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WHO DO YOU WORK FOR? A HARBOR PILOT'S STATUS UNDER THE LHWCA

By Vince C. Reuter*

Harbor pilots have always played a special role in maritime activity. Stemming from state law, a harbor pilot's qualifications are tied to a licensing board and association that operates distinct from the vessel, the vessel owner, and the master and crew.¹ Courts face an ongoing challenge determining how to treat harbor pilots in the catalogue of federal admiralty law's duties and remedies. In *Rivera v. Kirby Offshore Marine, L.L.C.*,² the United States Court of Appeals for the Fifth Circuit addressed this question by deciding whether a harbor pilot is covered under § 5(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), and thus whether he or she is limited to bringing a claim for negligence against a third party. The Fifth Circuit held no. By extension, that court addressed whether a harbor pilot could instead constitute a *Sieracki* Seaman,³ thus allowing him or her to bring a claim for unseaworthiness—and its benefits of strict liability. Here, the Fifth Circuit held yes.

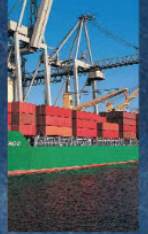
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¹ See, e.g., La. Stat. Ann. § 34:941 *et seq.*; N.Y. Nav. Law Chap. 37, Art. 6, § 87 *et seq.*

² *Rivera v. Kirby Offshore Marine, L.L.C.*, 983 F.3d 811 (5th Cir. 2020).

³ See *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946).

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CDC's CONDITIONAL SAIL ORDER – CHALLENGES TO RETURNING TO CRUISING

By Jeanne M. Grasso and Dana S. Merkel*

COVID-19 took the world by storm in January 2020, with the World Health Organization and U.S. Department of Health and Human Services declarations of a Public Health Emergency in late January. Shortly thereafter, the first major outbreak of coronavirus on a cruise ship occurred, quickly causing port States to quarantine or ban cruise ships from their ports, particularly in Asia and the South Pacific. In March, ports around the world, including in the United States, began turning away cruise ships and, on March 8, the U.S. Department of State advised against cruise travel. This was the beginning of the crisis that would face the cruise industry for the next 18+ months and possibly longer.

The World Health Organization declared COVID-19 a global pandemic on March 11, 2020, followed by the U.S. declaration of a national emergency. For all intents and purposes, cruising shut down in the United States and elsewhere, due in part to the U.S. Centers for Disease Control and Prevention's ("CDC") *No Sail Order and Other Measures Related to Operations*, issued on March 14, 2020, which applied to cruise ships with a capacity of 250 or more (crew and passengers). The No Sail Order, which prohibited cruise ships from operating in the United States, was subsequently extended and amended several times over the course of the year. The No Sail Order also required cruise ship operators to develop plans to prevent, mitigate, and respond to the spread of COVID-19 onboard cruise ships to protect crew, and obtain CDC approval for those plans.

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The No Sail Order was eventually replaced by CDC's *Framework for Conditional Sailing Order* ("CSO") on October 30, 2020, which was intended to set a path toward re-starting cruise operations in a way that best mitigated the spread of the coronavirus. Rather, the CSO created frustration for the cruise industry while it awaited guidance from CDC critical to implementing the CSO, which was not forthcoming for nearly six months.

CDC's Framework for Conditional Sailing Order

The CSO remains in effect until November 1, 2021 unless the U.S. Department of Health and Human Services declares that COVID-19 no longer constitutes a public health emergency or CDC otherwise rescinds or modifies the CSO based on public health or other considerations (or unless invalidated by the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit") as discussed below). It also applies to all cruise ships with a capacity to carry 250 or more persons onboard (crew and passengers), that would remain onboard for 24 hours or more.

The CSO included a number of phases that must be completed by each cruise ship before limited operations could resume. The first phase involved preparation to enter U.S. waters, including development of plans, four weeks of enhanced data collection reports, and testing/quarantine requirements, among others. The next phase addressed protection of crew and mandated laboratory testing of all crew by approved shoreside labs, along with continuing testing and mitigation protocols, as well as training of medical staff. Once these phases were complete, the ship would be eligible to conduct simulated voyages with volunteer passengers to test the cruise ship operator's ability to mitigate COVID-19 on the ship. The simulated voyage phase also required the operator to enter into port, medical, and housing agreements should an outbreak occur onboard. If the simulated voyages were successful as determined by CDC, the ship would then be eligible to obtain a Conditional Sailing Certificate that allowed restricted passenger operations on specific pre-approved itineraries. Overall, the process was anticipated to take numerous months to complete.

One of the difficulties of the CSO was that it was drafted seemingly assuming cruise ships would remain

primarily in U.S. waters. However, the vast majority of the large cruise ships have been anchored with minimal crew outside the United States. Nonetheless, CDC was adamant that all CSO requirements applied to cruise ships worldwide *if they intended to operate in the United States during the effective period of the CSO*, even if they presently had no specific plans for returning to operations in the United States. Many of the requirements of the CSO are onerous, and some near impossible to complete outside the United States, particularly as some of the requirements were in conflict with the COVID-19 prevention requirements of the port State where the vessel was located.

