

ADMIRALTY PRACTICUM



SPRING 2015

**JOSEPH A. CALAMARI
ADMIRALTY LAW SOCIETY**

ST. JOHN'S UNIVERSITY SCHOOL OF LAW

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**THE SEPARATION-OF-POWERS DOCTRINE PREVENTS THE JUDICIARY FROM
REVIEWING MILITARY ENGAGEMENTS THAT EXERCISE A DISCRETIONARY
FUNCTION**

Wu Tien Li-Shou v. United States of America
777 F.3d 175

United States Court of Appeals for the Fourth Circuit
(Decided January 23, 2015)

The Fourth Circuit Court of Appeals held that Wu’s claims presented a nonjusticiable political question, and the United States retained its sovereign immunity because it was engaged in the exercise of a discretionary function.

Wu Tien Li-Shou (“Wu”) filed suit against the United States of America (“the government”) for the accidental killing of her husband and the intentional sinking of her husband’s fishing vessel during a NATO counter-piracy mission.¹ Wu sought damages for her husband’s death and the loss of his fishing ship, the Jin Chun Tsai 68 (“JCT 68”), under the Public Vessels Act (“PVA”), the Suits in Admiralty Act (“SIAA”), and the Death on the High Seas Act (“DOHSA”).²

In response to Somali-based piracy threats, the United States and its allies within the North Atlantic Treaty Organization (“NATO”) conducted Operation Ocean Shield in the Gulf of Aden and the Indian Ocean waters around the Horn of Africa.³ On May 10, 2011, as part of Operation Ocean Shield, the USS Stephen W. Groves engaged JCT 68, a Taiwanese fishing ship hijacked by pirates in 2010.⁴ The ship housed nearly two-dozen pirates and three hostages, including Wu Lai-Yu, the master and owner of the ship.⁵ After an hour of fire, the pirates surrendered, but not before Master Wu was killed.⁶

The district court granted the government’s 12(b)(1) motion to dismiss for a nonjusticiable political question.⁷ The court noted that, even if Wu had subject matter jurisdiction, her claim would be futile because of the discretionary function exception to any waiver of the government’s sovereign immunity.⁸ Wu appealed the decision.⁹

On appeal, the Fourth Circuit affirmed the district court’s decision, holding that the separation of powers prevents the judicial branch from hearing this case because “allowing this action to proceed would thrust courts into the middle of a sensitive multinational counter-piracy operation and force courts to second-guess the conduct of a military engagement.”¹⁰

A case presents a nonjusticiable political question where “its adjudication would inject the courts into a controversy which is best suited for resolution by the political branches.”¹¹ In fact, the

¹ *Li-Shou v. United States*, 777 F.3d 175, 178 (4th Cir. 2014).

² *Id.* at 179; *See* 46 U.S.C. § 31101 *et seq.*, 46 U.S.C. § 30901 *et seq.*, 46 U.S.C. § 30301 *et seq.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 180 (quoting *Baker v. Carr*, 369 U.S. 186, 210-211, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). A nonjusticiable political question exists where there is: “(1) a textually demonstrable constitutional commitment of the issue to a coordinate

judiciary has shown the most deference in matters involving national security and defense.¹² Historically, Courts have not reviewed purely military decisions.¹³ Cases that require the judiciary to question actual, sensitive judgments made by the armed forces threaten to obstruct the aforementioned constitutional commitment to the other branches.¹⁴ Therefore, because this case presented “a textbook example of a situation in which courts should not interfere,” the Fourth Circuit affirmed the district court’s judgment.¹⁵

Wu’s complaint attempted to consider the precise details of the military engagement, including what kind of warnings were given, the type of ordinance used, the sort of weapons deployed, the range of fire selected, and the pattern, timing, and escalation of the firing.¹⁶ Discovery would inevitably draw the district court into the technicalities of battle, and require the issuance of subpoenas to NATO and American military commanders and officers.¹⁷ To resolve these issues, the court would be obligated to wade into sensitive and particularized military matters.¹⁸ Without the requisite military background and knowledge, a court lacks the tools to render a verdict on the operations of the armed forces.¹⁹

