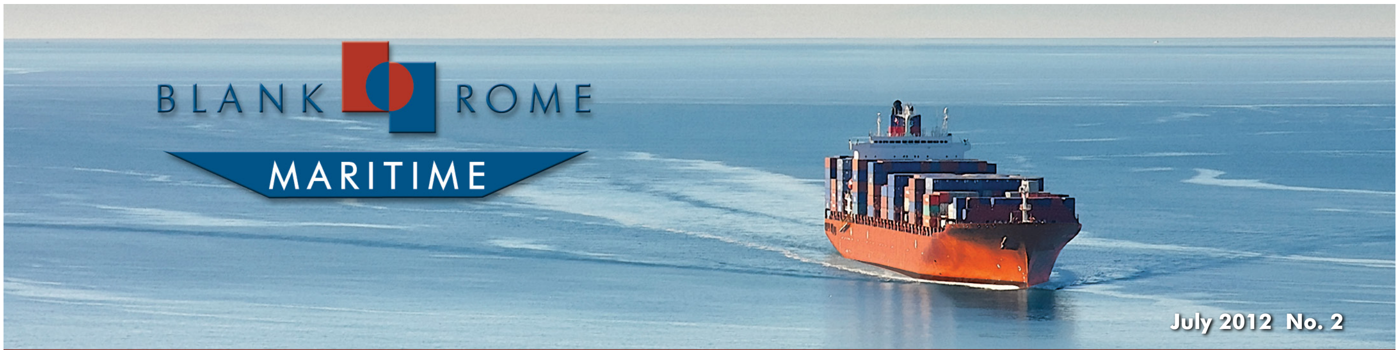

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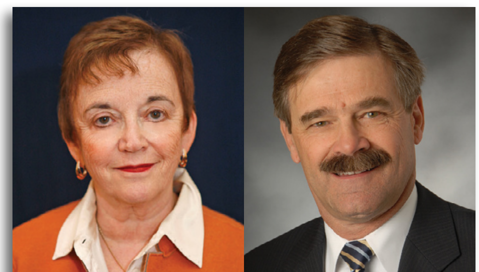
Congressional Failure to Enact Maritime Legislation and the Fiscal Cliff

BY JOAN M. BONDAREFF AND JONATHAN K. WALDRON



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As the November election draws closer, the main questions on everyone's lips in Washington, DC—other than who will win the election itself—are whether Congress can enact any maritime legislation and are we about to fall off a "fiscal cliff"? Congress has for the most part demonstrated an inability to enact substantive maritime legislation, including spill legislation following *Deepwater Horizon.* With regard to the phrase "fiscal cliff," this was coined by Federal Reserve Chairman Ben Bernanke to describe the perfect storm of economic events facing the nation. The questions for the maritime industry are when will Congress be able to accomplish anything in the maritime space, and what impact will the fiscal cliff, also called "Taxmaggeddon," have on their businesses?

Taxmaggeddon

The "fiscal cliff" consists of two major components: "sequestration" and the expiring Bush tax cuts. Other components include the need to raise the debt ceiling—estimated to occur this fall or later; the expiration of the payroll tax holiday; the extension of unemployment benefits; the Medicare "Doc Fix"; the Alternative Minimum Tax ("AMT") patch; and tax extenders (including the Production Tax Credit for the wind industry).

For those who haven't followed the budget debates closely, "sequestration" is the term Congress used in the Budget Control Act of 2011 (P.L. 112-25) to describe the imposition of automatic across-the-board cuts in the amount of $1.2 trillion over ten years to help balance the budget. Sequestration was triggered because the Joint Select Committee on Deficit Reduction could not reach a deal on how to balance the budget. The cuts will go into effect on January 2, 2013, unless Congress can now come up with an alternative. The cuts are equally divided between the Department of Defense ("DOD") and the civilian agencies. (Social Security, Medicaid, assistance to low-income families, and the Department of Veterans Affairs are exempt.)

To date, most of the focus has been on the impact on the defense industry, and major defense contractors have been very

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Congressional Failure (continued from page 1)

vocal in their opposition to sequestration. Lockheed Martin, for example, has announced they will send lay-off notices to their employees in the September-October time frame to provide the required 60-day notice. Their allies on the Hill are also very vocal in trying to forestall more cuts to DOD.

Recently, Congress has begun to focus on the impact of these cuts on the non-defense world. Senators Patty Murray (D-WA) and John McCain (R-AZ) joined forces to add an amendment to the farm bill, which passed the Senate 64-35, calling on the Obama Administration's Office of Management and Budget ("OMB") to report "as soon as practicable" on how the cuts would impact *both* the military and civilian agencies.

OMB has been reluctant to provide these details so far in the hope that Congress will do its job and avert the crisis. But once the farm bill is enacted, the Administration will have to provide this information to Congress and perhaps then, seeing the dramatic impacts the cuts will have, Congress will act!

In the meantime, Congress is working on the FY2013 budget for the year beginning on October 1, 2013. So far, no appropriations bills have been enacted for any department and some observers are predicting that we will have yet another Continuing Resolution to keep the government open though all or part of 2013. The lack of certainty over funding, along with the fear of sequestration, has led to agencies' holding back on awarding new contracts.

We have already seen a decline in budgets for the maritime agencies. For example, the Maritime Administration budget for FY2013 was cut significantly in the House-passed bill. No new funding was provided for the title XI loan guarantee program, the short sea shipping program, or the popular small shipyard grants program. The House has also zeroed out funding in 2013 for the also popular TIGER grant program, which allows ports to qualify for infrastructure funding. The Coast Guard has fared somewhat better with a 46 percent increase in funding for ship construction; but funding for aircraft purchases was reduced by 30 percent, and shore facilities and aids to navigation were reduced by 39 percent. However, even the Coast Guard would not be exempt from sequestration.

