# Royston Rayzor
# Texas Ports & Courts Update


***In this edition*: (1) Texas Port Activities and Developments – updates regarding projects and operations along the Texas coast; and**

**(2) Recent Maritime Opinions from Texas Courts – summaries of noteworthy opinions and orders recently issued by Texas courts and the Fifth Circuit Court of Appeals**

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Serving the legal needs of marine transportation companies and their insurers from four offices located along the Texas coast.

Houston / Galveston / Corpus Christi / Brownsville

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# TEXAS PORT ACTIVITIES AND DEVELOPMENTS

## Brownsville

### (1) Historic Aircraft Carrier Travels to Brownsville For Final Voyage

The *USS Kitty Hawk* – having served almost 50 years from the Vietnam War all the way through the Second Iraq War – will arrive at the International Shipbreaking/EMR Brownsville facility at the end of May.

The storied aircraft carrier began its final sea voyage in January. Unable to transit through the Panama Canal, the vessel required a 5-month/17,000-mile journey from Puget Sound, Washington down the Pacific Coast of the Americas and through the Strait of Magellan, and then back up the Atlantic Coast to Brownsville via the tug assistance of the *Michelle Foss*.

The 1,047-foot-long vessel was launched in 1960, and it was named after the area of the North Carolina Outer Banks where the Wright Brothers made their historic flights in 1903. When the vessel deployed to Vietnam, it quickly distinguished itself, earning a Presidential Unit Citation – a unit award that is considered equivalent to an individual sailor earning the Navy Cross – for its actions between December 1967 and June 1968 during the fierce fighting around the Tet Offensive.

Following the Vietnam War, when the vessel was deployed in the Tsushima Strait between Korea and Japan, it collided with a surfacing Soviet submarine. The incident resulted in a small piece of the submarine's propeller becoming embedded in the vessel's hull. The submarine propellor provided U.S. intelligence about the anechoic coating on Soviet submarine after chunks of the sound-dampening tile were recovered from the vessel's hull.

Brownsville's long-established and very active shipbreaker industry is often called upon to assist with final recycling of U.S. naval vessels.

### (2) Increased Fuel Costs Troubling to Local Shrimping Industry

Robust fuel prices are often viewed as good news for Texas, but we note some of the local downsides as well. Fuel prices are so exorbitant right now that many South Texas shrimp boats are not profitable, tied up at the dock, and our local shrimp boat operators are concerned that they will lose their crews if they remain unable to fish much longer. Currently, a 2-month voyage costs the typical operator around $60,000, and up to $100,000 – just for fuel alone.

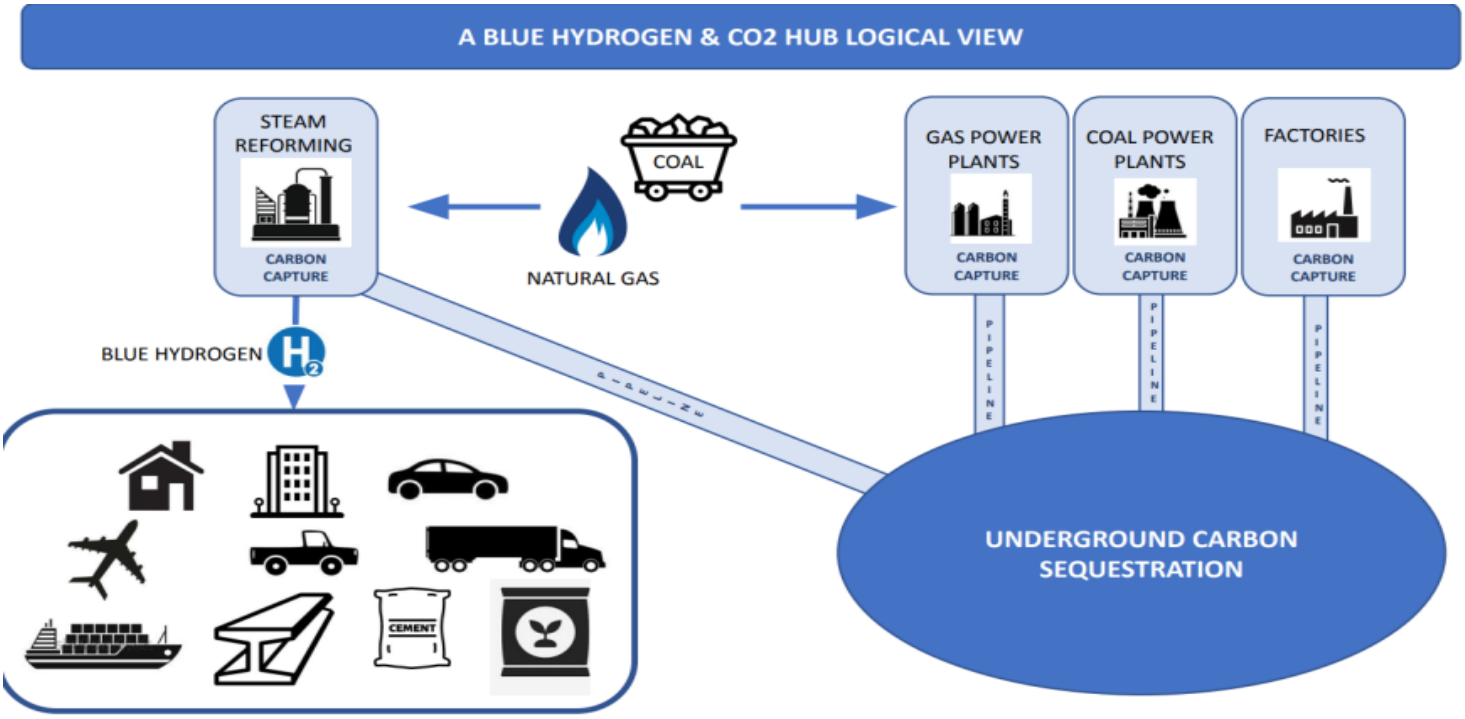
It is an unpleasant situation for the local shrimping industry. South Texas shrimpers are estimating that a fuel price of approximately $3.25 will be needed in order to return to profitability – diesel is currently priced at over $5/gallon, and gas is over $4/gallon at nearly all Texas locations.

Texas Gulf shrimp has typically had an extra appeal and price premium acceptability amongst the dining public, but concerns are increasing that restaurants and consumers may soon turn to "farm-raised" options from other parts of the world, and, if so, this may be a disruptor that will be hard to come back from.

## Corpus Christi: Carbon Capture and Blue Hydrogen Initiatives Press On

Canadian pipeline company Enbridge recently stated that it will partner with Denver-based Humble Midstream to develop a low-carbon blue hydrogen facility outside Corpus Christi. The planned facility at the Enbridge Ingleside Energy Center, if built, would cost roughly $2.5-3 billion and could come online as early as 2026.

The project aims to pull in natural gas through pipelines to the facility, where the gas would be converted into blue hydrogen and ammonia, which could be used for low-carbon energy purposes such as battery production for electric vehicles. The remaining carbon leftover would be captured and stored. Up to 95% of the carbon dioxide ($CO_2$) generated in the production process will be sequestered in newly developed carbon capture infrastructure, including facilities to be owned and operated by Enbridge, making this a fully integrated low-carbon solution. Enbridge's affiliate, Texas Eastern Transmission Pipeline, is expected to provide the transportation service for feed gas that will be used for the production process. Both hydrogen and ammonia have zero $CO_2$ emissions at the point of use.




Enbridge and Humble intend to jointly market the capacity of the facility and are in discussions with several potential offtake customers. The construction of any facilities will be subject to sufficient customer support and receipt of all necessary regulatory approvals.

## Freeport: Extension of Train 4 Deadline Requested by Freeport LNG

Freeport LNG recently asked federal regulators to extend the amount of time available to construct a fourth liquefaction train at its export plant in Freeport until August 2028. The U.S. Federal Energy Regulatory Commission (FERC) approved construction of the fourth train in May 2019, requiring Freeport to finish the train by May 2023, the company said in a recent filing.

In September 2020, FERC extended the time Freeport had to build the fourth train until May 2026. Freeport, however, said it has not started to build Train 4 "due in large part to delays" stemming from the COVID-19 pandemic. "The impact of the pandemic on the global community has now waned substantially, and global demand for U.S. LNG has rebounded and is projected to remain strong," Freeport LNG said. The company advised that it is "actively marketing Train 4 Project capacity to a number of potential off-takers, particularly in European markets, and is in active negotiations with several potential customers."

