RECENT MARITIME LAW DEVELOPMENTS IN THE FIFTH, NINTH, AND TENTH CIRCUITS

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I. FIFTH CIRCUIT

A. JONES ACT

1. *Ortega Garcia v. United States*, 986 F.3d 513 (5th Cir. 2021) (Willett)

(affirming denial of recovery to spouse of an undocumented alien killed by a Coast Guard vessel while swimming across the Brownsville Ship Channel who sued the Coast Guard and vessel manufacturer).

While patrolling the Brownsville Ship Channel around midnight, a United States Coast Guard vessel struck and killed Patricia Guadalupe Garcia Cervantes, a Mexican citizen who was trying to enter the United States illegally by swimming across the Channel. Her husband brought negligence and wrongful death claims against the United States, along with products liability, gross negligence, and wrongful death claims against the manufacturers of the vessel and its engines, Safe Boats[1] and Mercury Marine.

At first, Judge Olvera dismissed all the claims against the vessel and engine manufacturers and found the United States did not owe any duty to Cervantes unless the Coast Guard had actual knowledge about the probability of hitting Cervantes as she swam across the Channel. Plaintiff appealed.

[1] SAFE Boats International is an American-based boat manufacturer. SAFE stands for **S**ecure **A**ll-around **F**lotation **E**quipped. SAFE Boats manufactures vessels for military, law enforcement, fire, and rescue, and other agencies.

First, Judge Willett addressed whether there was admiralty jurisdiction against the United States under the Suits in Admiralty Act or Public Vessels Act. Concluding that the district court had admiralty jurisdiction, Judge Willett turned to the duty owed by the United States. Agreeing that a collision between a vessel and an individual swimming across the Channel was not reasonably foreseeable—even though the Coast Guard knew undocumented aliens used the Channel as a point of entry into the United States—Judge Willett agreed that the Coast Guard did not owe a duty to Cervantes.

Dismissing the product liability claims, Judge Willett agreed that Cervantes was neither a user nor a consumer of the vessel or her engines, and therefore there was no duty to warn—applying the Second Restatement of Torts, adopted by both the Supreme Court and Fifth Circuit in maritime products liability cases. Judge Willett also held that, even if maritime law gave standing to bring a products liability claim, there was no evidence that the alleged defects proximately caused Cervantes' death. Finally, Judge Willett held that there was no basis to supplement the maritime wrongful death remedy with state remedies for the death of a nonseafarer because there were no viable claims against the United States or the manufacturers.

2. ***Adriatic Marine, L.L.C. v. Harrington*, 834 F. App'x 124 (5th Cir. 2021) (per curiam)** (affirming dismissal for failure to establish causation for negligence and unseaworthiness after slipping on a pipe and applying *McCorpen* defense to maintenance and cure regardless of subjective intent to deceive or subsequent medical history).

Defendant slipped inside the engine room of the *M/V ADRIATIC* after cleaning the vessel's bilge and injured his lower back. No one witnessed the incident. He completed an incident report eight days later. Three months later, Adriatic began paying maintenance and cure after being contacted by counsel for Defendant. Defendant requested surgery but an independent medical examination disagreed with the opinion and denied the surgical procedure. Plaintiff moved for declaratory and summary judgment, contending that Defendant was not involved in an accident

onboard the *M/V ADRIATIC* nor did he sustain any injury while in service of another vessel owned by Plaintiff because he willfully and knowingly concealed his pre-existing medical conditions—including prior issues and injuries to his back.

Defendant claims that he did not understand the questions, but his testimony at his deposition and his completion of a similar questionnaire after this incident in which he denied neck or back problems—one day after a visit to the emergency room complaining of back pain—persuaded the district court otherwise. After declaring Plaintiff satisfied the *McCorpen* willful concealment defense, the district court reviewed the motions for summary judgment on the Jones Act negligence and unseaworthiness claims.

Dismissing these claims, the district court discussed Defendant's deposition where he failed to recall the incident, only remembering that he had slipped while stepping on a pipe. Defendant also posits that he was unable to glance down at his shoes because of his size. Unpersuaded, the district court dismissed the Jones Act and unseaworthiness claims. The Fifth Circuit affirmed, finding it was legally irrelevant whether he had a subjective intent to deceive or whether his subsequent medical history showed his back was not injured.

3. *Rivera v. Kirby Offshore Marine, L.L.C.*, 983 F.3d 811 (5th Cir. 2020) (Stewart) (affirming harbor pilot's recovery for unseaworthiness as a *Sieracki* seaman).

Before his accident, Captain Jay Rivera worked as a state-commissioned Branch Pilot for the Port Aransas and Corpus Christi Bay Area. In 2016, Captain Rivera was dispatched to pilot the *M/V Tarpon*—a tug owned by Kirby Offshore Marine. Captain Rivera boarded the vessel but was only partially escorted to the wheelhouse before losing sight of his Kirby escort and continuing the rest of the way alone.

To enter the wheelhouse, Captain Rivera had to climb over a two-foot-high bulkhead and through a watertight door. From the door, he had to use another step inside the engine-room hatch

access door to step down to the interior deck area. The area was dark. When Captain Rivera reached the inside step, he stepped down toward the deck with his left foot. He landed on the hatch cover, rolled his ankle, and fell. Captain Rivera lay on the deck after his injury, and the Kirby escort eventually found him and helped him the rest of the way to the wheelhouse. Once inside the wheelhouse, Captain Rivera requested ice and ibuprofen and reported his injury to Captain Crossman, the *Tarpon's* captain. Captain Rivera then piloted the *Tarpon* to its intended destination.

After exiting the *Tarpon*, Captain Rivera sought medical attention for his injury. Doctors confirmed that Captain Rivera fractured his fifth metatarsal of his left foot and placed his foot in an air cast. Captain Rivera experienced lingering injuries during his recovery, and doctors eventually diagnosed him with Complex Regional Pain Syndrome ("CRPS"). Captain Rivera was declared medically unfit for his mariner certification based on his condition and lingering injuries. On recommendation from the Board of Pilot Commissioners, the Governor of Texas revoked Captain Rivera's state harbor commission—causing him to lose his profession as a pilot.

Captain Rivera sued Kirby for negligence and unseaworthiness. Captain Rivera sought relief on alternative grounds for: Kirby's negligence under the common law, Kirby's breach of the duty of a seaworthy ship under *Sieracki*, and Kirby's negligent maintenance of the vessel under the LHWCA.

After a 7-day bench trial, Judge Hanks found Kirby was liable for both unseaworthiness and negligence. Because Captain Rivera could no longer work as a pilot, Judge Hanks awarded $11,695,136. Kirby appealed.

Writing for the Fifth Circuit, Judge Stewart held that Captain Rivera was not covered by the LHWCA because he had to be the employee of someone and there was no evidence that he

was an employee of anyone while serving as a pilot on the vessel. Captain Rivera—a member of the Aransas-Corpus Christi Pilots Association—was an independent contractor.

First, the Fifth Circuit has held that pilots are not covered under the Jones Act. As a result, Rivera's cause of action against Kirby was for unseaworthiness as a *Sieracki* seamen who is neither a Jones Act seaman nor covered by the LHWCA—and subject to its exclusive-remedy provision.

Second, finding sufficient evidence to support Judge Hanks' findings that the vessel was unseaworthy—and Captain Rivera was not comparatively negligent—the Fifth Circuit affirmed those findings. Addressing the argument that Judge Hanks should not have admitted evidence of the subsequent remedial measure of reflective tape near the area where Rivera was injured, the Fifth Circuit held that Judge Hanks did not abuse his discretion in admitting the evidence because there was sufficient evidence of Kirby's negligence without the photograph. Finally, the Fifth Circuit affirmed the damages award that stemmed from the K-1 tax forms from Rivera's S-corporation.

4. ***Knight v. Kirby Offshore Marine Pac., L.L.C.*, 983 F.3d 172 (5th Cir. 2020) (Barksdale)** (clarifying test for comparative fault when crewmembers are injured following orders and declining to overturn damage award that plaintiff considered inadequate).

Knight was a tankerman aboard the *M/V Sea Hawk*, a tugboat owned by Kirby that was towing a barge from the State of Washington to Alaska. As an offshore tankerman, Knight was responsible various aspects of deck labor on the tug and barges including loading and discharging cargo, assisting with repairs, and other heavy lifting tasks.

The *Sea Hawk* houses a stern line used when entering and exiting ports to secure the barge to the tug. The line was more than 100-feet long and several inches thick. At one point the line chafed. Once the vessels were in the open sea and the stern line was no longer in use, the captain ordered Knight and another crewmember to change out the line. When the order was given, four-

foot seas and winds of at least 20 miles an hour caused the *Sea Hawk* to roll. After removing the chafed line, they placed it on the deck next to them. As they were installing the new line, Knight stepped on the chafed line and injured his ankle. He claims the rocking of the vessel caused him to lose his balance. His injuries prevent him from returning to work in the same capacity. Knight sued, asserting a Jones Act negligence claim.

Following a two-day bench trial, the court found that Kirby and Knight were both negligent because "there were safer times to issue the order to change the line"; and Knight was contributorily negligent because he failed to "watch his footing while replacing the chafed stern line" and failed to "move the chafed stern line to a location on the boat where he would not have stepped on it". The court assigned equal fault to each party. Knight challenged the award of comparative fault, arguing he could not be found to be comparatively at fault as he was following an order at the time of his injury.

The majority[2] held that a seaman cannot be found negligent for carrying out a specific order from his supervisor but may be found at fault for carrying out a general order. The majority defined a specific order as "one that must be accomplished using a specific manner and method and leaving the seaman with no reasonable alternative to complete the assigned task." As the order to change out the line was a general order, Judge Barksdale held that the district court was not precluded from finding Knight to be negligent.

He then addressed each of the findings of negligence and concluded that Knight was an experienced tankerman who was familiar with the movement of vessels and who knew that the

[2] The three members of the panel of the Fifth Circuit disagreed on the issue whether the statement in a prior case that a seaman may not be found comparatively at fault when injured while carrying out an order was dictum or applicable law. Judge Elrod dissented and would have held that Knight could not be found at fault for the injury he incurred while following orders.

line was on the deck while he was preparing the new line. As a result, it was appropriate to find that Knight was negligent for failing to watch his footing.

Judge Barksdale found the finding of fault for placement of the line on the deck was clearly erroneous because the captain watched the procedure and found no irregularities in the work. Thus, the Fifth Circuit remanded the case to Judge Milazzo to find the percentages of fault for Kirby and Knight based on the single finding of comparative fault. Knight also urged the Fifth Circuit to reverse the award of $60,000 for his past and future pain and suffering. Knight injured his ankle and underwent three reconstructive surgeries and attended 100 sessions of physical therapy, eventually leading to a 14% foot-and-ankle impairment. Knight could not return to work as an offshore tankerman but could work as a shore tankerman. Judge Barksdale noted that the court looks to relevant federal and state cases to determine whether the damages are excessive, and he applied that analysis to determine whether an award was inadequate.

Although the award was on the lower end, it was not outside the bounds of plausibility, and the majority consequently affirmed the damages. Judge Elrod dissented and would have reversed the damage award as insufficient.

5. ***Sanchez v. Smart Fabricators of Texas, L.L.C.*, 978 F.3d 976 (5th Cir. 2020)** (granting en banc consideration to "to bring our jurisprudence in line with Supreme Court caselaw")

Gilbert Sanchez, a welder employed by Smart Fabricators of Texas was injured when he tripped on a pipe welded to the deck of a jacked-up drilling rig. At the time of the accident, Sanchez had been employed by Smart for 67 days. 65 days had been spent on rigs. Sanchez sued Smart for negligence under the Jones Act in state court. Smart removed the case.

The district court denied Sanchez's motion to remand and then granted Smart's motion for summary judgment, both for the same reason—Sanchez did not point to evidence that could establish his status as a seaman for purposes of the Jones Act and *Chandris, Inc. v. Latsis* (1) the

employee's duties must contribute to the function of the vessel or to the accomplishment of its mission and (2) the employee must have a connection to a vessel in navigation (or an identifiable group of such vessels that is substantial in terms of both its duration and its nature. Sanchez failed the second prong because his connection to the rig as a welder was not "substantial in nature" as refined by the Fifth Circuit in *Naquin v. Elevating Boats, LLC,* and *In re Endeavor Marine*. Sanchez appealed both orders.

On appeal in March 2020, Smart argued Sanchez was "a land-based ship-repairman, … not connected to vessels in navigation." Sanchez worked on drilling rigs only "while they were jacked up on the sea floor, with the body of the rig out of the water and not subject to waves, tides, or other water movement."

WFD Rig 350
Employment % - 72%
Location – moored inland

Enterprise 263 – <u>Injury Situs</u>
Employment % – 19%
Location – OCSLA

The Fifth Circuit first decided (1) Sanchez was a welder and not a seaman, (2) and he was injured when he tripped on a pipe welded to the floor—a circumstance unrelated to any perils of the sea.

In September 2020, a three-member panel reconsidered, finding instead that Sanchez qualified as a seaman so long as he is exposed to the perils of the sea—even if his duties are only

a step from shore. While reviewing Supreme Court precedent, the panel questioned whether Sanchez satisfied the nature element of the seaman test. All three members of the panel agreed the precedents should be reconsidered by the full court in order "to bring our jurisprudence in line with Supreme Court case law."

In late January 2021, the Fifth Circuit reheard the case en banc. A decision is forthcoming.

6. ***Luwisch v. Am. Marine Corp.*, 956 F.3d 320 (5th Cir. 2020) (per curiam), *reh'g denied* (May 22, 2020)** (denying maintenance and cure but granting recovery for negligence and unseaworthiness even though seaman misrepresented a pre-existing disability).

In November 2014, Plaintiff was the Chief Engineer onboard the *M/V American Challenger* and injured himself while storing line. Plaintiff climbed to the upper deck of the vessel—where he had never previously been—to see whether there was room to store the line. He discovered that there was already line lying on the upper deck and that it was obstructing part of the walkway, creating a hazard. Plaintiff then sought to climb back down the ladder but in doing so tripped over the line and fell ten feet, to the lower deck. He was taken to the hospital. A CT scan revealed damage to several of his cervical discs. He never returned to work for American Marine.

He began seeing doctors who eventually referred him to a surgeon for treatment. But disagreements over who would pay arose and the surgery never took place. For the next four months, Plaintiff worked intermittently as a mechanic for a series of different employers. In July 2016, Plaintiff resumed working as a chief engineer. When applying for employment as a chief

engineer, Plaintiff denied having any previous neck injuries or neck pain. In May 2018, Plaintiff quit his job and moved to Georgia to sell shrimp and run an RV park.

In 2017, Plaintiff sued American Marine, seeking maintenance and cure. Following a bench trial, the court uncovered that Plaintiff had been diagnosed with degenerative disc disease and a herniated disc in 2011. Because Plaintiff had not disclosed this condition to American Marine when he applied for employment, the district court ruled that Plaintiff was not entitled to maintenance and cure. But the court found the vessel was unseaworthy based on the placement of the lines on the upper deck, eventually assigning 80% fault to American Marine 80% and 20% to Plaintiff.

On appeal, American Marine argues that (1) the *American Challenger* was not unseaworthy, (2) the district court incorrectly apportioned fault between the parties, (3) Plaintiff's fall did not exacerbate his medical condition, (4) Plaintiff does not have a diminished earning capacity, (5) Plaintiff could not recover his medical expenses, and (6) the district court's pain-and-suffering award was excessive. The Fifth Circuit was not convinced.

The Fifth Circuit affirmed the finding of unseaworthiness based on the placement of the rope at the top of the ladder and the finding of negligence and comparative fault despite inconsistencies in Plaintiff's testimony. Second, the court also rejected use of the primary-duty rule as a bar to recovery, holding that an injury resulting from the seaman's failure to perform a duty of his employment only reduces his recovery unless the seaman's negligence is the sole cause of his injury.

Turning to damages, the Fifth Circuit affirmed the award of loss of future earning capacity, despite Plaintiff's employment after the accident, as he worked in pain out of economic necessity and would be unable to do so long-term; he had to misrepresent his condition to obtain employment; and his testimony that he had hoped to retire in five years was different from

intending to retire if he had not been injured. The Fifth Circuit also affirmed the award of future medical expenses, despite the denial of cure, as the denial did not influence his right to recover medical expenses under the Jones Act and for breach of the warranty of seaworthiness. The facts that the seaman's attorney paid his medical expenses and that there was no evidence of any obligation to reimburse the attorney did not prevent the seaman's recovery of the expenses on the Jones Act and unseaworthiness claims. The collateral source rule, inapplicable in maintenance and cure claims, applies to the Jones Act and unseaworthiness claims. The court also rejected application of the rule from *Cenac Towing* that contributory negligence may be found when a seaman has concealed his pre-existing condition—exposing himself to risk of aggravation—and then suffers an aggravation, as Judge Morgan made no findings to support such application.

Finally, the Fifth Circuit rejected American Marine's argument that the award of pain and suffering should be reduced because Luwisch was a "serial liar" and was not credible in his complaints. The Fifth Circuit concluded that he had "told a coherent and facially plausible story" and Judge Morgan could credit his testimony.

7. ***Hewitt v. Helix Energy Sols. Grp., Inc.*, 989 F.3d 418 (5th Cir. 2021)** (granting overtime to toolpusher who was paid biweekly based on a daily rate for days worked).

Michael Hewitt worked for Helix as a toolpusher. He worked more than 40 hours a week in hitches that lasted about a month. He was paid biweekly based on a daily rate for the number of days he worked in each two-week period.

Helix argued that it did not owe Hewitt overtime for the hours worked in excess of 40 each week as Hewitt was an exempt or highly compensated employee because his daily rate was greater than the weekly salary requirement from Department of Labor regulations. Even so, as his compensation varied by the number of days he worked, Judge Ho held that he could not be

considered to be a salaried employee and had a right to be paid overtime. In late May, the Fifth Circuit reheard the case en banc. A decision is forthcoming

B. Longshore and Harbor Workers' Compensation Act

1. *Stelly v. Duriso*, 982 F.3d 403 (5th Cir. 2020) (Haynes) (denying state law intentional inflection of emotional distress claim for sexual harassment by ILA board member because the worker had statutory remedies).

Rhonda Stelly began her career as a longshore worker in Houston in 2014. She claims that Paul Duriso, a board member of International Longshoremen's Association Local 1316 and Local 21, began sexually harassing her shortly after she started coming to the unions' hiring halls. He repeatedly asked her if she needed a "sugar daddy" and regularly described the sexual acts he wanted to perform on her. Her internal complaints eventually led to his suspension pending investigation, but he continued to come to the hiring halls and harass her.

