



# Texas Ports and Courts Update

## September 2021

### 1. COVID-19 Update

#### General Statewide Conditions

Similar to various other regions in the U.S., Texas COVID-19 infections and hospitalizations have risen over the past several weeks, approaching the numbers that were previously observed in late-2020/early-2021. For the past month, statewide daily new cases have regularly exceeded 15,000, frequently ranging between 16,000-19,000 new cases.

Vaccine supplies remain readily available, and Texas ranks around the 50<sup>th</sup> percentile for vaccination rates amongst the U.S. states. To further improve these numbers, local authorities have recently developed various vaccination incentives. For instance, the City of Houston and Harris County have created initiatives to offer up to \$150 to participants in their vaccination programs.

The latest surge in cases, coupled with the local pushes to expand vaccination efforts, appear to have encouraged increased vaccinations in recent weeks. In mid-July, almost 59% of the Texas population 12 years old or older had received at least one dose, and nearly 51% were fully vaccinated. As of September 14, over 70% of the Texas population aged 12 and over has received at least one dose, and almost 60% are fully vaccinated. Additionally, nearly

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78% of the Texas population aged 65 and over are fully vaccinated.

### **Texas Port Conditions**

Recognizing the inverse supply-demand issues faced by international seafarers (despite apparently strong demand, recent data from the Neptune Declaration Crew Change Indicator demonstrates that less than 22% of seafarers are vaccinated), the seafarers' centers along the Texas coast continue their vaccination efforts. As of August, the Houston International Seafarer's Center had facilitated the administration of over 8,000 vaccinations. The Corpus Christi International Seamen's Center, the International Seafarer Center in Brownsville, the Texas Port Ministry in Freeport, and the Port Arthur International Seafarers Center have also reported continued positive engagement in their vaccination efforts.

Although we have reported this before, given the important nature of this issue, we once again would like to highlight that the costs for these vaccination efforts are rather minimal. For instance, vaccinations arranged through the Houston International Seafarer's Center involve a \$150 per hour attendance fee (with a 3-hour minimum charge). Vaccine cards are issued upon completion, and a certificate is issued once the vaccinations are registered with Texas authorities.

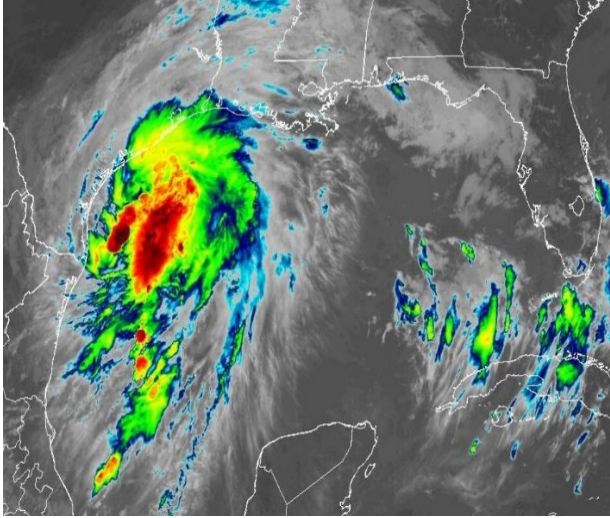
### **Texas Court Conditions**

Despite the increase in COVID-19 cases over the course of the summer, Texas courts have generally continued normal operations. Although the rise in cases has raised concerns regarding the safety of in-person jury trials, some local state courts are attempting to stay the course in order to pare down the large numbers of cases that have accumulated on their trial dockets over the course of the pandemic. However, some of the local federal courts have recently issued additional formal delays. For instance, the Houston/Galveston Divisions of the United States District Court for the Southern District of Texas will pause jury trials until at least October 12. Similarly, jury trials in the Corpus Christi/Victoria Divisions will not resume until at least October 31.



United States Courthouse, Corpus Christi

## 2. Recent Port Activity and Development Projects



The Ports of Brownsville, Corpus Christi, Freeport, Galveston, Houston, and Port Arthur/Beaumont continue to maintain normal operations. Although recent storm activity in the Gulf of Mexico (e.g., Hurricane Ida and Hurricane Nicholas) have created some disruptions, Texas port facilities mostly avoided significant physical damages. While we still have about a month-and-a-half until the end of the current hurricane season, thus far it has been relatively uneventful.