Freeport LNG is also participating in the U.S.-European Commission energy security task force recently announced by President Biden to assist in bringing LNG supplies to Europe. The U.S. reportedly remains committed to supplying LNG to Europe in order lessen reliance on Russian energy following the Ukraine invasion. However, since it is estimated that it will take about 48-56 months to build Train 4, Freeport LNG said "it is not possible" to meet the current May 2026 in-service deadline.

The 3 currently-operating trains at Freeport LNG can turn approximately 2.1 billion cubic feet per day of natural gas into LNG. Freeport LNG's customers include units of Osaka Gas Co Ltd, JERA (an alliance between Tokyo Electric Power Co. Holdings, Inc., and Chubu Electric Power Co.), BP PLC, Total SA, and SK E&S.

## Galveston: Channel Expansion Update

The recently passed Infrastructure Investment and Jobs Act (IIJA) includes substantial funding for dredging to extend and maintain the Galveston Ship Channel to its permitted depth of 46 feet. According to the U.S. Army Corps of Engineers, the IIJA appropriation will provide an estimated $11 million in federal funding for dredging. In addition to federally-funded maintenance, the Port of Galveston spends more than $1 million annually to maintain depths along is berths.

The federal project will extend the 46-foot depths to the end of the Galveston Ship Channel, allowing vessels calling on privately-operated terminals along the final 2,500 feet of the channel to access the permitted depths. The federal budget also includes $25 million for maintenance.

This would be the largest maintenance funding ever allocated for the Galveston Ship Channel, which is expected to increase cargo activity, strengthen the port's competitiveness, create more and better jobs, improve operational safety, and reduce emissions. The deepened channel will be able to accommodate larger vessels, which is important as ships continue to increase in size. Moreover, moving more cargo through the channel is expected to make the port eligible for even more federal funding.

Planned for 2023, the joint project of the Corps of Engineers and the Port of Galveston has an estimated total cost of $12-14 million.

## Houston

### (1) Breaking Container Cargo Records Yet Again

The Port of Houston posted its busiest April on record – handling a total of 334,493 twenty-foot equivalent units (TEU), a 21% increase over the same period in 2021. Year-to-date volumes have now reached 1,237,876 TEU, also a 21% increase year-on-year.

The ongoing surge in container volumes has been driven primarily by imports. In April, loaded imports at the Port of Houston amounted to 162,965 TEU – the highest figure yet. Loaded exports were also up 25% at 114,860 TEU. Outbound empty containers rose by 6% year-on-year to 43,155 TEU. Year-to-date empty container volumes have risen by 80% to 215,306 TEU.

Strong container activity is expected to continue through 2022, and the Port of Houston is implementing changes now to increase capacity and provide added flexibility to its users. The port also recently laid outs its plan to achieve a net-zero GHG footprint by 2050. In its roadmap to carbon neutrality, the port cited the need to upgrade technology, improve infrastructure and equipment, and utilize alternative fuels and clean energy sources.

### (2) More Efficient & Greener Solutions Eyed for Container Transport

FSX, LLC, the developer of the Freight Shuttle Seaport System and the Port of Houston, have entered into an agreement to explore the steps needed for deployment of the Freight Shuttle Seaport System at the Port of Houston's container facilities.

The Freight Shuttle Seaport System is an elevated, zero-emission system for moving shipping containers to and from terminals, making best use of available space and addressing the need to improve air quality in the region. The Freight Shuttle System moves truck trailers, domestic intermodal containers (up to 53 ft.), and all sizes of ocean shipping containers by zero-emission, electric-powered transporters on elevated guideways in highway or other rights-of-way over distances of up to 500 miles.


Due to the sustained commercial growth at the Port of Houston, infrastructure planners are seeking creative solutions to tackle both the logistical and environmental issues associated with the Port of

Houston's activities. Recent and ongoing global supply chain disfunction has obviously exacerbated this necessity.

The Freight Shuttle Seaport System is a force multiplier for cargo space by accelerating the rate at which shipping containers are moved from the port, transporting them via autonomous vehicles safely and efficiently to a facility closer to customer hubs and away from critical high-traffic choke points. The proposed system would keep pace with commercial growth at the port while reducing emissions and reducing truck miles on roadways shared by passenger vehicles.

Implementation of the Freight Shuttle System is one way that the Port of Houston is planning to stay in front of the shipping needs of the region. The agreement between FSX and the Port of Houston is a commitment to work together on the Freight Shuttle Seaport System, which represents a significant innovation and builds on the introduction of the intermodal shipping container which first saw large scale use nearly 60 years ago.

## Port Arthur/Beaumont: Expansion Updates

### (1) Port Arthur

The Port of Port Arthur continues to proceed with multiple projects. The proliferation of new home construction builds in Texas is translating to impressive volumes of imports of dimensional lumber, medium-density fiberboard, fencing, and plywood. Also strong are imports of wood pulp, military cargo moves, as well as exports of low-sulfur diesel.

The Port of Port Arthur recently completed the $42 million expansion of Berth 5 – adding 600 linear feet of dock space, as well as projects to widen the port's entrance road and augment cargo and truck staging areas.

The most substantial project currently underway is the $67 million undertaking to build an all-new Berth 6, including a 1,000-foot-long berth and backlands. Reroofing of Shed 2 is proceeding as well.

Also moving forward in 2022: a 5-acre expansion of laydown and rail facilities; a 2.2-acre augmentation of Berth 5 backlands; roadway resurfacing; asphalt capping, lighting and fencing at Lots 6 and 7; and the $14 million replacement of Shed 1. Additional land proximate to the present port is being acquired to further expand the facility's footprint.

### (2) Beaumont

Moving a bit up the Sabine-Neches Waterway, the Port of Beaumont looks to have 3 major dock projects, plus a new rail interchange track under construction by the end of 2022.

Further to our previous reports, the $85 million Main Street Terminal 1 dock reconstruction, which kicked off in February with an estimated completion in May 2024, is set to create a 1,150-foot-long dock for handling military equipment, wind turbine components, and forest products.

Private partner Jefferson Energy Companies anticipates completing construction of a $35 million liquid bulk dock at its Orange County terminal in April 2023.

Phase II of the Main Street Terminal 1 project ($57.3 million) includes demolition of a failed dock structure and construction of a new state-of-the-art general cargo dock. The new dock will be 1,200 feet long and 130 feet wide, with a larger section in the middle measuring 152 feet wide. By Q3 2022, it is anticipated that more than $100 million in new projects will be underway at the port, including 3 new docks and a new rail interchange track.

## RECENT MARITIME OPINIONS FROM TEXAS COURTS

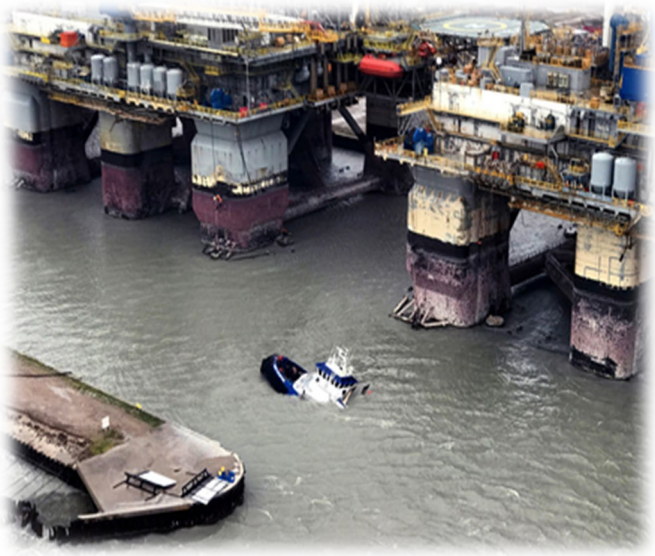
- ***Paragon Asset Co. Ltd v. Gulf Copper & Mfg. Corp.*, No. 1:17-CV-203, 2022 WL 970551 (S.D. Tex. – Brownsville, March 31, 2022) (Rodriguez) – Owner of runaway drillship owed tugboat company compensation for Hurricane Harvey-related damages.**

*(Kevin Walters, Jim Hunter, and Bob Etnyre of our Houston and Brownsville offices spearheaded the litigation efforts for Signet. There were myriad issues for the Court to unravel, resulting in a 76-page opinion after a lengthy trial with 1,200 exhibits – so, while this is one of our longer summaries, we have certainly pared it down quite a bit.)*

**Background**

In August 2017, Hurricane Harvey landed near Corpus Christi as a Category 4 storm. In nearby Port Aransas, a drillship dating back to the 1970s, the *DPDS1*, lay docked, with no crew, but with 2 tugboats alongside to help keep her in place during the storm. The *DPDS1* broke free from her moorings and immediately propelled the 2 tugboats into adjacent semi-submersible oil rigs, damaging those vessels, while also sinking one tugboat and impairing the other.

