a claims handler for UK P&I Club manager Thomas Miller.

*'By the time of his death, Jeremy was handling several of the most important maritime bankruptcy cases and was a leading light in this area of practice.'*

But Harwood wanted to be in New York, which brought him to Healy & Baillie in the late 1980s. "He was a rising star and became a partner pretty quickly," recalled Kimball. Harwood joined Blank Rome as a partner after its merger with Healy & Baillie in 2006.

Bankruptcy was Harwood's forte, beginning with early Healy & Baillie cases involving the US Lines and Lykes Lines insolvencies. As Kimball recounted during his eulogy for Harwood, "We were confronted with the task of handling tens of thousands of asbestos claims, many of which were outright frauds. Jeremy took to this with great tenacity, like a dog chasing a bone."

Over the next two decades his bankruptcy expertise grew. "By the time of his death, Jeremy was handling several of the most important maritime bankruptcy cases and was a leading light in this area of practice," said Kimball.

Harwood was driven by his bedrock belief that a contract should be honoured to the greatest extent possible. He was highly critical of how modern shipping contracts had devolved into 'options' that were simply walked away from when the market soured. "It hasn't always been this way," Harwood told Fairplay. "Now, if you don't want to pay, you don't pay. It's 'come and get me'. The commercial morality is extraordinary. This is a serious problem."

In earlier eras, he noted, if a shipowner reneged on a contract, "your name would be 'posted on the Baltic [Exchange]', which was the ultimate condemnation. It was like posting your name at the club entrance if you didn't pay your dues. That's the sort of moral opprobrium that was supposed to be attached to it. Now, people don't care. Today it's almost a mark of valour [to renege on a contract]."

Harwood's response to this shifting environment was to use the law as a cudgel to obtain whatever fairness was possible for his clients, whether via Rule B asset attachments, U.S. bankruptcy chapters 11 and 15, or other means.

It is particularly telling that when the 2nd Circuit ruled in October 2009 that electronic funds transfers were not attachable assets under Rule B, Harwood still didn't give up. In 2010, he petitioned the US Supreme Court—unsuccessfully—to overturn the 2nd Circuit's landmark decision.

"How strongly can I put it?" said Kimball in his eulogy, describing Harwood's tenacity. "Jeremy was an admirer of Winston Churchill and I think that one of Churchill's most famous speeches describes very well the approach Jeremy took."

The Churchill quote that Harwood "lived and breathed" was: "Never give in, never give in, never, never, never, never—in nothing, great or small, large or petty—never give in, except to convictions of honour and good sense."

AUTHOR: Greg Miller, Americas Editor, *Fairplay*

## As the Ice Melts, the White House and Coast Guard Turn Their Attention to the Arctic

**BY JOAN M. BONDAREFF**

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Administration officials have begun to engage in sufficient consultations before promulgating an implementation plan to accompany the White House's "National Strategy for the Arctic Region" (the "Strategy") as a result of their acknowledged failure to engage in such consultations before the release of the Strategy this year. Comments on the Strategy, described below, can be submitted to: Arctic@ostp.gov. The implementation plan is expected sometime this fall.

Upon announcing its Strategy on May 10, 2013, the White House Blog Posted:

> "The Arctic is rapidly changing. While the Arctic region has experienced warming and cooling cycles over millennia, the current warming trend is unlike anything previously recorded. As sea ice diminishes, ocean resources are more readily accessible. This accessibility…[has] inspired strong interest for new commercial initiatives in the region, including energy production, increased shipping, scientific research, tourism, and related infrastructure development. As an Arctic nation, the United States must be pro-active and disciplined in addressing changing regional conditions and in developing adaptive strategies to protect its interests."

The White House credited the work of twenty federal agencies, the State of Alaska, the Alaskan Native communities, and the Alaska Congressional delegation in producing the Strategy.

The Strategy, an 11-page high-level document, establishes three key priorities for the U.S. in the Arctic: 1) advance U.S. security interests; 2) pursue responsible Arctic Region stewardship; and 3) strengthen international cooperation. In executing the first priority, the Strategy refers to "intelligently evolv[ing] our Arctic infrastructure and capabilities, including ice-capable platforms as needed." However, commentators have noted that there is no budget accompanying the Strategy and the Administration has not budgeted for new Arctic icebreakers.

With respect to the second priority, the Strategy calls for increased charting of the Arctic region. And with respect to the third priority, the Strategy acknowledges the need to work through the eight-member Arctic Council (comprised of the U.S., Canada, Norway, Denmark (Greenland), Iceland, Finland, Russia, and Sweden), and to work towards U.S. accession to the United Nations Convention on the Law of the Sea.

In June 2013, a high-level delegation of Administration officials went to Alaska to meet with state and local officials to discuss the Strategy and its implementation. According to a June 20, 2013 report in the *Alaska Journal of Commerce*, "[s]tate officials meeting with the group said they were not entirely satisfied and that the policy statement has a lot of generalities but no commitments." (T. Bradner, *Alaska Journal of Commerce*, "Feds visit Alaska for input on Arctic policy.")