Wu further claimed that the government attempted to escape responsibility by establishing a safe zone between belligerency and ordinary law enforcement actions.²⁰ She analogized the incident with the JCT 68 to a “police officer stopping a vehicle on the highway,” and challenged the district court’s description of the altercation as a “belligerent operation.”²¹ While NATO’s counter-piracy activities do not amount to “belligerency” in the law of war meaning, the district court’s use of the word was vernacular, not technical.²² Furthermore, although the United States was not at war, the confrontation between the USS Groves and the JCT 68 was more than a mere law enforcement action.²³ The American military does not typically partake in simple law enforcement, and none of the actions of the USS Groves suggested garden-variety policy activity.²⁴ Nevertheless, a state of war did not have to exist for the actions of the USS Groves to be unreviewable by the courts.²⁵

Wu also challenged the district court’s holding that the United States retained its sovereign immunity from suit because it was engaged in the exercise of a discretionary function.²⁶ Wu contended that, although the exception applies to the SIAA, it did not apply to suits brought under the

political department; or (2) a lack of judicially discoverable and manageable standards for resolving it; or (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or (4) the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* (quoting *Baker*, 369 U.S. at 217).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 181.

²⁰ *Id.* at 182.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 183.

PVA, and that, even if it did, the sinking of the JCT 68 was beyond the bounds of the USS Grove's discretion.²⁷

In *McMellon v. United States*, the court held that “the SIAA must read to include a discretionary function exception to its waiver of sovereign immunity,” and “this exception is grounded in separation-of-powers concerns.”²⁸ “Because the separation of powers is a constitutional doctrine, ‘the courts must adhere to it even in the absence of an explicit statutory command.’”²⁹ The same separation-of-powers concerns that were present with the SIAA are present with the PVA.³⁰

The discretionary function exception applies to conduct that involves an element of judgment or choice.³¹ “The conduct of a military engagement is the very essence of a discretionary function.”³² Cases involving the use of military force lure courts into considering “complex, subtle, and professional decisions.”³³ The Supreme Court has held “that the selection of the appropriate design for military equipment...is assuredly a discretionary function.”³⁴ A countless number of circumstances arises during the course of a military operation, resulting in many plausible options that military commanders can choose to use as a response.³⁵ Therefore, the decision by the USS Groves to sink the JCT 68, a pirate mothership, was a discretionary act that is not to be reviewed by the judiciary.³⁶

Accordingly, the Fourth Circuit affirmed the district court's decision. Wu's claim presented a nonjusticiable political question, and the United States retained its sovereign immunity because it was engaged in the exercise of a discretionary function.

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²⁷ *Id.*

²⁸ *Id.* at 184. *See also McMellon v United States*, 387 F.3d 329, 349 (4th Cir. 2004).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.* (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)).

³⁴ *Id.* at 185 (quoting *Boyle v. United Techs. Corp.*, 487 U.S. 500, 511 (1988)).

³⁵ *Id.*

³⁶ *Id.*

A COMPANY THAT CREATES A SECOND COMPANY TO ACT AS ITS AGENT FOR SALVAGE OPERATIONS IS THE REAL PARTY IN INTEREST FOR AN ACTION SEEKING TO OBTAIN SALVAGE RIGHTS WHERE THAT AGENCY AGREEMENT IS VALID AND WHERE THE PRINCIPAL MAINTAINED SALVAGE RIGHTS BY ACTING WITH DUE DILIGENCE IN ONGOING SALVAGE OPERATIONS WITH SOME PROSPECT OF SUCCESS

Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, etc.

United States District Court for the Eastern District of Virginia, Norfolk Division
34 F.Supp.3d 595
(Decided: July 14, 2014)

The United States District Court for the Eastern District of Virginia held that: (1) a principal was substituted for its agent as a real party in interest in the agent’s action seeking to obtain salvage rights to any property recovered from a wreckage; (2) the principal met the requirements for maintaining its salvage rights; and (3) the principal did not violate a permanent injunction against interference with agent’s salvage operations.