The *DPDS1* itself grounded in the ship channel, refloated 3 days later, and then traveled across the channel, alliding with and damaging a research pier. The alleged damages totaled well over $10,000,000.



3 limitation of liability actions were filed by the respective owners of the *DPDS1* (Paragon) and the two tugboats (Signet). Both sides filed counterclaims, and the owner of the semi-submersible oil rigs (Noble) and the research pier (The University of Texas) filed claims for the damage to their property. Gulf Copper, which owned the pier to which the *DPDS1* had been docked, also filed a claim for damage to that pier. On top of all that, Paragon also asserted a claim against Signet's insurer, the American Club.

At the time of the hurricane's landing, the *DPDS1* had been "cold stacked" (*i.e.*, shutdown without a crew onboard) for several years.

In June 2015, a little over 2 years prior to Hurricane Harvey's arrival, Paragon and Signet entered into a Master Charter Agreement (MCA) to govern at least some of their business dealings, which were subject to Signet's tariff terms and conditions for its Corpus Christi-area operations.

On August 25, two Signet tugs, the *Signet Arcturus* and the *Signet Enterprise*, arrived at the Gulf Copper dock to assist the *DPDS1*. As the hurricane approached Corpus Christi, the Signet tugboat captains consistently reported that the mooring arrangement continued to hold the *DPDS1*. Around 6:00 p.m. that evening, the captains reported winds of 80-104 miles per hour, although they noted that other vessels in the area blocked the anemometer, so they were providing estimated wind speeds. At that time, the winds blew almost directly at the bow of the vessel. As evening fell, conditions worsened, and the winds peaked at 111 miles per hour, with gusts up to 129 miles per hour, and had shifted to a 45% angle off the port bow of the *DPDS1*.

At 10:48 p.m., the approximate time of the breakaway, the hurricane's sustained wind speed near the Gulf Copper dock was 92 miles per hour, with gusts of 115 miles per hour. By that time, the hurricane's winds came from the southwest, at an almost 90% angle to the *DPDS1*'s bow. In essence, the winds blew directly perpendicular to the entire portside of the vessel, pushing it away from the dock. According to one expert, this was a "worst case scenario", as the *DPDS1* "would present the largest sail area" under such conditions, placing maximum pressure on the mooring lines.

Despite their best efforts to control the situation, the *Signet Enterprise* and the *Signet Arcturus* both allided with the Noble semi-submersible oil rigs docked parallel to the *DPDS1*. The *Signet Enterprise* sank, and the *Signet Arcturus* sustained considerable damage.

Fortunately, while the *Signet Enterprise* crew spent hours in the water and on a powerless tug in the midst of a powerful hurricane, they were successfully rescued the next morning and did not sustain

significant physical harm. The *DPDS1* moved into the Corpus Christi Ship Channel and eventually grounded on the north side near St. Joseph Island.

## What Caused the Breakaway?

Not surprisingly, the parties disputed the cause of the *DPDS1*'s breakaway from the Gulf Copper dock. Signet generally contended that Paragon relied upon an unreasonably inadequate mooring system to keep the *DPDS1* moored. Paragon responded that its mooring system was adequate, that a microburst occurred directly over the *DPDS1*, and that no reasonably-designed mooring system could have kept the *DPDS1* in place through such an event.

When determining the cause of the breakaway, 2 factors prove particularly relevant: (1) the strength of the mooring system; and (2) the weather conditions near the *DPDS1*.

The Court ultimately found that the most likely cause of the *DPDS1*'s breakaway stemmed from hurricane winds of about 92–96 miles per hour exceeding the mooring system's capacity. Evidence was not found to support the occurrence of a microburst near the *DPDS1* at the time of the breakaway. Rather, the winds, at the moment when they blew almost directly perpendicular to the port side of the vessel, pushed the *DPDS1* away from the dock and applied greater force against the *DPDS1* than the mooring lines could withstand. Although the reported wind speeds were higher at an earlier point that evening, they also blew at an angle relative to the *DPDS1*, reducing the effective strain on the mooring system. At the time of the breakaway, the wind speed coupled with its direction (perpendicular to the port side) overwhelmed the mooring system, even with the 2 Signet tugs attempting to push the *DPDS1* toward the dock.

Within 30 minutes of breaking away from the Gulf Copper dock, the *DPDS1*, unmanned and without power, quickly drifted across the Corpus Christi Ship Channel and grounded near St. Joseph Island.

## Activities in the Aftermath

After the breakaway, Signet assigned the *Signet Constellation* to assist with the situation, but it was unable to prevent the *DPDS1* from alliding with the University of Texas's research pier on the south side of the channel, resulting in significant damage to the pier. After the allision, the *Signet Constellation* was maneuvered up to the *DPDS1*'s portside and pinned the *DPDS1* against the shore. In the ensuing days, Signet provided Paragon with 3 tugs to maintain the *DPDS1* in place until the drillship could be towed to another dock.

Once Hurricane Harvey fully cleared the area, Paragon began the process to move the *DPDS1* to the Gulf Marine Fabricators yard at Port Aransas. Paragon relied on 3 Signet tugs to keep the *DPDS1* in place on the ship channel shore during the week after the allision. Signet invoiced for those services applying the Tariff rate, and Paragon paid the invoices in full.

On September 26, Signet tugs towed the *DPDS1* from the Gulf Marine Fabricators yard at Port Aransas to International Shipbreaking yard at Port of Brownsville. Shortly thereafter, Paragon had the drillship dismantled.

## Procedural History and Alleged Damages

In late-2017, Paragon and Signet filed separate limitation actions and sued each other. The competing suits were then consolidated. 3 additional party groups filed claims: (1) Noble Drilling (U.S.) LLC; Noble Bob Douglas LLC; and Noble Drilling NHIL LLC; (2) Certain Underwriters and Insurers of the University of Texas as the Owner of the Port Aransas Research Pier and The University of Texas as Owner of the Marine Science Institute; and (3) Gulf Copper & Manufacturing Corporation and Gulf Copper Ship Repair, Inc. Each of these entities subsequently entered into settlement agreements with Paragon and Signet and were dismissed from this matter.

In July 2018, Paragon also made a third-party complaint against the American Club, Signet's P&I insurer. Paragon alleged that, under the MCA, Signet bore responsibility to identify Paragon as an insured under Signet's insurance policy with the American Club. The American Club responded that, as the Tariff and not the MCA applied to the services that Signet provided, the American Club had no insurance obligation as to Paragon.

## Alleged Damages

5 vessels and 2 structures sustained damages: Paragon's *DPDS1*, Signet's 2 tugboats, the Noble semi-submersible oil rigs *Danny Adkins* and *Jim Day*, the University of Texas's research pier, and the Gulf Copper pier. As stated above, the parties entered into settlements as to Noble, the University of Texas, and Gulf Copper. Paragon and Signet reserved the issue of recoverability of any settlement payments until the Court ruled on the initial liability issues.

With respect to the *DPDS1* and the 2 tugboats, Paragon and Signet each sought various categories of alleged damages. As to the *DPDS1*, Paragon sought $4,135,401 in damages. In relation to the *Signet Enterprise* and the *Signet Arcturus*, Signet sought damages totaling up to $9,833,433.38.

## The Court's Further Analysis

Paragon and Signet each claimed that the other's negligence proximately caused the damages resulting from the *DPDS1*'s breakaway from the Gulf Copper dock when Hurricane Harvey made landfall. Signet argued that Paragon unreasonably failed to act with sufficient speed to evacuate the *DPDS1* from the port, and having failed to do so, that Paragon utilized an inadequate mooring system to keep the vessel at the dock during the storm.

In response, Paragon contended that it acted reasonably when considering whether to tow the *DPDS1* out to sea, and that unpredictable weather conditions and port events thwarted its efforts. In addition,

Paragon argued that Signet's tugboats failed to fulfill their contractual obligations with respect to the *DPDS1*.

The Court concluded that Paragon failed to take reasonable precautions under the circumstances as known or that it reasonably could have anticipated before Hurricane Harvey made landfall in Port Aransas. A key factor as to whether Paragon acted reasonably was Paragon's assessment of the probability that the *DPDS1* would break away from the dock in light of the anticipated strength of the storm. As to this factor, Paragon's assessment proved unreasonable on 2 important data points – the mooring system's strength, and the hurricane's projected path, anticipated force, and arrival date.

