MONTGOMERY McCRACKEN

Maritime and Transportation Alert

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A quarterly publication providing information on important news and developments within the industry as well as within the firm.

IN THIS ISSUE

Discovery in Aid of Foreign Proceeding

By Matteo Bonuzzi

The United States District Court for the Southern District of New York recently considered the limits of discovery pursuant to 28 U.S.C. § 1782 in aid of a foreign proceeding on obtaining security.

In the recent case *Jiangsu Steamship Co. v. Success Superior Ltd.*, Jiangsu, the owner of the vessel M/V JIAN HUA filed a petition with the federal court for the Southern District of New York seeking discovery in aid of a foreign proceeding pursuant to 28 U.S.C. § 1782 from various New York banks and financial institutions.

28 U.S.C. § 1782 allows a court to compel discovery from a party located within the court's judicial district, if:

a. such discovery is for use in a foreign proceeding in front of a foreign tribunal;
b. discovery is requested by a rogatory issued by a foreign or international tribunal; or
c. if an interested party presents a motion to the Court to obtain such discovery.

In the Second Circuit (the U.S. federal appellate circuit including New York), a Court maintains discretion in deciding whether granting a motion under 28 U.S.C. § 1782.

In this recent case, the petition was filed within the context of a charter party dispute with the charterer Success Superior Limited ("SSL"), and the entity that guaranteed the charterer's performance, Mingli International Group S. de R.L. de C.V. ("Mingli"). The charter party provided for arbitration of disputes in London under English law, but the arbitration proceedings had not been started yet.

The evidence Jiangsu was seeking to obtain through the petition in New York related to SSL's and Mingli's assets held by financial institutions. It was undisputed that Jangsu was not seeking discovery in order to support the merits of its claim in the future London arbitration under the charter party. Jangsu justified resorting to 28 U.S.C. § 1782 by arguing that the evidence thus obtained would have been useful in bringing unspecified "foreign attachment proceedings" (in unspecified foreign countries) in order to secure or satisfy any award it might receive from the arbitrators in London.

As Jiangsu was not seeking discovery in anticipation of the London arbitration on the charterparty, but rather seeking either pre-judgment or post-judgment security in an undefined future action, the District Court denied Jiangsu's motion.

In making this decision, the District Court relied on the Second Circuit case Euromepa, S.A. v. R. Esmerian, Inc., 154 F.3d 24 (2 Cir. 1998), and explained that 28 U.S.C. § 1782 is only available when the foreign proceeding in aid of which discovery is sought is adjudicative in nature. Here, Jiangsu sought information about SSL's and Mingli's assets in New York banks so it could obtain security to address the potential positive outcome of the arbitration in London. As the District Court explained, "neither pre-judgment attachment nor post-judgment enforcement proceedings are "adjudicative" in nature" as they involve an enforcement proceeding that will not resolve the underlying claims.

U.S. District Court Explores What Constitutes "Other Damage" Under the Economic Loss Rule

By Ethan Hougah

A recent United States district court decision on a motion to dismiss explored whether tort claims based on mitigation of damage to "other property" was sufficient to overcome the Economic Loss Rule – which, under U.S. law, is the Rule that damages for economic loss are not recoverable in tort when unaccompanied by physical damage to property or personal injury.

In *Oldendorff Carriers GmbH & Co., KG v. Total Petrochemicals & Refining USA, Inc., et al.*, 2014 WL 6606542 (S.D. Tex. Nov. 19, 2014), plaintiff, the charterer of the *M/V Floriana*, brought suit against a number of defendants, including Total Petrochemicals & Refining USA, Inc. ("TP&R") and Unipec America ("Unipec") based on allegedly unusable bunker fuel. On or around January 17, 2013, TP&R provided bunker fuel to the *Floriana* from shore tanks in Lake Charles, Louisiana. TP&R purchased the fuel from Unipec. Pursuant to their contract with the plaintiff, TP&R warranted that the fuel would meet the marine fuel quality standards set by the International Standards Organization. However, when the crew of the *Floriana* burned the fuel, the fuel filters became repeatedly clogged. The *Floriana* crew determined that the fuel was unusable because it was off specification for density and viscosity, and contained tetradecene and polymeric particulate matter. The unusable fuel was then offloaded in the United Kingdom, in order to create capacity for replacement fuel.