The Bush tax cuts are slated to expire at the end of 2012, but former President Bill Clinton has already suggested that they may need to be extended for a while longer to avoid a further hit to the economy. President Obama has proposed allowing the cuts to expire on the wealthiest taxpayers while still protecting the middle class. Among the other provisions expiring on December 31, 2012, the two percent employee payroll tax deduction, the current estate tax regime, and various energy provisions will all come to an end if Congress does not act. Many of these provisions will be considered during the lame duck session following the November election, although the legislative calendar is already looking quite full for that short time frame, leading many to suspect that Congress will favor short-term extensions rather than fundamental reform.

Tax reform continues to be on everyone's lips, too, but serious reform is likely to be pushed back until 2013. The House is considering a mechanism to fast-track tax reform in 2013, but whether the Democrats agree to it depends on whether it is tied to increased revenues. At a minimum, significant tax reform discussions will continue in 2012, and a multitude of hearings are expected on the subject. In addition, both the House Ways and Means Committee and the Senate Finance Committee are developing discussion drafts to address corporate tax reform and other fundamental reforms to the tax code.

Failure to Enact Substantive Maritime Legislation

It is an understatement to say that the 112th Congress has not produced a lot of substantive legislation. As of this date, the only transportation-related legislation it has been able to agree on has been reauthorization of the highway bill on June 29. This bill included language that established a trust fund to be known as the "Gulf Coast Restoration Trust Fund" in which 80 percent of all administrative and civil penalties paid by responsible parties in connection with *Deepwater Horizon* will be placed for use to help restore the Gulf of Mexico following the incident.

Further, progress on the Coast Guard and Maritime Transportation Act of 2011 (H.R. 2838) continues to be slow in

2012. The House passed its Coast Guard Authorization last year. The Senate Commerce Committee filed its report and version of this bill (Coast Guard Authorization Act for Fiscal Years 2012 and 2013) in January of this year (S. 1665) after having reported it months earlier at the end of last year. Reportedly, the Senate continues to sort through the bill to fend off any problems (earmarks and other committee jurisdictional claims) and get it scheduled for Senate floor consideration or even consideration of a Conference with the House.

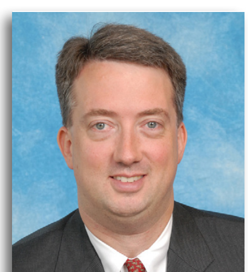
In order to keep things moving on the House side, Congressman LoBiondo introduced the Coast Guard Authorization bill of 2012 (H.R. 5887) on June 1, 2012, which was marked up on June 7 in the House Committee on Transportation and Infrastructure. With regard to specific spill-related legislation, there appears to be little—if any—movement until after the elections in 2013.

Conclusions

With so many issues being punted to this lame duck session, there are only a limited number of days for Congress to act to avoid the "fiscal cliff" or enact substantive maritime legislation. The Senate will continue to try and find floor time to move its Coast Guard bill, S.1665. It remains unclear if it will really happen before the summer recess or even this year. If they are successful, then the House and Senate Conference would likely move forward to work on mutually agreeable language. With regard to "Taxmaggeddon," with the fate of the economy in its hands, and a possible report from OMB on the effects of sequestration on popular programs, Congress may focus their minds and allow a deal to be struck on at least avoiding sequestration in 2013 and extending all or some of the Bush tax cuts. More likely, Congress will move the January effective date for sequestration to sometime in March 2013. ■

Maritime ... Or Not?

BY THOMAS H. BELKNAP, JR.


THOMAS H. BELKNAP, JR.
PARTNER

TBelknap@BlankRome.com

Here is a multiple choice question: which of the following contracts is considered to be a "maritime contract" under U.S. law? (a) a shipbuilding contract, (b) a ship-sale contract, (c) a ship-repair contract, and/or (d) a ship mortgage.

You will be forgiven if you simply tried to apply logic in answering this question and guessed that all four are maritime contracts. If you know your maritime law, however, then you should have answered that "c" and "d" are maritime contracts whereas "a" and "b" are not. Or, at least, that is the current state of the law.

Why might this matter? In the first place, it may impact whether a claim can be brought in the federal courts or whether it must be asserted in state court. Federal courts possess only "limited" jurisdiction, meaning they can only hear cases that are within the scope of their constitutionally defined jurisdiction. If the dispute involves a maritime contract, a claim may be brought in the federal court under its "admiralty and maritime" jurisdiction. If it is a non-maritime contract, however, then it may only be brought in the federal court if the "diversity" rules are met, meaning that the claim must exceed a certain amount and be between citizens of different states. Importantly, claims between non-U.S. citizens do not meet the diversity requirement, whereas the court's admiralty jurisdiction has no similar "citizenship" limitations.

A second important issue is that the maritime law has relatively permissive rules allowing for pre-judgment attachment of assets in support of a "maritime claim," which are not available to claimants on non-maritime claims. This right is principally defined by Rule B of the Federal Rules of Civil Procedure, Supplemental Rules for Admiralty or Maritime Claims. Under that rule, a party may obtain an attachment of the defendant's property located in a district where the defendant is not otherwise "found" merely by asserting a *prima facie* maritime claim. This is a low pleading threshold, and Rule B can be a very powerful tool—particularly useful in an industry where the business is international and assets are transitory.

A third and related issue is whether maritime liens can arise out of a breach of a contract. Such liens can create powerful priority and enforcement rights both as against the vessel owner and third-party claimants who may be seeking to enforce their own claims against the same assets. No maritime lien can arise from the breach of a non-maritime contract.

How did this happen? How is it that a contract to build or sell a ship is not a maritime contract whereas a contract to repair or mortgage a ship is a maritime contract? The answer goes back at least as far as 1857, when the United States Supreme Court decided *People's Ferry Company of Boston* v. *Beers*[1] and said this about a shipbuilding contract: "So far from the contract being purely maritime, and touching the rights and duties appertaining to navigation, (on the ocean or elsewhere,) it was a contract made on land, to be performed on land."[2] In 1918, the Court of Appeals for the Second Circuit (encompassing New York, Connecticut, and Vermont) held in *The ADA*[3] that a ship sale contract was not a maritime contract. The court cited no authority for the rule nor articulated any rational for the holding; nevertheless, the holding stuck and has been widely followed, in the Second Circuit and elsewhere.