As to the first data point, the trial record demonstrated that, when Paragon considered whether and when to tow the *DPDS1* out to sea as Hurricane Harvey approached, company decision-makers knew or should have known that they possessed inaccurate information about the mooring system installed to keep the *DPDS1* docked. In other words, Paragon had no reliable basis to determine whether the mooring system could withstand a tropical storm, much less a hurricane. As to the second data point, Paragon was also found to have acted unreasonably when assessing the strength and anticipated arrival of Hurricane Harvey.

Paragon relied on 3 defenses to reduce or negate its responsibility for the damage that the *DPDS1* caused after it broke away from the dock. The Court found each argument unpersuasive.

(1) Signet's Purported Negligence

Paragon first contended that Signet did not exercise reasonable care when providing tugboat services to the *DPDS1* at the dock, and that Signet's negligence led to the damages to the various vessels and piers.

The Court disagreed, finding that the evidence demonstrated that the Signet tugboats did not render services negligently. The tugboats possessed Z-drive propulsion systems, which enabled them to direct thrust in any direction. With such systems, the tugboats could push the *DPDS1* against the dock irrespective of whether the tugboats themselves were stationed perpendicular to the drillship. During the storm, the tugboats reported that, as the storm intensity increased, the captains of the two vessels increased the thrust level.

In short, the Court found that Signet's captains operated their tugboats reasonably under the circumstances and did not contribute to the *DPDS1* breaking away from the dock.

(2) Force Majeure

Paragon also argued that Hurricane Harvey represented an Act of God that negates any liability that Paragon may otherwise bear.

General maritime law provides for a force majeure defense to liability. A party asserting such a defense must satisfy 2 elements: (1) the weather was heavy; and (2) the shipmaster "took reasonable precautions under the circumstances as known or reasonably to be anticipated." The standard of reasonableness mirrors the analysis for negligence – *i.e.*, "that of prudent men familiar with the ways and vagaries of the sea". The party asserting the defense bears the burden of proof.

The Fifth Circuit has repeatedly found that storms like Hurricane Harvey qualify as Acts of God. However, the Court found that Paragon failed to establish that it "took reasonable precautions under the circumstances as known or reasonably to be anticipated" in the days before the hurricane made landfall. On the contrary, the Court found that Paragon's delayed decision and inadequate mooring system represented unreasonably deficient actions by Paragon. As a result, Paragon could not rely on the force majeure defense.

(3) Assumption of Risk

With respect to the damage to Signet's tugboats, Paragon argued that Signet willingly undertook to place those tugs at *DPDS1*'s side to help keep the vessel from becoming unmoored during Hurricane Harvey. In doing so, Signet understood that the storm represented a grave threat of causing the drillship to break free. As any damage to Signet's tugboats stemmed from the very danger that Signet agreed to guard against – *i.e.*, the breakaway of the *DPDS1* – Paragon argued that Signet cannot seek recovery from Paragon as to that damage.

Maritime law recognizes that contracted parties cannot recover for harm suffered from "dangers which the contractor was hired to correct". The defense typically arises in the context of shipyard contractors performing services for shipowners. In those situations, courts have denied recovery to contracted individuals who suffered injury when addressing the very problem the contractor was hired to remedy. Paragon conceded that such cases concern a separate and distinct context, but urged their "logical application" to the present matter. The Court declined to do so.

In the present case, Signet agreed to help keep the *DPDS1* moored to the dock, but Signet had no control over whether the mooring system would suffice. Paragon retained Signet to help strengthen the overall system keeping the *DPDS1* in place, but the presence of Signet's tugboats neither weakened the mooring system nor contributed to its failure.

## Allocation of Liability

The Court concluded that Paragon's negligence caused the *DPDS1* to break away from the dock, resulting in foreseeable damages to the Gulf Copper dock, the Signet tugboats, and the Noble semi-submersible oil rigs. As a result, the Court allocated full responsibility on Paragon for those damages. In addition, to the extent that the *DPDS1* suffered damage from the initial breakaway, Paragon was also found solely responsible for those damages.

## The P&I Claim

The American Club requested a take-nothing judgment in its favor because Paragon was not an insured or an additional insured under the Protection and Indemnity Insurance Contract with Signet. Paragon contended that it enjoyed coverage under the P&I Insurance Contract, because Signet agreed under the MCA to provide such coverage. In the alternative, Paragon argued that it qualified for coverage under the Additional Assureds and Waiver of Subrogation Clause of the P&I Insurance Contract.

Finding that Signet's Tariff governed, Paragon's argument failed. Thus, the American Club was found to have no liability as to Paragon for any of the damages at issue in this lawsuit.

**Damages**

The Court next turned to the measure of damages and the impact of the Tariff's provisions regarding the parties' liability for those damages.

This analysis hinged largely on the following findings: (1) With respect to the initial breakaway of the *DPDS1*, Paragon would bear full responsibility for the damages to the Gulf Copper dock, the Noble semi-submersible oil rigs, the Signet tugboats, and the *DPDS1* itself; (2) As to the damages to the University of Texas research pier, Signet and Paragon each would bear 50% responsibility; and (3) The Tariff governed as to Signet's provision of services from August 25-28.

(1) *DPDS1*

The Court concluded that Paragon would bear full responsibility for the *DPDS1*'s initial breakaway, and that Paragon and Signet each would bear 50% responsibility for the drillship's allision with the research pier. Based on these findings, Paragon could not recover for any damages to the drillship that stemmed solely from the initial breakaway.

Signet, however, was liable for 50% of the damages to the *DPDS1* occasioned by the allision with the research pier. Paragon, of course, bore the burden to establish its recoverable damages. But Paragon presented no evidence segregating the damages to the drillship pier or identifying the damages attributable solely to the incident. As a result, Paragon could not recover any damages from Signet as to such damages.

Paragon also requested damages that did not stem from the breakaway or the allision with the research pier. For example, Paragon included as damages the expenses related to the towing of the *DPDS1* from Corpus Christi to Brownsville to be scrapped. But Paragon could not recover such damages, as the purposes of compensatory damages in tort cases "is to place the injured person as nearly as possibly in the condition he would have occupied if the wrong had not occurred." Prior to Hurricane Harvey, Paragon had already decided to scrap the *DPDS1*, and to do so by October 2017. Such evidence revealed that the scrapping of the *DPDS1* did not arise from the events surrounding Hurricane Harvey, but was a decision that Paragon reached before the incident. And no evidence was introduced to indicate that the incident increased the cost of scrapping the *DPDS1*, or decreased its value as a vessel to be scrapped.

(2) *Signet Enterprise*

As to the *Signet Enterprise*, Signet sought up to $7,469,373.51 in damages. The parties agreed that, after the casualty, the *Signet Enterprise* was a constructive total loss – *i.e.*, the damage to the vessel was repairable, but the cost of repairs exceeded the fair market value of the vessel immediately before the incident. If a loss is deemed a constructive total loss, damages are the ship's value at the time of collision, less salvage.

The owner of a vessel considered a constructive total loss may also recover consequential damages, including for wreck removal services and surveyor expenses. The owner also recovers surveyor expenses, but only for surveys which estimated the damages or repair costs – not for surveys related to designing repair work. The long-established rule is that in a case of total loss, the owner is not compensated for the loss of use of the boat.

Applying the above principles to the requested damages, the Court found that Signet was entitled to recover $1,735,607.78 for wreck removal services and $41,412.17 for surveyor expenses. But Signet could not recover its alleged damages for loss of charter.

As to fair market value, the parties agreed that the recoverable amount is the fair market value minus $500,000 from the sale of the *Signet Enterprise* in December 2018. Signet, according to internal assessments, claimed that the fair market value of the *Signet Enterprise* was $5,650,000-6,150,000, but the Court accepted Paragon's valuation of $4,100,000, which was based upon third-party valuations.

Reducing the fair market value by the $500,000 from the sale of the *Signet Enterprise*, the Court found that Signet was entitled to recover $3,600,000 for the constructive total loss of that vessel.

(3) *Signet Arcturus*

Signet sought $2,364,059.87 in damages for the vessel. When a damaged vessel in a maritime accident is not a total loss, the owner is entitled to recover the reasonable cost of repairs necessary to restore it to its pre-casualty condition and actual profits lost during the detention necessary to make repairs. The claimant must establish the amount of repair costs with reasonable certainty that the damages claimed were actually or may be reasonably inferred to have been incurred as a result of the collision. As to loss of charter hire damages, the vessel owner must establish that the vessel was capable of being engaged in profitable commerce during the repair period.

Signet claimed that the cost of repairing the *Signet Arcturus* totaled $1,517,311.08. Paragon challenged the amount, arguing that $454,221.78 is unrecoverable because it stemmed from unreasonable steps that Signet took during the repairs, such as failing to conduct a detailed inspection of the vessel when initially dry-docked. Based on the trial record, however, the Court concluded that Signet demonstrated it incurred repair costs of $1,517,311.08 as a result of the *DPDS1* breaking away, and that those costs were reasonable and necessary.