The U.S. will take over as chair of the Arctic Council in 2015 and is seeking comments on what direction to take the Council. Comments can be submitted to the aforementioned email address listed in the introduction of this article. One of the topics is how to deal with "black carbon" from diesel engines in the surrounding Arctic nations. One possibility, suggested by Alaska Senator Mark Begich, is to replace diesel generators used by Alaska rural villages that could solve both health (asthma) and climate issues. Other potential issues are how to define eco-based management in the Arctic. The Strategy allows for an "all-of-the above" energy strategy in the Arctic, including hydrocarbon development. However, no drilling is expected in 2014, according to recent reports from the Secretary of the Interior.

U.S. State Department officials acknowledge that there is overlap between the work of the Arctic Council and the International Maritime Organization ("IMO"). For example, the IMO is working on a polar shipping code, which will need to be ratified by the U.S., in part, according to the same officials. These officials expect that pollution prevention from ships will be addressed at the IMO, whereas pollution from drill rigs, pipelines, and other onshore equipment will be addressed in the Arctic Council.

In the meantime, the Arctic Council, meeting in Sweden in May 2013, adopted an "Agreement on Cooperation on Marine Oil Pollution Preparedness and Response in the Arctic" (the "Agreement"). The Agreement's stated objective is to "strengthen cooperation, coordination, and mutual assistance among the

(continued on page 10)

As the Ice Melts, the White House and Coast Guard Turn Their Attention to the Arctic (continued from page 9)

Parties on oil pollution prevention and response in the Arctic in order to protect the marine environment from pollution by oil." The Agreement obligates each party to pre-position oil spill combating equipment in the Arctic; conduct a program of exercises for oil pollution response organizations and training; and develop plans and communication capabilities for responding to an oil pollution incident, among other obligations.

### The Coast Guard Issues Its Own Report and Completes Arctic Oil Recovery Exercise

Simultaneous with the release of the White House's Arctic Strategy, the Coast Guard issued its own Arctic Strategy to guide the Coast Guard's efforts in the region over the next ten years. The Coast Guard's stated intent is to pursue three key objectives in the Arctic: 1) improve awareness; 2) modernize governance; and 3) broaden partnerships. Of particular importance on the policy side is the Coast Guard's recommendation to establish an Arctic Policy Board within the Department of Homeland Security, and a commitment to establish an Arctic Center of Expertise at the U.S. Coast Guard Academy (pending funding availability).

With respect to critical assets, the Coast Guard acknowledges that its icebreaking capability is limited, but also states that the recent reactivation of the USCGC Polar Star will bring major icebreaking capability to the region. The Coast Guard encourages the nation to "plan for ice capable assets that can effectively carry out year-round search and rescue, environmental response, charting, scientific research, and other Arctic operations." During the summer season, the Coast Guard may forward-deploy aircraft, cutters, small boats, communication assets, personnel, and/or other resources to Barrow, Alaska, and other Arctic sites. The Coast Guard will also continue to partner with federal, state, and Native tribal representatives.

As part of its Arctic Strategy, on September 10, 2013, the Coast Guard completed a successful Arctic oil recovery exercise aboard the *USCGC Healy*. The exercise, conducted in the Beaufort Sea, involved air, surface, and underwater assets to simulate detection and recovery of oil from ice-strewn waters, according to the 17th U.S. Coast Guard District. The Coast Guard partnered with the National Oceanic and Atmospheric Administration, the Woods Hole Oceanographic Institute, and the University of Alaska-Fairbanks to conduct the drill.

All companies and persons interested in the Arctic should submit timely comments to the White House Office of Science and Technology Policy at Arctic@ostp.gov. A copy of the White House Strategy is available at the following link: www.whitehouse.gov/sites/default/files/docs/nat_arctic_strategy.pdf.

A copy of the Coast Guard's Arctic Strategy may be found at the following link: www.uscg.mil/seniorleadership/DOCS/CG_Arctic_Strategy.pdf. ■

## New Developments in Removal Practice in Maritime Cases

**BY DAVID G. MEYER**

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Recent amendments to the federal removal statute, 28 U.S.C. § 1441, may have far-reaching implications for the practice of maritime law, nationally. Specifically, in a significant departure from precedent, two recent decisions in the U.S. District Court for the Southern District of Texas have interpreted the amended statute to permit general maritime law claims to be removed from state to federal court *regardless of whether requirements for diversity jurisdiction, or some other basis of federal question jurisdiction, are met*. While it remains to be seen how this issue may develop over time, these opinions potentially represent an important new avenue for maritime practitioners to consider when assessing whether to remove a case to federal court.

Historically, general maritime law claims saved to suitors did not constitute federal questions for removal purposes, and federal courts could only assert removal jurisdiction over such claims when diversity or some other basis existed for federal jurisdiction. [*See, e.g., Morris v. T E Marine Corp.*, 344 F.3d 439, 444 (5th Cir. 2003) (recognizing the Outer Continental Shelf Lands Act, 43 U.S.C.A. §§ 1331, et seq., as one such basis).]