Eventually she sued both Locals and West Gulf Maritime Association for employment discrimination and retaliation. She also sued Duriso for intentional infliction of emotional distress. She obtained a judgment against Local 21. Local 1316 and West Gulf Maritime were dismissed. Duriso evaded service and a default judgment was ultimately entered against him.

Duriso appealed the default judgment. First, Judge Haynes found his failure to attempt to set aside the default judgment in the district court did not prevent him from appealing. Turning to the merits of the appeal, Judge Haynes noted that the intentional infliction action is a gap-filler tort available when the victim has no other recognized theory of redress.

Here, the victim had statutory claims available to her—and she had recovered before against Local 21. Reasoning that the availability of the statutory remedies on the same facts foreclosed Stelly's intentional infliction claim, Judge Haynes held that the district court abused its discretion in entering the default against Duriso. Judge Ho concurred but would have certified whether an intentional infliction action was available to Stelly to the Texas Supreme Court.

2. *Raicevic v. Fieldwood Energy, L.L.C.*, 979 F.3d 1027 (5th Cir. 2020) (per curiam) (affirming conclusion that a mechanic on an offshore platform was a borrowed employee of the platform owner and that the LHWCA was his exclusive remedy but finding the court improperly applied the *Ruiz* factors to reach that conclusion).

Plaintiff was employed by Waukesha Pearce Industries as a mechanic on Fieldwood Energy's offshore platform. Almost a year into working—and sleeping—on the platform, Raicevic awoke after midnight to an alarm blaring in the mechanic's room. While trying to address the mechanical issue that triggered the alarm, Raicevic slipped and fell twice due to oil that had leaked on the floor.

Raicevic sued Fieldwood Energy. A jury returned a verdict finding Fieldwood Energy and Raicevic were each 50% negligent. After Fieldwood raised the borrowed servant defense, Judge Hanks submitted the nine *Ruiz* factors on borrowed servant status to the jury to make factual findings on each factor. Judge Hanks then weighed the findings on the Ruiz factors and concluded both (1) Raicevic was a borrowed employee and (2) Fieldwood Energy was immune to suit based on the exclusive remedy provision in the LHWCA. Raicevic appealed.

The Fifth Circuit agreed that Raicevic was a borrowed servant based on the *Ruiz* factors but noted that Judge Hanks did not properly weigh the factors. The Fifth Circuit found Judge Hanks was correct that four of the factors are the most important ones when the court is determining whether the borrowed servant defense operates as a bar to common-law liability. But Judge Hanks only analyzed those four factors and treated the other factors as disposable. The Fifth Circuit emphasized that "no factor can be categorically excluded from the analysis." All of the Ruiz factors thus were analyzed and the court noted that only one factor favored Raicevic's argument that he was not a borrowed servant. As a result, the Fifth Circuit held that Fieldwood Energy could invoke the LHWCA as a bar—unless there was an exception in the LHWCA to the applicability of the bar.

Raicevic asserted that Fieldwood Energy could not claim immunity if it failed to secure payment of compensation as required by Section 905(a) of the LHWCA, and that LHWCA compensation had been paid by Waukesha Pearce's insurer and not by Fieldwood Energy's insurer. This raised the question whether an employer must prove not only that it had LHWCA insurance but that it paid LHWCA benefits. The Fifth Circuit answered that it was enough to obtain immunity and as Fieldwood Energy did have LHWCA insurance, it was entitled to immunity from the suit.

3. ***Skipper v. A&M Dockside Repair, Inc.*, 829 F. App'x 1 (5th Cir. 2020) (per curiam)** (affirming decision that an employee of a shipyard subcontractor was a borrowed servant of the shipyard under the LHWCA—even though borrowed servant status was not specifically pled as an affirmative defense and the contract between the parties stated he was an independent contractor).

In August 2017, Plaintiff Skipper was working on a barge in one of A&M's shipyards when he allegedly fell into an open manhole cover and suffered severe injuries. At the time of the accident, Skipper was employed by Helix as a painter and blaster. Helix provides services to A&M under a services agreement which provided that Helix and its employees were independent contractors of A&M. Skipper sued A&M for negligence as a result of his injuries. The district court held that A&M was Skipper's borrowing employer for purposes of the LHWCA and dismissed the case based on the exclusive remedy provision of the LHWCA. Skipper appealed.

On appeal, Skipper first argued that A&M had waived the borrowed servant defense by not raising it as an affirmative defense in its answer. Even so, the Fifth Circuit held that an affirmative defense is not waived if the defendant raised it at a pragmatically sufficient time so that the plaintiff was not prejudiced in his ability to respond. Skipper had reasonable notice because Helix argued his sole remedy was for compensation under the Louisiana Worker's Compensation Act or the LHWCA. The borrowed servant defense was definitively raised soon after in a motion for summary judgment. Lastly, Skipper argued the *Ruiz* factors presented fact questions—even though he had requested no more discovery on these issues.

The Fifth Circuit disagreed. The fact that the contract between A&M and Helix provided that Helix and its employees were independent contractors did not present a fact question on the issue of who has control because the facts established that Skipper was following the directions of A&M's yard superintendent and Helix did not have any supervisors at the job site. The Fifth Circuit disagreed with Skipper's interpretation of the factor whether Helix terminated its relationship with Skipper. Skipper argued that his employment relationship with Helix had not been terminated when he was working at the A&M shipyard, but the Fifth Circuit held that the inquiry focuses on whether Skipper maintained contact with Helix and not whether his employment relationship was severed.

Here, A&M was directing Skipper. No Helix supervisors were present at the job site. Skipper argued the factor about length of employment weighed in his favor because he had only worked for A&M for six days. The Fifth Circuit, however, answered that this is a significant factor only when the work for the borrowing employer is for a considerable length of time. The factor is neutral when the employee is injured early in the employment.

The Fifth Circuit also disagreed with Skipper on the factor considering who has the obligation to pay the worker. Although Skipper was paid by Helix, the funds to pay Helix were received from A&M. Thus, the Fifth Circuit held that this factor favored borrowed servant status. As seven of the nine Ruiz factors favored borrowed servant status, the Fifth Circuit affirmed the summary judgment for A&M.

4. ***Mays v. Chevron Pipe Line Co.*, 968 F.3d 442 (5th Cir. 2020), *as revised* (Aug. 4, 2020) (Duncan)** (affirming award to valve technician widow because LHWCA, not state workers' compensation act, applied to worker's death on a platform in state waters where there was a nexus to oil and gas activity on the outer Continental Shelf from a third party).

James Mays was killed in an explosion on an offshore platform owned by Chevron Pipe Line Company. Mays was employed by a subcontractor which serviced valves on Chevron's platforms. The platform is part of the Henry Natural Gas Gathering System that also includes

platforms located on the outer continental shelf. The platforms are connected by pipelines, and Chevron had to shut off gas flow from two OCS platforms to the valve on which Mays was working. Mays was killed in an explosion on the platform in state waters caused by gas flowing from the platforms on the OCS. Mays' widow and children sued Chevron for state-law wrongful death. Chevron claimed immunity under the state workers' compensation scheme. The question of LHWCA coverage was submitted to the jury because of the interconnectedness of the platforms. The jury found Mays' death was caused by Chevron's OCS activities, which meant that the LHWCA applied and that Chevron did not enjoy state immunity. The jury found Chevron 70% at fault for Mays' death and awarded his widow $2MM for her loss of Mays' affection.

On appeal, Chevron focused on the language of Justice Thomas' opinion in *Pac. Operators Offshore, LLP v. Valladolid*, which held that the worker's injury did not have to occur on the situs of the OCS as long as there was a substantial nexus between the injury and extractive operations on the OCS. Justice Thomas stated that there must be "a significant causal link between the injury that [the employee] suffered and *his employer's* on-OCS operations" (emphasis added by the Fifth Circuit).

Writing for the Fifth Circuit, Judge Duncan found Chevron's reliance on *Valladolid* was "misplaced." Focusing specifically on the language of the OCSLA that required an injury to an employee that resulted from operations on the OCS, Judge Duncan found the reference to OCS operations omitted any reference to the employer. Judge Duncan presumed must be "purposeful." Judge Duncan also found Mays' nexus to Chevron's OCS operations was sufficient.

Still, Chevron had the right to argue that it was Mays' employer and subject to immunity under the LHWCA. Chevron also attacked the jury's fact finding that there was substantial nexus between Mays' death and Chevron's OCS activities. Jury verdicts are analyzed under an

"especially deferential" standard. Judge Duncan cited the evidence from Ms. Mays' expert that the gas that escaped from the valve was extracted from the OCS and was a direct factor in Mays' death and held that the jury's decision should not be disturbed. Finally, the Fifth Circuit declined to overturn the jury's award of $2MM for Mrs. Mays' loss of affection, noting that she and the decedent had been together since she was 17, they had been married nearly 40 years, and his mangled and gas-tainted body could not be buried in the wooden casket he had chosen.

5. ***Simon v. Dir., Off. of Workers' Comp. Programs, United States Dep't of Lab.*, 816 F. App'x 1006 (5th Cir. 2020)** (affirming district court's decision that not opposing the defendant's motion for summary judgment in claimant's third-party action in exchange for $8,000 barred claimant's LHWCA claim as an unauthorized third-party settlement).

Clarence J. Simon was injured while working for Longnecker Properties as a rigger. Simon claims he slipped and fell from a drill pipe, twisting his left ankle—causing neck and back injuries—and leading to permanent total disability.

He sued Longnecker under the Jones Act and amended his complaint six times to include additional defendants. His action proceeded in federal court against those defendants after the judge dismissed Simon's Jones Act claims—although Longnecker remained in the case. Simon also pursued an LHWCA claim against Longnecker.

Defendants United Vision Logistics and Tri-Drill filed motions for summary judgment in the lawsuit, and Simon and United Vision filed a Motion to Consent Judgment Granting Motion for Summary Judgment that the court granted. Simon did not oppose Tri-Drill's motion, stating that Tri-Drill and Simon had "compromised their differences." Longnecker asked about the agreements among the parties and learned that Simon had agreed to the consent judgment dismissing United Vision for $2,500, and that Simon had agreed not to oppose Tri-Drill's motion for summary judgment in exchange for $8,000. Longnecker then opposed the dismissal of Tri-Drill, asserting that it would be inappropriate to enter a judgment for Tri-Drill rather than

dismissing the case as a settlement. Tri-Drill argued in response that Longnecker lacked standing to oppose the dismissal, but the district court agreed with Longnecker and granted its motion to confirm the settlement and dismiss Simon's claims against Tri-Drill, dismissing Tri-Drill's motion for summary judgment and Simon's claims against Tri-Drill based on the settlement. Simon appealed the district court's decision to the Fifth Circuit, which affirmed the decision of the district court.

Longnecker then moved to dismiss Simon's LHWCA claim. ALJ Kennington found Simon was estopped from asserting that he had not entered into a settlement with Tri-Drill based on collateral estoppel from the finding of the district judge that the Fifth Circuit had affirmed. That said, Judge Kennington did not find that Simon's agreement to consent to United Vision's motion for summary judgment in exchange for $2,500 was a settlement as the money was for costs and not as a settlement of his claim. Concluding that Simon's LHWCA claim was barred by the unauthorized settlement with Tri-Drill, Judge Kennington granted Longnecker's motion to dismiss the LHWCA claim. Challenging Judge Kennington's application of collateral estoppel, Simon appealed to the Benefits Review Board.

Determining that the issue before the district court was the same issue raised in the administrative proceeding, the existence of a settlement; that the existence of a settlement was fully litigated in the district court; and that the settlement decision was necessary to the prior judgment; the Board affirmed Judge Kennington's dismissal of the LHWCA claim.

Finding no errors in law or fact, the Fifth Circuit agreed with the use of collateral estoppel and affirmed the dismissal of Simon's LHWCA claim. Simon's petition for certiorari is pending.

6. ***MMR Constructors, Inc. v. Dir., Off. of Workers' Comp. Programs*, 954 F.3d 259 (5th Cir. 2020) (Davis)** (finding (1) worker injured on a platform that was temporarily floating on navigable waters during its construction satisfied the *Perini* test for coverage under the LHWCA; and (2) his employer satisfied the definition

of an employer under the LHWCA because the employer had an employee in maritime employment when the claimant was covered under *Perini*).

Henry Flores worked for MMR Constructors as a quality assurance and control technician on the electrical wiring for the construction of Chevron's tension-leg platform, *BIG FOOT.* At the time he tore his Achilles tendon, the platform was undergoing construction and floating on pontoons in the shipyard in Corpus Christi, Texas.

ALJ Romero held that *BIG FOOT* was not a vessel but found Flores was injured on the floating hull on navigable waters, so he satisfied the geographic component of the situs test. Even so, Judge Romero held that Flores did not satisfy the functional component of the situs test, the status test, or the definition for MMR Constructors to be an employer.

The rig in question.

The Benefits Review Board reversed the decision finding Flores' injury on navigable waters was sufficient under *Perini* to establish coverage under the LHWCA. Writing for the Fifth Circuit, Judge Davis held that Flores' claim was covered under the LHWCA by application of *Perini* and contrasting *Williams v. Avondale Shipyards* and *Travelers Ins. Co. v. Shea* in reaching

his decision. In *Avondale Shipyards*, the claimant was injured on a not-yet-commissioned Coast Guard cutter on its final sea trial. The craft was not yet a vessel, but the craft was on navigable waters, satisfying the situs requirement necessary for coverage under the LHWCA. In *Shea*, the claimant was injured on a floating outfitting pier, an extension of a ramp that had been permanently anchored to the shore and seabed. Even though the structure in *Shea* was floating, the court treated it as a pier or extension of land because it was permanently anchored for 18 years.

Big Foot is operated by Chevron. Co-owners are Statoil and Marubeni.

First, considering *Avondale Shipyards* and *Shea* together, Judge Davis found if a craft in navigable waters is permanently attached to land, the water underneath it is removed from navigation, and is not navigable under the LHWCA. Here, the *BIG FOOT* was only temporarily attached to the land while under construction, meaning the water underneath it was not removed

from navigation. Thus, Flores' injury occurred on navigable waters, satisfying the test for coverage under *Perini* but without having to satisfy the status test.

Big Foot is a dry-tree Extended Tension-Leg Platform (ETLP) with an on-board drilling rig and production capacity of 75,000 barrels of oil and 25 million cubic feet of natural gas per day. The Big Foot field was discovered in 2006 and is estimated to contain total recoverable resources in excess of 200 million oil-equivalent barrels. Chevron estimates the field will be in production for approximately 35-years.

Second, Judge Davis then addressed whether MMR Construction was an employer as defined in the LHWCA, looking to whether it had employees employed in maritime employment—in whole or in part on navigable waters. MMR argued that it did not satisfy the test because Flores was its only employee on the water and engaged in the construction of a platform—which is not maritime employment. Although there is language in the *Perini* that can be construed as requiring the employer to satisfy the definition of an employer separate from the simple *Perini* requirement that the worker be injured on navigable waters, Judge Davis noted that pre-1972 case law held that employers satisfied the definition of an employer under the LHWCA when they employed a claimant who qualified as an employee solely by being injured on navigable waters. Referencing *Bienvenu v. Texaco*—co-written by Judge Davis—Judge Davis held that Flores' work

on the water for several months was sufficient for MMR Construction to be considered an employer under the LHWCA.

Finally, Judge Davis addressed the constitutional argument that by applying the LHWCA to accidents that lack a connection to traditional maritime activity, the LHWCA exceeded the limits of federal maritime jurisdiction. Judge Davis found even though cases determining jurisdiction under the Admiralty Jurisdiction Statute were decided after *Perini*, there was no indication from the Supreme Court that it intended to question its analysis in *Perini*. Thus, the Fifth Circuit is bound by the Supreme Court's understanding of the constitutionality of the coverage of the LHWCA in *Perini*.

7. ***Sea-Land Servs., Inc. v. Dir., Off. of Workers' Comp. Programs*, 949 F.3d 921 (5th Cir. 2020) (Smith)** (affirming ALJ's decision to deny that the claimant suffered a new injury, disbelieving claimant and his treating physician).

Clarence Ceasar injured his back and neck while working for Sea-Land in 1997. Thirteen years later, after multiple surgeries, Ceasar settled his compensation claim but left his medical benefits open. Almost immediately, his physician, Dr. Dan Eidman, released Ceasar to return to work. Ceasar went to work for Universal Maritime Service (UMS) where he complained of a new injury to his back, neck, and shoulder.

Ceasar and Sea-Land argued that Ceasar had sustained a new injury or aggravation of his prior disability in the incident with UMS. UMS argued Ceasar's claim was a natural progression of his prior disability arising from his injury with Sea-Land. The dispute was tried before ALJ Rosenow.

ALJ Rosenow first found that Ceasar had established a *prima facie* case with his testimony along with Dr. Eidman but that UMS had rebutted the presumption with the testimony of Drs. Vanderweide and Kagan, who had reviewed Ceasar's records, and Dr. Brown, who had examined Ceasar. ALJ Rosenow then weighed the evidence and, giving more weight to the defense

physicians and giving little weight to Ceasar's testimony because Ceasar contradicted his medical records and had a motive to ascribe his injury to UMS so that he could receive compensation.

ALJ Rosenow held that Ceasar's injuries stemmed from a natural progression of his pre-existing condition. The Benefits Review Board and the Fifth Circuit agreed, affirming the decision. Judge Smith explained that the ALJ could give less weight to the opinion of the treating physician when there was good cause, and there was good cause as much of Dr. Eidman's testimony diverged from that of Caesar, his testimony was at times internally inconsistent, and his conclusions were undermined by the well-reasoned opinions of the examining physicians.

8. ***Island Operating Co., Inc. v. Dir., Off. of Workers' Comp. Programs, United States Dep't of Lab.*, 811 F. App'x 258 (5th Cir. 2020) (Costa)** (rejecting argument that impeaching the claimant's credibility requires the ALJ to set aside his testimony).

For more than 25 years, Henry Jones worked as a production operator for Island Operating. Throughout that career, Jones performed manual labor on oilfield platforms in the Gulf of Mexico without serious injury. But in September 2016 while performing a physically demanding task, he felt the sudden urge to use the restroom. He had two bloody bowel movements, which he reported, but did not mention the pain he felt in his low back and leg. Jones was diagnosed with anal fissures and was released to return to work, but he asked for FMLA leave so he could recover from his back pain.