In exchange for $377,000.00, the owner of the *Floriana* settled its contaminated fuel claims under the Time Charter Party against Oldendorff, and assigned its rights as against other parties that were involved in providing fuel to the vessel. Subsequently, plaintiff Oldendorff asserted claims against the defendants TP&R, Unipec and others for, *inter alia*, breach of contract, negligence, breach of warranty of fitness, and fraud. Additionally, the plaintiff asserted a claim based on product liability, alleging that one or more of the defendants was strictly liable for failure to properly design, manufacture or market the bad fuel.

In pertinent part, the Amended Complaint alleged that:

> This bad fuel ultimately was not usable by the ship, as it clogged the vessel's fuel filters. The full extent of the problems caused by the use of the bad fuel are still being sorted out, and it may be that the vessel's main engine has sustained or will sustain damage due to the undesirable particulate matter present in the bad fuel.

Defendant Unipec filed a motion to dismiss arguing, among other things that the plaintiff was barred from recovering economic damages by the economic loss rule because the only damage was to the bunker fuel itself and because the plaintiff was "a sophisticated commercial party that could have contracted for a remedy, but chose not to do so." In considering this portion of Unipec's motion, the district court noted that, pursuant to *East River S.S. Corp. v. Transamerica Delaval, Inc*., 476 U.S. 858 (1986), the U.S. Supreme Court found the "economic loss rule" prevented a maritime plaintiff from maintaining a tort cause of action "when a defective product purchased in a commercial transaction malfunctions, injuring only the product itself and causing purely economic loss." 476 U.S. at 859.

More importantly, the district court went further to determine that by also alleging damage to the fuel filters, the plaintiff alleged damage to property beyond the defective fuel itself. Accordingly, the district

court found that the tort claims for unusable fuel that also alleged damage to fuel filters were not barred by the Economic Loss Rule.

Interestingly, the plaintiff also argued that its claims were not barred by the economic loss rule because it pleaded mitigation of additional damage to the vessel's engine. This "mitigation" argument was based, in part, on *Catalyst Old River Hydroelectric Ltd. Partnership v. Ingram Barge Co*., 639 F.3d 207 (Fifth Cir. 2011), where the Fifth Circuit held that costs incurred to prevent permanent physical damage can satisfy the physical damage requirement to recover for economic loss under general maritime law. Essentially, the plaintiff in *Oldendorff* argued that because mitigation can be considered physical damage to show economic loss, mitigation to prevent damage to "other property" is legally cognizable as "damage to that other property" for purposes of the *East River* economic loss doctrine.

However, the district court found that the plaintiff's allegation of *possible* damage to the engine fell short of alleging damage to "other property" as needed to overcome the economic loss rule. This is because mere possibility does not satisfy the *Iqbal* requirement of facial plausibility, *i.e*., "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In the end, the district court found that the plaintiff's mitigation argument was intriguing, but insufficiently pleaded since it was unclear whether the alleged mitigation efforts were limited to preventing further damage to the fuel, or avoiding the "sheer possibility" of damage to the engine. The district court noted that the former scenario would fail to allege damage to "other property," whereas the latter would face the same facial plausibility issues as the plaintiff's allegations concerning "possible damage" to the engine. Hence, the plaintiff was allowed time to amended its Complaint to clarify this claim in light of the distinction.

While the *Oldendorff* court did not expand the limits of the Economic Loss Rule, the district court confirmed the possibility of pleading mitigation of damage to other property as a viable tort claim under the economic loss doctrine.

