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EDITOR'S NOTE: ENERGY OPPORTUNITIES

Victoria Prussen Spears

TURNING TO TRANSMISSION: A CRITICAL CONNECTION IN THE ENERGY TRANSITION

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INFRASTRUCTURE INVESTMENT AND JOBS ACT: KEY PROVISIONS AND CONSIDERATIONS FOR PROJECT PARTICIPANTS

Mike Stenglein, Stephen V. O'Neal, J. Michael Taylor, Ethan P. Davis and Leigh Nathanson

BIDEN ADMINISTRATION ANNOUNCES ELECTRIC VEHICLE CHARGING ACTION PLAN TO "FAST-TRACK" NEW INFRASTRUCTURE LAW INVESTMENTS

Jorge Medina, Aimee P. Ghosh and Zachary C. Rozen

CAPTURING THE MOMENT: CONGRESS MOVES FORWARD TO PROMOTE CARBON CAPTURE TECHNOLOGIES

Erin Grubbs, Allison B. Rumsey, Ethan G. Shenkman, Sarah Grey and Brian D. Israel

MARITIME LAW: MARINE CASUALTY INVESTIGATIONS

Zachary J. Wyatte

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VOLUME 22

NUMBER 3

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Editor's Note: Energy Opportunities

Victoria Prussen Spears

79

Turning to Transmission: A Critical Connection in the Energy Transition

Daniel Hagan, John Forbush and Aaron Bryant

81

Infrastructure Investment and Jobs Act: Key Provisions and Considerations for Project Participants

Mike Stenglein, Stephen V. O'Neal, J. Michael Taylor, Ethan P. Davis and Leigh Nathanson

94

Biden Administration Announces Electric Vehicle Charging Action Plan to "Fast-Track" New Infrastructure Law Investments

Jorge Medina, Aimee P. Ghosh and Zachary C. Rozen

105

Capturing the Moment: Congress Moves Forward to Promote Carbon Capture Technologies

Erin Grubbs, Allison B. Rumsey, Ethan G. Shenkman, Sarah Grey and Brian D. Israel

108

Maritime Law: Marine Casualty Investigations

Zachary J. Wyatte

112

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Maritime Law

Marine Casualty Investigations

*By Zachary J. Wyatte**

Despite decades of implementing international safety protocols, advancements in ship design, and an industry-wide focus and dedication to improved safety, marine casualties will continue to occur; maybe not as often, but they will happen. The author of this column provides guidance for attorneys representing owners during marine casualty investigations.

IMPORTANCE OF PREPAREDNESS

Without a doubt, shipping industry stakeholders should always strive to have zero days lost due to accidents. But, equally, the industry should also always be prepared to immediately respond to and investigate unfortunate events when they occur. In this regard, it is critical to understand the investigative process that sets in motion after a significant marine casualty occurs.

Investigating and providing legal representation for clients following a marine casualty has shown that, despite decades of implementing international safety protocols, advancements in ship design, and an industry-wide focus and dedication to improved safety, marine casualties will continue to occur; maybe not as often, but they will happen. Simply put, following all the safety protocols put in place may not be enough to avoid a casualty. Indeed, vessels of all sizes, large and small, transiting the world's oceans, subject themselves to influences beyond their control that create the inherent risk of a casualty occurring.

AUTHORITY TO INVESTIGATE MARINE CASUALTIES

When a marine casualty triggers an investigation, the U.S. Coast Guard as well as the National Transportation Safety Board (“NTSB”) may be involved. The Coast Guard has broad authority to immediately investigate a “marine casualty” to determine the cause, whether a violation of law has occurred, whether the offender should be subject to a civil or criminal penalty, and whether there is a need for revised or new laws or regulations to prevent the recurrence of a similar casualty.¹ The jurisdictional reach of the Coast Guard related to investigating marine casualties involving foreign-flag vessels is

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¹ 46 U.S.C. § 6301. The term “marine casualty” includes any accidental grounding, or any occurrence involving damage to a vessel, its apparel, gear or cargo, or injury or loss of life of any person including any person diving from a vessel and using underwater breathing apparatus.