For example, various representatives from Signet, the Coast Guard, Rolls-Royce (the maker of the Z-drive), and the American Bureau of Shipping (ABS) visually inspected the vessel, including opening up the top of the Z-drive. Based on their collective discussion and inspection, they uniformly decided not to open up the hub because they had no indication of any damage internally. Doing so may have uncovered the internal damage to the Z-drive at that moment, but it also would have required substantial time and costs. The Court found that Signet acted reasonably when not ordering a full inspection of the Z-drive, based on the available data.

Later, after the first sea test, Signet realized that issues persisted, and that an internal analysis would be required. At that time, the repair dock was no longer available for an extended period, and as a result, Signet dry-docked in that location solely for the short period necessary to make temporary repairs so that the *Signet Arcturus* could then proceed to an available repair dock in Pascagoula, Mississippi. This series of events explained the 3 separate dry-docks for the *Signet Arcturus*, and the sequence of repairs was not unreasonably undertaken. Other evidence demonstrated that the damages to the tugboat arose from the *DPDS1* breaking away, and supported the amount paid for the repairs.

The Court found that Signet was entitled to recover $1,517,311.08 in repair costs, $37,055.74 expended in salvage costs, and $54,225.74 incurred for surveyor expenses.

Signet also requested $755,467.31 for loss of charter hire, relying principally on an internal cost analysis. As to this category of damages, Paragon argued that Signet incorrectly based the requested amount on "gross, unreduced revenue and utilization calculations" and failed to account for various market factors, such as whether "Signet's Ingleside operations returned to normal operations prior to the completion of repairs to the tug." Based on the trial record, the Court concluded that Paragon's arguments were valid, and that Signet had not proven its requested damages by a preponderance of the evidence. Ultimately, the evidence on which Signet relied upon was found not to demonstrate that the company lost $755,467.31 in profits from loss of charter hire for the *Signet Arcturus*.

On the contrary, the Court found that any profits would have been significantly lower, and may have proven fully elusive in the dampened market in the months after Hurricane Harvey. As a result, the Court concluded that Signet was not entitled to any damages for loss of charter hire.

(4) Indemnity

Signet argued that, under the Tariff, Paragon possessed a contractual obligation to indemnify Signet for any damages arising from the services provided under that contract. In particular, Section 16 of the Tariff specified that "Owners [Paragon] agree to indemnify Signet Group from and against third party liabilities arising out of this agreement not covered by the other indemnity provisions of this Tariff, but only to the extent of the negligence or other fault of the Owners Group."

An indemnity provision should be construed to cover all losses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties. Based on a straightforward application of Section 16 of the Tariff, the Court found that Signet was entitled to contractual indemnification from Paragon for any damages that Signet has paid related to the Noble semi-submersible oil rigs. The Court also concluded that Paragon's negligence proximately caused those damages in full.

In addition, the Court found Signet responsible for only 50% of the damages to the University of Texas research pier. To the extent that Signet incurred liability beyond 50% of those damages, Signet was found to be entitled to contractual indemnity from Paragon for that amount.

## Conclusion

The Court found that Paragon was solely responsible for the initial breakaway of the *DPDS1* from the Gulf Copper dock, and it was liable for the damages that resulted in the immediate aftermath of that event. The damaged vessels and structures included the *DPDS1* itself, the Gulf Copper dock, the Signet tugboats, and the Noble semi-submersible oil rigs. As to the *Signet Enterprise*, Signet was found to be entitled to recover $1,735,607.78 for wreck removal services, $41,412.17 for surveyor expenses, and $3,600,000 as the fair market value of the vessel at the time of casualty. As to the *Signet Arcturus*, Signet was found to be entitled to recover $1,517,311.08 in repair costs, $37,055.74 in salvage costs, and $54,225.74 for surveyor expenses.

The subsequent allision with the University of Texas research pier represented a separate incident that both Paragon and Signet could have avoided. Each party was found to bear 50% responsibility for the resulting damages to the research pier.

As to each of the 2 incidents, Signet's Tariff governed as to the services that the tugboats provided.

The Court reached no findings on the issue of recoverable attorney's fees and costs, or on the recoverability and rate of pre- and post-judgment interest. The Court advised that it would consider these issues before entering a final judgment.

A copy of the Court's opinion many be accessed via the following link:
https://www.dropbox.com/s/um8zuyju2y72bhi/Paragon%20v.%20Signet%2C%20et%20al..pdf?dl=0

- ***Central Boat Rentals, Inc. v. M/V Nor Goliath*, 31 F.4th 320 (5th Cir. April 12, 2022) – Fifth Circuit declines to go along with tugboat interests' creative attempt to assert alleged maritime lien rights against heavy-lift vessel following bankruptcy of rig decommissioning contractor that retained the tugboat services.**

**Background**

After the long one above, we switch over to this quick read. In this one, the 5th Circuit again tackled the question of whether provisions were a "necessary" under the Commercial Instruments and Maritime Liens Act ("CIMLA"). The dispute arose from the bankruptcy of Epic Companies. Epic was a general contractor that decommissioned oil platforms in the Gulf of Mexico, subcontracting with owners of various vessels to complete decommissioning projects, including heavy-lift vessels, material barges, and tugboats.

The *Nor Goliath* was a heavy-lift vessel hired by Epic to lift oil platform components out of the water and place them onto barges. Tugboats then towed the loaded barges from the *Nor Goliath*'s location in the Gulf of Mexico to an inland scrapyard for further dismantling, returning to the *Nor Goliath* with empty barges. These tugboats were owned by various towing companies.

Following Epic's bankruptcy, the suppliers looked elsewhere to recoup their costs. The towing companies joined a suit filed in the Southern District of Mississippi federal court, seeking to assert and enforce maritime liens under CIMLA against the *Nor Goliath*, maintaining that the tugboats provided it necessary services by towing the barges.

The *Nor Goliath* and the towing companies each filed competing motions for summary judgment. The district court granted summary judgment to the *Nor Goliath*, holding that the services rendered by the tugboats did not create a lien on the *Nor Goliath*. The towing companies filed this appeal.

**The Panel's Analysis**

Under CIMLA, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner: (1) has a maritime lien on the vessel; (2) may bring a civil action *in rem* to

enforce the lien; and (3) is not required to allege or prove in the action that credit was given to the vessel.

"Necessaries" includes repairs, supplies, towage, and the use of a dry dock or marine railway. "Necessaries" includes most goods or services that are useful to the vessel, keep it out of danger, and enable it to perform its particular function. These are items useful to vessel operations and necessary to keep the ship going. "Necessaries" are the things that a prudent owner would provide to enable a ship to perform well the functions for which it has been engaged. Courts look to the "particular function" and requirements of a ship to determine what is a necessary for that ship.

The towing companies first argued that the *Nor Goliath*'s particular function was the entirety of the decommissioning process; therefore, every good or service used to decommission an oil platform was a necessary to the *Nor Goliath*. The 5th Circuit panel disagreed. The decommissioning project was Epic's goal as the general contractor, and Epic hired a fleet of vessels for the project. As the *Nor Goliath*'s role was to lift platform components and place them on the barges, its necessaries were goods or services it used for this particular function.

The towing companies next argued their services provided the barges to the *Nor Goliath*, and the barges were equipment necessary for the *Nor Goliath*'s particular function. The 5th Circuit panel again disagreed. It was plain that the barges were not equipment for the *Nor Goliath*, did not help the *Nor Goliath*'s crane raise/lower the platform components, and so the *Nor Goliath* did not "use" the barges. Thus, the towing companies did not provide a service necessary to the *Nor Goliath*'s particular function.

For their third argument, the towing companies alternatively contended that they provided a necessary as the decommissioning project would have ground to a halt without the tugboats moving the barges; thus, the *Nor Goliath* indirectly benefitted from the towing of the barges. The argument that maritime liens arose from indirect benefit misapprehended the concept of liens for necessaries. Mutually-beneficial conduct is expected when each vessel was hired by the same general contractor. Each ship in Epic's fleet indirectly benefitted from the barges being towed just as every ship indirectly benefitted from the *Nor Goliath*'s lifting and loading. But mutually-beneficial conduct alone cannot give rise to a maritime lien under CIMLA, otherwise multi-ship operations would give rise to an untenable situation where all the ships in a fleet would have liens on the other. In sum, maritime liens for necessaries run against the vessel that received the necessary and no further.