Another critical difficulty of the CSO was that although it included a number of phases and requirements, the details of how the vessels must complete each phase were not provided in the order; though such details (or technical instructions) were expected by the end of 2020. When informed that cruise ships were ready to move forward with the phases set forth in the CSO early in 2021, CDC informed the industry that they could not move forward until CDC developed guidelines for how the phases must be completed. In other words, the industry remained at a standstill for months until CDC issued the requisite technical instructions.

In April 2021, more than five months after the CSO was issued, CDC began releasing additional guidance on the CSO phases. Since then, the guidances have undergone numerous changes in response to industry questions and comments, as well as increasing vaccination rates. As a result, over the past few months some cruise ships have commenced operations in the United States under the strict CSO requirements, while others have opted to avoid the United States altogether, instead operating out of the Caribbean or in Europe or Asia. While this is a positive start, it will likely take months, if not years, to get back to the pre-pandemic volume of cruising.

Florida Challenges CDC's Conditional Sail Order

CDC's CSO, and the prior No Sail Orders, have not been without conflict. The State of Florida challenged the CSO in early April 2021 by filing a lawsuit in the United States District Court for the Middle District of Florida in Tampa, when it appeared CDC was making little effort to allow vessels to move through the CSO phases and actually allow cruise companies to restart operations. Florida argued that CDC's actions in restricting the cruise ship industry were "arbitrary and capricious," unconstitutional, contrary to the Administrative Procedure Act ("APA"), and far exceeded its authority. Alaska and Texas filed to join Florida in the suit, though Alaska later sought to be removed. On June 18, 2021,

a U.S. District Judge agreed and issued a preliminary injunction, finding that Florida was likely to prevail on its claims that CDC's actions in restricting the cruise industry exceeded its authority under the APA and that the state's economy was likely to suffer imminent and irreparable injury if cruise ships remained idle.

The District Court prohibited the CDC from enforcing the CSO against any cruise ship arriving in, within, or departing from a Florida port as of July 18 and gave CDC until July 2 to propose a less restrictive order. Since that time, CDC issued at least four updates to its policies and procedures for restarting cruise operations. The U.S. Department of Justice ("DOJ") appealed the District Court's June 18 decision to the Eleventh Circuit, and also requested that the District Court stay the injunction prohibiting enforcement of the CSO as the appeal moves forward, arguing that the CSO "does not shut down the cruise industry but instead provides a sensible, flexible framework for reopening." The District Judge denied CDC's request for a stay, so CDC appealed that decision to the Eleventh Circuit on July 7. On July 18, the Eleventh Circuit granted DOJ's request for a stay, but, just five days later, following Florida's emergency filing with the U.S. Supreme Court, the Eleventh Circuit reversed course and denied the stay, stating that the DOJ "failed to demonstrate an entitlement to a stay." The Eleventh Circuit's decision on the substance of the matter remains pending and, in the interim, CDC cannot enforce the CSO, which is now a voluntary program.

U.S. Coast Guard Role in Restarting the Cruise Industry

The U.S. Coast Guard ("USCG") also has a hand in the restart of the cruise industry. It is requiring a full annual Certificate of Compliance inspection before a cruise ship can resume passenger operations, even if the vessel's current certificate is still valid. This is because of the USCG's concerns associated with the cessation in cruise operations and the related uncertainties of vessel material condition and crew proficiency. The USCG wants to ensure machinery and safety systems are maintained in proper condition, and crew proficiency is evaluated prior to resuming passenger operations. A cruise ship must be ready to meet the CDC's simulated voyage requirements and be fully staffed for the appropriate period of time to fulfill requirements of SOLAS (International Convention for the Safety of Life at Sea) and STCW (International Convention on Standards for Training, Certification and Watchkeeping) for crew familiarization, training, and drills before the USCG will conduct the inspection.

Canada's Continued Ban on Cruise Ships

Even for those vessels that are able to resume operations, Canada's continued ban on cruise ships poses challenges for vessels with itineraries to Alaska or on the Great Lakes. Foreign-flag vessels must call on a foreign port during their itineraries to operate cruises from the United States in compliance with the Passenger Vessel Services Act ("PVSA"). Canada's ban rendered Alaskan and Great Lakes cruises by foreign-flag vessels impossible to be completed without violating the PVSA. Recently however, legislation was passed temporarily allowing cruise ships to complete Alaskan itineraries without stopping in Canada by deeming a "roundtrip voyage of a covered cruise ship transporting passengers between a port or place in the State of Alaska and a port or place in the State of Washington" a foreign voyage for purposes of U.S. law if the voyage begins prior to February 28, 2022, and if certain administrative conditions are met. However, the same PVSA exception has not been provided for Great Lakes itineraries.

Conclusion

After more than 16 months idle, the cruise industry seems to be cautiously optimistic about restarting passenger operations this year. CDC continues to engage with the industry and modify its requirements when needed to allow cruising to resume while still mitigating the risk of COVID-19 as best as reasonably possible. A handful of cruise ships have resumed limited capacity itineraries from the United States under the CSO and a number of smaller cruise ships that were not subject to the CSO have been operating successfully in the United States since March. As vaccination rates increase, the industry and cruise enthusiasts look forward to full resumption of cruising in the near future, though it may have a very different look than before the pandemic.