Hawaiian Settlement Not So Sweet for Matson Navigation

By Robert O'Connor

In a significant settlement announced by the Hawaii Attorney General's Office, Matson Navigation Company has agreed to pay the state $15.4 million for a September 2013 spill of molasses into Honolulu Harbor. Under terms of the settlement, Matson will pay through a combination of cash, restoration and other environmental programs. The spill, which discharged some 1,400 tons of molasses, negatively impacted dissolved oxygen and pH levels in the Harbor and surrounding areas, killing about 25,000 fish and other sea creatures, damaging sensitive coral reefs and disrupting Harbor operations. A copy of the AG's news release can be viewed here.

The spill originated from a pipeline that Matson Navigation and an affiliate, Matson Terminals, Inc., used to transfer bulk molasses to vessels at a neighboring berth. Matson allegedly was aware that the pipeline had been leaking molasses for some time before the spill occurred. Things got sticky for the Company when Company officials admitted to investigators that while it had plans to respond to spills of oil or other chemicals, it did not have a plan in place for a release of molasses. Despite not having a plan in place, Matson Navigation quickly accepted responsibility for the release and expended significant resources on the response.

Notably, the State conducted its own investigation to assess the environmental impact of the spill, and hired an outside law firm to pursue its damage claim against Matson Navigation. Concurrently, the federal government conducted both criminal and civil investigations. In January 2015, Matson Terminals pled guilty to two misdemeanor counts of discharging a pollutant without a permit, and agreed to pay a $400,000 fine, plus restitution of $600,000 to parties injured when the release shut down the Harbor and disrupted the local economy. The $600,000 was originally characterized as a Community Service Payment but after the federal magistrate reviewing it raised concerns, the United States reclassified it as restitution. News of the federal criminal sentence and restitution order was released by the Justice Department in January and can be read here.

The federal government is reviewing the civil settlement between Matson Navigation and the State to determine whether it affects the federal government's ongoing civil investigation. In the meanwhile, faced with significant costs from the spill and to upgrade its molasses handling and transfer facilities, Matson agreed to discontinue all of its molasses operations in Hawaii.

To Lien or Not to Lien – When bunkers are supplied to a vessel

By Kaspar Kielland

The United States Court of Appeals for the Fourth Circuit considered whether a supplier of necessaries had a valid maritime lien despite a "no lien" clause and stamp.

In *World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co.*, 783 F.3d 507 (Fourth Cir. 2015), a bunker supplier arrested the vessel M/V HEBEI PRINCE, while she was anchored at the port of Norfolk, Virginia, for unpaid bunkers provided to the vessel in United Arab Emirates. The bunker order confirmation identified the bunker supplier as the "seller" and the charterer, the owners and operators of the vessel as the "buyer." The confirmation also included language that: "Any disclaimer stamps placed by vsl on the bunker will have no effect and do not waive the seller's lien." The charterer due to financial problems failed to pay for the bunkers. Therefore, the supplier arrested the vessel and demanded that the vessel owner payed the outstanding amount.

When the arrest was initially challenged by the vessel owner, the District Court held that the supplier had a valid maritime line under the U.S. Federal Maritime Lien Act ("FMLA") since proper notice of a U.S. Choice of Law provision was given to the charterer and to vessel owners, and the "no-lien" disclaimer, which was stamped on the bunker delivery received by the vessel's chief engineer after that the fuel had been supplied, was not enforceable against the supplier.

It should be noted that, under the FMLA, a supplier of necessaries that received instruction to deliver necessaries to the vessel – in this case bunkers - from a party that is authorized to bind the vessel - in this case the vessel's charterer - is entitled to a maritime lien on the vessel. Once a lien has been created, the supplier can arrest the vessel transiting in any U.S. port as security for a claim – in this case the amount owed by the charterer to the supplier for the bunker supply - even in absence of any other connections to the United States - like in the case at bar, where the bunker supply and the contract negotiation for such supply took place in foreign countries between foreign entities.

On appeal, the Fourth Circuit confirmed, among other things that: (1) the U.S. choice of law provision contained in the supplier's general terms and conditions, which were referenced in the order confirmation and delivery receipt, was sufficiently noticed and enforceable; (2) no objection was made to the bunker confirmation language protecting the supplier's lien (3) the supplier had never been provided notice of the "no lien" clause in the charter party for the vessel; (4) the "no lien" stamp was added to the bunker receipt after delivery and not in advance (e.g., when the bunkers were ordered); and (5) the supplier was not required to engage in self-help (i.e., retrieve the bunkers) after receiving the "no lien" stamp on the receipt.