The towing companies finally made a last-ditch argument that they were entitled to maritime liens as they protected the *Nor Goliath* from the hazards of the sea, alleging that the *Nor Goliath* would be in danger if it was forced to hold an oil platform component suspended by its crane in choppy waters. However, the towing companies did not present any evidence of the danger these conditions posed to the *Nor Goliath*, which previously suspended and transported large loads without the aid of barges.

As the towing companies failed to demonstrate a legal basis for their claimed maritime liens against the *Nor Goliath*, the district court's grant of summary judgment was affirmed.

A copy of the Fifth Circuit opinion is available via the following link:
https://www.dropbox.com/s/ew1z5t9ozc4si6t/Central%20Boat%20Rentals%20v.%20Nor%20Goliath.pdf?dl=0

- ***Underwood v. Parker Towing Co.*, Inc., No. 21-30531, 2022 WL 1553527 (5th Cir. May 17, 2022) – Fifth Circuit affirms summary judgment dismissal finding that deckhand failed to adhere to company lifting policies – and common sense.**

**Background**

Underwood sued his employer, Parker Towing, after sustaining a back injury while working onboard a vessel. The district court granted summary judgment to Parker Towing as to all of Underwood's claims. Underwood appealed.

Underwood began working as a deckhand for Parker Towing in 2008, primarily onboard the towboat *Miss Morgan*. He was supervised by the ship's captain. Parker Towing provided training for Underwood through a deckhand school and on-the-job training, including safe lifting technique training. Parker Towing also required Underwood to take continual back safety tests and a physical examination, which included having to carry an 80-pound weight over a distance of 200 feet.

On October 31, 2019, the captain directed Underwood to pump rainwater out of the open cargo hold of a barge that was being towed by the *Miss Morgan*. This was a routine task which Underwood had performed before. Underwood carried a water pump from the *Miss Morgan* onto the barge, placed the pump on the deck of the barge, and then draped the pump's hose over the wall of the barge's cargo hold to reach the water in the bottom of the hold.

A deckhand would often use a 2-inch pump to perform this task, but there were no 2-inch pumps available on the *Miss Morgan*. So, Underwood used a larger 3-inch pump. Due to the height of the wall around the barge's cargo hold, a standard pump hose could not reach the water in the bottom of the cargo hold; this problem would typically call for the use of an extension hose. However, the only extension hose available had a hole in it. Instead, Underwood placed the pump on an overturned bucket, giving the pump sufficient height to reach the bottom of the cargo hold without an extension hose. Underwood claimed that a Parker Towing captain previously showed him this workaround method. Underwood was able to use safe lifting techniques to place the pump on the bucket without incident.

When the pumping concluded, Underwood removed the 57-pound pump from the top of the bucket. Underwood claimed that the height of the pump on the bucket prevented him from using safe lifting techniques and that he twisted his back while lifting the pump off the bucket and felt a sharp pain in his back.

Underwood did not tell his captain about the pain or report the incident on his departure report at the end of his shift. In the following days, Underwood reported having back pain and later required back surgery. Parker Towing approved and paid for the surgery under its cure benefits and provided maintenance payments.

Underwood ultimately sued Parker Towing seeking damages and arguing that his injury was due to the negligence of Parker Towing and its failure to provide a seaworthy vessel. Parker Towing moved for summary judgment, which the district court granted, and Underwood then appealed.

**The Panel's Analysis**

Underwood argued that Parker Towing was negligent in its failure to provide a reasonably safe work environment by not giving adequate guidance or training as to the maximum weight its employees should lift and that this caused Underwood's injury.

Under the Jones Act, a seaman is entitled to recovery if his employer's negligence is the cause, in whole or in part, of his injury. An employer may be held liable where its negligence caused the seaman's injury in "even the slightest" way.

While an employer is obligated to provide a reasonably safe work environment, a seaman is obligated to act with the ordinary prudence of a reasonable seaman in like circumstances, including one of similar training and experience. Thus, comparative negligence bars a seaman from recovering under the Jones Act for damages sustained as a result of his own fault. Additionally, the employer must have notice and the opportunity to correct an unsafe condition before liability attaches. The standard of care is not what the employer subjectively knew, but rather what it objectively knew or should have known.

Underwood does not contest that Parker Towing's Deckhand Manual instructed deckhands to ask for help if a load was too heavy, that Parker Towing routinely trained him on safe lifting techniques, and that he failed to use those techniques when lifting the pump. Instead, he alleges that Parker Towing should not have assigned him the task of lifting the pump without first establishing a clear limit as to the number of pounds he should lift.

The Fifth Circuit panel declined to conclude that Parker Towing created an unsafe work environment by assigning Underwood the task of moving the 57-pound pump without establishing a numerical lifting limit for its employees. The panel found that Parker Towing could rely on Underwood to exercise reasonable care, and a seaman may fail to observe proper care for his own safety in failing to seek the help of others aboard ship, once he realizes or should realize that an assigned task is beyond his individual physical capacity. The panel observed that a deckhand with training on how to safely lift objects and 10 years of experience routinely dealing with similar equipment should have realized if this task was beyond his capacity. Underwood also admitted that he could have told the captain if he assessed that lifting the pump posed a danger, but he did not do so.

The panel determined that it was not the weight of the pump alone that caused the injury, as Underwood was initially able to lift the pump onto the bucket without incident. Rather, the weight was made dangerous by Underwood's unsafe lifting technique, which he used despite Parker Towing's policy requiring safe lifting techniques.

Underwood also contended that the danger arose because he employed the workaround method of using the bucket — a method a Parker Towing captain taught him — and that once the pump was on the bucket, he could not use safe lifting techniques. But the bucket method was not inherently dangerous, as it was undisputed that Underwood had used this method before. Again, it was the use of unsafe lifting techniques that made the bucket method dangerous. And if Underwood determined that he could not use safe lifting techniques to get the pump off the bucket, he could have told his captain or asked for assistance … but he did not.

Given the training and prior execution of this task by Underwood without injury and the available assistance, the Fifth Circuit panel found that Parker Towing had no reason to know there was a danger to Underwood. Parker Towing was thus not negligent in giving its deckhands discretion to determine

personal lifting limits rather than designating a numerical limit. As Underwood was found to have failed to establish a genuine issue of material fact as to whether Parker Towing failed to maintain a reasonably safe work environment, the grant of summary judgment to Parker Towing was found to be proper.

Underwood also argued that the *Miss Morgan* was unseaworthy. For a vessel to be found unseaworthy, the injured seaman must prove that the owner has failed to provide a vessel, including her equipment and crew, which is reasonably fit and safe for the purposes for which it is to be used. Unseaworthiness can arise from a number of circumstances, such as defective equipment, appurtenances in disrepair, or an unfit crew. To establish the requisite proximate cause in an unseaworthiness claim, a plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the unseaworthiness.

Underwood claimed that Parker Towing's failure to keep a smaller pump or equipment to repair the extension hose rendered the *Miss Morgan* unseaworthy. But the panel concluded that these purported defects did not render the *Miss Morgan* unseaworthy; the vessel was still reasonably fit for its intended purpose of towing and tending to the barges in Parker Towing's custody. Although the extension hose for the 3-inch pump was damaged, the function of the ship could still have been safely undertaken had Underwood engaged in safe lifting techniques or asked for assistance. While a jury could have found that a working extension hose or 2-inch pump would have presented an easier method of removing the water, that is insufficient to raise a question as to whether the method used by Underwood rendered the *Miss Morgan* unseaworthy.

As Underwood failed to establish a genuine issue of material fact as to whether the *Miss Morgan* was unseaworthy, the grant of summary judgment to Parker Towing on this claim was likewise found to be proper.

A copy of the Fifth Circuit opinion is available via the following link:
https://www.dropbox.com/s/nzvtz2lq7lcx3ct/Underwood%20v.%20Parker%20Towing.pdf?dl=0

- ***Moran v. Signet Maritime Corp.*, No. CV H-21-4214, 2022 WL 901554 (S.D. Tex. – Houston, March 28, 2022) (Rosenthal) – "Snap removal" of maritime personal injury claim ok'd by Houston federal court.**

**Background & Overview**

Charles Moran, a Louisiana citizen, sued Signet, a Texas company, in Texas state court, seeking maintenance and cure in a seaman's personal injury case. Signet removed to federal court, and Moran moved to remand on the ground that the forum-defendant rule precluded removal. He argued alternatively that removal and "snap removal" are unavailable in a Jones Act seaman case.

At the time of the incident giving rise to this action, Moran was a captain working for Signet on a commercial tug. He tripped and fell in a parking lot in September 2021, the night before he was to board the vessel to begin a new 28-day hitch after his week off. He broke his ankle.