generally restricted to the navigable waters of the United States, which includes waters seaward from the coastline to 12 nautical miles.²

The NTSB is an independent federal agency charged with investigating all civil aviation accidents in the United States and significant accidents in other modes of transportation including “major marine casualties” occurring on the navigable waters of the United States or involving a vessel of the United States under regulations prescribed jointly by the NTSB and the Coast Guard.³

THE MARINE CASUALTY INVESTIGATION

When a vessel-related accident occurs on the navigable waters of the United States, the operator, owner, or person in charge of a vessel involved in such a casualty is obliged to give the soonest practicable notification, often followed by a written report, to the local Coast Guard Sector or office. This begins a process in which livelihoods, liberty, and civil liability might all be at stake. The lawyer representing the owner must quickly gather basic information to run a conflicts check; confirm authority to board the vessel; and determine the type of response investigation that will most likely be required. Careful thought is required when the Coast Guard investigating officer calls to request an interview.

The requirements to notify the Coast Guard of the occurrence of an incident are laid out in Subpart 4 of Title 46 of the Code of Federal Regulations. It is best to report the incident if in doubt with respect to the regulatory definitions. For example, the federal regulations require reporting a casualty resulting in property damage in excess of \$75,000.⁴ Unless little more than scratching of paint occurred, (except in situations involving an allision with a bridge),⁵ it

Collisions, strandings, groundings, foundering, heavy weather damage, fires, explosions, failure of gear/equipment and any other damage that might affect or impair the seaworthiness of the vessel are included within the meaning of this term. 46 C.F.R. §§ 4.03-1(a), (b).

² In 1991, Congress gave the Coast Guard the authority to investigate marine casualties involving U.S. citizens on foreign-flag passenger vessels operating in certain areas of the high seas beyond navigable waters. 46 U.S.C. § 6101(f). Jurisdiction with respect to U.S.-flag vessels is worldwide.

³ 49 U.S.C. § 1131(a)(1)(E). These joint regulations are identical. A major marine casualty means a casualty involving a vessel, other than a public vessel, that results in (1) the loss of six or more lives; (2) the loss of a mechanically propelled vessel of 100 or more gross tons; (3) property damage initially estimated as \$500,000 or more; or (4) a serious threat, as determined by the Commandant of the Coast Guard and concurred in by the Chairman of the NTSB, to life, property, or the environment by hazardous materials. 46 C.F.R. § 4.40-5(d); 49 C.F.R. § 850.5(e).

⁴ 46 C.F.R. 4.05-1(a)7.

⁵ Immediately after the addressing of resultant safety concerns, the owner, agent, master, operator, or person in charge, shall notify the nearest Sector Office, Marine Inspection Office or

would be wise to immediately notify the Coast Guard rather than wait for the estimate of a marine surveyor.

At the outset, the lawyer should gather the following information at a minimum:

- (1) The name of the vessel, its location, and the nature of the incident;
- (2) The condition of the crew, vessel, and cargo;
- (3) The identity of any other involved party, injured or otherwise;
- (4) The vessel's itinerary;
- (5) The presence of governmental authorities; and
- (6) Contact information for the vessel owner, underwriters, and vessel's agent.

Such information will assist the lawyer when making important decisions with respect to the initial response. For instance, the lawyer must determine the type of information that must be collected and decide whether to send notices of protest or notices of claims, or whether to retain and dispatch a marine surveyor.

With respect to the investigation, the lawyer must understand the Coast Guard's role and capabilities. The Coast Guard's investigations range from obtaining and analyzing evidence for minor incidents to establishing a marine board of investigation to investigate incidents involving serious personal injury, death, and significant environmental and property damage. The purpose of every Coast Guard investigation is to analyze the facts surrounding the casualty, determine the root cause(s) of the casualty, and, if necessary, initiate corrective actions. It will use the information gathered during the investigative process to consider promulgating new rules or advisories to prevent further casualties.