For whatever their original merit, commentators have long criticized these rulings as defying logic and as being inconsistent with international practice. As the eminent admiralty author

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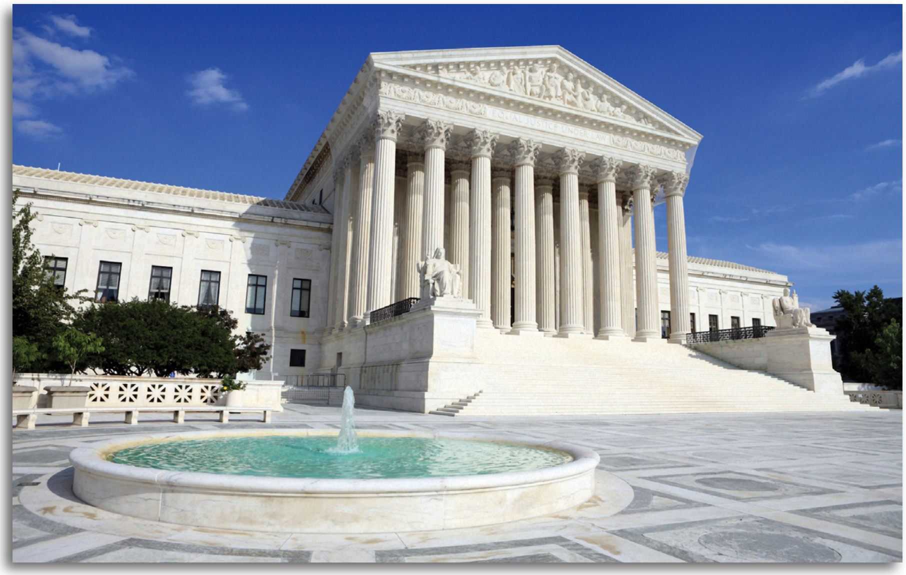


Charles L. Black, Jr. wrote in *Admiralty Jurisdiction: Critique and Suggestions,*[4] regarding the determination of what contracts are maritime: "The attempt to project some 'principle' is best left alone. There is about as much 'principle' as there is in a list of irregular verbs." Others have described the analysis as "inconsistent even in its artificiality,"[5] as "produc[ing] bizarre results, outcomes that warp the fabric of admiralty jurisdiction,"[6] or, more to the point, as simply "unfortunate."[7]

More recent decisions from the Supreme Court have raised some hope among scholars that these rulings are susceptible to being overruled. In *Exxon Corp* v. *Central Gulf Lines, Inc.,*[8] the Supreme Court reversed a longstanding bright line rule that agency contracts could never be maritime contracts. That court ruled that "the 'nature and subject-matter' of the contract at issue should be the crucial consideration in assessing admiralty jurisdiction."[9] And in *Norfolk Southern Railway Co.* v. *James N. Kirby, Pty. Ltd.,*[10] the Supreme Court held that a multi-modal bill of lading involving ocean carriage was a maritime contract governed by the Carriage of Goods by Sea Act even as to damage occurring on the over-land legs of the voyage. According to the *Kirby* court, the inquiry was whether the contract had reference to maritime service or maritime transaction—in sum, was it sufficiently "salty" in nature to involve the court's maritime jurisdiction?

In 2008, a United States District judge in New York felt sufficiently emboldened by these rulings to conclude that *Exxon* and *Kirby* "support the demise of the holding in The ADA" and ruled that a ship sale contract was a maritime contract and, consequently, that a claim thereunder would support a maritime pre-judgment attachment.[11] That court wrote "a contract for the purchase of a launched ship … has a distinctly 'salty flavor,' for the sole purpose of a ship is to sail" and "[maritime] commerce requires a vessel, sailors, and ship fuel, and there is simply no justification for including contracts for the latter two requirements in admiralty jurisdiction while excluding contracts for the former."[12]

Other judges in the Southern District of New York declined to follow the new course charted by *Kalafrana,* however, finding instead that nothing in *Kirby* and *Exxon* supported the ruling that *The ADA* had been reversed *sub silentio.*[13] And in December 2009, in *Primera Maritime Ltd.* v. *Comet Fin. Inc.,*[14] the Second Circuit thwarted a similar assault on the ship-construction contract rule, though perhaps not without providing a glimmer of hope for those aspiring someday to change the rule: "[Plaintiff] is correct to point out that the conceptual approach taken in [*Exxon* and *Kirby*] suggests that modern principles disfavor *per se* admiralty rules based on the site of the contract's formation or performance." Still, the Second Circuit concluded that its hands were tied: "Until the Supreme Court declares that contracts for ship construction are maritime in nature, disputes arising from such contract will not give rise to the federal courts' admiralty jurisdiction."

Conclusion

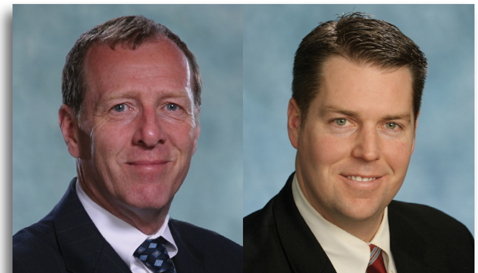
It is probably just a matter of time before the right case gets before the Supreme Court that will allow it to reassess these jurisdictional questions in light of modern developments. And one might surmise that if the Supreme Court is willing to take a critical look at its earlier rulings, it would be hard-pressed to defend them in light of its rulings in *Exxon* and *Kirby* and in light of the widespread criticism of the current doctrine. Of course, as we learned just recently with regard to its ruling on the heath care legislation, the Supreme Court is full of surprises. So, we will have to wait and see what happens.