14 days later, a port captain telephoned Moran and told him that his employment was terminated. Moran alleged that, although he had not sought maintenance and cure for the injury or made any claim to Signet for these benefits, Signet's action was substantially motivated by the fear that he would do so. Signet responded that, as it told Moran at the time, he was fired because Signet had completed its investigation of an August 2021 incident in which a tow Moran was pulling through the Brazos River floodgates struck a floodgate wall and caused over $115,000 in damage. Signet's investigation showed that Moran had failed to "break apart his tow" before navigating the floodgates, as Signet's written procedures required, and instead pulled his barges "strung out," or "end to end."

In December 2021, Moran sued Signet for maintenance and cure in state court. 9 days later, before Signet was served, it removed to federal court. Moran then sought remand on the basis that "snap removal" by a single-forum defendant, in a case asserting a general maritime claim filed by a Jones Act seaman, is improper removal. Signet responded that diversity jurisdiction is present and that the "snap removal" was proper despite the fact that it is a forum defendant, noting that Moran is not asserting a Jones Act claim.

## The Court's Analysis

The threshold issue in this case was the propriety of "snap removal" by a forum defendant who is not yet served at the time of removal. Texas cases also allow snap removal when a forum defendant removes before it is served. Thus, the fact that Signet was a forum defendant did not make its removal before service improper.

Moran's assertion of a general maritime law claim also did not make removal improper. Moran relied on the general solicitude shown to Jones Act seamen – but he was not asserting a Jones Act claim. Instead, he asserted a general maritime law claim.

The case law is clear that such a claim filed in state court may be removed if diversity jurisdiction is present, even though it could not be removed if combined with a Jones Act claim.

The Court found that Moran offered no persuasive authority as to why it should depart from precedent and add complexity by limiting the statute's application to non-forum defendants who have not already been served, or to preclude removal if the plaintiff raises any claim, including a maritime claim, and the plaintiff is a Jones Act seaman.

The Court observed that the plain language of the removal statute allows for removal of suits involving a single defendant who is a resident of the forum state, and the Court further remarked that such construction is not an absurd result. This application "provide[s] a bright-line rule keyed on service" and is a result that "a reasonable person could intend." The doctrine that courts must "strictly construe the removal statute and favor remand" does not counsel remand in these circumstances because the statute's unambiguous text dictates a different result.

## Conclusion

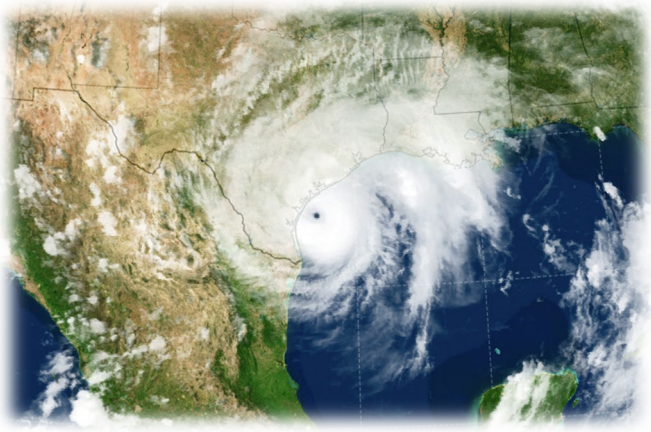
The motion to remand was denied.

A copy of the Court's order is available via the following link:
https://www.dropbox.com/s/lkm6pw5rrxiciwh/Moran%20v.%20Signet.pdf?dl=0

- ***Argos Ports (Houston) LLC v. Kirby Inland Marine, LP*, No. CV H-18-00327, 2022 WL 1093809 (S.D. Tex. – Houston, April 12, 2022) (Lake) – Tugboat company that was bailee of barges that broke free during storm could not recover salvage costs from barge owners.**

**Background**

This one is another Hurricane Harvey-related proceeding.



On February 5, 2018, Argos filed suit against Kirby and Greens Bayou Fleeting, alleging that certain barges under their control broke free from moorings during Hurricane Harvey and damaged Argos' property. Kirby was acting as bailee for Marquette, Ceres, Ingram Barge, and Terral River Service when the hurricane struck.

At the time of the hurricane, Kirby and T&T Salvage were party to an agreement that designated T&T Salvage as the "Salvage and Firefighting Primary Resource Provider to be listed in Kirby's United States Coast Guard Vessel Response Plan."

Pursuant to the Kirby-T&T Salvage Agreement, Kirby retained T&T Salvage to remove the barges from Greens Bayou after the hurricane, and ultimately paid T&T Salvage $7,696,264.79. T&T Salvage acknowledged that it was paid in full for its services.

On February 2, 2018, Kirby and T&T Salvage entered into an Assignment of Salvage Rights Agreement, pursuant to which T&T Salvage purported to assign to Kirby whatever salvage rights it had "for salvage services rendered to the barges at Greens Bayou owned by the Barge Owners."

On March 9, 2018, Kirby filed a third-party complaint against the barge owners, seeking to recover expenses incurred for the salvage work that T&T Salvage performed. Each of the barge owners responded by filing counterclaims against Kirby for damages to their individual barges, alleging that Kirby's negligence caused or contributed to the breakaway.

Kirby then sought to "recover the cost of salvage of the barges from Ceres, Ingram, Marquette, and Terral River under the law of marine salvage as well as the Salvage Convention of 1989 because it successfully rescued the barges from marine peril."

**The Court's Analysis**

Kirby sought compensation for the salvage costs it incurred when it hired T&T Salvage to recover barges that broke away while under Kirby's exclusive control. Kirby requested a warrant for the attachment of the barges so that they may be condemned and sold. The barge owners argued that "Kirby's actions were not voluntary based on the bailment relationship that existed with the barge owners and Kirby's obligation to exercise reasonable care for the barges in its control." Kirby argued in response that its claim was not foreclosed because "when the barges broke away from the moorings through the negligence of a third party, Kirby ceased being a bailee, and any salvage efforts undertaken after that point were voluntary."

Admiralty recognizes 2 methods of creating a lien for salvage services: (1) by pure salvage; and (2) by contract. The Court previously held that Kirby did not have a contractual salvage claim.

A claim for pure salvage has 3 elements: (1) the existence of a marine peril; (2) services that are voluntarily rendered when not required by an existing duty or special contract; and (3) success in whole or in part. The parties did not dispute that a maritime peril existed or that the salvage operation was successful – the only dispute was whether the salvage services rendered by Kirby and T&T Salvage were rendered voluntarily.

Once the barges were delivered to Kirby, a bailment relationship was established, and Kirby as bailee had a duty to exercise reasonable care of the barges and keep them adequately moored at all times. In the context of salvage, a party that has a pre-existing duty to a vessel is generally not considered a volunteer and not allowed to recover in salvage based on actions encompassed by those duties. Kirby owed a preexisting duty to the vessels it salvaged, and therefore Kirby's salvage efforts – including its hiring of T&T Salvage – were not voluntary and thus could not support a pure salvage claim.

The Court was not persuaded that a breakaway terminated the duty of a barge's bailee, given that one of a bailee's duties is to prevent breakaways from happening in the first place. The bailee of a barge has a pre-existing duty that forecloses any salvage claims it might make as to that barge as a matter of law, regardless of who was at fault for the sinking of the vessel.

It was not a question of whether Kirby was under a duty to "regain possession of bailed property" taken from it by an Act of God – the duty that foreclosed Kirby's voluntary salvage claim was its duty to prevent the loss of the property in the first place.

It is a longstanding rule of salvage law that crewmembers are not entitled to a salvage award for saving a ship on which they are crewmembers because it is within their duty to the ship. The reason for the rule is that it is within the duty of the crew in case of danger to the ship to exert themselves to save the ship. It would be unwise to tempt the crew to get the ship and cargo into a position of danger in order that, by extreme exertion, they might claim salvage compensation. Thus, a barge's bailee is not entitled to salvage – it would be "unwise" to "tempt" bailees to place the vessels in their care in a position of danger by which they may profit.

Kirby argued that its relationship to the barges was more like the relationship between the crew of one vessel and another vessel, but this argument was premised on the same faulty reasoning – *i.e.*, once the barges broke loose, Kirby was under no duty to "regain" them. The Court concluded that Kirby's salvage claim against the barge owners was foreclosed by Kirby's duties as bailee.

The barge owners argued that, even if Kirby had acted voluntarily in salvaging the barges, Kirby would still have no claim against the barge owners for the money it paid to T&T Salvage, because: (1) such claim would be predicated on salvage rights that T&T Salvage assigned to Kirby; (2) T&T Salvage never had a salvage claim against the barge owners; and (3) any salvage claim T&T Salvage might have had against the barge owners was extinguished when Kirby paid T&T Salvage for its salvage services.