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:**

#### ***Expansion & Proposed Tunnel Below Ship Channel***

Similar to other channel deepening/widening projects in Houston, Corpus Christi, Port Arthur/Beaumont, and Freeport, the Port of Brownsville is expected to begin work on its own channel expansion project. With a price tag of approximately \$350 million, the Brazos Island Harbor Channel Improvement Project will deepen the port's 16-mile ship channel from 42 feet to 52 feet. The project is scheduled for completion in 2024.

SpaceX recently approached local authorities to evaluate the prospects for a tunnel to link South Padre Island with SpaceX's Boca Chica facilities. The tunnel, which would be built by Elon Musk's The Boring Company, would require substantial depths as it would cross below the ship channel. Equipment transports for SpaceX's operations have caused repeated roadway traffic delays and closures. It is thought that the proposed tunnel would alleviate these issues and improve commutes for SpaceX personnel, many of which reside on South Padre Island.

### **Corpus Christi:**

#### ***Going Green – Embracing Carbon Capture & Storage***

While the Port of Corpus Christi's petroleum transport operations remain robust and growth continues in that sector, the port is also looking ahead to advance green initiatives that utilize its locational advantages.

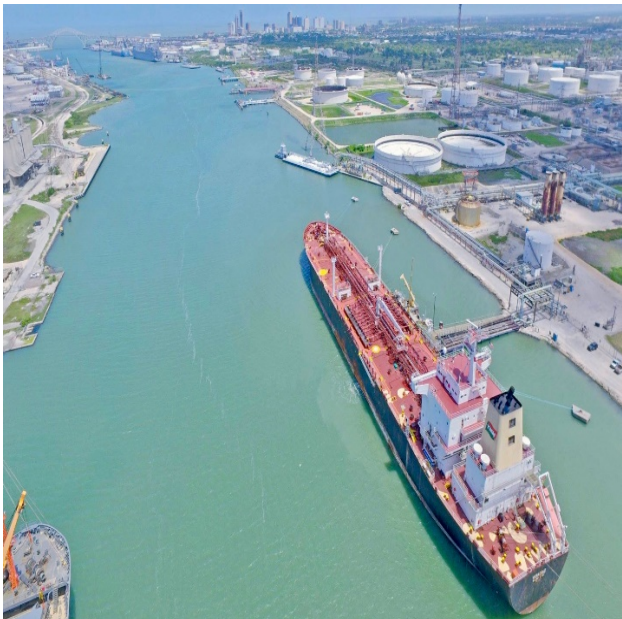






For instance, the Port of Corpus Christi and Howard Midstream Energy Partners, LLC (HEP) recently executed a Memorandum of Understanding concerning the conversion of HEP's Javelina refinery services facility into the region's first blue hydrogen production facility. "Blue hydrogen" is produced through a hydrogen production process where carbon dioxide is also produced but then subsequently captured via carbon capture and storage (CCS).

The Javelina refinery facility is well-positioned with pipeline connectivity to all six of the local refineries, and a readily available supply of methane due to direct connections to the Permian Basin and Eagle Ford Shale production fields. The facility controls approximately 60 million cubic feet per day of hydrogen production through a combination of hydrogen entrained in the refineries' waste gas that the facility processes, and hydrogen produced through a steam methane reformer process. HEP intends to capture its carbon dioxide emissions at Javelina, thus avoiding atmospheric release. The parties will collaborate to identify uses for the residual carbon dioxide, as well as capture and storage options. Captured carbon dioxide can be transported to industries that require it for production, such as steel, or that assimilate it, such as cement.



In another step to advance its carbon-capture capabilities, the Port of Corpus Christi and the Texas General Land Office recently announced a separate MOU to work together to develop infrastructure that captures carbon dioxide produced during oil and natural gas development. The MOU states the agencies' intention to co-develop "a carbon dioxide storage solution" in the Corpus Christi area.

## **Freeport:**

### ***Velasco Terminal Expansion***

Work continues to progress on Port Freeport's \$130 million project to expand its Velasco Terminal. The terminal expansion involves building 1,600 feet of new berths, including one berth that will be dredged to a depth of 51 feet. The expansion will also add two more cranes for post-Panamax vessels, complementing the two already in service at the port.

In 2017, Port Freeport handled about 100,000 twenty-foot equivalent units (TEUs). Once the Velasco Terminal expansion is complete, Port Freeport officials expect to see up to 2 million TEUs per year.