World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co. emphasizes that proper notice of contractual provisions is essential. Thus, all players in the maritime industry must pay particular attention to how they incorporate, reference, and give notice of the various terms and conditions that are part of their maritime contracts, as their respective rights and liabilities can be greatly affected for the better or for the worst.

U.S. Coast Guard Investigations: Admissible or Not in Litigation?

By Melanie Leney

A U.S. District Court considered whether photographs taken as part of a U.S. Coast Guard investigation were admissible.

Under 46 U.S.C. § 6308(a), no part of a U.S. Coast Guard Marine Casualty Investigation Report, including findings of fact, opinions, recommendations, deliberations or conclusions, is admissible as evidence or subject to discovery in any civil or administrative proceedings. The statute is clear and it is generally accepted that the Coast Guard's actual investigative report is protected from discovery and inadmissible as evidence in litigation. *See, e.g., Guest v. Carnival Corp.*, 917 F.Supp.2d 1242, 1245 (S.D. Fla. 2012).

However, what happens when the Coast Guard investigates an incident but no Marine Casualty Investigation Report ("MCIR") is created? Are documents generated by the Coast Guard as part of its preliminary investigation admissible at trial or not? This is precisely the situation the District Court faced in *Newill v. Campbell Transp. Co., Inc.*, No. 12-cv-1344, 2015 WL 222438 (W.D. Pa. Jan. 14, 2015).

In *Newill*, the Coast Guard launched a preliminary investigation into plaintiff Newill's fall following defendant's report of the incident to the Coast Guard. At some point, nine photographs of the accident scene were taken, although the Marine Casualty Investigator had no recollection as to who took the photos or when they were taken. The Coast Guard's preliminary investigation determined that the fall was not a serious marine accident or a major marine casualty, so the investigation ended at the preliminary level. The Coast Guard did not generate a MCIR. Plaintiff later obtained the photographs from the Coast Guard via a Freedom of Information Act request. Defendant filed a motion to preclude admission of the photographs at trial, and plaintiff filed a cross-motion to establish their admissibility.

The *Newill* Court immediately recognized that there was almost no case law directly on point inasmuch as the existing cases involved situations where an actual report existed. However, it found persuasive the cases taking a narrower interpretation of Section 6308(a). First, it found that Section 6308(a) extends only to reports of an investigation conducted under Section 6301. Here, the Coast Guard's investigation never passed the preliminary level and no report was made. It was, therefore, "as though the photographs were just like any other document in the possession of the Coast Guard," which may or may not be admissible at trial under the rules of evidence. Second, the District Court found that even if Section 6308(a) does cover preliminary investigations, the photographs were not the type of materials the statute was designed to cover. They did not fix any type of liability, but merely illustrated the condition of the objects depicted.

Although recognizing this as a "close call," the District Court held that Section 6308(a) was not a bar to the admissibility of the photographs.
In short, although Section 6308(a) appears to be a total bar to the admissibility of Coast Guard investigations, in certain circumstances, there may be exceptions to the statute.

Wrongful Arrest Requires Bad Faith, Malice or Gross Negligence

By Cora Dayon

The United States Court of Appeals for the Eleventh Circuit recently considered whether honest reliance on legal counsel versus immediately releasing a vessel and implied knowledge of the actual identity of the vessel owner constitute grounds for wrongful arrest.

On September 5, 2007, Dantzler Inc. was awarded a judgment by a Brazilian court against Monsted Chartering ("Monsted"). In an attempt to collect the judgment, Dantzler's Brazilian counsel petitioned the Brazilian court to arrest a vessel believed to be operated by Scan-Trans Holdings A/S ("Scan-Trans"), a successor-in-interest to Monsted. On June 18, 2013, the M/V Industrial Fighter ("Industrial Fighter") was seized pursuant to the arrest order issued by the Brazilian court.