This article first appeared in the August 2012 edition of *Maritime Reporter*. To learn more about *Maritime Reporter,* please visit www.maritimereporter.com. ■

1. 61 U.S. 393 (1857).
2. *Id.* at 402.
3. 250 F. 194 (2d Cir. 1918).
4. 50 Colum. L. Rev. 259, 264 (1950).
5. Gilmore & Black, *The Law of Admiralty* (2d Ed. 1975), p. 26, n. 28.
6. David J. Bederman, *The Future of Maritime Law in the Federal Maritime Courts: A Faculty Colloquium: Admiralty Jurisdiction,* 31 J. Mar. L. and Com. 189, 204 (2000).
7. 1 Benedict on Admiralty § 185 at 12-26.
8. 500 U.S. 603 (1991).
9. *Id.* at 611.
10. 543 U.S. 14 (2004).
11. *Kalafrana Shipping Ltd. v. Sea Gull Shipping Co. Ltd.,* 591 F. Supp. 2d 505 (S.D.N.Y. 2008).
12. *Id.* at 509.
13. *See e.g., Polestar Mar. Ltd.* v. *Nanjing Ocean Shipping Co.,* 631 F. Supp. 2d 304 (S.D.N.Y. 2009).
14. 355 Fed. Appx. 477, 2009 U.S. App. LEXIS 26331 (2d Cir. 2009).

The Doctrine of Judicial Estoppel—Alive, Well, Expanding, and Still Devastating

BY JEFFREY S. MOLLER AND JAMES J. QUINLAN



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The doctrine of "judicial estoppel" is alive and fully applicable to maritime personal injury claims. In fact, recent case law suggests that the doctrine is expanding somewhat. Judicial estoppel can have a devastating effect on a plaintiff's damages calculation and can sometimes be a complete bar to a lawsuit, leaving a longshoreman or Jones Act seaman with little more than an order of dismissal in their pocket. It is for these reasons that Blank Rome's maritime litigation team regularly dives deeply into a plaintiff's past for records containing contradictory statements that could limit or sink a pending claim.

Judicial Estoppel: The Basics

The doctrine of judicial estoppel serves to prevent a litigant from taking a position or asserting a claim in a court proceeding that is directly contrary to a statement made or position taken in a previous proceeding. The authority to apply the doctrine stems from the court's inherent equitable authority to sanction malfeasance. The stated purpose of judicial estoppel is to protect the integrity of the court process, but the doctrine is also applied to prevent the commission of a fraud upon a defendant. Generally, judicial estoppel bars a litigant from asserting a position that is inconsistent with one he or she previously took before a court, but prior inconsistent statements made by the litigant in non-judicial proceedings can give rise to judicial estoppel, as well.

Most federal circuits have a test, framework, or rubric for the doctrine's application. The law in the Third Circuit, for example, sets out a typical test consisting of three requirements. First, the party being estopped must have taken two positions or made

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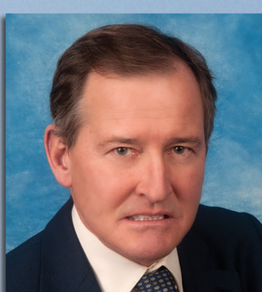

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Congratulations to Jeremy Harwood: Selected as One of the Top Five Maritime Lawyers by TradeWinds 2012

"Jeremy Harwood: Notorious as an aggressive maritime litigator who can flash a grin or a dagger."

— TradeWinds 2012

Excerpted from TradeWinds 2012: Not being broke has become a fairly exclusive distinction for shipowners but it makes a big difference in which jurisdiction you go broke.

An increasing share of the power in the industry lies in the hands of the bankruptcy judges, liquidators or court-appointed administrators of Singapore, South Korea, the US, Germany, the UK and various offshore havens.

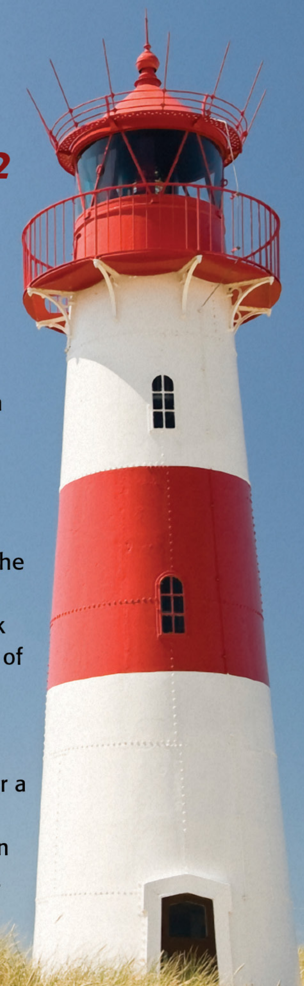
New York lawyers such as Blank Rome's Jeremy Harwood have sold troubled shipowners on the idea of the US as a jurisdiction where they can hang on to more control for themselves.

Bankruptcy, like shipping, is a cyclical industry and Harwood has worked the game, going back to the wave of insolvencies in the 1980s that included US Lines and Lykes Lines, then the failures of Millennium Seacarriers and Interbulk in the 1990s.

More recent names include Daewoo Logistics, The Containership Company and Marco Polo Seatrade.

However, Harwood is also notorious as an aggressive maritime litigator who can flash a grin or a dagger.

The Englishman, and graduate of Oxford and Sandhurst, may be better liked by his clients than by some of his opposite numbers in the relatively chummy New York maritime legal community.

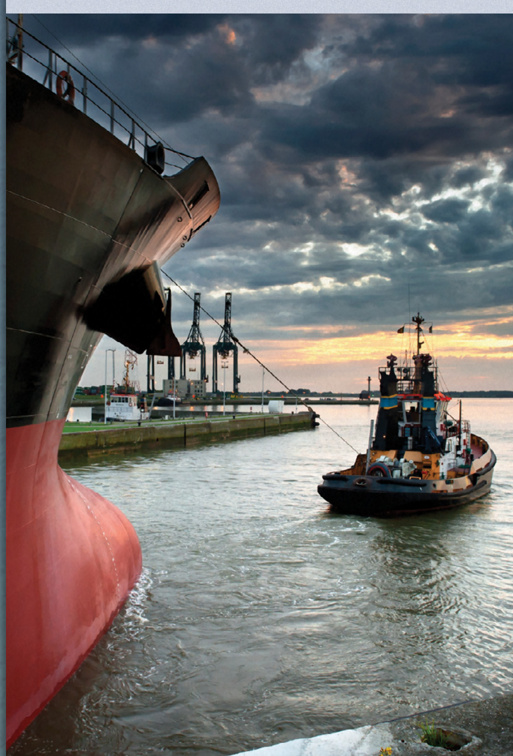


Chambers 2012 Honors Blank Rome Maritime Attorneys

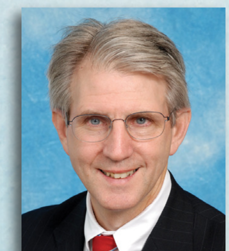
SHIPPING LITIGATION (NEW YORK)