Roll-on/Roll-off (Ro/Ro) cargo remains one of Port Freeport's fastest growing segments. The port has experienced a \$400 million increase in automobile imports since 2018, and it has been exporting nearly \$1.5 billion in Texas-assembled automobiles annually. Up to three Ro/Ro vessels call at the port on a weekly basis. New car exports are mostly destined for delivery to the Middle East, and new car imports arrive primarily from South Korea and India. The port has also experienced a robust market for export of used vehicles to West Africa.

### **Galveston:**

#### ***LNG Bunkering Expected to Be Available This Year***

The Port of Galveston and Stabilis Solutions, Inc. recently entered into a Memorandum of Understanding to facilitate the use of LNG as a marine fuel at the port. Under the terms of the MOU, the Port of Galveston and Stabilis will work together to provide turnkey LNG fueling solutions to marine vessels calling on the port, including identifying suitable dock space for shore-to-ship fueling operations, obtaining the necessary permits and approvals, identifying and educating potential customers, and executing LNG fueling events. Stabilis will deploy its existing fleet of mobile cryogenic assets, including LNG transportation and distribution equipment, and provide LNG from its liquefaction facilities in Texas and Louisiana to support LNG fueling operations. LNG bunkering services are expected to be available later this year.

According to DNV, demand for LNG as a marine fuel is projected to grow from approximately 1.0 million tons per year in 2020 to nearly 4.0 million tons per year by 2024, a compound annual growth rate of over 30%. Stabilis and the Port of Galveston hope to attract more LNG-fueled vessels and to encourage additional conversions to LNG fuel.

#### ***Ro/Ro & Heavy Equipment Handling Improvements***

The Port of Galveston recently completed an infrastructure improvement project at its West Port Cargo Complex to accommodate large Ro/Ro construction and farming equipment cargoes. The 18-month project included new paving, dock repairs, an equipment processing center, and an industrial wash pad for equipment cargo exports. The complex is designed to handle a wide range of cargoes, including Ro/Ro, large wind turbine pieces and grain with rail service, laydown areas and more.





This marks completion of just the first phase of a \$30 million improvement project to expand the port's cargo area, improve infrastructure, consolidate major cargo activities, and position the port for additional growth.

Future improvement activities at the complex include filling in three outdated slips to add almost 20 waterfront acres and 2,000 linear feet of docking space and extending a rail spur to the waterfront.

## **Houston:**

### ***A New Container Handling Record***

July 2021 was the Port of Houston's busiest month ever for containers, handling 297,621 twenty-foot equivalent units (TEUs). The figure marks an increase of 27% year-over-year and an increase of 224 TEUs compared to the previous all-time record set in March 2021.

Year-to-date, the Port of Houston reports a 15% increase in TEUs compared to 2020, which was a record year for containers and surpassed the 3-million-TEU mark. July was the fifth month this year for double-digit growth in containers.

Overall cargo trade at the Port of Houston remains robust. Trade has increased from \$64 billion to \$75 billion (17%) through the first six months of 2021, compared to the same period in 2020.

## **Port Arthur/Beaumont:**

### ***Renewable Diesel Plant Operational in Early 2023***

Valero and Darling Ingredients recently announced that their new renewable diesel plant in Port Arthur will enter operations in the first half of 2023, ahead of their previous expectation for a second-half 2023 startup. The Port Arthur plant is expected to increase U.S. renewable diesel production capacity by 470 million gallons per year. The plant is expected to use cooking oil, distiller's corn oil, and rendered animal fats for the production of the renewable diesel, which is especially coveted in markets with low carbon fuel programs.





### 3. News from the Courts

- *Patil v. Amber Lagoon Shipping GmbH & Co.*, No. 21-30004, 2021 WL 3889288 (5th Cir. Aug. 31, 2021) – affirming summary judgment dismissal of surveyor’s 905(b) personal injury claim against the vessel

#### **Background and Procedural History**

The plaintiff, Pradeep Patil, was a surveyor employed by Maritech Commercial, Inc. Patil attended the M/V AMBER LAGOON to perform ultrasonic testing of its hatch covers while the vessel was docked in Houston. Ultrasonic testing is a procedure whereby a vessel’s hatch covers are battened down, and a tester sets up an ultrasonic transmitter inside the hold, walks around the belly of the hatch cover while pointing an ultrasonic signal detector at the hatch cover’s seal, and takes decibel readings to identify any leakage in the seal. The vessel’s second officer accompanied Patil during the process.