Almost a month after he stopped working, he notified Island Operating of his back problems. He was diagnosed by Dr. Gunderson with degenerative changes in his spine and a ruptured disc. Dr. Gunderson later testified that Jones' symptoms related to an injury suffered in September 2016. The LHWCA carrier, Louisiana Workers' Compensation Corp., declined the treatment recommended by Dr. Gunderson and referred Jones to Dr. Romero for a second opinion. Dr. Romero confirmed the herniated disc and agreed that the herniation was likely caused by the

manual labor or straining to have a bowel movement, but the LHWCA carrier declined to pay benefits. The case was tried to ALJ Rosenow who found the claim compensable, and the BRB affirmed.

Before the Fifth Circuit, the employer, and carrier argued that Jones' complaints were not credible because he had withheld information about his injury. Acknowledging the credibility issues raised by the employer and carrier, Judge Costa noted that impeaching a witness' credibility does not automatically require the factfinder to set aside that testimony. Instead, the fact finder can give the appropriate weight to the testimony—either accepting or rejecting it. Here, ALJ Rosenow did not ignore the credibility issues and thoroughly explained why he concluded that the claim was compensable despite the credibility issues. Given the substantial evidence standard of review, Judge Costa held that the Fifth Circuit would not disturb the finding that Jones's claim was compensable. Finally, Judge Costa noted that the Fifth Circuit could award attorney's fees for work performed by Jones's attorney related to the defense of the appeal to the Fifth Circuit and requested counsel to submit a motion detailing his work and the market's hourly rate.

9. ***Bourgeois v. Dir., Off. of Workers' Comp. Programs, United States*, 946 F.3d 263 (5th Cir. 2020) (Higginson)** (affirming ALJ's findings based on decision that the employer's medical expert was more credible than the treating doctor).

Tramond Bourgeois, a former employee of appellee Fab-Con, Inc., filed a claim for benefits under the LHWCA after he was injured while working on navigable waters in 2014. ALJ Price found that Bourgeois suffered injuries to his right shoulder, right ankle, and low back. Bourgeois appealed, arguing that he suffered more severe shoulder and back injuries, including a labrum tear and lumbar facet arthrosis. Judge Price concluded that the employer's medical expert, Dr. Sweeney, presented a more thorough and credible opinion than the treating physician, Dr. Johnston. Although an MRI shortly after the accident suggested that Bourgeois suffered a small ventral labral tear, Dr. Johnston treated Bourgeois for a superior tear three years later. Judge Price

agreed with Dr. Sweeney that Dr. Johnston found tears in structures that were not present three years earlier. The Fifth Circuit declined to address the claimant's argument that his shoulder surgery was intended to address an AC joint sprain, as it was not raised until claimant's motion for reconsideration in the Benefits Review Board. Finally, the Fifth Circuit affirmed the finding that Bourgeois did not suffer from lumbar facet arthrosis, based on the testimony of Dr. Sweeney, who relied on a higher resolution MRI than the lower resolution MRI that suggested that Bourgeois might have sustained facet arthrosis.

C. Maritime Contracts

1. ***Mays v. C-Dive, L.L.C.*, 799 F. App'x 232 (5th Cir. 2020) (Costa)** (requiring subsidiary of contracting party to be named as an additional insured because of interchangeable references in the master service agreement).

An explosion injured four divers employed by C-Drive, L.L.C. during the decommissioning of a pipeline in the Gulf of Mexico. Gulf South Pipeline Company, the owner of the pipeline had hired C-Dive to plug it. The divers sued C-Dive and Gulf South for Jones Act negligence plus negligence and unseaworthiness under general maritime law.

Gulf South responded with cross-claims against C-Dive and third-party claims against C-Dive's insurers, Catlin Insurance Company and New York Marine & General Insurance Company. Among other things, Gulf South claimed that its master services agreement ("MSA") with C-Dive required that Gulf South would be included as an additional insured under C-Dive's comprehensive general liability insurance policies. C-Dive, Catlin, and New York Marine countered that the MSA was between C-Dive and Gulf South's parent company, Boardwalk Pipelines, LP, and that the additional insured provision applied only to the parent company—not its subsidiaries. Both sides sought summary judgment. The district court granted Gulf South's motion. It concluded that the MSA's additional insured provision applied to Boardwalk Pipelines, LP, and its subsidiaries, including Gulf South. And because C-Dive's policies with Catlin and New York Marine cover any

entity that C-Dive contractually agrees to include as an additional insured, those policies covered Gulf South too.

Judge Milazzo concluded that the MSA was maritime, so there was no problem with the anti-indemnity and anti-insurance provisions of the Louisiana Oilfield Indemnity Act. She then held that Gulf South was an additional insured on C-Dive's liability policies. The insurers argued that the specific reference in the additional insured provision to Boardwalk Pipelines, LP, compared to the use of Boardwalk—which included subsidiaries—elsewhere in the agreement, reflected a specific intent to differentiate these parties so that only Boardwalk Pipelines, LP, and not its subsidiary Gulf South, was afforded additional insured coverage. C-Dive and its insurers appealed.

Judge Costa concluded the reference to Boardwalk Pipelines, LP in the additional insured provision encompassed Gulf South, noting the agreement used Boardwalk Pipelines, LP, and Boardwalk interchangeably throughout the document. That was also demonstrated by the provision that Boardwalk Pipelines was known as Boardwalk but then stated that reference to Boardwalk would include its subsidiaries, including Gulf South. Thus, when the additional insured provision named Boardwalk Pipelines, LP, it referred to Boardwalk, which referred to Gulf South. Even the additional insured provision used the terms interchangeably when it provided for the naming of Boardwalk Pipelines, LP and then provided that the policies would be primary to any other insurance available to Boardwalk. Judge Costa reasoned that it would make no sense to require the policies to name only the parent company when the policies were primary to the coverage of the subsidiaries. Judge Costa therefore held that Judge Milazzo correctly ruled that C-Dive's insurance policies unambiguously included Gulf South as an additional insured.

2. *Melancon v. Carnival Corp.*, 835 F. App'x 721 (5th Cir. 2020) (per curiam) (affirming decision that passenger who is deaf, mute, visually impaired, and

functionally illiterate, possessed capacity to consent—regardless of ADA requirements—binding her to the time limitation in the ticket).

Plaintiff, who was deaf and mute, visually impaired, and functionally illiterate, brought a negligence action against Carnival, alleging she slipped on a "foreign substance" onboard the *Carnival Dream*—injuring her hip, leg, and other parts of her body.

Exactly three years later, Plaintiff sued Carnival alleging negligence and claiming the vessel was unseaworthy, citing unsafe conditions on the deck. Carnival moved to dismiss, citing the ticket's one-year statute of limitations. Plaintiff argued the contract was unenforceable because she lacked capacity to enter into it. The district court granted Carnival's motion to dismiss. Plaintiff appealed.

Plaintiff argued that under Americans With Disabilities Act, Carnival failed to provide accommodations—rendering her contractually incapacitated. The Fifth Circuit noted that both parties agreed that Melancon's disabilities fell within the ADA—however, her argument assumed that the ADA required Carnival to provide aids and services while contracting via the internet. Although the court did not address whether such a duty was owed, Plaintiff failed to show that an ADA violation of the kind would negate contractual capacity. The court reasoned that Plaintiff's claim confused concepts of capacity and mutual assent and failed to explain how the presence of one party's duty negated the other's contractual capacity. Basic contract law does not require that a signing party read or understand a contract to be bound, and it thus does not require that the drafting party employ any particular method of communication. The Fifth Circuit denied Plaintiff's request for leave to amend her complaint (on appeal) because the proposed amendment would be futile. Plaintiff could not establish a lack of capacity to consent to the terms of the ticket contract and was bound by the one-year period of limitation—barring her claim.

3. ***Richter v. Carnival Corp.*, 837 F. App'x 260 (5th Cir. 2020) (per curiam)** (affirming dismissal of breach of contract action finding email expressing intent insufficient to create implied contract).

Sue Richter sued Carnival Corporation for unlawfully using her reality television concept *SeaGals* to create its own reality television show, *Vacation Creation*.[3]

Richter claimed breach of contract, quantum meruit, fraud, and breach of confidence or misappropriation of confidential information based on Carnival's alleged theft and use of her proprietary concept. The district court granted Carnival's motion to dismiss, finding that Richter

[3] *Vacation Creation* aired during its first season as part of The CW's "One Magnificent Morning" Saturday morning block. The show moved to ABC stations for season two which began in October 2018. The show was hosted by Tommy Davidson, known for his role in *In Living Color*, alongside travel expert and YouTube sensation Andrea Feczko –

> Vacation Creation with Tommy Davidson and Andrea Feczko is one of Carnival Corporation's original TV series. With cruise vacations growing twenty percent faster than land-based vacations and with more people than ever taking cruise vacations year over year, the show's inaugural season's strong ratings are a testament to Americans' interest in cruising. Vacation Creation takes audiences on an inspirational journey as they follow the voyages of families who have been chosen to experience a custom-tailored cruise vacation of a lifetime. Families that are facing hardship, in need of hope, or are seeking much-needed time together are able to travel to incredible destinations and create lasting memories.

See Cunard's Queen Mary 2 Featured on TV Series Vacation Creation, PR NEWSWIRE, February 14, 2018 (available at https://www.prnewswire.com/news-releases/cunards-queen-mary-2-featured-on-tv-series-vacation-creation-300598415.html) (last accessed March 31, 2021).

had failed to state a plausible breach of contract claim and that her state law fraud and quantum meruit claims were preempted by the Texas Uniform Trade Secret Act.

Richter appealed, asserting that the district court erred in determining that no implied contract had been formed between Carnival and herself and in finding her state law claims preempted. The Fifth Circuit agreed that an email stating that Carnival was "onboard with the reality show," that "Carnival Corp. w[ould] provide cabins aboard [thei]r ships, the contest, contestants, and shore excursions associated with our fleet," and that "[o]ther details w[ould] be outlined in a formal contract" allowed a plausible inference that the parties engaged in preliminary negotiations. But without more, the Fifth Circuit declined to infer that the parties mutually intended to be bound.

D. PRACTICE AND PROCEDURE

1. ***Su v. Wilmington Tr., Nat'l Ass'n*, No. 20-20337, ___ Fed. Appx. ___, 2021 WL 126415 (5th Cir. Jan. 13, 2021) (per curiam)** (holding that failure of attorney for Nobu Su to appear at hearing was not grounds to set aside judgment in favor of lender) – *Nobu Su I.*

Hsin Chi Su (aka Nobu Su) owned patents awarded by Japan, Korea, and China on certain technology related to piping structure for commercial shipping vessels. Su patented designs for pipelines installed inside a vessel's hull instead of on the outside. In 2010, four corporations allegedly owned and controlled by Su ("Whale Corporations") obtained loans from a syndicate of lenders to finance the construction and purchase of multiple cargo vessels. In 2013, the Whale Corporations entered Chapter 11 bankruptcy proceedings. During those proceedings, the bankruptcy court authorized the sale of the vessels to OCM Formosa Strait Holdings, Ltd., which held most of Whale Corporations' debt.

Nobu Su is the former billionaire boss of Today Makes Tomorrow ("TMT"), one of Asia's largest shipowners. He was jailed for contempt of court in March 2019 for 13 months and is embroiled with numerous long-running court battles. Since being released from jail, he was deemed a flight risk and has been barred from leaving the United Kingdom.

In July 2014, Su sued several of the Whale Corporations' lenders, seeking a declaration that the vessels' sale did not alter patent rights he allegedly held that were incorporated into the vessels' design or, in the alternative, the monetary value of his alleged intellectual property. As successor-in-interest to one of these lenders, Wilmington Trust counterclaimed, alleging that Su had personally guaranteed the loans but had failed to pay the outstanding balance left after the sale of the vessels.

In 2015, Wilmington Trust filed two motions for summary judgment. Su opposed, through his counsel, HOOVER SLOVACEK LLP. While Wilmington Trust's motions were pending, Su substituted ROBINS KAPLAN LLP as his counsel.

On December 7, 2018, the district court ruled that Su was not entitled to declaratory or monetary relief and entered a final judgment that purported to terminate all of the outstanding motions. But the district court did not specifically address Wilmington Trust's counterclaims. On

January 30, 2019, Su appealed. On March 4, 2019, the Fifth Circuit dismissed Su's appeal for want of prosecution.

A month later, Wilmington Trust petitioned the district court to reopen the case to adjudicate its counterclaims against Su. The district court granted this motion and scheduled a hearing for May 16, 2019. In its scheduling order, the district court dictated that whoever receives the notice must confirm that every other party knows of the setting, and that each party must appear by an attorney with (a) full knowledge of the facts and (b) authority to bind the client. But three days before the scheduled hearing, Robins Kaplan moved to withdraw as Su's counsel. At the hearing, Su did not appear, nor did any attorney appear on his behalf. The district court tried to contact ROBINS KAPLAN, but its phone call went straight to voicemail.

After a brief argument by Wilmington Trust's counsel, the district court agreed that "there [was] no reason not to" grant summary judgment for Wilmington Trust and awarded it $60,459,959.33 for outstanding principal, $17,169,737.40 for prejudgment interest, and post-judgment interest at the rate of 2.32%.

On May 21, 2020 Su moved to vacate the judgment under Federal Rule of Civil Procedure 60(b). Su claimed that he had been held in civil contempt by a court in the United Kingdom and was consequently incarcerated from March 29, 2019 until April 8, 2020. He maintained that, because of his incarceration, he did not learn of the reopening of his case, the May 2019 hearing, or the district court's grant of summary judgment for Wilmington Trust until after these events took place. He also attested that he was unable to locate counsel to attempt to vacate the district court's judgment before his release from prison in April 2020. Thus, he argued, his failure to defend himself against Wilmington Trust's motions for summary judgment was excusable. The district court denied his motion. Su appealed.

On appeal, the Fifth Circuit found the district court suggested that it had considered the merits of Wilmington Trust's counterclaims and was granting judgment on the strength of its arguments—not because Su failed to appear at the hearing. Because Su presented his objections to the district court through the counsel of his choice and judgment was entered against him on the merits, the circumstances of this case are not so "extraordinary" as to justify the reversal of the district court's denial of relief under Rule 60(b)(6) on abuse of discretion review.

2. ***In re S. Recycling, L.L.C.*, 982 F.3d 374 (5th Cir. 2020) (Clement)** (determining barge in the process of being scrapped—with a severed bow, gaping hole open, and inoperable cargo tanks—is not a vessel).

After a flash fire onboard a tanker barge during shipbreaking operations killed one worker and injured another, Southern Recycling, L.L.C., brought a petition for exoneration or limitation of liability under the Limitation of Liability Act.

Southern Recycling purchased an articulated tug/barge unit ("ATB") for shipbreaking and recycling from Kirby Offshore Marine Operating, LLC ("Kirby"). The ATB comprised a tugboat and an oceangoing tanker barge, the *DBL 134*. Southern Recycling and Kirby agreed that the vessels should be cleaned of all chemicals, petroleum products, and sludge. Kirby hired a contractor to clean and an inspector to confirm the cleanliness. Kirby then transported the ATB from New York to the International Shipbreaking Limited, L.L.C. ("ISL") shipyard in Brownsville, Texas—the site of the accident.

ISL, an affiliate of Southern Recycling had custody of the ATB for shipbreaking and began to conduct preliminary shipbreaking activities, including removing deck plates, cutting "small doors" in the cargo tanks, and making cuts to the bow of the barge. ISL workers also began to remove pipes that were part of a heating coil system in the cargo tanks. Unfortunately—because the barge had been used to transport gasoline, other petroleum products, and ethanol—the pipes contained an unknown amount of gasoline. While Plaintiffs were cutting through one such pipe, a

spark ignited a pocket of gasoline vapors, causing an explosion and fire that killed one and severely injured another.

Southern Recycling argued that DBL 134 is still floating in the Brownsville Shipyard and had even been moved since the accident within the ISL facility. Southern Recycling contended that the cuts were minor and preparatory only, and that DBL 134 retained the essential characteristics of a vessel—including that it still floats. The district court, however, considered photographs of the barge submitted by the parties, including one that depicted a gaping hole open to the sea down to or below its waterline:

The district court granted the motion to dismiss after finding the DBL 134 was a dead ship—not a vessel—and it lacked subject matter jurisdiction. Southern Recycling appealed.

On appeal, the Fifth Circuit limited its review to the vessel inquiry—finding judicial economy is served by addressing the antecedent question of jurisdiction at the outset, rather than the remaining merits inquiry on the limitation of liability action. The Court found there was no question that an oceangoing barge is a vessel, nor was there any doubt that Southern Recycling's

subjective intent to dismantle DBL 134 for scrap is insufficient to render it a dead ship. DBL 134, at a minimum, was a vessel when it arrived at ISL's shipyard in Brownsville. The question is whether it had become a dead ship yet when the accident happened.

Comparing photographs and the technical manuals, the Fifth Circuit found the cuts visibly extended to well below the fully loaded waterline. Looking to *Lozman v. City of Riviera Beach*, the Court similarly found that a reasonable observer would not consider DBL 134 to be a vessel but a dead ship in the process of being scrapped.

Based on this reasoning, the Fifth Circuit found the district court did not err in concluding DBL 134 was a dead ship, meaning it lacked subject matter jurisdiction and was the action was properly dismissed under Federal Rule of Civil Procedure 12(b)(1).

3. *Perrin v. Hayward Baker, Inc*., No. 20-30241, ___ Fed. Appx. ___, 2020 WL 7380249 (5th Cir. Dec. 10, 2020) (per curiam) (enforcing application of maritime law to uphold a seaman's settlement agreement after the seaman tried to back out of the agreement).

At the time of his accident, Perrin was employed as a commercial diver by Specialty Divers, Inc., working on the Columbia Lock and Dam Project. Hayward Baker was a sub-contractor who was hired by Massman Construction Company to provide coring and grouting work on the Columbia Lock & Dam Project. While Perrin was underwater monitoring the pouring of grout, a pipe "shot up from the floor of the Lock & Damn structure through the water and into the air" (expletive in original). The pipe came down on his leg, fracturing his left femur.