BAND 1 **BLANK ROME LLP**

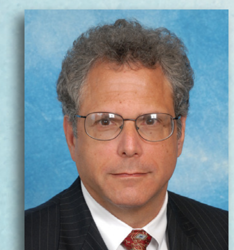
The Firm: This market leading team has the depth and expertise to handle the most complex litigation. The team advises on the full range of disputes from those in the environmental sphere to criminal and bankruptcy cases. It also acts for a broad range of clients which includes shipowners, operators, and charter parties. Notable clients include Steamship Mutual Insurance Services, UK P&I Club, and Yasa Shipping.



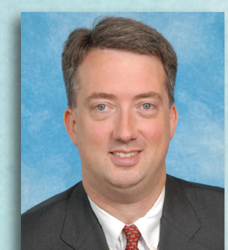
Key Individuals for Shipping Litigation



John D. Kimball, ranked as a band one attorney in *Chambers 2012,* is "clearly a leader" in this space according to market sources. They go on to describe him as "a top notch litigator and a formidable adversary." In one highlight, he defended Companhia Siderurgica Nacional in a $53 million ICC arbitration.



Jack A. Greenbaum, ranked as a band three attorney in *Chambers 2012,* is a senior litigator who has extensive experience handling difficult litigation, including complex oil spill cases. Sources remain impressed with his working style, saying: "He always hits the nail on the head."



Thomas H. Belknap, Jr., ranked as a band three attorney in *Chambers 2012,* is known for being "always prepared, articulate, knowledgeable and practical" in his approach to running cases. He has been working on numerous cases in the past year, including *Pan Oceanic v. RSUSA, LLC,* which concerns a $1.45 million claim regarding the failure of the charterer to present cargo at the load port.

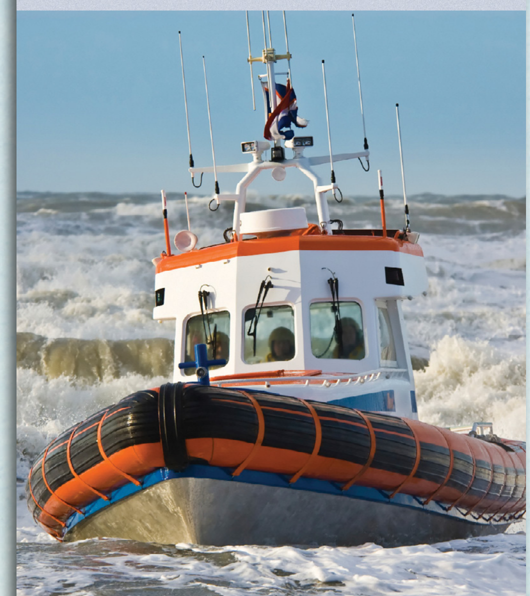
The quotes, commentary, and rankings referenced in this document are published in Chambers 2012.

SHIPPING REGULATORY (OUTSIDE NEW YORK)

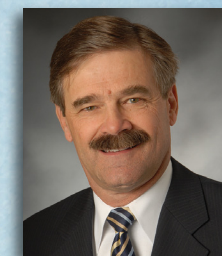
BAND 1 **BLANK ROME LLP**

The Firm: This team provides expert advice on a whole host of regulatory issues and, although strong across the board, it is held in particularly high esteem for its expertise in the Coast Guard area. As well as being busy in this space, following the *Deepwater Horizon* incident the team has also been advising on amending responder immunity laws under the Oil Pollution Act of 1990.

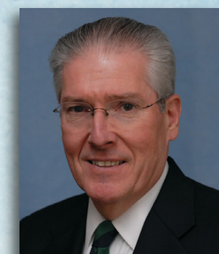
Client Service: "If something happens at 2 a.m. and I need an answer, they are always on call and able to pitch in on a moment's notice."



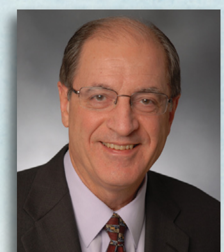
Key Individuals for Shipping Regulatory



Jonathan K. Waldron, ranked as a band one attorney in *Chambers 2012,* is highly sought after for advice on complex issues arising in the Coast Guard space. Sources note his breadth of experience, saying: "He represents a wide swath of the industry and can bring a lot of different perspectives to bear."

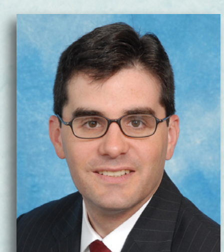


T. Michael Dyer, co-chairman of the firm, ranked as a band two attorney in *Chambers 2012,* continues to be highly respected in this area. Sources "have total confidence" in him, describing him as "extremely well prepared and thoughtful" and also valuing his "wide area of expertise."

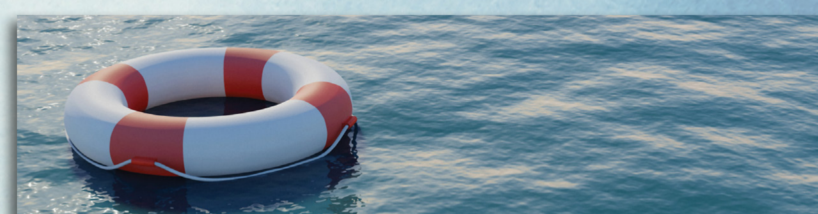


Duncan C. Smith, ranked as a band three attorney by *Chambers 2012,* is recommended by market sources for his "insight into the drafting process." He has extensive experience in the Coast Guard area, which ties in well with Blank Rome's focus on this space.