Upon seizure of the Industrial Fighter, the current time charterer of that vessel, Industrial Maritime Carriers, LLC ("IMC"), notified Dantzler that the Industrial Fighter was being mistakenly held because neither Monsted, nor Scan-Tran or any other successor of Monsted held an interest in the Industrial Fighter. IMC evidenced this by producing copies of readily available publications which indicated that a German company, MS "ERIS J" Schiffahrtsgessellschaft mbH & co. KG ("Eris"), owned the vessel. Instead of immediately releasing the vessel, Dantzler contacted both its Brazilian and its United States counsel for advice on how to proceed. Dantzler's United States counsel contacted IMC in an attempt to resolve the confusion. Simultaneously, Eris, the owner of the Industrial Fighter, petitioned the Brazilian court to release the vessel on June 20, 2013. On June 24, 2013, the petition was granted and the vessel was released.

Soon after, IMC filed suit in the Southern District of Florida alleging wrongful arrest of a vessel and tortious interference with contract and business relationships. Dantzler moved for summary judgment to dismiss the claims, and the District Court for the Southern District of Florida granted summary judgment. See *Industrial Maritime Carriers, LLC v. Dantzler, Inc.*, 62 F.Supp.3d 1355 (S.D. Fla, 2014).

IMC appealed to the United States Court of Appeals for the Eleventh Circuit. On appeal, IMC argued that Dantzler was liable for wrongful arrest because Dantzler failed to provide the Brazilian court with the true identity of the vessel's owner and Dantzler had implied knowledge that the arrest was improper because there were maritime publications that listed Eris as the owner of the Industrial Fighter.

In *Indus. Mar. Carriers, LLC v. Dantzler, Inc.*, No. 14-15130, 2015 WL 3423103 (11th Cir. May 29, 2015), the Appellate Court found that there was no evidence that Dantzler knew that the Industrial Fighter belonged to Eris, prior to having the vessel arrested. Although Dantzler was subsequently notified of the true ownership of the vessel, Dantzler did not act with bad faith, malice or recklessness by consulting with its counsel to resolve the matter opposed to immediately releasing the vessel. Additionally, the Appellate Court found that, although Dantzler may have impliedly known the identity of the true owner of the vessel by way of maritime publications, implied knowledge only amounted to negligence. The Appellate Court confirmed that negligence alone is insufficient to prove the wrongful arrest of a vessel.

Finally, the Appellate Court held that honest reliance on advice of counsel is an absolute defense. Here, the Appellate Court found that Dantzler relied on its Brazilian counsel to handle the matter, and there was no evidence that Dantzler should have known that Madeira's actions were inappropriate. As the Appellate Court succinctly stated, "wrongful arrest is not a tool to redress good-faith mistakes of a party's identity or the law, even though these mistakes may turn out to be costly."

Ultimately, IMC was unable to show bad faith, malice or recklessness on behalf of Dantzler, and the Court refused to overturn precedent and expose Dantzler to liability based on its negligent acts and representations of its attorney.

Firm News and Events

Judge Says Terminal Not Liable for Hurricane Sandy-Soaked Sweaters

Partner **Vince DeOrchis**, with assistance by associate **Kaspar Kielland** and legal clerk **Matteo Bonuzzi**, obtained a favorable judgment in the Southern District of New York on behalf of Zim Integrated Shipping Services, Ltd. against claims from Lord & Taylor LLC related to damages incurred as a result of Hurricane Sandy. As a result of flooding at the New York Container Terminal, 211 cartons containing Lord & Taylor's clothing items were ruined by water damage. While Hurricane Sandy was figuratively an Act of God, the court had to determine whether it was legally an Act of God and the judge found that it was and absolved Zim from liability for the loss. Articles about the case have appeared in American Shipper, Hellenic Shipping News Worldwide, New York Law Journal and Courthouse News.

OW'S U.S. Arms in Talks to Forge 'Consensual' Bankruptcy Plan

OW Bunker's U.S. units and key creditors are seeking to work out a "consensual" bankruptcy plan as part of a court-ordered mediation in Connecticut. The firm's Maritime and Bankruptcy groups are representing OW Bunker. Read more in TradeWinds.