The sinking of the *S.S. Central America* (“*Central America*”) in September of 1857 marked one of the worst maritime disasters in American history.¹ Given the significant attention surrounding the sinking, many attempted to locate the wreck; nevertheless, efforts were futile.

Tommy Thompson, along with a number of investors (“Investors”), formed RLP with the objective of locating and salvaging the *Central America*.² Subsequent to forming RLP, Thompson and Investors formed a second company, Columbus-America Discovery Group (“CADG”).³ RLP entered into an Agency Agreement with CADG, under which CADG acted as RLP’s agent in the salvaging of the *Central America*.⁴ The Agency Agreement provided that CADG “act exclusively as the Partnership’s agent and for the benefit of the Partnership, incurring no benefit to itself, other than reimbursement of expenses.”⁵ Furthermore, the Agency Agreement stipulated termination of the Partnership under three conditions: “(a) ninety (90) days following the end of any calendar year in which the Partnership has not undertaken any substantial activity with respect to the location, verification, or recovery of the *Central America*; (b) termination of the Partnership as provided in the Partnership Agreement; or (c) immediately upon written notice by the Partnership of termination of the agreement.”⁶ Accordingly, CADG was henceforth the agent of RLP, and RLP the principal of CADG.

In 1987, two years prior to the actual find of the *Central America*, CADG mistook another wreck to be the *Central America* and filed an action to obtain salvage rights for any property recovered from the *Central America*.⁷ Subsequently, CADG found the *Central America*, and the court issued a

¹ *Columbus-Am. Discovery Grp., Inc. v. Unidentified, Wrecked, & Abandoned Sailing Vessel*, 34 F.Supp.3d 595, 597 (E.D. Va. July 14, 2014). The *Central America* set off from Havana to New York, carrying over 500 passengers and crew and a substantial amount of gold. The vessel sank off the coast of South Carolina during a hurricane, taking with it over 400 people and its cargo. *Id.* at 598.

² *Id.* at 598. See *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d 450, 455–457 (4th Cir. 1992).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 601.

⁷ *Id.* at 598.

permanent injunction enjoining any person from conducting salvage operations or interfering with salvage operations being conducted by CADG.⁸ The United States Court of Appeals Fourth Circuit awarded CADG exclusive salvage rights and a salvage award of ninety percent of the recovered gold, with the rest going to underwriters of the vessel.⁹ CADG salvaged gold and other artifacts with the present-day value of hundreds of millions of dollars.¹⁰

In 2006, former employee crewmembers of CADG brought suit against RLP and CADG in the United States Court for the Southern District of Ohio, alleging that they were not fully compensated for their work in the salvage effort.¹¹ Consequently, the court enjoined Thompson from selling any assets that were in dispute and asked him to explain what had happened.¹² Ultimately, Thompson failed to appear in court and a warrant was issued for his arrest.¹³

The Court of Common Pleas of Franklin County Ohio placed RLP in receivership due to RLP's "apparent disarray and insolvency."¹⁴ Ira Kane, the receiver, was asked by the court to make every effort to conduct maritime operations that would create a positive financial return for RLP.¹⁵ It was through Kane that RLP filed its Motion to Substitute Party at issue in January 2014.¹⁶ CADG filed a response stating that RLP failed to provide the court with all of the facts that were relevant to the Motion to Substitute Party.¹⁷

Despite the pending decision on the Motion to Substitute Party, RLP contracted with Odyssey Marine Exploration, Inc. ("Odyssey") to recommence salvage operations on the *Central America*.¹⁸ On April 17, 2014, RLP filed a new *in rem* action with the court to obtain rights to the newly salvaged property obtained by Odyssey.¹⁹ In response to RLP's activities, CADG filed Notices with the court alerting the court of the renewed salvage activities and alleging a violation of the court's permanent injunction. Consequently, the court issued a warrant for the arrest of the artifacts,²⁰ but ultimately found that Odyssey was qualified to continue the salvage operation on behalf of RLP.²¹

The court analyzed three issues in its decision on the Motion to Substitute Party: (1) whether RLP was the real party in interest based on the Agency Agreement with CADG; (2) whether CADG had exercised sufficient diligence to maintain its salvage rights, to which RLP now wanted to assume as the real party in interest; and (3) whether RLP violated the permanent injunction.²²

⁸ *Id.*

⁹ *Id.* (citing *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 56 F.3d 556, 562 (4th Cir. 1995)). The case had been closed since July 2000. *Id.*

¹⁰ *Id.* See *Columbus-Am. Discovery Grp.*, 974 F.2d at 458.