Key Individual for Shipping Finance



Brian P. Devine is listed in *Chambers 2012* as a key contact in Blank Rome's New York City office for the firm's shipping finance practice.



SHIPPING FINANCE (NEW YORK)

BAND 3 **BLANK ROME LLP**

The Firm: This team continues to have a solid reputation in shipping finance. Although it maintains a broad practice, it has been particularly active dealing with issues such as ship refinancing, restructuring, and bankruptcies arising out of the financial crises. Its broad portfolio of clients includes JPMorgan Securities, Credit Suisse, Horizon Lines, and HMS Global Maritime. The firm also boasts impressive links between its offices in the U.S. and China.

Client Service: "They are absolutely great and are fully responsive 24 hours a day."

The Doctrine of Judicial Estoppel (continued from page 5)

two statements that are irreconcilably inconsistent. Second, judicial estoppel should be applied only if a party changed or adapted his or her position in bad faith or with the intent "to play fast and loose with the court." Third, the judicial estoppel remedy must be "tailored to address the harm identified" and applied only where a lesser sanction would not adequately redress the harm done by the litigant's misconduct.

Judicial Estoppel: A Broader Application than Commonly Understood

Elements #2 and 3 of the Third Circuit test are fairly standard. Courts regularly require a showing of some conduct suggestive of bad faith or improper motive with respect to the inconsistent statements. And judicial estoppel will usually be applied in a way that is narrowly tailored to address the potential harm under the factual circumstances of the case. However, the requirement that a party must have taken two irreconcilably inconsistent positions is loosely defined, giving the courts some latitude in determining the types of statements and circumstances that qualify.

Courts have held, for example, that the timing of the inconsistent statements is not necessarily determinative. Therefore, both statements need not have been made during the course of the same pending lawsuit. Nor is it absolutely necessary for both statements to have been made in court proceedings. For example, prior statements made to local, state, and federal agencies, or to insurance companies, if sufficiently inconsistent with a later position being taken before a court, can give rise to a judicial estoppel. The fact that the prior inconsistent statement was not actually made by the plaintiff himself is not a problem either, if the statement was made at his/her direction or on his/her behalf. For example, a statement made by the plaintiff's physician that the plaintiff has authorized or endorsed in some fashion (by behavior or practice) would qualify. Finally, it is not always necessary to prove that the plaintiff actually obtained some sort of benefit from making the prior inconsistent statement.

A Recent Blank Rome Judicial Estoppel Success

In defending a multi-million dollar claim, we recently convinced a federal district court judge in the Third Circuit to apply judicial estoppel against a Jones Act seaman. In that matter, a tug boat captain had filed a suit in which he alleged that an unseaworthy condition aboard his employer's tugboat had caused injuries to his shoulder and back that would permanently disable him from all future maritime employment. During discovery, records were obtained from various sources pertaining to several previous Jones Act suits that the plaintiff had filed over his career. In those files, we located a 19-year old pretrial statement in which the plaintiff (via his counsel) had alleged that he had injured his back so severely that he would never again work as a mariner. In deposition, the plaintiff admitted to having settled that case for a significant sum.

We also obtained the plaintiff's U.S. Coast Guard file, which contained copies of applications for renewal of his license. Each of the license renewal applications was accompanied by a declaration co-signed by the plaintiff and his family doctor to the effect that the plaintiff was currently physically capable of performing the duties of a mariner. Notably, the plaintiff's most recent renewal application had been submitted ten months *after* the occurrence of the injury at issue in the current lawsuit, at a time when he was submitting Unfit for Duty slips to, and collecting maintenance and cure from, our client.

Armed with this evidence, we filed a motion for summary judgment asserting a two-pronged judicial estoppel argument. We first argued that the plaintiff could not have experienced a maritime career-ending injury twice. Because he had filed a statement with another federal court in 1993 claiming to have been permanently disabled from maritime work, he should be barred from seeking a second recovery for his future lost earnings. In the alternative, we argued that the declaration of medical fitness most recently submitted to the Coast Guard was directly contradictory to the claim of disability being made in his current Jones Act case, so he should be precluded from collecting damages for any prospective lost earnings after the date of his Coast Guard declaration.

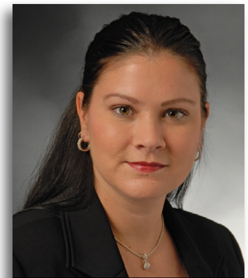
Though not willing to preclude the plaintiff's entire claim based on the 19-year old pretrial statement (due primarily to some potential ambiguity that would require consideration by a jury), the court did apply judicial estoppel based upon the inconsistent medical declaration made to the Coast Guard. The court found that the plaintiff was well aware of the inconsistency between his declaration to the Coast Guard and his position in the lawsuit and had provided no reasonable explanation. Therefore, a presumption of bad faith was appropriate and the imposition of judicial estoppel was necessary to prevent the perpetration of a fraud upon our client by means of the lawsuit.

A Practical Tip for Defending Jones Act and LHWCA Claims

We recommend digging deep during discovery by requesting access to any type of records in which a plaintiff may have made a statement about his physical or mental condition. Some areas to consider are the files of attorneys involved in prior lawsuits, documents in the possession of state and/or federal agencies that pertain to a plaintiff's licensure, and insurance company files pertaining to applications for coverage or claims for disability benefits. Those sources of information may contain proof that a plaintiff made a statement or took a position that is contrary to a position being put forward in his pending lawsuit. If a past contradictory statement made by or on behalf of a plaintiff can be located via thorough, diligent, and creative discovery, it can be the basis of a strong motion for the invocation of the doctrine of judicial estoppel. ■

Don't Risk an Expensive Run-In with the U.S. Federal Maritime Commission

BY TARA L. LEITER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For the first time in years, the U.S. Federal Maritime Commission ("FMC") has a full complement of five Commissioners and a renewed commitment to enforce the Shipping Act of 1984 (as amended, the "Shipping Act"). As a maritime lawyer representing clients before the FMC, I am often asked, "What is the FMC, what does it do, and why should I care?" The FMC is ramping up its efforts to find and penalize those who violate the Shipping Act, so it is a good idea to have at least a basic knowledge of the enforcement power of the FMC and how it can affect your business.