The holds on the AMBER LAGOON rise six feet above the main deck, and each hold is split into port-side and starboard-side sections, with a 3-foot-wide gap between those two sections. There are port-side and starboard-side hatch covers on top of each hold. Each hold contains port-side and starboard-side access ladders, which allow individuals to ascend and descend between the main deck and the hatch covers.

When Patil completed his testing of the port-side hatch cover of one of the holds, he noticed that the port-side access ladder he had previously used to reach the top of the hold had become blocked by cargo containers and was no longer a viable method of descending to the main deck (stevedores were conducting cargo operations during his attendance). In response, Patil asked the second officer to retrieve the ultrasonic transmitter that Patil had set up inside the hold and bring it back to the main deck. In order to do so, the second officer jumped across the 3-foot gap between the port and starboard sides, descended the starboard-side access ladder to the main deck, and began climbing through a manhole in the deck to reach the inside of the hold.

Patil, a surveyor with 45 years of experience in the maritime industry, decided to cross the 3-foot gap as well. But Patil chose not to jump the gap, because he was older and less nimble than the second officer. Instead, Patil sat down on the port-side ledge and attempted to swing his right leg over the gap and place his right foot onto the starboard-side ledge. However, Patil’s right foot slipped, and he fell six feet to the main deck, suffering a small forehead laceration and a left-heel fracture.

Patil filed this suit against the defendants, the vessel’s owners and managers, alleging negligence claims under Section 905(b) of the Longshore and Harbor Workers’ Compensation Act. See 33 U.S.C. § 905(b). Patil alleged that he slipped and fell due to a “foreign substance” on or near the hatch covers.

While Patil testified in his deposition that he did not actually observe a foreign substance in the area of his slip-and-fall, he stated that he assumed that he slipped on “some grease,” because hatch cover cleats are typically greased so that they slide easily through ledge holes. Patil further testified that he examined his work boots after the incident and noticed “a little bit” of grease on the tip of one boot. Regarding the surrounding conditions at the time of the accident, Patil testified that: (1) although the sun had begun to set, there was still daylight in the area; (2) the vessel’s

lighting was not yet on, but he did not yet need lighting for visibility; and (3) the vessel was docked and stable in terms of movement.

The second officer testified in his deposition that the hatch cover cleats were usually greased to prevent corrosion, and the vessel's crew was responsible for ensuring that Patil's inspection areas were free of grease. He further stated that, in preparation for Patil's attendance, the chief officer followed the vessel's standard operating procedure by sending multiple crewmembers to examine the testing areas for grease and clean the surfaces of the hatch covers with rags and chemicals. The second officer also testified that, before the accident, he did not observe any type of foreign substance in the area of Patil's slip-and-fall, nor did Patil advise him of the presence of any foreign substance.

Neither Patil's medical records from the date of the accident nor an employee injury report made any mention of a foreign substance in the area of the slip-and-fall.

The defendants moved for summary judgment, which was granted by the district court.

### **Appeal – Patil Claims Fact Issues Regarding the Turnover and Active Control Duties**

Under Section 905(b), a covered maritime employee is entitled to recover damages for personal injuries caused by the negligence of a vessel. Patil, a surveyor, was a covered employee under the LHWCA, because he was a "person engaged in maritime employment" at the time of the accident at issue. See 33 U.S.C. § 902(3).

As described by the U.S. Supreme Court over 40 years ago in *Scindia*, vessel negligence under Section 905(b) is limited to breach of the three narrow duties that shipowners owe to maritime employees: (1) a "turnover duty," (2) a duty to exercise reasonable care to prevent injuries in the areas of the ship under the "active control of the vessel," and (3) a "duty to intervene" to prevent unsafe cargo operations. *Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156 (1981).

On appeal, Patil argued that the district court erred in finding no genuine dispute as to any material fact with respect to his claims that Defendants breached their "turnover" and "active control" duties.