¹¹ *Id.* See *Williamson et al. v. Recovery Ltd. P'ship et al.*, No. 2:06cv292, 2011 WL 2181813 at *2 (S.D. Ohio June 3, 2011) *aff'd*, 731 F.3d 608 (6th Cir. 2013).

¹² *Id.* at 599. See *Williamson*, 731 F.3d at 617.

¹³ *Id.* Thompson is currently still a fugitive and is actively sought by the United States Marshals Service. *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 600.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 601-7.

RLP asserted that it was the real party in interest because CADG acted as RLP's agent pursuant to the Agency Agreement.²³ The Agency Agreement provided that the agreement would terminate "90 days following the end of any calendar year in which the Partnership has not undertaken any substantial activity with respect to the location, verification, or recovery of the *Central America*."²⁴ Here, neither party contested that the Agency Agreement had ended, and both agreed that the Agency Agreement was in effect when CADG began salvage operations and when the court declared CADG to be salvor-in-possession.²⁵ Under Ohio law, "a principal is entitled to both tangible and intangible property gained by an agent as a result of their agency relationship."²⁶ Accordingly, as the principal of CADG, RLP "is entitled to the salvage rights obtained by CADG as a result of its agency relationship with RLP."²⁷ Therefore, the court found that "RLP [was] the real party in interest by virtue of the Agency Agreement in place at the time CADG brought this action to obtain salvor-in-possession status of the *Central America*, under which award all salvage was conducted prior to 2014."²⁸

Next, the court addressed whether RLP or CADG properly exercised their salvage rights. "The underlying purpose of salvage law is the complete salvaging of a distressed vessel."²⁹ Salvors do not receive title to the salvaged property.³⁰ "Rather, 'they save it for the owners and become entitled to a reward from the owner or from his property,'³¹ and so a salvor is 'bound to act for the interest of the owner as well as his own.'³² "For that reason, a salvor has the right to exclude others from engaging in salvage operations only 'so long as the original salvor appears ready, willing and able to complete the salvage project.'³³ In cases where the ship has some historical significance, the interests of the public must also be taken into consideration.³⁴

To determine if a salvor-in-possession has maintained its salvage rights, the efforts of the salvor must be "(1) undertaken with due diligence, (2) ongoing, and (3) clothed with some prospect of success."³⁵ Although there is no set formula as to what qualifies as due diligence, a court will look to the nature and situation of the operations and the site itself to determine whether the salvor took the requisite amount of control necessary to retain exclusive rights to the site.³⁶ Here, RLP claimed that the long period with no physical salvaging was due to technological challenges, as the ability to recover artifacts scattered throughout the debris field had not then been invented.³⁷ Thus, it was not a failure of due diligence but rather something outside of its control. Moreover, RLP consistently engaged in on-shore activities, including the care and management of previously salvaged material and ongoing scientific experiments with materials placed at the wreck site.³⁸ Finally, RLP argued there

²³ *Id.* at 601.

²⁴ *Id.*

²⁵ *Id.* at 602.

²⁶ *Id.* RLP and CADG are both Ohio entities, and the Agency Agreement specifies that Ohio law applies to any disputes under the Agreement. *Id.*

²⁷ *Id.*

²⁸ *Id.* at 604.

²⁹ *Id.* at 600. (quoting *R.M.S. Titanic, Inc. v. Wrecked & Abandoned Vessel*, 924 F.Supp. 714, 719 (E.D.Va. 1996)).

³⁰ *Id.*

³¹ *Id.* (quoting *R.M.S. Titanic, Inc.*, 286 F.3d 194, 202 (4th Cir. 2002)).

³² *Id.* (quoting *The Amethyst*, 1 F.Cas. 762, 764 (D.Me. 1840)).

