



# Texas Ports and Courts Update

## September 2020

*We have collected and summarized these developments over the past month in order to help keep you apprised of the latest news from the ports and courts on the Texas coast.*

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### **1. COVID-19 Ports Update**

Texas COVID-19 infections and hospitalizations have generally decreased over recent weeks, as the state has enacted more stringent social distancing measures. In view of these developments, the Governor of Texas recently loosened some of the restrictions, including previous closures of bars. It remains to be seen what effect these less restrictive policies may have on the COVID-19 situation in Texas.

Overall, operations at Texas ports have not been significantly impacted by COVID-19 outbreaks. During the initial stages of the pandemic's arrival in Texas this spring, there were a couple minor disruptions (lasting a day or less) at two container terminals at the Port of Houston, but, otherwise, we are not aware of any significant coronavirus-related stoppages at Texas ports.

At the Ports of Brownsville, Corpus Christi, Freeport, Galveston, Houston, and Port Arthur/Beaumont, shore leave is now generally permitted and crew changes/repatriation requests are allowed on a case-by-case basis. U.S. Customs and Border Protection (CBP) is generally minimizing boarding activities, preferring to utilize local agents as intermediaries to exchange scanned copies of documents, signatures, etc. Many vessels and terminal facilities are requiring that temperatures be taken of anyone boarding/entering (with appropriate protective gear). Vessels must notify Coast Guard boarding teams of any crew illnesses prior to embarkation. Vessels are also required to notify the Coast Guard Captain of the Port of any crewmember showing symptoms consistent with COVID-19. Crewmembers can seek testing at medical facilities with testing kits. Stevedores continue normal operations with appropriate protective gear and social distancing.

One crew issue that continues to be a difficulty is arrangement of international travel for departing crewmembers. CBP is generally requiring direct, non-stop flights to a foreign airport, and, while many

international flights departing from Houston have returned to service, it is still necessary from time-to-time to make international travel arrangements through Dallas-Fort Worth Airport (DFW). CBP officials have allowed crew to depart out of DFW on the day following departure from the vessel. However, this can be an expensive process. CBP has required up to four guards stay with crew from the time of departure from the vessel to their departing flight from DFW. CBP has also required the crew to be driven to DFW (all ground transport – no domestic flights within Texas to DFW allowed). Costs for transport from the vessel to a local hotel and then to DFW have been known to total \$4,000.00 or more and costs for four guards for the transit have added another \$4,000.00 to the tab in some instances.



Over the course of the pandemic, we have also been involved in some situations that have presented difficult logistical issues for the disembarkation/transport of crewmembers with actual/suspected cases of COVID-19. Recognizing a need to better solve these problems, one local Texas company (Ryan Marine Services, Inc.) has developed a Passenger Isolation Module (PIM) system that can be transported to/from vessel to service such needs. The Coast Guard-approved PIM system is equipped with air conditioning, a bathroom and radio communications and can accommodate up to twelve passengers attended by medical personnel. Additional information regarding the PIM system is available at [ryanmarine.com](http://ryanmarine.com).

## 2. Recent Port Activity and Development Projects

Despite the various disruptions and difficulties presented by the current global economic climate, Texas ports remain active and are continuing various growth initiatives. Below are some highlights of recent activities and expansion efforts at the Ports of Brownsville, Corpus Christi, Freeport, Galveston, Houston, and Port Arthur/Beaumont.



**Brownsville:** The Port of Brownsville has experienced a substantial uptick in wind cargo tonnage this year. In 2019, the Port of Brownsville serviced cargos for seven different wind energy projects under development. Thus far in 2020, the port has serviced cargos for 18 projects, and cargos for at least two more wind energy projects are expected to be handled by the port before the close of the year. The projects are variously located in West Texas, New Mexico, northern Mexico, and the U.S. Midwest. Breakbulk steel cargos are also up for the year. Through the first six months of 2020, the port has already handled 1.5 million metric tons of breakbulk steel cargos (a total of 2.4 million metric tons were handled in 2019). The local Keppel Amfels shipbuilding facilities are, among other projects, building two LNG-powered Jones Act containerships for Pasha Hawaii that are scheduled for delivery this year.