#### **The Turnover Duty**

The turnover duty applies to the shipowner's obligation before or at the commencement of the maritime employee's activities, and imposes two responsibilities on the vessel owner:

1. the vessel owner must exercise ordinary care under the circumstances to turn over the ship and its equipment in such condition that a maritime employee can carry on his operations with reasonable safety; and
2. the vessel owner must warn the maritime employee of latent or hidden dangers which are known to the vessel owner or should have been known to it (however, a vessel owner has no turnover duty to provide a warning for "open and obvious" dangers or dangers a reasonably competent maritime employee should anticipate encountering)

In view of the above framework, the Fifth Circuit panel found that the vessel was turned over to Patil in a reasonably safe condition. The panel noted the second officer's testimony that crewmembers examined Patil's inspection areas for grease and cleaned the surfaces of the vessel's hatch covers before his testing commenced. The panel further noted the absence of any evidence



of latent or hidden slip hazards that were known to the defendants, and the second officer did not see any foreign substances in the area of the accident.

Additionally, the panel observed that Patil, a surveyor with 45 years of experience in the maritime industry, reasonably should have anticipated encountering potential slip hazards in traversing the 3-foot-wide, 6-foot-tall gap between the port and starboard sides of the hold. The panel further highlighted the fact that the need for caution was even more apparent in light of the fact that Patil was attempting this maneuver for the first time after consistently using the traditional (and safer) method of navigating between the two sides of each hold via the access ladders.

The panel aptly summarized that Patil's turnover duty claim was essentially premised on his unsupported assumption that the later-discovered spot of grease on his work shoes came from the site of his accident and caused his slip-and-fall, despite the fact that neither Patil nor the second officer observed grease in that area. Accordingly, the panel found no fact issues with respect to the turnover duty claim.

### *The Active Control Duty*

Under the active control duty, a vessel may be liable under Section 905(b) if it:

1. actively involves itself in the cargo operations and negligently injures a maritime employee, or
2. if the vessel fails to exercise due care to avoid exposing the maritime employee to harm from hazards he may encounter in areas, or from equipment, under the active control of the vessel during his work operations.

Thus, liability under the active control duty is premised on the presence or existence of a hazard under the active control of the vessel. Moreover, liability under the active control duty is not relieved when the hazard is open and obvious. However, if a vessel has relinquished control over an area to the maritime employee, then it is the primary responsibility of the maritime employee to remedy a hazard in that area.

Patil argued that the defendants breached the active control duty, (1) when the defendants' cargo operations caused the port-side access ladder for the hold to become obstructed with cargo containers, thus forcing Patil to attempt the dangerous crossing that led to his slip-and-fall; and (2) when the second officer took an active role in Patil's ultrasonic testing work and failed to ensure Patil's safe descent to the main deck.

With respect to cargo operations, the second officer testified that all cargo operations (including all bulk cargo and all container loading, discharge, movement, placement and securing activities, as well as all crane operations necessary to conduct all such activities) were directed, controlled, and performed by an independent contractor stevedoring company and its longshore crews. The second officer further stated that the vessel's officers and crewmembers did not conduct, direct, supervise or control any such cargo, container, or crane activities and operations. Patil presented no evidence to refute this testimony. Consequently, the panel found that the defendants had no active involvement over the vessel's cargo operations and did not exercise active control over the areas and equipment involved in those operations.

The panel likewise found that the defendants did not maintain active control over Patil's work. Specifically, Patil maintained full autonomy over the equipment used and areas examined during the testing period, and there was no evidence that the second officer set up or operated the

ultrasonic testing equipment, directed Patil on how to use that equipment, or restricted Patil's freedom to move about the testing areas on the vessel in the manner Patil saw fit. The panel further noted that the second officer's role was merely limited to following Patil around, marking areas of leakage identified by Patil, and retrieving a piece of equipment from the inside of a hold at Patil's instruction after testing was complete. Moreover, the panel observed that the very reason the second officer was not available to help Patil descend to the main deck was because Patil sent him ahead to retrieve Patil's equipment. Thus, the panel found that the defendants did not exercise active control over Patil's ultrasonic testing work.

The panel further noted that, even if the defendants had actively involved themselves in Patil's ultrasonic testing work, the active control claim would still fail, as such a claim requires the existence of a hazard, and Patil's "unsupported speculation" regarding the presence of grease at the site of his accident did not raise a fact issue concerning the existence of a hazard.

Accordingly, the panel found that Patil's active duty claim also failed to raise any fact issues, and the district court's summary judgment dismissal of Patil's claims was affirmed.