The FMC and What It Does

The FMC is the regulatory agency responsible for administering and enforcing the Shipping Act, the Controlled Carrier Act ("CCA"), and the Foreign Shipping Practices Act ("FSPA"). The FMC's jurisdiction extends to all vessel operating common carriers ("VOCCs"), non-vessel operating common carriers ("NVOCCs"), freight forwarders, and marine terminal operators ("MTOs") operating in the U.S. foreign commerce. This article only briefly discusses the CCA and FSPA as the Shipping Act is the most commonly cited statute by the FMC in its enforcement actions.

In short, the CCA allows the FMC to ensure that a controlled carrier's rates are not unjustly and unreasonably below market, which could disrupt trade or harm privately-owned carriers. A controlled carrier is one that is owned or controlled by a government as opposed to an individual or privately or publicly held company. The FSPA authorizes the FMC to investigate the treatment of U.S. carriers by foreign governments. If the FMC determines that U.S. carriers are subject to certain discriminatory practices in a foreign country, but the carriers of that foreign country are not subject to the same discriminatory practices in the United States, the FSPA allows the FMC to issue sanctions against the carriers of the discriminating foreign country.

The primary statute administered and enforced by the FMC is the Shipping Act, which regulates, amongst other things, common carriage in the foreign commerce of the United States. The principal purposes of the Shipping Act are: (1) to protect shippers from "unfair or unreasonable" discrimination by carriers, (2) to protect shippers from disreputable or unqualified NVOCCs and freight forwarders, and (3) to enable carriers and MTOs to enter into agreements between or among themselves that might otherwise run afoul of the U.S. anti-trust laws provided that they are not substantially anti-competitive.

The Shipping Act accomplishes the first purpose by requiring that VOCCs publish a tariff setting forth their rates, charges, and terms of service, and file with the FMC any privately negotiated "service contracts" they enter into with their shipper customers. The Shipping Act then requires that carriers charge either the applicable tariff rate or the rate contained in a service contract filed with the FMC. The Shipping Act's second purpose is accomplished by requiring NVOCCs and freight forwarders, depending on their location, to either register with or be licensed by the FMC, demonstrate their qualifications, and arrange financial security (usually in the form of a surety bond). The third purpose is accomplished by requiring that all carrier agreements be filed with the FMC for review to determine if the agreement is "substantially anti-competitive." After reviewing the filed agreement, if the FMC finds that the agreement is substantially anti-competitive, it can seek to enjoin operations under that agreement. If the FMC does not seek to enjoin operation under the agreement on the grounds that the agreement is substantially anti-competitive and the agreement becomes effective, the parties are granted anti-trust immunity with respect to activities authorized by the agreement.

Why You Should Care

The available monetary penalties for violations of the Shipping Act can be significant. In addition to monetary penalties, the FMC has the ability to revoke trading privileges if (continued on page 10)

Don't Risk an Expensive Run-In (continued from page 9)

it determines such action is necessary to protect the shipping public from fraud and unfair practices. Although revocation of trading privileges is an available option, the FMC usually resorts to monetary penalties. If the FMC determines that a violation has been committed unknowingly, the penalty can be up to $8,000 per violation. In most cases, each bill of lading constitutes a separate offense. If the FMC determines that the violation was committed knowingly and willfully, that penalty increases to $40,000 per violation. Take a minute to consider the magnitude of these potential penalties. For example, if a carrier was to unintentionally commit a single type of violation during the term of a service contract for 2,000 TEUs with each TEU carried on a separate bill of lading, the potential penalties would total $16 million (*i.e.* $8,000 x 2,000 bills of lading). If each of the violations in our example were committed knowingly and willfully (such as deliberately mis-rating cargo), the potential penalties skyrocket to $80 million.

These extreme penalties would be very difficult for the FMC to collect, so it is understandable that the FMC rarely seeks to impose the maximum penalty allowable under the Shipping Act. In fact, the FMC and the alleged violator almost always enter into what is known as a "compromise agreement." Once the FMC's Bureau of Enforcement completes its investigation, it will often negotiate a settlement with the alleged violator. Typically, the alleged violator agrees to pay a mitigated penalty—one that is far less than the maximum statutory penalty—in exchange for a release from further action by the FMC with respect to any alleged violations uncovered during the FMC's investigation. No admission of guilt is made on the part of the alleged violator in exchange for the penalty mitigation. While the mitigated penalties are far less than the allowable penalties under the Shipping Act, they are still steep enough to encourage the alleged violator to change its suspect practices.

With the FMC's stepped up monitoring and enforcement programs, Shipping Act violators may find themselves paying hefty penalties. Just two months ago, the FMC entered into compromise agreements with eight NVOCCs and related companies for total of $490,000 in penalties. Three of the NVOCCs paid a combined total of $235,000. While the FMC appears to be currently focused on NVOCCs, there have been significant penalties assessed against vessel operators, including a $1.2 million civil penalty against a major carrier in 2011. In the announcement made by the FMC in connection with this penalty, the FMC's Chairman said, "These penalties should serve as a reminder… If you're violating the law, sooner or later, we will find you, and the consequences can be serious."

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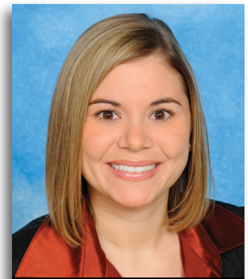
Obtaining Evidence in the United States for Use in Foreign Proceedings—An Update[1]

BY LAUREN B. WILGUS



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Title 28, Section 1782 of the United States Code can be a fruitful source of discovery for foreign litigants. The Statute is a legal device that authorizes a United States federal court to order a person "residing" or "found" within the court's geographical jurisdiction to provide testimony or documents for use before a "foreign or international tribunal."

In seeking evidence for use in a foreign legal proceeding under Section 1782, a district court may, but is not required, to order a person to produce discovery if the following three statutory requirements are met: (1) the application must be made by a "foreign or international tribunal" or "any interested person;" (2) the person or entity from whom the discovery is sought must reside or be found in the federal district in which the application is filed; and (3) the discovery must be for use in a proceeding in a "foreign or international tribunal."