**Corpus Christi:** Reflective of the Port of Corpus Christi's status as the leading U.S. export gateway for crude oil, the port has been added to Argus' American GulfCoast Select (Argus AGS) Crude Index which provides real-time commodity pricing data from Argus. The Argus AGS price assessment was requested by numerous customers to provide further differentiation from the traditional Cushing, Oklahoma storage and trading hub. The port has invested billions in new energy infrastructure, including pipelines, storage facilities, marine terminals and an improved ship channel. The Corpus Christi Ship Channel



Improvement Project is both widening and deepening the Corpus Christi Ship Channel to accommodate larger vessels while promoting two-way traffic. Upon completion, the channel will be the deepest channel on the U.S. Gulf Coast at 54 feet Mean Lower Low Water (MLLW), and the widest with 530 feet of main channel width plus 400 feet of additional barge lanes, promoting safe two-way passage of both ocean-going vessels and barge traffic.

**Freeport:** Last month, Port Freeport and Horizon Auto Logistics opened a newly paved 20-acre section for handling roll-on, roll-off (ro-ro) cargos. The port has experienced an increase in ro-ro/breakbulk cargos in recent years, and this year is no exception. Year-to-date vessel callings to the port are almost 12% higher than 2019 year-to-date levels.

**Galveston:** Despite the present suspension of cruise activity, Royal Caribbean remains committed to expanding its presence at the Port of Galveston. Construction of a new cruise terminal for Royal Caribbean's exclusive use is still slated to begin in April 2021. During the Port of Galveston Board of Trustees meeting earlier this month, it was announced that Disney Cruise Line hopes to resume operations in time for a Caribbean cruise voyage that is presently set to depart from Galveston on November 20. The Port of Galveston is the fourth-busiest cruise port in the U.S., servicing over 1 million passengers in 2019.

**Houston:** Fortunately, the Port of Houston mostly avoided damages and delays as a result of Hurricane Laura. While the Houston Ship Channel was closed for approximately one day and most plant and terminal facilities suspended operations as a precautionary measure, these disruptions were brief, and the port resumed operations shortly after the hurricane threat cleared. Although the Port of Houston is experiencing some recent downturns, the decreases in many sectors are not as substantial as other U.S. and international ports. For instance, year-to-date container twenty-foot equivalent units (TEUs) for the first seven months of the year are down just 3% compared to 2019, which was a record year. Additionally, container activity is up 8% compared to the same time period in 2018, another record year during its time. Although the July total tonnage at the port was down 6% (with steel, breakbulk cargo and autos all down compared to July of last year), grain and bulk cargo again showed increases, as they did in June.

**Port Arthur/Beaumont:** Although the Port Arthur/Beaumont area is approximately only 50 miles from where Hurricane Laura made landfall in Louisiana, the local plant and terminal facilities were largely spared of any significant damage. Many resumed operations not long after the hurricane threat dissipated, and the port has essentially returned to normal operations. While the Sabine Pilots report that year-to-date vessel arrivals are down about 19% from 2019 levels, some of these decreases are attributable to the recent hurricane disruptions, and it is expected that the numbers will improve as the year progresses.

### 3. News from the Courts

#### *Current Status of Trials/Court Proceedings in Texas Federal & State Courts*

Texas federal and state courts continue to be impacted by the COVID-19 pandemic. At this time, it appears unlikely that in-person jury trials will resume this year. However, this remains a fluid situation, and we continue to keep an eye out for any changes.

Although state and federal courts remain operational, nearly all hearings, conferences, depositions, and mediations are being conducted via video-conference or telephonic means. Continuances are freely granted in most instances, and the Texas Supreme Court has repeatedly tolled statutes of limitations throughout the year.

## **Sanchez v. Smart Fabricators – Will the Fifth Circuit Reevaluate the Issue of Jones Act Seaman Status?**

We continue to keep an eye on a case in the U.S. Fifth Circuit Court of Appeals (*Sanchez v. Smart Fabricators*) that may ultimately alter its analysis for determining Jones Act seaman status. *Sanchez v. Smart Fabricators* has been pending before the Fifth Circuit for over a year now, already taking a couple of turns along the way.

Gilbert Sanchez, a welder employed by Smart Fabricators, was injured on a jack-up rig when he tripped on a pipe welded to the rig. Mr. Sanchez asserted a Jones Act negligence claim against Smart Fabricators, alleging he qualified as a seaman.

The well-known *Chandris* test developed by the U.S. Supreme Court utilizes two prongs to determine Jones Act seaman status: (1) whether the claimant's duties contributed to the function/mission of a vessel; and (2) whether the claimant has a connection to a vessel or fleet of vessels that is substantial in both duration and nature.