The Fifth Circuit's opinion may be accessed via the following link:

<https://www.ca5.uscourts.gov/opinions/unpub/21/21-30004.0.pdf>

- *In re Callan Marine, Ltd.*, No. 4:21-cv-01938, 2021 WL 4086227 (S.D. Tex. Sept. 8, 2021) – denying a plaintiff's lawyer's request to chaperone his client's independent medical examination

Although it is generally accepted that plaintiff's lawyers are not permitted to attend their clients' independent medical examinations, this customary practice is occasionally challenged. Recently, a Houston federal district court denied a plaintiff's attempt to break from the status quo.

In *Callan Marine*, the plaintiff, Cesar Garza, alleged that he was injured while working on a vessel owned and operated by his employer, Callan Marine, Ltd., a dredging company. Garza brought a Jones Act negligence claim and other claims against Callan.

Although Garza agreed to submit to a medical examination conducted by an orthopedic surgeon selected by Callan, he brought his attorney to accompany him into the examination room. At the time of the examination, the surgeon's nurse said the lawyer's attendance was not allowed, and she would only permit the attendance of an interpreter to make sure there was no language barrier since Garza does not speak fluent English. Garza's lawyer protested, but the nurse refused to budge, and they ultimately left the surgeon's office without Garza undergoing a medical examination. Garza subsequently filed a motion for protective order, seeking the court's directive that his attorney be permitted to attend the medical examination along with the interpreter.

Upon consideration of the motion, the court noted that the federal procedural rule concerning independent medical examinations (Federal Rule of Civil Procedure 35) is silent on who may attend a physical examination. However, the court added that the overwhelming majority of courts to consider the issue have refused to permit third-party observers, including attorneys, from attending such examinations, and further observed that the rationale for refusing to allow lawyers into the examination room has been "perfectly summarized" in a law review article: "The presence of an attorney has a high probability of causing adverse effects on the examination, including the injection of an adversarial atmosphere into the examination and the possibility of making the

attorney a witness. The consequences of this presence, including delays in the trial and disruptions of the examinations, warrants the exclusion of attorneys.” William Scott Wyatt & Richard A. Bales, *The Presence of Third Parties at Rule 35 Examinations*, 71 TEMP. L. REV. 103, 127 (1998).

The court further stated that an attorney’s attendance would subvert the purpose of Rule 35, which is to put both the plaintiff and defendant on equal footing with regard to evaluating the plaintiff’s medical status. Thus, where one party has been examined by his doctors outside the presence of others, the other party should be given the same opportunity. Since Garza was previously examined by his hand-picked medical professional outside the presence of observers, the court observed that it appeared only fair that Callan be afforded the same opportunity to have its expert examine Garza without anyone (other than an interpreter) in attendance.

The court also noted that the only time courts should allow the presence of an attorney at a medical examination is the rare instance where special circumstances exist, and a party seeking to have his lawyer present at a medical examination bears a heavy burden to show there are special circumstances unique to that party’s situation that distinguish the case from others in which examinations are sought.

As justification for his lawyer’s attendance during the medical examination, Garza simply argued that his counsel should be permitted to attend the examination “to provide moral support” and ensure that the doctor performing the examination did not engage in “improper conduct.” Not surprisingly, the court found that neither of these reasons constitute “special circumstances” sufficient to justify the presence of counsel at a medical examination.

As to the “moral support” argument, the court noted that such a basis would be true in all cases involving a medical examination of this type. Accordingly, the “moral support” argument did not distinguish this case from others or constitute a special circumstance.

Regarding Garza’s claim that he needed his lawyer’s attendance to ensure that no improper conduct occurred, the court was likewise unmoved. The court noted that such arguments have been repeatedly rejected due to the numerous pre-trial and trial procedures that protect the examinee from any impermissible harm. For instance, Garza, like any plaintiff undergoing an independent medical examination, would receive an examination report and then have the opportunity to depose the physician, cross-examine him, and introduce contrary expert evidence. Additionally, should a physician make an improper inquiry, Garza would have the opportunity to seek the exclusion of such questioning from trial.

In summation, the court concluded that a lawyer does not have an inherent right to attend the medical examination of his client, and Garza did not meet his burden to demonstrate special circumstances that warranted his lawyer accompanying him into the examination room. Thus, the plaintiff’s lawyer was denied admission.

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

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