Perrin sued Hayward Baker for negligence under maritime law in January 2019. But he instructed his counsel not to sue his employer, Specialty. As trial approached, Perrin's counsel—now, intervenors below—negotiated a settlement with counsel for Hayward Baker. On November 12, 2019, Perrin's counsel represented to Hayward Baker's counsel that he "spoke to Mr. Perrin who has advised that if offered he would accept $145,000 in full and final settlement." Hayward

Baker agreed, and the parties notified the court that they had reached a settlement. Given this settlement, the court dismissed the case but retained jurisdiction to enforce the settlement agreement.

As of January 10, 2020, Perrin stated that he intended to abide by the settlement. Four days later, counsel for Hayward Baker had learned that Perrin would not execute final documentation. Hayward Baker then moved to enforce the settlement, attaching correspondence between counsel as evidence of the agreement. Perrin—now assisted by new counsel—responded, arguing that the correspondence was legally insufficient to constitute a binding settlement agreement under Louisiana law. He also argued that he did not intend to release either Specialty or Massman, the project's general contractor, from liability. Hayward Baker replied, filing more correspondence and an affidavit from Perrin's former counsel confirming that Perrin had agreed to release all three companies associated with the Columbia project. The motion was fully briefed and the district court scheduled the matter for oral argument on March 11, 2020.

The evening before oral argument—nearly two weeks after Hayward Baker's reply—Perrin filed a sur-reply and affidavit in which he sought to create an issue of fact by contending that his counsel lacked authority to enter into the settlement. Perrin's dilatory filing prompted the district court to hear the party's competing evidence during the proceedings on March 11th. Counsel for both parties were present along with counsel for Specialty and the intervenors, Perrin's former counsel. Despite having filed an affidavit the night before, Perrin did not attend the proceedings. The district court heard evidence and argument from both parties and the intervenors.

At the close of the hearing, the district court ruled that Perrin sued under general maritime law, and thus the settlement's enforceability would be assessed under maritime law—not Louisiana law. The district court determined that Perrin's former counsel was credible and the testimony and

documentary evidence revealed that Perrin knowingly agreed to settle his claim and release the related parties, with the understanding that Specialty would waive an insurer's lien arising from Perrin's receipt of benefits after his accident. When Perrin failed to execute the agreement, the district court granted a motion dismissing Perrin's claim with prejudice and adopting the settlement agreement. Perrin appealed.

The Fifth Circuit first found the district court correctly concluded federal maritime law applied. Although the settlement agreement is a contract, the district court correctly found that it retained authority to adjudicate questions of the agreement's validity and enforceability because of the agreement's maritime subject matter—even if Hayward Baker filed the relevant motion after the court's self-imposed deadline.

Second, the Fifth Circuit confirmed under maritime law oral settlement agreements are enforceable—even when a party later refuses to sign the memorializing documents. *Hardison v. Abdon Callais Offshore, L.L.C.*, 551 F. App'x 735, 738 (5th Cir. 2013). Here, the record contained ample correspondence showing that all parties believed a settlement was reached. The Fifth Circuit found this sufficient to support the district court's conclusion that Perrin agreed to settle his claim on November 12, 2019.

4. ***REC Marine Logistics, L.L.C. v. Richard*, 829 F. App'x 51 (5th Cir. 2020) (per curiam*)*** (dismissing defense attorney's appeal of sanctions for lack of appellate jurisdiction).

In the first appeal, former counsel for REC Marine Logistics, L.L.C. challenges sanctions that were imposed on him for failure to comply with discovery requests and requests for a vessel inspection. In the second appeal, the same counsel challenges sanctions because of his disruptive behavior at a deposition.

Generally, attorneys must await the end of litigation before appealing sanctions. Because the matter is ongoing and no final judgment has been entered, the Fifth Circuit asked the parties to

submit supplemental letter briefs addressing whether Salley's appeals are premature. Both parties responded that, because Salley was allowed to withdraw as counsel in the underlying matter on October 6, 2020, his appeals of sanctions ordered against him should be permitted.

The Fifth Circuit had previously recognized limited exceptions to that rule in *Markwell v. County of Bexar*, 878 F.2d 899 (5th Cir. 1989) (holding that such orders are appealable "where an order assesses sanctions against an attorney who has withdrawn from representation at the time of the appeal, and immediate appeal of the sanctions order will not impede the progress of the underlying litigation."). But the validity of the rule has been in question since the Supreme Court decision in *Cunningham v. Hamilton County*, in which the Court emphasized that "the appealability of a Rule 37 sanction imposed on an attorney" should not "turn on the attorney's continued participation." 527 U.S. 198, 209 (1999).

Thus, the Fifth Circuit reasoned that even if the *Markwell* exception has continuing viability—which it did not decide—it does not apply, and the court lacked jurisdiction over Salley's appeals.

5. ***Nat'l Shipping Co. of Saudi Arabia v. Valero Mktg. & Supply Co.,*** **963 F.3d 479 (5th Cir. 2020) (Stewart)** (affirming district court's conclusion that Rule 14(c) tender did not overcome contractual arbitration and forum-selection clauses).

In March 2019, two shipping companies—the National Shipping Company of Saudi Arabia ("National Shipping") and Indelpro S.A. DE C.V. ("Indelpro")—sued Valero alleging that it had supplied them with contaminated fuel. Valero answered both complaints and filed a third-party complaint against Trafigura Trading L.L.C. ("Trafigura"). In its third-party complaint against Trafigura, Valero alleged claims for breach of contract, negligence, express and implied warranty breach, products liability, and violations of the Texas Civil Practice and Remedies Code. Valero also invoked Rule 14(c) to tender Trafigura as a direct defendant in the National Shipping case on grounds that it was liable for the damages alleged.

Trafigura, the third-party defendant, asserted that Valero's claims fell under three contracts between Trafigura and Valero—one with a mandatory arbitration clause and two with exclusive forum selection clauses. On these grounds, Trafigura moved to sever and transfer the claims subject to the forum selection clauses to the Southern District of New York (the designated forum) and to dismiss the claims subject to the arbitration clause in favor of arbitration.

The district court granted Trafigura's motion to sever and transfer the claims under the two contracts with the forum selection clauses and to sever and dismiss the claims under the contract with the arbitration clause. The district court found that one contract contained a valid arbitration agreement and that several of Valero's claims fell within the scope of that agreement, meaning severance and dismissal in favor of arbitration was appropriate. The district court the others contained exclusive forum selection clauses identifying the Southern District of New York as having exclusive jurisdiction. Finally, citing the Fifth Circuit's opinion in *Texaco Exploration & Prod. Company v. AmClyde Engineered Products Company*, 243 F.3d 906, 908, 910 (5th Cir. 2001), the district court held that the Rule 14(c) tender did not overcome the contractually agreed upon arbitration and forum selection clauses.

On appeal, Valero argued that the district court erred in concluding that the dismissal and transfer of its third-party claims against Trafigura demanded dismissal of its Rule 14(c) tender of Trafigura in the National Shipping case. Trafigura counters that this court lacks jurisdiction to entertain Valero's appeal under 28 U.S.C. § 1292(a)(3) because the district court's ruling did not constitute a final determination of the rights and liabilities of the parties.

The Fifth Circuit agreed because the district court's March 2020 order stated it merely ruled on the forum for determining rights and obligations—it did not determine them. Moreover,

Valero's own liability had yet to be established. Trafigura also conceded in its brief that its liability remains a live issue. Valero's appeal was dismissed for lack of jurisdiction.

6. ***Vantage Deepwater Co. v. Petrobras Am., Inc.*, 966 F.3d 361 (5th Cir. 2020), *cert. denied*, No. 20-1032, 2021 WL 666498 (U.S. Feb. 22, 2021) (Southwick)** (determining (1) waiver of appellate review in arbitration agreement did not deprive appellate court of jurisdiction to review arbitration award in favor of offshore driller; and (2) public policy exception could not be used to question the merits of an arbitration award that the oil company had to pay damages on a contract procured by bribery but ratified, as the arbitration agreement's validity was not questioned) – *Nobu Su II*.

Vantage operates a fleet of oil rigs. Petrobras is an infamous state-owned multinational oil company headquartered in Brazil. In 2007, Petrobras had not listed Vantage as an approved drilling service contractor. In exchange for help procuring drilling-services contracts, Vantage's largest shareholder and board member Hsin-Chi-Su—also known as Nobu Su—agreed to pay around $30MM in bribes distributed as kickbacks.

Vantage told United States regulators in 2017 that it had discovered evidence its executives were at least willfully blind to Su's bribery. In 2018, the United States Department of Justice entered a non-prosecution agreement with Petrobras relating to the fraud. The Justice Department stated that multiple Petrobras individuals had received bribes to help Vantage win the drilling contract with Petrobras.

Back in 2009, Vantage Deepwater Company and Petrobras Venezuela executed the Agreement for the Provision of Drilling Services ("DSA"). Under the DSA, Vantage would perform offshore drilling services for Petrobras for an eight-year term. Also in 2009, Petróleo Brasileiro executed a Form of Payment and Performance Guaranty, in which it "unconditionally, absolutely and irrevocably guarantee[d]" Petrobras Venezuela's obligations under the DSA. To fulfill Vantage's obligations, Vantage's parent company bought an ultra–deepwater oil rig called

the *Titanium Explorer* for over $948MM. The DSA's eight-year term began in December 2012. Over that time, international allegations of institutional corruption and bribery began to surface.

M/V Titanium Explorer (IMO 9506590)

About two years into the DSA's term, in October 2014, Vantage and Petrobras executed the Third Novation and Amendment Agreement. This agreement included an arbitration clause which provided that any disputes arising out of the DSA would be "exclusively and finally resolve[d]" through arbitration conducted by the International Center for Dispute Resolution of the American Arbitration Association ("AAA") in Houston, Texas. Vantage and Petrobras agreed that the arbitrators would have the "power to rule on objections concerning jurisdiction, including the existence or validity of [the] arbitration clause and existence or the validity of" the DSA. The Third Novation also stated that "[t]he parties waive irrevocably their right to any form of appeal, review

or recourse to any court or other judicial authority, to the extent that such waiver may be validly made."

In August 2015, several years before the end of the DSA's term, Petrobras terminated the DSA. Just afterward, Vantage demanded arbitration under the Third Novation, claiming over $450MM in expectancy damages and over $800MM in reliance damages. The asserted expectancy damages reflected lost profit calculations, and the asserted reliance damages primarily stemmed from Vantage's incurring debt to acquire the *Titanium Explorer*.

After the tribunal spent significant time debating procedural issues and investigating assertions of bias, the final award was issued on June 29, 2018 awarding Vantage over $620MM. The next month, Vantage petitioned to confirm the arbitration award in the in the United States District Court for the Southern District of Texas. Petrobras opposed confirmation and moved the district court to vacate the award. To support its motion to vacate, Petrobras sought leave to depose Gaitis—the sole dissenting arbitrator on the panel.

In May 2019, the district court denied the motion to vacate and granted Vantage's petition to confirm the award. The court entered final judgment and ordered Petrobras to pay $733,968,000 (the arbitration award plus interest), and post-judgment interest. Petrobras appealed.

The dispute is governed by Chapter 3 of the Federal Arbitration Act ("FAA"), which governs nondomestic arbitration awards subject to the Inter-American Convention on International Commercial Arbitration of January 30, 1975 ("Panama Convention"). The FAA requires that a court confirm an arbitration award unless there is a ground for refusing to enforce the award as specified in the Panama Convention. The Supreme Court has recognized an "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 631 (1985). "A court may not review the merits of an [arbitration] award — it

must accept the facts found by the arbitrator and the arbitrator's interpretation of the contract and applicable law." *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union*, 831 F.2d 72, 74 (5th Cir. 1987).

Petrobras argues that public policy precluded confirming the arbitration award. Petrobras also argues that the district court's denial of its discovery motions led the court to base its confirmation order and denial of vacatur on an incomplete record. Vacatur is warranted, Petrobras contends, because the arbitrators failed to issue a "reasoned award" as to one defendant. On top of responding to Petrobras's arguments, Vantage argues that Petrobras waived its right to appeal.

The Fifth Circuit found the district court's judgment was affirmable on the merits and declined to address the question of the appeal waiver. Discussing the merits, first, the Fifth Circuit affirmed the district court's conclusion that there was no public policy impediment to enforcement because both Vantage *and* Petrobras allegedly engaged in misconduct and later ratified the contract. Second, the Fifth Circuit denied Petrobras' discovery motions and motion to vacate even though the arbitrators failed to fully reason the decision.

7. ***Bonin v. Sabine River Auth. of Louisiana*, 961 F.3d 381 (5th Cir. 2020) (Jolly)** (affirming suit by residents of Texas and Louisiana for flooding of their property by the Sabine River was removable under the Class Action Fairness Act)

About 300 property owners along the meandering Sabine River in Texas and Louisiana sued after their properties were allegedly damaged by flooding alleging (1) takings claims against river authority of Texas and Louisiana, and (2) claims for negligence, trespass, and private nuisance against operators of hydroelectric generators at a dam. Another group of property-owning plaintiffs brought separate suit alleging virtually identical claims. The cases were removed and consolidated, and the United States District Court for the Eastern District of Texas, Thad Heartfield, Senior District Judge, adopted reports and recommendations of Zachary Hawthorn, United States Magistrate Judge, denying motion to remand by property owners in first case, and granting

operators' motion to dismiss and declining to exercise supplemental jurisdiction over claims against river authorities. Property owners appealed.

The Fifth Circuit found that the case did not qualify as a mass action because it falls under one of CAFA's exceptions to "mass action" jurisdiction. The exception provides that "the term 'mass action' shall not include any civil action in which ... all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State." 28 U.S.C. § 1332(d)(11)(B)(ii)(I).

Plaintiffs assert that the suit meets this exception because: (1) all the claims arise from the flooding of the Sabine River in March 2016; (2) that flooding qualifies as an "event or occurrence" as defined by the Fifth Circuit; (3) that flooding occurred in Texas, the state where the action was filed; and (4) all the plaintiffs' injuries occurred in either Texas or Louisiana, which is contiguous to Texas. The court found the Plaintiffs' argument fails on the third point.

Plaintiffs concede that the March 2016 Sabine River flooding event occurred in both Texas and Louisiana. But plaintiffs argue that the flooding in Louisiana does not "negate the fact that the rainfall and flooding took place in Texas." But the statutory language—when read in context of the exception as a whole—makes this interpretation untenable. In short, the exception for a local single event does not apply to the 2016 flooding event. The *Bonin* suit qualifies as a mass action and had a federal home when it first entered the door. Even so, the Fifth Circuit affirmed the remand of the remaining claims against the state authorities to Texas state court.

8. ***Latiolais v. Huntington Ingalls, Inc*., 951 F.3d 286 (5th Cir. 2020) (en banc) (Jones)** (clarifying shipyard's right of removal for asbestos case under 28 U.S.C. § 1442(a)(1)—the Federal Officer Removal Statute).

Plaintiff was a naval machinist onboard the *U.S.S. Tappahannock* and exposed to asbestos while his ship underwent refurbishing for several months in the 1960s and 1970s. Plaintiff later contracted mesothelioma and died. The shipyard defendant refurbished naval vessels under contracts with the Navy. These contracts generally required it to use asbestos for thermal insulation and obligated the shipyard "to comply with government plans and specifications, and the federal government had the right to and did exercise supervision over the process to ensure such compliance."

Photo No. USN 1141717 USS Tappahannock (AO-43) on 1 August 1969

Plaintiff sued in state court, seeking to recover for shipyard owner's alleged negligence in failing to warn him about asbestos hazards and failing to provide adequate safety equipment. The action was removed to federal court under the federal officer removal statute, 28 U.S.C. § 1442(a)(1), and plaintiff moved to remand. The district court granted the motion for remand because neither the United States nor any of its officials controlled the shipyard's safety practices—failing the "causal nexus" requirement. The shipyard appealed. The original panel ordered that the case should be remanded to state court, but the Fifth Circuit unanimously held that the removal was proper.

The statute permits an officer of the United States, or anyone acting under that officer, to remove a case, if it acted pursuant to the federal officer's directions and asserts a colorable federal defense. As the shipyard was working under its federal contract with the Navy, it satisfied the requirement that it be a person acting under a federal officer. The question was whether the shipyard asserted a colorable federal defense.

The Fifth Circuit noted that no federal question need be raised in the well-pleaded complaint as long as the defendant asserted a federal defense in its response. Some case law had required that the defendant establish a direct causal nexus test between the defendant's actions performed under color of federal office and the plaintiff's claims. Following that authority, the panel of the Fifth Circuit had originally ruled that the negligence claims, such as failure to warn, failed the causal nexus requirement. The full Fifth Circuit held that all that was necessary was that the action be connected with or associated with an act under color of federal office. As the allegations were that the shipyard was negligent in the installation of asbestos and failing to warn about its dangers, that negligence was linked to the performance of the shipyard's work and sufficiently related to an act under color of federal office.

Next, Judge Jones held the shipyard had sufficiently asserted the federal defense outlined in *Boyle v. United Technologies Corp*.—extending federal immunity to contractors in the performance of discretionary duties when the contractor establishes that the United States approved reasonably precise specifications, the equipment conformed to those specifications, and the supplier warned the United States about the dangers of use of the equipment that were unknown to the United States. The Navy required the shipyard to install asbestos and to comply with certain related safety practices, and Avondale complied with those requirements.

Lastly, the shipyard established that the United States knew more about the hazards of asbestos than Avondale did, so Avondale did not fail to warn the United States of dangers about which the United States was unaware. As a result, the shipyard pled a colorable federal defense and satisfied all the requirements for removal.

9. ***Genesis Marine, L.L.C. of Delaware v. Hornbeck Offshore Services, L.L.C.*, 951 F.3d 629 (5th Cir. 2020) (Ho)** (affirming district court's denial of attorney's fees to both parties when both were the "prevailing party" on breach of maritime contract claims).

In 2013, Hornbeck Offshore Services sold nine sea vessels to Genesis Marine. At the time, Hornbeck already had charter agreements for the vessels in place with third-party customers. To continue providing services to these existing customers without interruption, Genesis, and Hornbeck entered into a series of contracts including "crewman" and "shipman" agreements. The third agreement was a set of "back-to-back" contracts, again particularized to each vessel. Hornbeck agreed to keep honoring existing charters for its current customers and to provide services until the charters could either be assigned to Genesis or Genesis entered into new agreements altogether. Hornbeck agreed to staff and operate the vessels it had just sold to Genesis, collect payment for charters, and then remit the funds back to Genesis within ten days. Here, the

relevant back-to-back agreement concerns Hornbeck and its preexisting charter customer Anadarko.