Under the first requirement, the term "any interested person" is not limited to parties in a foreign proceeding, but also includes a non-party who has an interest in obtaining judicial assistance in a foreign proceeding.

The second requirement that the witness must reside or be found in the federal district where the application is filed is straightforward; however, there are limitations on the scope of discovery permitted under this requirement. The prevailing view is that Section 1782 does not authorize discovery of documents held abroad. Thus, even if a witness is located in the federal district where the application is filed, the witness cannot be forced to produce documents located outside of the United States. One New York decision, however, has held that Section 1782 does not require that the documents sought to be discovered be found in the district and, instead, held such considerations should be weighed on a case-by-case basis along with other discretionary factors.[2]

The meaning of the term "foreign or international tribunal" under the third requirement has led to many conflicting decisions. Since the Statute does not define any of its explicit terms, courts are left to decide their proper meaning, often with differing views. One recurring conflict is the question of Section 1782's applicability to foreign private arbitrations. Prior to 2004, several federal courts, including the Second and Fifth Circuits, determined that foreign private arbitrations were not "foreign or international tribunals" within the meaning of the Statute.[3] In a 2004 decision, *Intel Corp.* v. *Advanced Micro Devices, Inc.,* 542 U.S. 241 (2004), the United States Supreme Court provided guidance for courts interpreting and applying Section 1782. The

Supreme Court did not explicitly determine whether a foreign private arbitration is a "foreign or international tribunal" under Section 1782; however, the Supreme Court's reasoning and dicta strongly indicate that private arbitral tribunals fall within the Statute.

Since *Intel,* the majority of courts that have considered whether foreign private arbitral tribunals fall within the scope of Section 1782 have concluded that they do. A minority of courts, however, have followed the Second and Fifth Circuit's pre-*Intel* decisions and have held that foreign private arbitrations remain outside the scope of the Statute. While the pre-*Intel* decisions in the Second and Fifth Circuits remain on the books, an argument can be made that those decisions should be reconsidered in light of the *Intel* case. To date, the Second Circuit has not reexamined the issue and the Fifth Circuit has maintained its pre-*Intel* position.

Another interesting question under this requirement is whether there is a distinction between a "foreign" tribunal and an "international" tribunal. An argument can be made that the term "foreign" tribunal refers to any tribunal located abroad, whereas the phrase "international" tribunal refers to any arbitral tribunal created pursuant to a treaty or interstate agreement regardless of location, including the United States.[4] The *Intel* case is instructive in this regard. In *Intel,* the Supreme Court observed in dicta that "[Section] 1782 is a provision for assistance to tribunals abroad."[5] To date, however, no case has definitely addressed this issue.

Section 1782 is a powerful tool for foreign litigants because discovery is much broader in the United States than in most other legal systems. Notably, the discovery available under §1782 is not limited by the scope of discovery available in the jurisdiction where the main action is pending.

If the statutory requirements are satisfied, the district court may also consider four discretionary factors in deciding whether to grant or limit the requested discovery. These factors include: (1) whether the person from whom discovery is sought is a party in the foreign proceeding; (2) the nature of the foreign tribunal, the character of the proceedings underway abroad, and the receptivity of the tribunal to U.S. federal-court judicial assistance; (3) whether the Section 1782 petition conceals an attempt to circumvent discovery rules of the foreign country or the United States; and (4) whether the discovery request is unduly intrusive or burdensome. The decision of whether to grant a Section 1782 application, and the scope of the relief, if granted, is within the discretion of the federal district in which the application is filed and is made on a case-by-case basis.

Properly utilized, a party may obtain testimony from a key witness or critical documents that might otherwise be beyond the jurisdiction of a foreign court. Based on the plain meaning of the Statute and the Supreme Court's expansive reading of Section 1782, in *Intel,* an argument can be made that the Statute should be available to foreign private arbitrations seated outside of the United States. However, the question will only be definitively answered when the Supreme Court explicitly addresses whether foreign private arbitrations constitute "tribunals" under the Section 1782. Until then, any decision to seek discovery in the United States for use in a foreign private arbitration should be considered on a case-by-case basis in consultation with United States counsel. ■

1. See "Obtaining Evidence in the United States for Use in Foreign Private Arbitrations" by W. Cameron Beard published in the August 2010 edition of *International Litigation & ADR Update* and "Gathering Evidence in the United States for Use in Foreign Proceedings: 28 U.S.C. §1782" by W. Cameron Beard published in the October 2008 edition of *Mainbrace*.
2. See *In re Gemeinshcaftspraxis Dr. Med. Schottdorf,* No. Civ. M19-88 (BSJ), 2006 *U.S. Dist. LEXIS 94161,* at *16-17 (S.D.N.Y. Dec. 28, 2006). Two other courts have cited to the *In re Gemeinshcaftspraxis* decision with approval, but without further discussion or analysis of the split of authority. See *In re Eli Lilly & Co.,* No. 3:09 MC 296(AWT), 2010 U.S. Dist. LEXIS 59121, at *13 (D. Conn. June 15, 2010); *Minatec Finance S.A.R.L. v. SI Group Inc.,* No. 1:08- CV-269 (LEK/RFT), 2008 U.S. Dist. LEXIS 63802, at *14 n.8 (N.D.N.Y. Aug. 18, 2008).
3. See *NBC.* v. *Bear Stearns & Co.,* 165 F. 3d 184 (2d Cir. 1999) and *Republic of Kazakhstan* v. *Biedermann Int'l,* 168 F.3d 880 (5th Cir. 1999).
4. See *NBC,* 165 F. 3d, *supra* note 3, at 189-190 ("[T]he legislative history reveals that when Congress in 1964 enacted the modern version of §1782, it intended to cover governmental or intergovernmental arbitral tribunals and conventional courts and other state-sponsored adjudicatory bodies.")
5. See *Intel Corp.* v. *Advanced Micro Devices, Inc.* 542 U.S. 241, 263 (2004).

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