However, on December 7, 2011, Congress revised the language of Section 1441. The full version of the amended statute reads as follows:

> (a) **Generally.** Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Removal based on diversity of citizenship.
>
> (1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.
>
> (2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendant is a citizen of the State in which such action is brought.

28 U.S.C.A. § 1441(a) & (b) (2012).

Approximately five months after the new statute became effective, U.S. District Court Judge Gray Miller of the Southern District of Texas denied a plaintiff's motion to remand on the basis that under the amended version of Section 1441, general maritime law claims are removable regardless of whether diversity jurisdiction is present. [*See Ryan v. Hercules Offshore, Inc,* No. H-12-3510, 2013 WL 1967315 (S.D. Tex. May 13, 2013).]

In *Ryan,* the plaintiff was the estate of a worker who died during drilling operations offshore Nigeria. The estate filed suit in Texas state court, asserting claims against several defendants for negligence and unseaworthiness pursuant to the Death on the High Seas Act, general maritime law, and the *Sieracki* seaman doctrine. The defendants removed the case to federal court, asserting that the estate's claims fell within the federal district court's original jurisdiction, and "a plain reading" of the amended version of 28 U.S.C. 1441 made those claims removable, even though they had been unremovable under the prior version of the statute. *Ryan,* 2013 WL 1967315 at *1.

In the course of deciding against the estate's motion to remand, Judge Miller conducted a thorough evaluation of the case law interpreting the prior version of the statute and the language of the amended statute and found:

> When Congress amended section 1441, it left the reference in section 1441(a) to cases in which courts have "original" jurisdiction being removable unless prohibited by an act of Congress… However, it deleted the text in section 1441(b) upon which courts in the Fifth Circuit relied as being an "Act of Congress" that precluded removal of cases that did not meet the other requirements of section 1441(b). The new version of section 1441(b) speaks solely to cases that are removed on the basis of diversity of citizenship...
>
> * * *
>
> Plaintiffs argue that maritime claims cannot be removed pursuant to section 1441(a) because they do not arise under the Constitution, treaties, or laws of the United States. However, neither the prior version nor the new version of section 1441(a) refers to claims that arise under the Constitution, treaties, or laws of the United States. This reference was found in the previous version of section 1441(b). Both versions of section 1441(a) refer to original jurisdiction, and federal district courts have "original jurisdiction" over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled [pursuant to 28 U.S.C. § 1333(1)]."

*Ryan,* 2013 WL 1967315 at *3-5.

Based on this evaluation of the case law and statutory language, Judge Miller denied the motion to remand because all of the plaintiffs' claims were "admiralty claims over which a federal district court has original jurisdiction and the revised removal statute does not limit the removal of these claims." *Ryan,* 2013 WL 1967315 at *6.

Shortly after Judge Miller issued his ruling in *Ryan,* U.S. District Court Judge Lee Rosenthal reached a similar conclusion in *Wells v. Abe's Boat Rentals Inc.,* No. H-13-1112, 2013 WL 3110322 (S.D. Tex. June 18, 2013). The plaintiff in *Wells* alleged he was injured while working as a crewman on a supply vessel and participating in a cargo transfer from the vessel to a fixed platform located offshore Louisiana. The plaintiff filed suit in Texas state court, asserting Jones Act claims against his employer and negligence claims under general maritime law against the owner and operator of the platform. The defendants removed, and the plaintiff sought remand, arguing that Jones Act and general maritime claims are not removable. *Wells,* 2013 WL 3110322 at *1.

In response to the plaintiff's motion to remand, the defendants asserted that 28 U.S.C. § 1441 as amended allowed removal if there was original jurisdiction and no other statutory bar to removal. The defendants argued that there was original jurisdiction under the Outer Continental Shelf Lands Act ("OSCLA"), and that "even if the claims [were] general maritime claims, they are removable under the amended version of the removal statute." *Wells,* 2013 WL 3110322 at *1.

Judge Rosenthal denied the motion to remand as to the platform's owner and operator, holding that because "the *Ryan* court's analysis of the effect of the amended version of the removal statute is consistent with the case law analyzed," the plaintiff's claims against the platform's owner and operator were removable whether they fell under OSCLA or were general maritime law claims. *Wells,* 2013 WL 3110322 at *3. However, Judge Rosenthal severed and remanded the plaintiff's Jones Act claims against his employer based on the statutory bar to removal of Jones Act claims under 46 U.S.C.App. § 30104 and 28 U.S.C. § 1445(a). Id.

It is important to recognize that these opinions are still new and have not been subjected to appellate review. However, Judge Miller and Judge Rosenthal are very well-respected jurists with extensive experience handling maritime cases, and the reasoning in their decisions appears sound. *Ryan* and *Wells* mark a potential sea change in venue for admiralty and maritime cases and provide maritime practitioners with a new argument for removing cases involving general maritime law claims. ■

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