Genesis sought to terminate all the shipman agreements. A dispute over the propriety of termination led to litigation. Under the back-to-back agreement, Genesis sued for breach of contract for the unpaid balance on the Anadarko charter hire, $722,346.36. Hornbeck replied with affirmative defenses of setoff and accord and satisfaction and argued that Genesis had an outstanding balance of $117,284.54. Hornbeck also asserted counterclaims for unpaid management fees totaling nearly $3MM under the various shipman agreements.

Following a bench trial, the district court dismissed the shipman fees counterclaims and rendered judgment for Genesis for $722,346.35 for the unpaid charter hire. The district court also awarded $117,284.54 to Hornbeck.

Both parties asked for attorney's fees as the "prevailing party." The district court denied fees, reasoning that: (1) fees were not authorized by the shipman agreement, which controlled the litigation, and, in the alternative, (2) both Genesis and Hornbeck were prevailing parties, thus nullifying any award.

On appeal, the Fifth Circuit adopted the definition of "prevailing party" in 42 U.S.C. § 1988, a "plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." Under that definition both Genesis and Hornbeck prevailed because the judgments materially altered the relationship between the parties—placing Hornbeck in Genesis's debt—and also forcing Genesis to pay an amount of money it otherwise would not pay.

10. *Psara Energy, Ltd. v. Advantage Arrow Shipping, L.L.C.*, 946 F.3d 803 (5th Cir. 2020) (Jones) (dismissing appeal of order staying maritime case for arbitration and

administratively closing the case for lack of appellate jurisdiction because it was not a finder order).

In 2010, Psara entered into a bareboat charter agreement with Defendant Space Shipping, Ltd. to charter the *CV STEALTH*. Following a charterparty amendment, Geden Holdings, Ltd. was made the performance guarantor of Space Shipping.

In 2014, the *CV STEALTH* was detained in Venezuela for more than three years by prosecutorial authorities, and Space Shipping failed to return the ship by the latest contractual redelivery date of June 22, 2015. When the *CV STEALTH* was finally released from Venezuela, it was out-of-class and had deteriorated due to neglect. The damage was so bad it could not sail and was in need of extensive repairs. Space Shipping towed the *CV STEALTH* to Trinidad where Psara took possession on March 24, 2018. She was later sold as scrap.

As a result of the damage, Psara initiated a London maritime arbitration claim against Space Shipping and Geden for damages equivalent to the repaired market value of the ship--$18MM—and amounts for unpaid charter hire, legal costs, interest, and other costs—an additional $1.8MM.

Shortly after the contractual redelivery date but before it began arbitration, Psara discovered that Geden Holdings had transferred its entire fleet of vessels to other corporate entities. Based on the transfer of the fleet, Psara sued in April 2018 against Space Shipping, Geden, and others alleging breach of contract, fraudulent transfer, and corporate succession theories.

To obtain security, Psara attached the *Advantage Arrow* and *M/V Advantage Start*, two of the defendants' vessels found within the Eastern District of Texas. The owners moved to vacate the attachments which were vacated but the vessels were eventually released after posting substitute security. The district court delayed addressing the motion to vacate attachment.

In June 2018, the owners of the *Advantage Arrow* and *M/V Advantage Start* moved for referral to arbitration in London because Psara's claims all arise from the charter party between Psara and Space Shipping, which contains a valid and enforceable arbitration clause. The Advantage Defendants contended that they should take part in Psara's ongoing arbitration proceedings against Space Shipping because Psara claims that the Advantage Defendants are a successor to Space Shipping and therefore liable for Psara's losses under the charter party.

11. *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454 (5th Cir. 2020), as revised (Aug. 4, 2020) (Duncan) (finding aquaculture regulations in the Gulf of Mexico exceeded National Marine Fisheries Service statutory mandate).

The Magnuson-Stevens Act[4] creates eight Regional Fishery Management Councils administered by the National Marine Fisheries Service, a division of NOAA. After the Gulf of Mexico Fishery Management Council established a plan to regulate and permit environmentally sound and economically sustainable aquaculture in the Gulf of Mexico, a coalition of fishing and conservation organizations challenged the rule that was enacted to implement the plan—asserting

[4] The objective of the Magnuson-Stevens Act is to conserve and manage the fishery resources found off the coasts of the United States by preventing overfishing. Congress passed the Act in 1976 after finding that aggressive fishing practices, especially by foreign trawlers, had imperiled important fish stocks and the coastal economies dependent on them. The Act provides a framework for protecting and managing fishing and fisher resources in federal waters.

that the rule was outside the Council's authority to regulate fisheries under the statute. The Fifth Circuit noted the agency itself conceded the Act fits poorly with aquaculture. In the proposed rule's environmental impact statement, NMFS conceded that "[t]he [Act] was ... not explicitly written for managing at sea fish farming or aquaculture operations." Thus, "[m]any of the principles and concepts that guide wild stock management under the [Act] *are either of little utility or not generally applicable* to the management of aquaculture operations".

Reasoning that an aquaculture facility is encompassed within the fisheries regulated by the statute, Judge Duncan found the statute did not authorize the Council to regulate aquaculture. Judge Higginson dissented, stating that the grant of authority to the Council did not distinguish between methods of fishing, and mesh cages for aquaculture should not be distinguished from the pots, cages, lines, traps, nets, and other enclosures that have been used from time immemorial.

12. ***Certain Underwriters at Lloyd's, London v. Axon Pressure Prod. Inc.,*** **951 F.3d 248 (5th Cir. 2020)** (reversing expert, liability, and indemnity decisions from a "byzantine dispute arising out of a catastrophic oil well blowout" in the Gulf of Mexico).

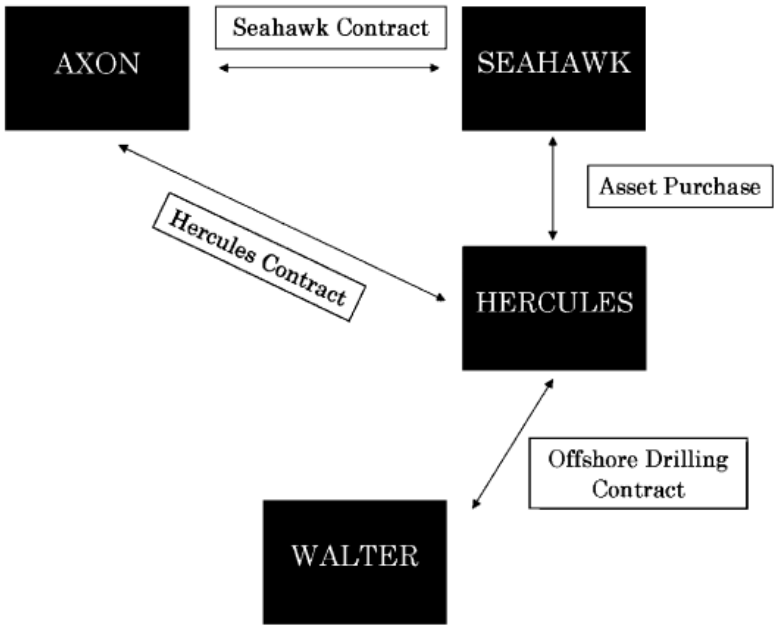
In 2010, Axon was hired by Seahawk Drilling to work on equipment on the *HERCULES 265*, including refurbishing equipment designed to prevent blowouts. That contract was later assigned to Hercules Drilling, which bought the vessel and contracted with Walter Oil & Gas directly.

In 2013, a blowout occurred. Walter's insurers—Certain Underwriters at Lloyd's—paid over $48MM. Walter and its insurers sued Axon, asserting products liability claims related to parts on which Axon had worked that allegedly caused the blowout.

Axon filed a counterclaim against Walter for indemnity in the capacity as a third-party beneficiary of the drilling contract and brought a third-party claim against Hercules Drilling. Hercules Drilling then sought indemnity from Walter.

Judge Hoyt found Axon was entitled to indemnity from Hercules Drilling and Walter for the claims brought against Axon by Walter. He also held that Hercules was entitled to indemnity from Walter for the claims brought by Axon against Hercules.

The parties' indemnity obligations are governed by a web of contracts. This simple diagram outlines the contours of those contractual relationships:



Judge Hoyt also struck multiple experts and ruled that Walter and the underwriters failed to prove causation and failed to show that Axon's products were defective. Multiple parties appealed aspects of Judge Hoty's rulings.

Faced with multiple appeals and cross-appeals, the Fifth Circuit reversed most of Judge Hoyt's rulings. First, Judge Duncan agreed with Judge Hoyt that it was the contract between Seahawk and Axon that governed between those parties, and that contract provided for Hercules, which assumed the contract, to defend and indemnify Axon for the claims brought by Walter against Axon in this suit. But Judge Duncan disagreed that Walter had to indemnify Axon as a third-party beneficiary of the drilling contract between Hercules Drilling and Walter. The drilling contract required that Walter indemnify Hercules Drilling for some risks and that it indemnify Hercules Drilling and its contractors and suppliers for other risks. As the damages sought in the suit were allocated to Walter only for the claims of Hercules, Walter did not have to indemnify Axon. Although the drilling contract required Walter to indemnify Hercules for the damages sought in the suit, Walter did not sue Hercules directly. Axon was entitled to indemnity from Hercules, and Hercules sought to pass that obligation to Walter. But the drilling contract provided the allocation provisions did not apply to actions that arose solely because of an indemnity agreement. As a result, Judge Duncan held that Hercules could not obtain indemnity from Walter for Hercules' indemnification obligations.

Second, the Fifth Circuit evaluated Judge Hoyt's decision to strike the products liability expert after he failed to explain his reasoning. Finding it had no way of knowing whether Judge Hoyt performed his gatekeeping responsibility properly, Judge Duncan reversed the judgment for Axon and held that Judge Hoyt should "examine afresh the admissibility of Bellemare's expert testimony and give reasons for [his] decision."

Finally, Judge Duncan reversed Judge Hoyt's grant of summary judgment that Walter and the underwriters failed to show a question of material fact on causation and the unreasonably dangerous nature of the equipment on which Axon had worked. Judge Hoyt focused on the conclusion of Walter's investigation that by the time Walter tried to close the rams, the well was flowing at a pressure exceeding the blowout preventer's capabilities. However, Judge Duncan did not find that admission dispositive as the evidence shows that a defect in the rams prevented the flow from stopping after they had been activated. Moreover, Judge Hoyt's ruling that there was not a question of fact on the issue of an unreasonably dangerous condition was "pithy to the point of being incomplete"—a single sentence.

E. RULE B – ATTACHMENT

1. ***ING Bank N.V. v. Bomin Bunker Oil Corp.*, 953 F.3d 390 (5th Cir. 2020) (Duncan)** (denying maritime lien because mere awareness of owner or charterer of subcontractor's involvement in supplying bunkers does not constitute authorization).

The fallout from the bankruptcy of O.W. Bunkers has traveled around the world and circled our circuit courts. Here, the charterer of the *BULK FINLAND* contracted with O.W. Bunker Malta to supply bunkers to the vessel. O.W. Bunker Malta then subcontracted with O.W. Bunker U.S.A. to supply the bunkers, and O.W. Bunker U.S.A. subcontracted with Bomin Bunker Oil Corp. to supply the bunkers. Bomin delivered the fuel to the vessel, and the vessel's chief engineer signed a receipt confirming that the vessel was ultimately responsible for the debt.

Each of the contracting parties issued an invoice to its counterparty up the contractual chain but O.W. Bunker collapsed before the invoices came due. Bomin and ING Bank arrested the vessel to obtain security for their claim. Both the vessel's charterer and ING Bank moved for summary judgment, arguing Bomin did not have a maritime lien under CIMLA.

Bomin satisfied the "provision of necessaries" requirement under CIMLA. But the question presented was whether Bomin supplied the bunkers on the order of the owner or person authorized by the owner.

In the situation where the bunkers were supplied by Bomin—a subcontractor—it must show that an entity authorized to bind the ship controlled the selection of the subcontractor, its performance, or both. Bomin first tried to establish that authority through the terms of its subcontract. Judge Smith rejected that argument as maritime liens cannot be created by contract—only by CIMLA. The subcontract could not establish authorization by the vessel's owner or its agent.

In the alternative, Bomin argued that the vessel's charterer authorized Bomin to provide the bunkers based on the contract between the charterer and O.W. Bunker Malta that specified that BOMINFLOT would supply the fuel, by Bomin's invoice directed to the master and/or owner and/or charterer of the vessel, and by the receipt signed by the vessel's chief engineer. Still, Judge Smith held that these documents demonstrated only that the charterer was aware of the supplying by Bomin and not that it authorized Bomin under CIMLA. Thus, the Fifth Circuit held that Bomin did not have a maritime lien.

2. ***Martin Energy Servs., L.L.C. v. Bourbon Petrel M/V*, 962 F.3d 827 (5th Cir. 2020) (Cain)** (refusing to grant maritime lien because fuel provided to support vessels that transported the fuel to supply other vessels did not constitute necessaries for the support vessels themselves).

Martin Energy delivered fuel to three support vessels owned by CGG Services, which carried the fuel in their cargo tanks to refuel three other vessels working off the Louisiana coast. CGG originally bought fuel directly from Martin Energy, but later it started buying fuel from O.W. Bunker, which arranged for the deliveries through Martin Energy.

After O.W. Bunker filed for bankruptcy, CGG did not pay for the O.W. Bunker invoices, and Martin Energy sued, seeking in rem claims against the support vessels. The *in rem* claims were tried to Judge Fallon, who held that Martin Energy had a maritime lien on the support vessels.

M/V BOURBON PETROL
"floating gas station"

Disagreeing with Judge Fallon, the Fifth Circuit held that the fuel did not constitute necessaries for the support vessels. Although recognizing that fuel may qualify as a necessary under CIMLA, Judge Duncan noted that the fuel was not supplied to the support vessels as fuel for operating the support vessels. He reasoned that extending the concept of necessaries to cargo transported by a vessel would be an "unprecedented expansion" of the CIMLA—rejecting the argument that the fuel was necessary for the support vessels to perform their "particular function" of serving as "floating gas stations."

F. RULE F – LIMITATION OF LIABILITY

1. ***Payne v. Double J. Marine, L.L.C.*, 828 F. App'x 222 (5th Cir. 2020) (per curiam)** (dismissing untimely suit by laborers on a vessel brought after the default date in a limitation action).

In February 2016, Plaintiffs were working on a vessel that was in a collision. The owners of the second vessel started a Limitation Action. Four months after the Limitation Action was settled and dismissed—two and half years after the claims deadline—the Plaintiffs filed a separate maritime personal injury suit against the vessel owners. The district court dismissed for failure to state a claim and denied the Plaintiffs' request to reopen the Limitation Action. Plaintiffs appealed.

Affirming the denial, the Fifth Circuit pointed to a factually and legally identical case, *Collins v. Double J. Marine, L.L.C.*, 802 F. App'x 843 (5th Cir. 2020) (per curiam), where another worker on the vessel—represented by the same counsel—appealed the dismissal of his separate maritime personal injury claim and the denial of his request to reopen the Limitation Action. Here, the shipowners provided proper notice under the statute, Plaintiffs failed to prove he was a known claimant deserving of mailed notice, and Plaintiffs failed to prove actual failure to receive notice by publication. As a result, the claims were properly dismissed.

2. ***In re Devall Towing & Boat Serv. of Hackberry, L.L.C.*, 827 F. App'x 411 (5th Cir. 2020) (per curiam)** (rejecting "novel approach" of partially lifting the stay in a limitation action without the stipulation of all claimants).

Plaintiff Jason Lanclos, a deckhand, and member of the crew of *M/V Kenneth J. Devall*, was injured breaking the tow of the vessel *M/V Zeland M. Deloach, Jr.* Both his employer and the owner of the vessel filed limitation actions after receiving notice of Lanclos's intent to sue. In responding to the complaint of Deloach, Devall made claims of contribution and indemnity from Deloach. In the meantime, Lanclos also sued in Louisiana state court which was stayed by the federal district court under Supplemental Rule of Civil Procedure F(3).

Lanclos agreed to a stipulation that he would not seek to enforce any judgment exceeding the value of the limitation fund or assert res judicata. But Devall would not enter into the stipulation and opposed Lanclos's motion to lift the stay.

At first, the trial judge was inclined to deny Lanclos's motion to lift the stay, but decided to resolve the conflict between the right of the vessel owner to limit liability and the right of the personal injury claimant and seaman to pursue a common law remedy in state court under the saving to suitor's clause by taking "a novel approach" and enjoined all parties from prosecuting claims but allowing discovery, pretrial matters and trial to proceed in Cameron Parish including the indemnity and contribution claims of Devall against Deloach. The parties were also enjoined from enforcing any judgment or asserting res judicata or issue preclusion in state or federal court. Devall appealed.

The appellate panel in a *per curiam* opinion reviewed the matter for abuse of discretion. Though the Supreme Court most recently in *Lewis v. Lewis & Clark Marine, Inc.* held that a limitation injunction may be dissolved by the district court when it is satisfied that the owner's right to limit is protected, the decision does not suggest that a trial court has broad authority to force a party into a position as Devall was in this case. "Discretion to lift a stay when all claimants submit the necessary stipulations does not mean discretion to impose those stipulations by injunction." Here, the trial court abused its discretion; and the Fifth Circuit reversed the lifting of the stay. The Limitation Act mandates that all proceedings are stayed without the consent to a stipulation by all parties in the limitation proceeding.

3. *Deloach Marine Servs., L.L.C. v. Marquette Transp. Co.*, L.L.C., 974 F.3d 601 (5th Cir. 2020) (Duncan) (declining to second guess district court's findings of fault in a collision case between two flotillas).

In January 2016, the towboats *M/V Justin Paul Eckstein* ("Justin") and *M/V Vanport* ("Vanport") collided on the Mississippi River. Before the collision, the *Justin* sat idle on the west

bank of the river, south of a fleeting facility. The *Justin* was facing north and needed to enter the channel to move south. In order to turn around, the *Justin's* captain planned to execute a "top around" maneuver by which her bow—or more precisely, the bows of her barges—would be extended into the river's navigational channel and use the river current to turn the bow. The *Justin* made a radio call to announce that he intended to top around into the channel.