There was no dispute that Mr. Sanchez's job duties contributed to the function/mission of the vessel. However, the second prong of the *Chandris* test – the duration and nature of his connection to a fleet of vessels – was contested by Smart Fabricators. As Mr. Sanchez had worked 65 of his 67 workdays on jack-up rigs, the temporal component of the second prong was easily decided in his favor. But the nature of his connection to the fleet of vessels presented a more difficult question. Careful not to run into conflict with the Fifth Circuit's 2014 decision in *Naquin v. Elevating Boats, LLC*,<sup>1</sup> the initial three-judge panel in *Sanchez* elected to compare three components of the work of Mr. Sanchez and Mr. Naquin: (1) the surface that they worked upon; (2) their work duties; and (3) whether their injuries were related to the "perils of the sea."

The initial three-judge panel in *Sanchez* found that, unlike the claimant in *Naquin*, Mr. Sanchez worked on a vessel that was jacked-up out of the water, and, accordingly, his workplace was "stable, flat, and well above water" and not "subject to waves, tides, or other water movement." Additionally, while the claimant in *Naquin* was a vessel repair supervisor, Mr. Sanchez was merely a welder that did not operate/navigate the jack-up rig. Finally, while the claimant in *Naquin* was injured while operating a vessel's crane, Mr. Sanchez was only injured when he tripped on a pipe that had been welded to the deck of the jack-up rig. Taking these items into account, the Fifth Circuit's March 2020 opinion found that Mr. Sanchez was not a Jones Act seaman.

In April 2020, however, the *Sanchez* court reversed course and withdrew its March 2020 opinion, which was ultimately replaced by a new opinion issued last month that found Mr. Sanchez was in fact a Jones Act seaman. So, how did they get there? Looking further at the issue of the surface upon which Mr. Sanchez worked, and comparing these facts to the Fifth Circuit's precedent in *Naquin* and *In re Endeavor Marine, Inc.* (another Fifth Circuit opinion finding seaman status for a claimant that worked on a vessel jacked-up next to a dockside pier and returned home each night), a new three-judge panel found that Mr. Sanchez should be considered a Jones Act seaman. While this seems like a painful reversal of fortune for Smart Fabricators and other maritime employers in similar positions, all may not be lost.

In addition to reversing course, the new opinion included an interesting concurrence joined by the other two judges on the three-judge panel. The concurrence questions the propriety of the Fifth Circuit's previous interpretations of the *Chandris* test and casts doubt upon the validity of the analyses in *Naquin* and *Endeavour*. Rather bluntly, the concurrence stated: "I am persuaded that we did not correctly follow the [U.S. Supreme] Court's dictates in holding that Sanchez satisfied the nature element of the substantial connection requirement. All of his welding work on the [rig] was done while the rig was jacked up adjacent to the dock. He was never assigned to sail on the vessel, and instead only had to take two steps off the rig and onto land every evening at the end of his shift. His work was essentially land-based, never exposing him to the perils of the sea. I believe that we should take this case *en banc* and bring our jurisprudence in line with Supreme Court caselaw." An unusual situation, to say the least.

Circumstances like these open the door for the court to change its course, and it currently appears as though there is a good chance it may take the opportunity to develop a more practical approach that truly accounts for whether the incident was related to the perils of the sea. Smart Fabricators filed a petition for a rehearing *en banc*, and, earlier this past week, the Fifth Circuit ordered Sanchez to file a response to the motion. We will continue to watch this one and pass along any further developments.

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<sup>1</sup> *Naquin* found Jones Act seaman status for a vessel repair supervisor at a shipyard. Mr. Naquin spent about 70% of his time working on lift-boats that were jacked-up/docked in the canal next to the shipyard. The remaining 30% was mostly spent in the shoreside fabrication shop or on a land-based crane. About 2-3 times per week, he worked on a vessel being moved within the canal. He rarely worked on a vessel at open water. Like *Sanchez*, *Naquin* found that the first prong of the *Chandris* test was easily satisfied. As to the second prong, his connection to his employer's fleet was found to be substantial in both duration and nature. It held that the repair, maintenance, and operation tasks that occupied 70% of Mr. Naquin's time satisfied the duration requirement, and that the danger involved in working on docked vessels was sufficient exposure to the sea's perils to satisfy the nature requirement of the *Chandris* test's second prong. Thus, it was determined that Mr. Naquin qualified as a Jones Act seaman.

**This update was collectively prepared by our offices in Houston, Galveston, Corpus Christi, and Brownsville. Our offices remain open and fully operational, and our lawyers and marine investigators are conveniently located near each of Texas' major ports.**

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