Kirby's claim to recover T&T Salvage's costs was predicated on the assignment, which provided that T&T Salvage's salvage claims against the barge owners would be assigned to Kirby.

The Court had previously found that T&T Salvage was not a volunteer and thus would have no right to pure salvage. The Court also found that, because T&T Salvage had no contract with the barge owners, it had no claim for contractual salvage against the barge owners. Because T&T Salvage had no salvage

claim against the barge owners, it had no claim to assign to Kirby. As Kirby's claim to recover T&T Salvage's costs was based on T&T's purported assignment of a claim that T&T Salvage never had, Kirby's claim failed as a matter of law.

Kirby did not dispute the barge owners' argument that T&T Salvage had no salvage claim to assign to Kirby. Instead, Kirby argued that salvage claims are assignable, and assignments do not extinguish liens against salved property. While this may be a generally-accurate statement of the law, it was not in dispute. The barge owners never argued that salvage claims were not assignable or that T&T's purported assignment of its salvage claim to Kirby extinguished a lien on the barges.

The barge owners' argument is that T&T Salvage lacked a valid salvage claim to assign to Kirby in the first place. The Court was persuaded by that argument, and therefore the Court granted the barge owners' motion with respect to Kirby's claim to recover T&T Salvage's costs.

Moreover, even if T&T Salvage had a valid salvage claim and assigned it to Kirby, any claim T&T Salvage might have had would have been extinguished by payment. Kirby sought a warrant for attachment of the salvaged barges and asked that said vessels "be condemned and sold to pay for [salvage costs], costs and attorneys' fees." Kirby was thus seeking a maritime lien – a special property right in a vessel that "arises when the debt arises, and grants the creditor the right to appropriate the vessel, have it sold, and be repaid the debt from the proceeds." There was no dispute that T&T Salvage was paid in full for its services.

The Court accordingly concluded that T&T Salvage had no claim to assign to Kirby because T&T Salvage never had a contractual or pure salvage claim to assert against the barge owners and because at the time of the purported assignment, T&T Salvage's claim had been satisfied by payment. Thus, Kirby's claims failed as a matter of law to the extent that they were based on Kirby's right to be paid for the salvage services rendered by T&T Salvage.

The barge owners' motion for summary judgment seeking dismissal of Kirby's claims was thus granted.

A copy of the Court's order is available via the following link:
https://www.dropbox.com/s/qb4k9shc4gqi6lp/Argos%20v.%20Kirby.pdf?dl=0

- ***In re OHT Hawk AS*, No. 21-60796, 2022 WL 1486778 (5th Cir. May 11, 2022) – Fifth Circuit refuses to permit a pass for an untimely claim made in limitation action.**

**Background**

On March 29, 2019, the *Hawk*, a semi-submersible heavy lift vessel, was transporting a dry dock in the Huntington Ingalls Incorporated shipyard in Pascagoula, Mississippi when it allided with a barge and a Navy destroyer under construction. The *Hawk*'s owners filed a limitation of liability action.

Pursuant to Rule F(4) of the Federal Rules of Civil Procedure Supplemental Rules for Admiralty or Maritime Claims, the district court ordered all persons with claims arising from the allision file within 30 days. A number of parties — including the shipyard, the United States, and various insurers — did so, and for months the district court managed the multiple claims vying for the *Hawk*'s limited fund.

On May 6, 2021, approximately 17 months after expiration of the filing deadline, Luis Cruz, a pipe insulator who had been aboard the *Hawk* at the time of the allision, sought leave to file a claim.

The district court denied leave, citing the mature state of the litigation. Cruz appealed.

**The Panel's Analysis**

The Limitation of Liability Act allows a vessel owner to limit its liability for certain civil claims related to an incident that occurred during a voyage to the value of the vessel. The Act also allows the owner to channel all claims against the owner into a single federal proceeding by prohibiting any other actions related to the voyage outside of the limitation proceeding.

Once an owner initiates a limitation proceeding, Supplemental Rule F(4) requires that all claims against the owner be filed within 30 days. The court must provide notice of the limitation proceeding, as well as the claim deadline, by publication in a newspaper for four weeks prior to the claim deadline. Additionally, the owner must mail notice to anyone known to have asserted a claim against him before he initiated the limitation proceeding. Claims must be filed before the date specified in the notice; however "[f]or cause shown," the court can enlarge the time in which a claim must be filed.

The relatively short filing period and the lack of formal process means that persons with claims must be both vigilant and diligent. To ameliorate some of the rigors of this result, the 5th Circuit adopted a liberal stance towards filing late claims, embodied in the principle that so long as the limitation proceeding is pending and undetermined, and the rights of the parties are not adversely affected, the court will freely grant permission to file late claims' upon a showing of the reasons therefor. The 5th Circuit utilizes an abuse of discretion standard to evaluate a lower court's denial of leave to bring an untimely claim in the limitation proceeding.

The district court denied Cruz's motion for leave to file his claim, finding: (1) the limitation proceeding was "partially determined" because a claim against the Hawk had been settled; (2) allowing Cruz's late claim would prejudice the parties by causing delay, increasing litigation expenses, and threatening the adequacy of the limited fund; and (3) Cruz's reason for missing the deadline — that he resided in New Orleans, but notice was published in a Mississippi newspaper — was not good cause to excuse his untimeliness. The Fifth Circuit panel did not believe that any of these conclusions amounted to an abuse of discretion.

First, the district court did not abuse its discretion in determining that the limitation proceeding was partially determined when Cruz filed his motion. A proceeding is partially determined when the petitioner has settled a claim and is in settlement negotiations over the others. Additionally, district courts within the 5th Circuit consider factors like the nearness of a trial date, the amount of discovery completed, and the passage of other material pretrial deadlines in assessing whether a limitation proceeding is partially determined.

Cruz filed his motion for leave on May 6, 2021 – approximately 17 months after the filing deadline of November 20, 2019 mandated by Supplemental Rule F(4). In those months, the parties to the limitation proceeding stipulated to liability, as well as to the value of the fund from which all claimants could recover. The only other personal injury claim in the proceeding settled. The parties exchanged expert

disclosures and other discovery. In fact, when Cruz filed his motion, discovery was less than a month from closing. Given the advanced stage of the litigation, the 5th Circuit panel found no abuse of discretion in the district court's conclusion that the proceedings were partially determined. In fact, only a few months after Cruz filed his motion, all claims against the Hawk settled and the case resolved.

For many of the same reasons, the panel found no abuse of discretion in the district court's conclusion that granting Cruz leave to file belatedly would prejudice the parties to the limitation proceeding, that is, both the *Hawk* and the claimants. The court found that adding Cruz's claims would adversely affect the parties because the proceeding was near completion. The discovery deadline was less than a month away when Cruz filed and would likely need to be continued if Cruz's claim were permitted. Thus, Cruz's late filing would have likely added delay and increased the litigation costs for all parties to the proceeding.

Finally, the panel did not find any abuse of discretion in the district court's determination that Cruz failed to demonstrate good cause for his failure to timely file his claim. Cruz's reason for missing the deadline was that he did not receive actual notice of the limitation proceeding because he lived in New Orleans and the notice was published in the *Sun Herald*, a local newspaper in Harrison County, Mississippi, where the allision occurred. Other circuits have found that when a late claimant did not receive actual notice of a limitation proceeding because notice was published in "a place remote from the residence of potential claimants," that is a sufficient ground to excuse the late filing of claims. However, in those cases, notice was published in a different country, or several states away from where the late claimants lived. In this matter, notice was published in a newspaper serving a county just over 70 miles from New Orleans where Cruz lived. The panel noted a previous 5th Circuit wherein no abuse of discretion was when notice was published in the *Galveston Daily News* and the late claimants lived in Port Arthur and around Sabine Pass. There, like this matter, the distance between the late-claimant and the coverage area of the publication was less than 100 miles and — more relevant to the question of "remoteness" — the 2 were in adjacent metropolitan regions. Thus, the panel found no abuse of discretion in the district court's analysis of this factor.

For the above reasons, the order denying Cruz leave to file his late claim was affirmed.

A copy of the Fifth Circuit opinion is available via the following link:
https://www.dropbox.com/s/evskbzpvv0dy95l/OHT%20Hawk%20%28Cruz%29.pdf?dl=0

**This update was jointly prepared by Royston Rayzor's team of maritime lawyers and marine investigators.**

**Royston Rayzor's fully-staffed offices are conveniently located near each of Texas' major ports.**

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