10th Annual International Maritime Law Seminar

The International Maritime Law Seminar, co-founded by partner **Vince DeOrchis**, is taking place for the 10th consecutive year October 1 in London. With an average attendance of more than 250 insurance and maritime law professionals, the seminar has grown from a small event to one of the most anticipated legal seminars in London. The half day seminar, "Recent Developments in Maritime Law: A Multi-Jurisdictional Perspective" will feature 15 speakers from 14 different countries, addressing recent developments in maritime law within their respective jurisdictions.

MMWR Partners Recognized by Chambers USA

The firm is pleased to announce that partners **Tim Bergère** and **Vince DeOrchis** have been ranked in the 2015 edition of Chambers USA: America's Leading Lawyers for Business in the areas of Environmental Law and Maritime and Transportation, respectively. For nearly 25 years, Chambers and Partners has published the world's leading guides to the legal profession and has built a reputation for in-depth, objective research. The company has more than 140 full-time researchers who conduct thousands of interviews with lawyers and their clients worldwide, which establish the Chambers USA rankings. The qualities on which the rankings are assessed include firmwide strengths, areas of expertise, and reputation in the legal market.

MLA Luncheon in New York

The firm recently hosted a luncheon in its New York City office in conjunction with the Maritime Law Association's Spring 2015 Meetings, which took place April 29 – May 1.

Montgomery McCracken's Maritime and Transportation Practice Group

The Maritime and Transportation practice group at Montgomery McCracken represents marine, intermodal, trucking, rail and energy interests, as well as their respective insurers. The group serves all sectors of the maritime industry including ship owners, charterers, pilots, cargo owners, shipyards, port authorities, terminals, commodities traders, non-vessel operators and non-vessel operating common carriers. We handle claims involving pollution incidents, collisions, tug and tow issues, salvage, cargo loss and damage, personal injury, maritime products liability, regulatory issues, limitations on liabilities, insurance and reinsurance issues, subrogation and coverage disputes.

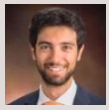
Recognizing the substantial threat posed by pollution incidents, Montgomery McCracken is well-equipped to defend all civil and criminal aspects of these incidents, including natural resource damage claims. The firm has assembled a response team of lawyers with extensive experience in maritime, criminal and environmental law. With lawyers in Philadelphia, New Jersey and New York, as well as close correspondents worldwide, we can quickly marshal resources to assist clients in response to an incident. We have also developed proactive crisis management programs to help clients prepare for unforeseen events.

In addition to handling claims involving cargo and products, our integrated team assists clients in bankruptcy and restructuring, corporate and finance matters, and defense of criminal investigations, including compliance matters such as the Foreign Corrupt Practices Act and sanctions administered by the U. S. Treasury Department's Office of Foreign Asset Control. Our business transaction lawyers support clients with contract preparation and review, development of corporate compliance programs and auditing performance under such protocols, general corporate matters, corporate finance, review of insurance policies and programs, employment matters and regulatory updates. The collective knowledge and experience in the industry enables us to fashion recommendations consistent with our clients' objectives.

The attorneys in our group are well aware of client requirements in terms of reporting the progress, updating budgets and meeting deadlines. In short, for every matter entrusted to us—large or small, simple or complex—we tailor our services to the clients' needs. We build long-term relationships with our clients based on mutual trust and respect.

The maritime and transportation team offers clients 24/7 service and is available via phone or email anytime. In the event of an incident or emergency, please contact any member of the team.

Meet the Group

 John Levy, Practice Chair	 Vince DeOrchis, Partner	 Fred Kuffler, Partner	 Tim Bergère, Partner	 Gene O'Connor, Partner	 Tricia Sadd, Partner	 Tim Semenoro, Partner
 Cora Dayon, Associate	 Ethan Hougah, Associate	 Kaspar Kielland, Associate	 Melanie Leney, Associate	 Bobby O'Connor, Associate	 Matteo Bonuzzi, Legal Clerk	