Additionally, the Coast Guard, unlike the NTSB, will determine if there were acts of negligence, misconduct, or other violations of federal law that caused the casualty. And, if so, the Coast Guard may refer the matter to the U.S. Department of Justice for a further review to determine whether a crime was committed. Consequently, it is critical at an early stage of the investigation that the lawyer representing the owner make a determination whether any crew member has any potential personal criminal exposure that might create a

Coast Guard Group Office whenever a vessel is involved in a marine casualty consisting in an unintended strike of (allision with) a bridge. 46 C.F.R. § 4.05-1(a)(1). In other words, in addition to the instances when a vessel's intentional strike to a bridge creates a hazard to navigation, the environment, or the safety of a vessel, any unintentional allision must be reported no matter the extent of damage.

conflict of interest between the owner and that crew member. If so, then it will be very important to ensure that the crew member is separately represented by counsel so that he or she may receive unvarnished advice about whether/how to proceed in connection with any investigation.

WITNESS STATEMENTS

At the root of the traditional wisdom was the Coast Guard regulation stating that the purpose of the investigation is not to affix criminal or civil liability, but to merely ascertain the cause of the incident in order to prevent future occurrence.⁶ The regulations also contain a form of limitation with respect to the admissibility of the mariner's statement:

In order to promote full disclosure and facilitate determinations as to the cause of marine casualties, no admission made by a person during an investigation . . . may be used against that person in a [license suspension and revocation] proceeding, except for impeachment.⁷

This provision seems to assure mariners that their statements would not come back to haunt them in subsequent proceedings against their licenses. It was also thought that cooperation with the Coast Guard is relatively harmless because the final report of the Coast Guard's investigation cannot be used in a civil lawsuit to affix liability.⁸

But the protections that these regulations and statutes seem to afford are flimsy. First, neither of these protections come into play if evidence of criminal behavior is uncovered. The Coast Guard is duty-bound to notify the local U.S. Attorney's office if a formal Marine Board of Investigation is impeached. Moreover, the Coast Guard is legally required to present any evidence of criminal conduct uncovered in its investigation to the U.S. Attorney General. Therefore, even if a statement made to the Coast Guard might not be directly useable as evidence in a suspension and revocation proceeding or as evidence in a civil trial, such statements or evidence might be directly used in a criminal prosecution.

Any statements made to an investigating officer, whether amounting to an admission or not, can be used to assess liability for civil penalties. The federal statutes allow for imposition of a civil penalty of \$5,000 for every proven breach

⁶ 46 C.F.R. § 4.07-1(b).

⁷ 46 C.F.R. § 5.101(b).

⁸ 46 U.S.C. § 6308; *but see* L. Lambert, The Use of Coast Guard Casualty Investigation Reports in Civil Litigation, 34 J. Mar. L. Comm. 75 (2003).

of the Inland Navigational Rules⁹ and \$25,000 for every instance of negligent navigation.¹⁰ There is nothing in the law or the regulations to prevent the Coast Guard from using any statement given in an interview to support its assessment of those civil penalties.

COOPERATION WITH INVESTIGATION

Ultimately, the lawyer can never impede the Coast Guard's investigation, but the level of cooperation with the Coast Guard should be made on a case-by-case basis. Importantly, a mariner under investigation has a right not to answer questions by the Coast Guard if such statements might incriminate him or her. Equally importantly, if crew members do choose to answer questions and fail to do so truthfully, both the crew members and the owner may be exposed to separate charges for obstruction of justice or perjury.

There may very well be instances in which a full exposition by the mariner may convince the Coast Guard that no further inquiry or investigation need be made and/or that no negligence or breach of the rules of the road took place. Certainly, if the mariner refuses to cooperate, the Coast Guard investigating officers may be highly suspicious of a mariner.

In the end, however, the decision whether to answer questions must be made with the presumption in mind that any statement given to the Coast Guard will be used in some form or another in suspension and revocation hearings, civil penalty hearings, and criminal trials.

⁹ 33 U.S.C. § 2072 (a).

¹⁰ 46 U.S.C. § 2302(a).