Further up the channel, the *Vanport* made a port-to-port passing agreement with a larger vessel. The *Vanport's* captain put the vessel in idle and moved out of the channel to allow the larger vessel to overtake her. During the overtake, the *Justin* called the *Vanport* –

> **JUSTIN**: I straightened her up there with all the traffic coming. I think you're down far enough now that I can go ahead and start letting her spin.
>
> **VANPORT**: Yeah, you sure can. I'm just slowed down to get this ship by me ....
>
> **JUSTIN**: Yeah, seeing as how I'm going to be about abreast here and I got her crossways, I didn't want to have my head stuck out there in nobody's way.
>
> **VANPORT**: I appreciate it. I saw that, but I had confidence.

Unfortunately, the two captains interpreted this exchange differently. *Vanport* thought the *Justin* planned to execute the top-around maneuver *after* the *Vanport* passed by. The *Justin* thought the *Vanport* would be kept clear while she executed the maneuver *ahead* of the *Vanport*, in part because the *Vanport* had said he had "slowed down." The *Justin* began to top around right after the radio exchange and pushed the bow into the channel. As the *Vanport* passed the larger vessel, he realized the *Justin* was turning directly into the *Vanport*'s path. The *Justin* tried to back away but it was too late. Less than a minute later, the *Justin's* barges collided with the *Vanport's* lead barge. The collision caused about $1.2MM in damage to the *Vanport's* cargo. Insurers of the *Vanport* reimbursed the cargo owner for the full amount, and Deloach, the *Vanport's* owner, took an assignment of any claim against the *Justin's* owner, Marquette.

The district court held a two-day bench trial, hearing testimony from both captains and two expert witnesses. The court found both captains at fault, apportioning 70% to *Justin* and 30% to *Vanport*. Its findings rested on ordinary negligence, the Pennsylvania Rule, and negligence by violating an industry custom. Judge Vance found that both captains had violated Rule 2, which obliges captains to keep "the ordinary practice of seamen." The court next found the *Justin* violated Rule 14(d) which gives downbound vessels the right-of-way over upbound vessels. Both parties appealed.

Both parties disputed the district court's findings, but, deferring to her findings, Judge Duncan did not find any clear error in her assessments of fault. Judge Duncan did note that Judge Vance's opinion did not make findings on prejudgment interest, so the case was remanded solely to determine whether prejudgment interest should be awarded.

4. ***In re Prosper Operators, Inc.*, 813 F. App'x 955 (5th Cir. 2020) (per curiam)** (granting dismissal of limitation action for want of publication even though the claimant received actual notice by mail).

Plaintiff Mitchell Navarre, an employee of Prosper Operators, was injured while performing work on a stationary platform in Sweet Lake, Louisiana—after trying to jump from the platform to a boat.

He sued Prosper in Louisiana state court and Prosper then brought this action in federal court seeking limitation of shipowner's liability. The district court issued an order approving the action and directing Prosper to notify known claimants of the limitation action and to publish notice of the action in the Lake Charles American Press. Prosper sent two letters to Navarre but Prosper failed to publish the requisite notice of the limitation action in the newspaper. Navarre then moved to dismiss the limitation action based on the failure to publish notice in the newspaper. Prosper responded that Navarre had received actual notice of the action. Magistrate Judge Kay

granted Prosper an extension of time to publish the notice, but Judge Cain vacated the magistrate judge's order and dismissed the action.

Concluding that the district judge did not abuse his discretion—particularly as Navarre's state-court action was delayed for years by the failure to publish—the Fifth Circuit affirmed the dismissal of the limitation action.

G. DEEPWATER HORIZON[5]

1. ***In re Deepwater Horizon, No. 20-30300*, ___ Fed. Appx. ___, 2021 WL 96168 (5th Cir. Jan. 11, 2021) (per curiam)** (affirming dismissal of claims for negligent infliction of emotional distress for fishermen in the vicinity of the Deepwater Horizon explosion and fire).

On the day of the *Deepwater Horizon* incident, Plaintiffs were on a fishing trip, about fifteen miles away at the time of the explosion. Plaintiffs saw what looked like the *Deepwater Horizon* on fire and heard and felt a sonic boom. Shortly after, Plaintiffs responded to a distress on their radio. Arriving at the scene about twenty minutes later, they saw people, lifeboats, and fiery debris in the water. Plaintiffs went to try to help rescue individuals—navigating their small fishing vessel around floating wreckage from the *Deepwater Horizon* and using gaffs to push fiery debris away. While searching for people in the water, Plaintiffs kept 100 to 200 feet from the burning rig but could not go any closer because of the shooting flames and overwhelming heat.

As they made laps around the smoldering remnants of *Deepwater Horizon* looking for victims, Plaintiffs "believed they were under constant threat of another massive explosion that would send debris towards them and their boat." Plaintiffs also "felt and heard deep rumbling sounds coming from deep below the surface of the water," which shook their boat and caused them to believe that they were at immediate risk of harm.

[5] The Deepwater Horizon Economic & Property Damages Settlement ("Settlement Agreement") and associated documentation referenced in this section including the relevant methodologies can be found at the official court-authorized website – http://www.deepwaterhorizoneconomicsettlement.com/index.php.

Years after the incident, Plaintiffs sued for negligent infliction of emotional distress. Defendants moved to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court granted Defendants' motion and dismissed Plaintiffs' complaint with prejudice. It determined that a plaintiff could recover for negligent infliction of emotional distress if he satisfies either the physical-injury-or-impact ("physical-injury test") or the zone-of-danger test under general maritime law but held that Plaintiffs failed to plead sufficient facts for a negligent infliction of emotional distress claim under either test. Plaintiffs appealed but the Fifth Circuit affirmed.

On appeal, Plaintiffs argue that they raised a plausible cause of action under both the physical-injury and zone-of-danger tests. Although the Fifth Circuit has recognized recovery under the physical-injury test for general maritime claims of emotional injury, *see Plaisance v. Texaco, Inc*., 966 F.2d 166, 169 (5th Cir. 1992) (en banc), here it found neither the physical-injury test nor the zone-of danger was met and declined to answer whether a zone-of-danger negligent infliction of emotional distress claim presents a recoverable injury, *see Barker v. Hercules Offshore, Inc.*, 713 F.3d 208, 224 (5th Cir. 2013).

Under general maritime law, a plaintiff may recover for emotional injury provided there is some physical contact. That physical contact must, however, be more than "trivial." Plaintiffs' injuries failed to meet the physical-injury test because their distress stems from what they *saw*—the exploding rig and debris in the water—and not what they *felt*—the rumbling sounds that shook their boat.

Even if a maritime claim of emotional injury were cognizable under the zone-of-danger test, the Fifth Circuit found Plaintiffs also fail this test because there was no immediate risk of physical harm. In the rare instances in which the Fifth Circuit has addressed whether a plaintiff

was objectively within a zone of danger, the court held the plaintiff must be in the same location as the accident and subject to immediate risk of harm. Here, the Plaintiffs were never closer than 100-200 feet away.

2. ***Claimant ID 100006076 v. BP Exploration & Prod., Inc.*, 825 Fed. Appx. 208 (5th Cir. 2020) (per curiam)** (denying Florida real estate broker recovery from the Deepwater Horizon Economic & Property Damages Settlement Agreement for commissions on real estate deals that were cancelled for lack of funding from the purchaser and not because of the oil spill).

At the time of the *Deepwater Horizon* incident, claimant Schooley worked as a real estate broker in Destin, Florida. In 2012, he filed Business Economic Loss claims with the Settlement Agreement totaling over $400,000 for commissions lost on real estate transactions that allegedly failed to materialize due to the spill. Schooley contended that two specific contracts for real estate in Florida were never completed as a direct result of the spill—one for the purchase of undeveloped land and the other for a shopping center.

But after interviewing multiple witnesses and considering the record, the Fraud, Waste, and Abuse Department of the Claims Administrator's Office ("FWA") denied Schooley's claims, determining that the alleged real estate deals "were not cancelled as a result of the Spill; rather, the sales were cancelled due to a lack of funding of the purchaser." The FWA also found that Schooley "submitted fabricated documents which also contained forged signatures" and that his submissions "simply could not have been the result of error or mistake but were instead intentionally submitted by the Claimant in an attempt to deceive the Settlement Program into providing compensation to which the Claimant was not otherwise entitled."

Schooley appealed to the Appeal Panel, which remanded the FWA's claim denial based on new information submitted by Schooley and his counsel. The FWA was unpersuaded by the new information and found that Schooley's counsel was "misleading" and the information he provided

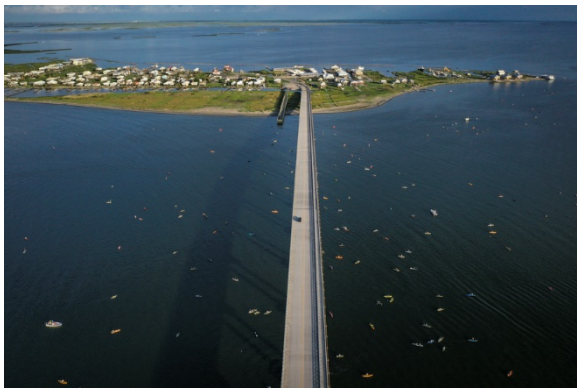
"directly conflict[ed] with the in-personal interviews" eventually concluding the evidence "overwhelmingly" supported denying the claims.

Schooley again appealed to the Appeal Panel, which upheld the FWA's denial on the same grounds. The district court denied Schooley's request for review. Schooley appealed again but the Fifth Circuit affirmed.

On appeal, Schooley argued the district court abused its discretion in denying review because the Appeal Panel did not recite the applicable clear and convincing standard and may have applied a preponderance of the evidence standard. The Fifth Circuit was unpersuaded by the modicum of factual error Schooley managed to muster—noting the notarization status of certain documents.

3. ***BP Exploration & Production, Inc., v. Claimant ID 100179569*, 803 F. App'x 793 (5th Cir. 2020) (per curiam)** (affirming award to bridge builder who timely performed contract and received full contract price but still suffered an economic loss recoverable under the Deepwater Horizon Economic and Property Damages Settlement Agreement).

Louisiana hired Johnson Bros. to build a bridge to connect Louisiana to Grand Isle—the only inhabited barrier island in Louisiana.



A view of the Grand Isle Bridge. The bridge, previously known as the Caminada Bay Bridge, was severely damaged during Hurricane Katrina and a new bridge had to be reconstructed in its place. © Drew Angerer

Johnson Bros. built it, and Louisiana paid for it. But the *Deepwater Horizon* tragedy interfered with Johnson Bros.' construction, reducing its profits. Johnson Bros. successfully filed a $2.5MM Deepwater Horizon Settlement Agreement claim based on the increased expenses caused by unexpected interference based on the clean-up efforts. BP appealed to the district court, which refused to exercise its discretionary review. BP appealed to the Fifth Circuit, but the Fifth Circuit affirmed.

On appeal, BP argued the district court abused its discretion by failing to correctly apply the Settlement Agreement, alleging the Johnson Bros. did not suffer an "actual loss" caused by the spill and the causation attestation was implausible.

The Fifth Circuit was unpersuaded because the spill's clean-up efforts caused Johnson Bros' variable expenses to rise and figured this was an example of a plausible explanation and not an example of an improbable claim. *In re Deepwater Horizon ("Deepwater Horizon III")*, 744 F.3d 370, 378 (5th Cir. 2014).

4. ***BP Exploration & Production, Inc. v. Claimant ID 100191715*, 951 F.3d 646 (5th Cir. 2020) (Engelhardt)** (refusing $77MM recovery to global commodities merchandiser with a distribution port in Tampa, Florida, which satisfied the "V-shaped revenue pattern" for the Deepwater Horizon Economic Damages Class Action Settlement Agreement because of a price spike and drop in the price of fertilizer unrelated to the blowout).

Claimant owned and operated a distribution port in Zone D[6] that bought and supplied ammonia and fertilizers around the world. After satisfying the "V-Shaped Revenue Pattern", Claimant was allotted $77,688,762.55 under the Settlement Agreement's award calculations.

BP unsuccessfully appealed the award to the appeals panel. It sought discretionary review from the district court, which granted review but affirmed Claimant's award. BP appealed again, arguing the V-Shaped Revenue Pattern was satisfied solely based on a price spike and drop unrelated to the oil spill. Claimant disputed BP's interpretation of the Settlement Agreement and maintained that it did not have to proffer any additional evidence due to its revenue curves.

But the Fifth Circuit has found that "credible evidence of a sole, superseding cause for a claimant's loss" may warrant "an investigation into the plausibility of the attestation." The Fifth

[6] Claimants in Zone D—such as the claimant here—must pass one of seven qualitative tests to establish that their loss was caused by the oil spill. One of those tests is the "V-Shaped Revenue Pattern," which is shown by: (a) a 15% or more drop in revenue in three straight months between May-December 2010 compared to the same months in other benchmark year(s), and (b) a 10% upturn in the same months in 2011 compared to 2010.

Circuit remanded the claim—the third it has remanded for consideration of whether there was a sole, superseding cause of the claimant's purported loss. *See also BP Expl. & Prod., Inc. v. Claimant ID 100238083*, 778 F. App'x 296 (5th Cir. 2019) (per curiam); *BP Expl. & Prod., Inc. v. Claimant ID 100296061*, 777 F. App'x 772 (5th Cir. 2019) (per curiam).

5. ***In re Deepwater Horizon*, 805 Fed. App'x 262 (5th Cir. 2020) (per curiam)** (affirming dismissal based on contumacious conduct and failure to respond to pretrial orders in the Deepwater Horizon litigation).

To help organize the claims in the multi-district proceeding, the district court issued separate pretrial orders depending on the type of the claim. Claimant disregarded instructions from the district court for its category of claims—responding to a show cause order on the last day. Arguing its attorney was not served with the order, nor had he seen it when reviewing his clients' individual dockets, the district court dismissed the claim prejudice, noting the attorney failed to sign up for electronic service and disregarded the prior pretrial orders. Affirming the decision on appeal, the Fifth Circuit found Claimant and its counsel demonstrated contumacious conduct with its repeated failure to comply with pretrial orders.

6. ***BP Exploration & Production, Inc. v. Claimant ID 100354107*, 947 F.3d 295 (5th Cir. 2020) (Southwick)** (affirming award to Walmart who modified its accounting system one month after the Deepwater Horizon because the change only caused minimal discrepancies in comparing income before and after the blowout).

In June 2015, Walmart submitted separate business economic loss claims to the Claims Administrator for each of Walmart's nine stores along the Gulf Coast. Walmart changed its accounting system in May 2010—the month after the *Deepwater Horizon* explosion. Five claims were appealed separately and consolidated into one panel.

Following the assistance of PWC accountants, the Claims Administrator issued awards totaling over $17.4MM. BP appealed the awards, arguing that Walmart's accounting system change made its profit and loss data for the pre-May 2010 period inconsistent with the same data

in the subsequent period. Walmart responded by providing supplemental information and a reconciliation memorandum to the Claims Administrator. The district court declined to review the claim, finding there was no showing of misapplication or contradiction of the settlement agreement.

7. ***Claimant ID 100245152 v. BP Expl. & Prod., Inc.*, 796 F. App'x 841 (5th Cir. 2020) (per curiam)** (determining shareholder payments and pre-spill debts that were forgiven do not increase the value of a non-bankrupt claimant in calculating economic losses under the Failed Business Compensation Framework).

Claimant was USA Hosts—a Nevada corporation engaged in "destination management." It designs and implements "events, activities, tours, transportation, and program logistics in a particular geographic area." At the time of the *Deepwater Horizon* incident, USA Hosts had locations in Dallas, Hawaii, Las Vegas, New Orleans, and Washington, D.C. In January 2011, USA Hosts sold the New Orleans branch of its operations as part of a sale that also included the company's Las Vegas and Washington, D.C. facilities. All three facilities were sold for a lump-sum purchase price of $1MM, which was broken down by category of asset but not by location.

USA Hosts submitted a business economic loss claim solely on behalf of its New Orleans location. Because the New Orleans location was sold between May 1, 2010 and December 31, 2011, the Claims Administrator classified the claim as one for a failed business economic loss.

The first two compensation determinations—which both used the sales proceeds compensation methodology—incorrectly attributed the entire price of the January 2011 sale to the New Orleans location. They therefore determined that USA Hosts was entitled to -$310,319.63 in compensation and should receive a zero-dollar award. USA Hosts filed requests for review and reconsideration, creating a third eligibility notice. That notice also used the sales proceeds compensation methodology and again led to a negative and zero-dollar award. But as USA Hosts

pointed out to the Appeals Panel, the Claims Administrator made a mistake when calculating revenue. The Appeals Panel thus remanded the claim for recalculation.

On remand, the Claims Administrator applied the bankruptcy compensation methodology instead of the sales proceeds methodology. It used forgiven debts and shareholder payments to increase the liquidated value calculation. This final eligibility notice also led to a zero-dollar award, though it calculated the compensation amount due to USA Hosts as - $7,367.41. USA Hosts objected to the use of the bankruptcy compensation methodology. Its request for reconsideration, administrative appeal, and petition for discretionary review were all unsuccessful. USA Hosts appealed.

The Fifth Circuit reversed the district court's refusal of discretionary review and remanded the case. It identified a split on the issue of compensation methodology for failed business claimants that did not go through bankruptcy but whose balance sheets reflected forgiven debts and shareholder payments within the meaning the of Settlement Agreement.

For example, Appeal Panel decision 2018-1178 makes that commonality clear: it notes that "three previous Appeal Panel decision[s] ... held that the [Settlement Program's] increases to total liquidation value in the form of items of the type at issue here, where the claimant never filed bankruptcy, exceeded the bounds of Exhibit 6." Appeal Panel decision 2019-16 found the Account Compensation Calculation Schedule used by the Settlement Program "for all claims involving [f]ailed [b]usinesses." The Account Compensation Calculation Schedule directs all claims administrators—in contravention of the Appeal Panel decisions quoted above—to add creditor claims that existed prior to the spill and were "[d]ischarged [s]ubsequently" to the liquidation value of an entity's assets—even if that entity went through bankruptcy.

8. ***BP Expl. & Prod., Inc. v. Claimant ID 100319411*, 790 F. App'x 15 (5th Cir. 2020) (5th Cir. Jan. 15, 2020) (per curiam)** (affirming eight-figure award to

Mississippi copper-tube producer after determining fact-specific discrepancies between the claimant's financials and tax returns are insufficient to overturn the award).

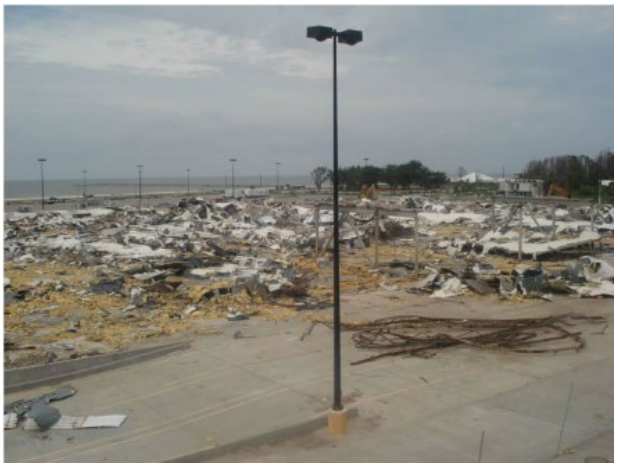
Claimant owns and operates a copper tube production facility in Fulton, Mississippi and submitted a business economic loss claim to the Settlement Program. To ensure that Claimant's profit and loss statements (P&Ls) only reflected the activity of the claiming facility, the Settlement Program accountants compared Claimant's financial statements with its gross sales general ledger statements. The accountants also sought clarification from Claimant by email and conference call about discrepancies before creating new P&L statements that the Settlement Program used to calculate Claimant's award of $29,701,243.19.

BP appealed the award to the internal Appeal Panel, arguing, among other things, that the award reflected "inaccurate and inappropriate financial documents," citing "substantial discrepancies" in Claimant's tax returns as evidence that the financials were unreliable. Claimant's affidavit of the CFO and Treasurer of Mueller Industries, Inc. explained that these discrepancies stem from Claimant's parent company's transfer-pricing tax preparation methodology. After review, the Appeal Panel rejected BP's final proposal of $0 and ultimately awarded Claimant $27,412,374.17 in total compensation. BP sought review in the district court, which was denied. BP appealed, asserting that the district court abused its discretion in denying review because the Appeal Panel's decision misapplied the Settlement Agreement by failing to require the Settlement Program to reconcile and resolve the discrepancies between Claimant's financials and its tax returns—an issue BP alleges is a recurring issue on which Appeal Panels are split.

The Fifth Circuit affirmed the district court's judgment denying discretionary review because BP's allegations are fact-specific and do not implicate an Appeal Panel split or misapplication of the Settlement Agreement.

9. ***BP Expl. & Prod., Inc. v. Claimant ID 100354107*, 948 F.3d 680 (5th Cir. 2020) (Duncan)** (affirming award to Walmart using start-up business economic loss methodologies because store reopened after Katrina six months before the Deepwater Horizon incident).

In 2003, Walmart opened Supercenter #5079 in Pass Christian, Mississippi—directly across from the Gulf of Mexico. These photos show the store's parking lot and the structure itself after it was annihilated by Hurricane Katrina in August 2005:




Following the storm, Walmart immediately announced plans for reopening and expansion of the store. Construction began in late 2008 and continued until Fall 2009. During this time, the store had no revenue. Finally, on October 14, 2009, the rebuilt store reopened to the public. But on April 20, 2010—just six months after the store reopened—the *Deepwater Horizon* exploded in the Gulf of Mexico.

The Settlement Agreement provides several compensation frameworks for business entities, including one for regular Business Economic Loss ("BEL") claims and another for Start-Up Business Economic Loss ("SBEL") claims. Both frameworks allow businesses to submit claims for economic losses computed in part by comparing actual profits during a post-spill "Compensation Period" to expected profits for the same timeframe. The choice of filing a BEL or SBEL claim is not left to the claimant. Rather, the Settlement Agreement defines a Start-Up

Business as one with less than 18 months of operating history at the time of the *Deepwater Horizon* incident.

In June 2015, Walmart filed an SBEL claim for its Pass Christian store, selecting July 2010–January 2011 as its Compensation Period and July 2011–January 2012 as its Benchmark Period. Based on financial documentation provided by Walmart, the Settlement Program computed a total net compensation of $817,392.13 and issued an award for that amount.

BP challenged this award before an appeal panel, urging that because the Pass Christian Walmart had a "longstanding" history dating back to its 2003 opening, it had more than 18 months of operating history and therefore should not have been treated under the SBEL framework. BP asserted that Walmart's claim properly belonged within the BEL framework, which, according to BP, would yield an award of $0.

The appeal panel noted BP's arguments but affirmed the award. The panel acknowledged a prior decision finding that a business with no sales to customers from January 2008 until April 2009 did not qualify for SBEL treatment but observed that Walmart distinguished that case while supplying several other decisions holding that periods of dormancy did not preclude start-up treatment. The appeal panel adopted Walmart's Final Proposal. BP promptly sought discretionary review of the appeal panel decision in the district court. On November 14, 2018, the district court denied BP's request without comment. BP appealed.

The Fifth Circuit was not persuaded the appeal panel contradicted or misapplied the Settlement Agreement nor did the Court identify a split. Applying maritime law in interpreting the contract, the Fifth Circuit found the Settlement Agreement is subject to at least two reasonable interpretations: "[L]ess than 18 months of operating history at the time of the Deepwater Horizon Incident" could mean less than 18 months of total operating history. On that interpretation, which

BP favors, a business that reopened—after an extended period of dormancy—less than 18 months before the spill would be precluded from SBEL classification if the business previously operated for some substantial period adding up to a total of 18 months or more. But the language could also be read to mean less than 18 months of continual operating history before the spill. On that reading, a business with a previous operating history followed by an extended period of dormancy could still be eligible for SBEL classification if its reopening took place less than 18 months before the spill.

Agreeing with Walmart, the Fifth Circuit found it difficult to believe that the parties intended to foreclose recovery by businesses that suffered spill-related losses mere months after finally resurfacing from the Gulf Coast's previous catastrophe, Hurricane Katrina. To the contrary, the Settlement Agreement instructs the Claims Administrator to select the framework and information that will "produce the greatest economic damage compensation amount[.]" The different frameworks for BEL and SBEL claims were not implemented to favor a particular type of business or restrict recovery for others, but "[t]o account for specific circumstances" in a claimant's business that might impede its ability to file a claim under one or the other framework.

II. NINTH CIRCUIT

A. JONES ACT

1. ***Gibbons v. Union Pacific R.R. Co.*, 807 F. App'x 662 (9th Cir. 2020) (per curiam)** (affirming $1.5MM award for mental and emotional damages to FELA plaintiff who was "probably ornery all the time.").

Greg Gibbons was injured in a bridge collapse and sued Union Pacific under FELA. At the time of the incident, Gibbons was hauling equipment and supplies through a canyon near Caliente, Nevada. To reach his destination, Gibbons had to traverse a railroad flatcar bridge owned and maintained by Union Pacific. The flatcar bridge spanned roughly one-hundred feet and was suspended roughly twelve feet above the canyon floor. As Gibbons crossed the canyon, the bridge collapsed into the riverbed, causing injuries to Gibbons' neck and back. After the jury awarded Gibbons $500,000 for future medical and hospital expenses, $1,500,000 for future lost wages and benefits, $1,500,000 for mental and emotional damages, and $1,500,000 for physical pain and suffering, the railroad appealed.

Citing Gibbons' testimony that he was unhappy and ornery all the time after the accident, the Ninth Circuit affirmed the nonpecuniary awards but reversed the award of $1,500,000 for future lost wages and benefits as Gibbons remained employed without salary restrictions.

The Ninth Circuit gave Gibbons the option of either submitting to a new trial or accepting reduced damages that the district court considered justified.

2. ***Ruan v. United States*, 831 F. App'x 797 (9th Cir. 2020) (per curiam)** (affirming dismissal under Suits in Admiralty Act because tolling runs from the date of injury for a maintenance and cure claim, and negligent assignment and other continuing tort theories did not toll limitations for a discrete, traumatic injury).

Michael Ruan injured his finger on April 26, 2016 after it was struck by a surging line while working onboard *USNS Red Cloud*, one of the Military Sealift Command's Ro/Ro ships.

He sued the United States in April 2018 for negligence under the Jones Act and unseaworthiness and maintenance and cure under the general maritime law. The United States moved to dismiss the complaint as untimely and outside the two-year statute of limitations under the Suits in Admiralty Act. *See* 46 U.S.C. § 30905.

In response, Ruan argued the maintenance and cure claim was ongoing and that he was also entitled to bring a claim for negligent assignment because his disability arose from his assignment to unsuitable work after his accident which aggravated his injury. Both the district court and the Ninth Circuit rejected these arguments.

First, the Ninth Circuit held that even though Ruan asserted that the United States failed to care for Ruan after his injury, his cause of action for maintenance and cure under the Suits in Admiralty Act runs from the initial date of the injury. Second, the court also rejected negligent assignment and other continuing tort theories as a basis to toll the running of the statute of limitations because Ruan suffered a discrete, traumatic injury—even if it were made worse by later actions of his employer.

B. LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

1. ***Int'l Longshore & Warehouse Union v. Nat'l Lab. Rels. Bd.*, 978 F.3d 625 (9th Cir. 2020) (Hawkins)** (reversing NLRB in an intra-union dispute over which union would be performing maintenance and repair work at Kinder Morgan's bulk terminal facility in Vancouver, Washington).

Kinder Morgan contracted electrical maintenance and repair work at its bulk terminal facility in Vancouver, Washington, to a company that employed electricians represented by the International Brotherhood of Electrical Workers (IBEW).

Kinder Morgan's Vancouver, Washington Terminal spans 5 acres and handles bentonite clay, copper & zinc concentrate, slag, coke, and aggregates.

Then, the Pacific Maritime Association (PMA)—which counts Kinder Morgan as a member—negotiated a collective bargaining agreement that granted to the International Longshore and Warehouse Union (ILWU) maintenance and repair work for *all* stevedore cargo-handling equipment.

The Longshoremen and PMA have a decades-long collective bargaining relationship. As a multiemployer association whose members, including Kinder Morgan, employ Longshoremen at ports along the West Coast, PMA negotiates and administers CBAs on its members' behalf. Kinder Morgan operates marine terminals at several West Coast ports—including its Vancouver facility, which it has operated since the 1990s.

Kinder Morgan continued to use the IBEW electrical workers after the collective bargaining agreement with the Pacific Maritime Association awarded the work to the ILWU. Members of the ILWU filed grievances. The National Labor Relations Board ruled for the IBEW, but the Ninth Circuit disagreed, holding that the language of the collective bargaining agreement with the ILWU unambiguously granted to the ILWU all maintenance and repair work on stevedore cargo-handling equipment.

The Ninth Circuit's decision turned on the following language: "[t]he scope of work shall include ... maintenance and repair ... of all present and forthcoming technological equipment related to the operation of stevedore cargo handling equipment (which term includes containers and chassis) and its electronics, that are controlled or interchanged by PMA companies, in all West Coast ports." In short, such language encompasses both maintenance and repair work and unambiguously assigns to the ILWU ***all*** maintenance and repair work, on ***all*** present and future stevedore cargo handling equipment—including its technological equipment and electronics—for ***all*** PMA members, at ***all*** West Coast ports.

2. ***Hale v. BAE Sys. San Francisco Ship Repair, Inc.*, 801 F. App'x 600 (9th Cir. 2020) (per curiam)** (reversing BRB decision and finding unauthorized settlements of third-party suits by the daughters of ship repairers—which released all heirs—did not bar the widows' LHWCA death claims).

In two cases before the Ninth Circuit, widows of California shipyard workers who were allegedly exposed to asbestos on the job and suffered fatal illness as a result seek compensation

under the Longshore Act. But their daughters brought third-party actions and signed settlement agreements that released the claims of all heirs while their fathers were still alive.

The widows of the deceased workers brought claims for death benefits under the LHWCA. ALJs Larsen and King denied the claims for failing to obtain the approval of the decedents' employer, triggering Section 933(g) of the Act. In both cases, the United States Department of Labor's Benefits Review Board (BRB) also denied the claims after determining that the settlements bound all heirs—including the widows—and triggered the forfeiture provision, terminating the widows' benefits.

But a majority of the Ninth Circuit panel disagreed, holding that, even if the widows were bound by the settlements signed by the daughters, the widows had not technically entered into the settlement. Judge Gould dissented, citing the definition of "enter" in Black's Law Dictionary, meaning "to become a party to." As the widows were bound by the settlements, Judge Gould concluded that they were parties to the settlements and had entered into them in accordance with the meaning of Section 933(g). The orders of the BRB were reversed and the case remanded.

3. ***Aguilar v. Navy Exch. Serv. Command*, 794 F. App'x 648 (9th Cir. 2020) (per curiam)** (affirming ALJ's selection of geographic area finding Hawaii as the relevant community rate for an award of attorney's fees when attorney was in California, but the injury occurred in Hawaii).

Petitioner Angela Aguilar seeks review of the Benefits Review Board's order denying reconsideration of an ALJ's attorney's fees award. The Ninth Circuit reviews the ALJ's selection of a geographic area as the "relevant community" in calculating attorney's fees for abuse of discretion, and we do not overturn that selection if it is "adequately justified and supported by substantial evidence."

Here, claimant was employed in Hawaii. His attorney has offices in both San Rafael, California, and Honolulu, Hawaii. After ALJ Gee[7] awarded medical benefits under the LHWCA, her attorney filed a fee petition seeking an award at a rate of $525 per hour based on awards from the San Francisco Bay area. After issuing a length opinion finding Hawaii as the relevant community and awarding fees at the market rate of $350 per hour, claimant's attorney appealed.

Both the BRB and the Ninth Circuit affirmed Judge Gee's award. The Ninth Circuit rejected the challenge to the relevant community to determine the rate for fees, noting that the Ninth Circuit has explicitly left that determination to the ALJ and BRB to make on an individualized basis. The appellate review of the decision on the relevant community is based on abuse of discretion and that decision is not overturned if it is "adequately justified and supported by substantial evidence." Here, the decision was supported because the hearing was in Honolulu at Aguilar's request, and counsel maintained an office in that venue.

Next, the Ninth Circuit rejected counsel's argument that he did not have notice of the relevant community that was used by Judge Gee. Even though he sought fees based on awards in California, ALJ Gee issued her award based on the Hawaii market after doing extensive research on that market without giving notice to the parties that she planned to award fees based on that market. The Ninth Circuit found that even if the ALJ erred by questioning the relevant community without giving notice to the parties, the court could only overturn that decision after concluding there would have been a contrary result following such error. Thus, it was unreasonable to conclude that with notice and the opportunity to respond, the ultimate fee award would have been different.

4. ***Kupke v. Dir., Off. of Workers' Comp. Programs*, 802 F. App'x 290 (9th Cir. 2020) (per curiam)** (Ninth Circuit rejected Florida attorney's argument for award of fees at $485 per hour and awarded $350 per hour based on the market rate in South Florida for an LHWCA/DBA case heard in San Francisco).

[7] Judge Gee retired in 2019.

This case is another dispute with Judge Gee in San Francisco over the appropriate fee award resulting from a hearing loss case which settled. Here, a Florida attorney[8] submitted petitions totaling $133,925.00 in fees, based on hourly rates up to $485/hour. Judge Gee determined that the appropriate market to determine the hourly rate was South Florida. After performing her own research, she decided that the appropriate hourly rate was $350/hour for the highest billers—reducing the hours for behavior that was unreasonable and baffling, ultimately awarding $66,700.50 in fees.

Following the Benefits Review Board's affirmation of Judge Gee's decision, the firm appealed to the Ninth Circuit. Arguing she failed to give the firm official notice of her intent to rely on fee awards from the Southern District of Florida, the Ninth Circuit noted that—even if Judge Gee had erred by failing to give the firm notice of her intent to rely on fee awards from the Southern District of Florida—the failure to give notice was not prejudicial.

Finally, the firm's briefs and oral argument failed to explain why the decisions relied on by Judge Gee were inappropriate indicators of the prevailing rates in South Florida. After a request for supplemental briefing, the response from the firm was "bereft of any arguments on this point." The Ninth Circuit affirmed the ward.

5. *Zaradnik v. Dutra Grp., Inc.*, 792 F. App'x 518 (9th Cir. 2020) (per curiam) (affirming ALJ's decision to defer ruling on attorney's fees until after the appeal on the merits of the compensation award was not subject to appellate review).

Following 48 days of employment by Dutra Group, Kelley Zaradnik sought compensation for an aggravation of her pre-existing conditions by cumulative trauma. ALJ Dorsey awarded her benefits but later modified his decision on reconsideration.

[8] The firm has offices in both Fort Lauderdale, Florida, and Washington D.C.

Dutra Group appealed the award to the Benefits Review Board. The BRB remanded the case for further consideration, and that decision was appealed to the Ninth Circuit. In the meantime, claimant's counsel petitioned for fees and costs before the Office of ALJs, but Judge Dorsey retired.

Making another appearance, Judge Gee ruled that it would be premature to rule on the fee petition while the case was still on appeal. Zaradnik appealed that decision to the BRB, which affirmed Judge Gee's ruling. As the ruling merely deferred a decision on the merits of the fee petition, the Ninth Circuit found it was not conclusive and not subject to appeal or a writ of mandamus and reasoned that the claimant had identified no provision in the LHWCA that requires fee petitions be adjudicated within a certain time frame.

Both the petition for review and petition for a writ of mandamus were denied.

6. ***Orpilla v. Hawaii Stevedores, Inc.*, 792 F. App'x 520 (9th Cir. 2020) (per curiam)** (affirming ALJ and BRB's determination of the relevant community to establish the rate for claimant's attorney's fees and affirming ALJ and BRB may rely on evidence from other cases in that market when the evidence submitted is insufficient).

This decision arises from another hearing loss claim of a claimant who was employed in Hawaii, but whose attorney has offices in both San Rafael, California, and Honolulu, Hawaii. The attorney sought fees based on his home market of San Francisco, rather than the market in Honolulu. ALJ Larsen rejected an hourly rate of $525 for the San Francisco market and instead followed Judge Gee's market analysis in *Aguilar v. Navy Exch. Serv. Command* for the Honolulu market, awarding a rate of $350/hour.

Agreeing with the BRB, the Ninth Circuit affirmed the award. The Ninth Circuit noted that the court leaves the applicable hourly market rate up to the BRB, ALJs, and District Directors to determine the relevant community. Additionally, claimant's counsel failed to submit evidence of

the prevailing rates in that market—meaning Judge Larsen was allowed to rely on other cases to determine the applicable rate.

7. ***Serv. Emps. Int'l, Inc. v. Dir., Off. of Workers' Comp. Programs*, 793 F. App'x 655 (9th Cir. 2020)** (holding Defense Base Act worker's suicide after discovering (1) his wife was having an affair and seeking a divorce and (2) his daughter was using illegal drugs was compensable under the DBA because the work-related separation from his family significantly intensified marital dysfunction).

Mr. Dill worked for SEII in Iraq as a Pest Control Specialist from December 2004 until June 2006. He was a Marine veteran. According to Mrs. Dill, he was angry, narcissistic, high strung, had spending problems and went into a war zone to make more money and get out of debt and had a proclivity to be controlling and to blame his wife for things. Mrs. Dill testified that he was impulsive and just one day decided he would go to work in Iraq in his chosen profession of pest control.

In June 2006, Mr. Dill came back to a broken home—his wife was having an affair and was seeking a divorce, and his daughter was using illegal drugs. The next month, Wade shot and killed himself at a hotel, leaving suicide notes blaming Mrs. Dill for his action. As the divorce had not been completed, Mrs. Dill brought this death claim as Wade's widow under the Defense Base Act. Wade had not been examined by a psychiatrist during his lifetime, so both Barbara and his employer presented opinions through a "psychological autopsy."

Dr. Seaman contended that the decedent had a pre-existing adjustment disorder and that the work-related separation from his family "significantly intensified the dysfunction in his marriage"—concluding that the combination of his stress from working in Iraq and his marital separation led to his suicide. Dr. Whyman agreed that Mr. Dill had pre-existing psychological conditions but argued that Mr. Dill's employment in Iraq did not affect his underlying condition and that his suicide was the culmination of all the things that had gone wrong in his life.

ALJ Berlin credited the opinion of Dr. Seaman, concluding that it was more congruent with the circumstances of Mr. Dill's employment and home life and that it was supported by an Army study addressing suicides by Army personnel and ruling Mrs. Dill had established a direct, natural, and unbroken chain of causation between Wade's employment in Iraq and his suicide.

The ALJ can credit the testimony of one witness over another and the BRB and the Ninth Circuit affirmed Judge Berlin's finding. His employer argued that its due process rights were violated when Judge Berlin admitted a supplement to Mrs. Dill's expert report without notice but the Ninth Circuit held that there was no violation of due process because Judge Berlin provided each party a chance to brief the value of the supplemental report.

8. *Calabrese v. BAE Sys. Hawaii Shipyards*, 794 F. App'x 565 (9th Cir. 2020) (per curiam) (Aggravation of a prior condition does not occur every time an employee experiences pain at work)

Michael Calabrese worked for BAE Systems at its Pearl Harbor facility as an electrician and later as a Product Support/Maintenance Foreman. He claims he sustained career-ending cumulative trauma in his left hip after going up and down stairs at BAE. He brought a claim alleging the frequent climbing of stairs and ladders caused an aggravation of the avascular necrosis in his hip.

ALJ Larsen credited the testimony of the employer's medical expert, Dr. Lau, over that of the claimant's medical expert, Dr. Soma, and held that claimant had not shown by a preponderance of the evidence that he suffered from a work-related aggravation of his avascular necrosis. The Ninth Circuit agreed—finding substantial supporting evidence based on the testimony of Dr. Lau that claimant did not sustain an aggravation because he would experience pain regardless of his activity, whether at work or lying in a bed. Claimant then presented the legal argument that courts hold that an aggravation occurs whenever the employee experiences pain at work. But Ninth Circuit did not agree that the case law in the Ninth Circuit or other circuits held that instances of

pain necessarily equate to an aggravation of an earlier injury or condition. As the evidence presented from Dr. Lau was enough to rebut the presumption—and presumably to constitute substantial evidence that claimant was not entitled to benefits, but claimant waived that argument—the Ninth Circuit affirmed ALJ Larsen's decision denying benefits.

9. ***Jordan v. SSA Terminals, LLC*, 973 F.3d 930 (9th Cir. 2020) (Block)** (Ninth Circuit held "that credible complaints of severe, persistent, and prolonged pain can establish a prima facie case of disability, even if the claimant can literally perform his or her past work).

Anthony Jordan worked for SSA Terminals as a longshoreman. About 85% of the time, he was assigned to drive a heavy truck—a "tractor" —to move cargo containers around the terminal. Jordan also owned and operated a small landscaping business.

Jordan was injured when the tractor he was driving for SSA Terminals was lifted and dropped by a crane. Jordan underwent spinal fusion surgery in March 2018, but SSA's LHWCA carrier disputed his disability for the period between April 2016 and his surgery based on surveillance showing Jordan lifting and carrying objects, engaging in physical activities such as bending and doing pushups, and attending sporting events—where he appeared to sit and stand for long periods without difficulty. During that period, Jordan did not perform longshore work, but he did continue to work in his landscaping business.

ALJ Larsen was presented with testimony from Jordan and several physicians on the issue of whether Jordan was disabled between April 2016 and March 2018. Jordan testified everything was painful and he could not work for any extended period but continued some of the physical tasks of his landscaping business because he had no choice. Dr. Reynolds—who did not watch the surveillance videos—testified that Jordan was totally disabled from longshore work mainly because he could not work an eight-hour day in a regular fashion.

An osteopath, a neurologist, and an orthopedist, all of whom viewed the videos, testified that Jordan's complaints contradicted the videos and that he could return to work as a longshoreman without restrictions. Judge Larsen disbelieved Jordan's testimony about his disabilities and his complaints of pain as "not wildly improbable." Noting the differences in the surveillance video and Jordan's self-described limitations was "striking," and the impact of the videos on the medical opinions was "remarkable." Crediting the opinions of the physicians who viewed the videos, Judge Larsen ruled that Jordan could return to work without restrictions and was thus not disabled.

The BRB affirmed Judge Larsen's determination that Jordan did not establish that he was disabled for the period, and the Ninth Circuit was presented with the issue of whether Jordan's complaints of pain described a covered disability. Writing for the Ninth Circuit, District Judge Block of the Eastern District of New York held "that credible complaints of severe, persistent, and prolonged pain can establish a prima facie case of disability, even if the claimant can literally perform his or her past work." Noting the considerable range between the "poles" of pain (between "discomfort and torture"), Judge Block stated that "the level of pain must be sufficiently severe, persistent, and prolonged to significantly interfere with the claimant's ability to do his or her past work." He added that pain could be so severe that an employee literally cannot do the job or cannot perform the required work over a full workday. He also stated that employees do not have to perform work that would exacerbate the injury to a degree that significantly impedes the claimant's ability to perform his or her past work. As Judge Larsen did not apply the new standard for the worker's ability to perform his past work, the Ninth Circuit reversed the affirmance of his decision and ordered the Benefits Review Board to remand the case to Judge Larsen to decide whether Jordan's complaints of pain were credible and whether the pain affected his ability to do his past

work as described by the Ninth Circuit. Judge Block added that if the ALJ finds that the complaints are not credible, he need not take them into account.

C. PRACTICE AND PROCEDURE

1. ***Garrett*, 981 F.3d 739, 741 (9th Cir. 2020) (Tashima)** (finding Montana's Holter Lake which is formed by two dams on the Missouri River is not navigable for purposes of admiralty jurisdiction—even though listed as navigable by the Coast Guard).

On April 28, 2019, two recreational fishing boats capsized on a dammed portion of the Missouri River known as Holter Lake. Several passengers suffered hypothermia. One person drowned. One of the boats filed a limitation action. Claimants in the limitation action moved to dismiss the action for lack of admiralty jurisdiction. Judge Haddon dismissed the action, and the Ninth Circuit affirmed.

Even though the Coast Guard has designated the Lake as a navigable waterway, the Ninth Circuit did not find had any effect on whether the Lake was navigable. Here, the stretch of the Missouri River where the Lake is located is wholly within Montana and is obstructed from interstate or international navigation by Holter Dam at one end and Hauser Dam at the other end. Thus, Judge Tashima held that the locality test was not satisfied. Despite urging that the Ninth Circuit should reject this "outdated view of the locality test," Judge Tashima was not willing to change the Ninth Circuit's interpretation of the locality test—distinguishing cases cited by Garrett where the waterway had access to interstate or international waters.

2. ***Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549 (9th Cir. 2020), *cert. denied sub nom. Cooper v. TEPCO*, No. 20-730, 2021 WL 1163742 (U.S. Mar. 29, 2021) (9th Cir. May 22, 2020) (Bybee)** (dismissing California suit against Tokyo Electric Power Co. on grounds of international comity by Navy service members who were exposed to radiation from the Fukushima Daiichi Nuclear Power Plant in Japan).

In the wake of a 9.0-magnitude earthquake and tsunami in Japan, the Fukushima Daiichi Nuclear Power Plant (FNPP) was damaged. Hundreds of United States servicemembers deployed

onboard the *U.S.S. Ronald Reagan* and other vessels from the 7th Fleet. to provide relief to the victims, allege that they were exposed to radiation from the FNPP. The plaintiffs, servicemembers, and their families, sued in California for negligence and strict products liability against Tokyo Electric Power Company (TEPCO), the power plant's owner and operator, and General Electric Company (GE), the manufacturer of the plant's boiling water reactors.

This is the second time the Ninth Circuit has heard an appeal in this case. In 2017, it affirmed the district court's denial of TEPCO's motion to dismiss. *Cooper v. Tokyo Elec. Power Co.*, 860 F.3d 1193 (9th Cir. 2017) ("*Cooper III*"). On remand, GE and TEPCO both moved to dismiss. GE argued that Japanese law should apply to the case and that, under Japanese law, only the plant operator could be liable for injuries resulting from the power plant's failure. TEPCO argued for dismissal on international-comity grounds. The district court granted both motions to dismiss.

Writing for the Ninth Circuit, Judge Bybee agreed that Japanese law applied to the case. Finding Japan had strong interest in the case being litigated in Japan, he affirmed the dismissal on grounds of international comity.

D. PRACTICE AND PROCEDURE

1. *TMF Tr. Ltd. v. Monjasa Ltd*., 799 F. App'x 559 (9th Cir. 2020) (per curiam)

(declining to equitably subordinate preferred ship mortgage to lien for necessaries).

TMF Trustee held a preferred ship mortgage on the *M/T Megacore Philomena* and arrested the vessel to enforce its lien. Monjasa, a maritime lienor for necessaries whose line was outranked in priority by the ship mortgage, intervened and sought to equitably subordinate the ship mortgage lien on the ground of inequitable conduct by the mortgagee.

Unable to establish that the financial transaction underlying the mortgage was a sham, Monjasa argued that the arrest thwarted a sale of the vessel. Even so, the court responded that TMF Trustee was justified in concluding that the sale was unlikely because the date of sale had passed a month before the mortgagee arrested the vessel. The court also rejected the argument that the timing was inequitable based on accumulating liens because, even if TMF Trustee knew about the liens, conduct based on negligence or indifference is insufficient to allow equitable subordination.

Finally, the court rejected Monjasa's argument that TMF Trustee should have to pursue another vessel before receiving assets from the sale of the *Megacore Philomena* under the marshaling of assets doctrine, as the other vessel was not subject to the jurisdiction of the court to give the court the authority to order a marshaling of assets.

E. RULE B – ATTACHMENT

1. ***Pac. Gulf Shipping Co. v. Vigorous Shipping & Trading S.A.*, __ F.3d ___, 2021 WL 1167855 (9th Cir. Mar. 29, 2021)** (affirming summary judgment denying corporate veil piercing to charterer of vessel who sought to enforce arbitration award against Greek shipping family enterprise).

Pacific Gulf chartered the *M/V ADAMASTOS*, operated by the Gourdomichalis brothers through Phoenix Shipping and owned by Adamastos Shipping. After numerous problems arose with the vessel, leading to the abandonment of the vessel and spoilage of its soyabean cargo. Litigation progressed up the charter chain. Eventually, Pacific Gulf initiated arbitration with Adamastos Shipping. Adamastos failed to respond and Pacific Gulf obtained an award. Pacific Gulf sought to enforce its award against other entities owned by the Gourdomichalis brothers, including attachment of the Gourdomichalis vessels all over the world in both South Africa and the Southern District of Texas—where they arrested the *M/V VIGOROUS*, owned by Vigorous Shipping, another Gourdomichalis entity.

Dozens of depositions were taken, and more than 100,000 pages of documents exchanged. Judge Mossman granted summary judgment to the Gourdomichalis enterprises, concluding that Pacific Gulf's efforts to pierce the corporate veil came back "largely empty handed." Pacific Gulf appealed.

The Ninth Circuit applied federal common law to examine the two corporate identity arguments. Writing for the Ninth Circuit, Sixth Circuit Judge Boggs first addressed the argument that one of the entities was a successor business entity of Adamastos Shipping. Judge Boggs agreed

with the decisions of the other circuit courts requiring a transfer of all or substantially all of the predecessor's assets for there to be successor liability. As Pacific Gulf failed to satisfy this standard, the Ninth Circuit held that the district court correctly dismissed the successor liability claim.

Pacific Gulf also argued that it could pierce the corporate veil of the Gourdomichalis companies because it had established that the corporate form of the defendants was being dominated and controlled by the brothers. Judge Boggs noted that the Second Circuit allows the plaintiff to pierce the corporate veil by proving either domination and control or fraud. But the Ninth Circuit employs a conjunctive test that requires domination *and* control *and* injustice from not piercing the veil *and* some form of ill intent.

Although there was ample evidence of the control and domination of Vigorous Shipping by the Gourdomichalis brothers—the Giorgio Armani purchases and other minor explainable accounting discrepancies were not evidence of fraud.

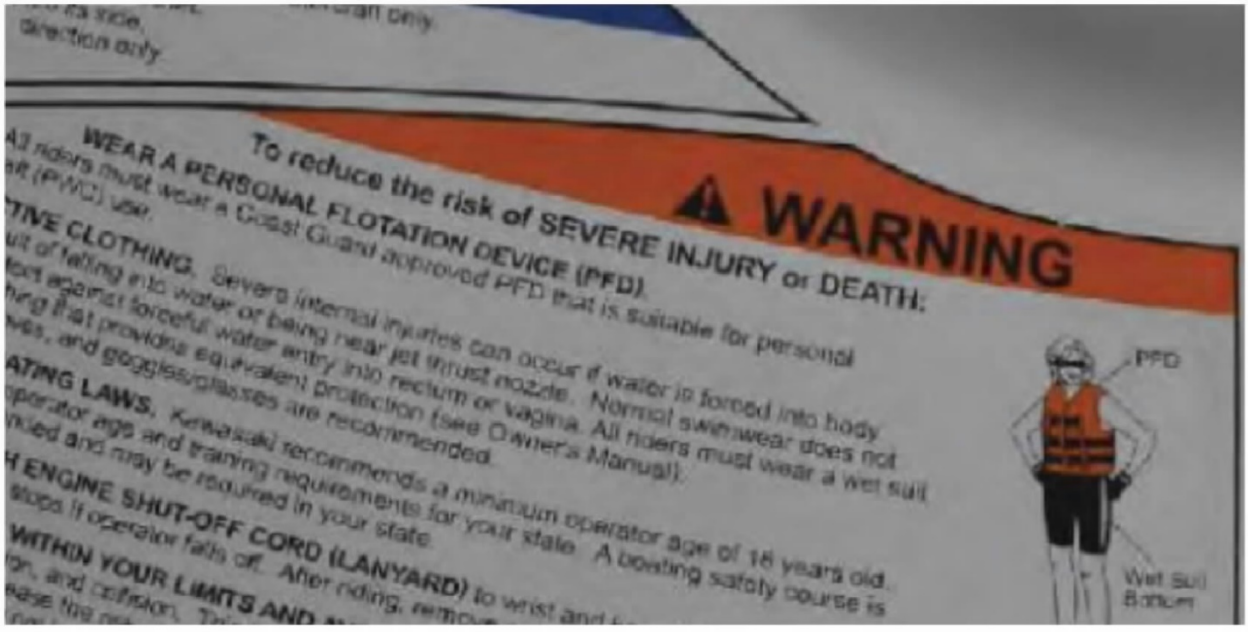
III. TENTH CIRCUIT

A. PRODUCTS LIABILITY

1. ***Wells v. Kawasaki Motors Corp., U.S.A.*, __ Fed. App'x ___, 2021 WL 1169414 (10th Cir. Mar. 29, 2021) (Phillips)** (affirming dismissal of a passenger's personal injury suit against jet-ski manufacturer).

Nicole Wells suffered severe internal abdominal injuries from an underwater stream of high-pressured water emitted from a Kawasaki jet-ski after she fell backwards off the back while accelerating. In her ensuing lawsuit, she argues the jet-ski seat was defectively designed and that Kawasaki was negligent in relying on warnings to prevent these injuries. She brought claims for inadequate warnings and for design defect.

For decades, jet-ski manufacturers have known riders are at risk for these sorts of injuries. Since 2001, they have warned of this risk and others, in a large, standardized on-product label, which was developed with input from several stakeholders, including the United States Coast



Guard. This bright-orange label was located on the back this jet-ski and was a critical component of Kawasaki's warning system.

Below this warning heading comes this:

> **WEAR PROTECTIVE CLOTHING**: Severe internal injuries can occur if water is forced into body cavities as a result of falling into water or being near jet thrust nozzle. Normal swimwear does not adequately protect against forceful water entry into rectum or vagina. All riders must wear a wet suit bottom or clothing that provides equivalent protection (see Owner's Manual).

Plaintiff produced an expert who opined the Plaintiff would have been likely to have fallen from the jet ski had it been equipped with Kawasaki's luxury seat—the LX—that had more hip support. Dr. Kasbekar reached this conclusion by performing a drag test he designed with a bag at Ms. Wells' weight covered in swimsuit material. He used a cable/pulley system to measure the force needed to slide the bag across the seat and concluded that Wells would not have fallen from the luxury seat. The district court ruled that this test was unreliable, noting that it had not been subjected to peer review and had no known rate of error and struck Dr. Kasbekar's opinion. The Tenth Circuit agreed, with Judge Phillips dismissing the argument from Kawasaki's marketing material that the luxury seat allows riders to feel much more connected to the watercraft under hard acceleration as "merely puffery" that "does not establish that the LX seat would likely have prevented Wells's injuries." The district court also excluded the opinion of Wells' expert, Joellen Gill, that the warning was ineffective in changing the behavior of jet ski users.

After striking her experts, Judge Nuffer granted summary judgment to Kawasaki. Applying maritime law to this incident that occurred on navigable waters, Judge Nuffer held that the plaintiff needs to provide expert evidence or opinion supporting both failure to warn and design defect cases. The lack of such evidence led to the dismissal of Wells' claims against Kawasaki.