³³ *Id.* (quoting *Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel*, 640 F.2d 560, 567 (5th Cir. 1981)).

³⁴ *Id.* See, e.g., *Columbus-Am. Discovery Grp.*, 974 F.2d 450, 468 (4th Cir. 1992).

³⁵ *Id.* at 604 (quoting *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1061 (1st Cir. 1987)).

³⁶ *Id.* (citing *R.M.S. Titanic, Inc.*, 924 F.Supp. at 720-22).

³⁷ *Id.*

³⁸ *Id.*

was a clear prospect of success evidenced by additional artifacts salvaged by Odyssey.³⁹ Therefore, the court found that “there [was] diligent maintenance of the salvage rights to the wreck of the *Central America*, and that no other salvor [came] forward. RLP is the real party in interest, and also [RLP] maintain[ed] salvor-in-possession status.”⁴⁰

Lastly, the court held that RLP did not violate the permanent injunction.⁴¹ In granting a permanent injunction, district courts are granted considerable deference when interpreting their own orders.⁴² To establish civil contempt of a permanent injunction, “a movant must show by clear and convincing evidence that it suffered harm as a result of the offensive conduct.”⁴³ Here, upon termination of the agency relationship, “any salvage rights that CADG gained as a result of [the] relationship were held on *behalf* of RLP.”⁴⁴ CADG could not have profited from the permanent injunction because it was the agent of RLP, and a “former agent who remains in possession of property of the principal holds it on the principal’s behalf,’ and is subject to the duty not to use property of the principal of the agent’s own purpose.”⁴⁵ Therefore, RLP did not violate the permanent injunction because CADG suffered no harm by RLP.

Accordingly, the court granted RLP’s Motion to Substitute Party finding RLP to be the real party in interest in CADG’s action seeking salvage rights for any property recovered from the vessel. Additionally, RLP met the requirements for maintaining salvage rights, and RLP did not violate the permanent injunction.⁴⁶

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³⁹ *Id.* at 605.

⁴⁰ *Id.*

⁴¹ *Id.* at 606-7.

⁴² *Id.* at 606. (citing *JTH Tax, Inc. v. H & R Block E. Tax Servs., Inc.*, 359 F.3d 699, 705 (4th Cir. 2004)).

⁴³ *Id.* (citing *JTH Tax*, 359 F.3d at 705).

⁴⁴ *Id.* at 607.

⁴⁵ *Id.* (quoting Restatement (Third) Of Agency §§ 8.09 cmt. b, 8.05 (2006)).

⁴⁶ *Id.* at 601-7.

**MOBILE DRILLING RIG - A VESSEL UNDER MARITIME LAW - MAY ALSO BE A
“STATIONARY SOURCE” UNDER THE CLEAN AIR ACT**

United States v. Transocean Deepwater Drilling, Inc.
767 F.3d 485
United States Court of Appeals for the Fifth Circuit
(Decided September 18, 2014)

The Fifth Circuit Court of Appeals affirmed a denial of motion to quash administrative subpoenas for lack of jurisdiction where the lower court found that a self-stabilizing drilling unit, that could be considered a vessel under general maritime law, is also a “stationary source.” Therefore, the Chemical Safety and Hazard Investigation Board is not precluded from investigating marine oil spills.

In the wake of the *Deepwater Horizon* drilling disaster,¹ numerous governmental agencies were deployed to investigate, including the Chemical Safety and Hazard Investigation Board (“CSB”).² CSB, as part of its investigation, issued five administrative subpoenas to the owner of the drilling rig, Transocean Deepwater Drilling, Inc. (“Transocean”).³ Transocean refused to comply with the subpoenas and, in response to the government’s petition to enforce them,⁴ moved to quash the subpoenas and dismiss the petition.⁵ Transocean’s motions were denied by the district court, and they appealed to the Fifth Circuit.⁶

Transocean claimed that CSB lacked jurisdiction, and, therefore, the authority to issue subpoenas, because: (1) the *Deepwater Horizon* was not a stationary source; and (2) that Congress neither intended the CSB to investigate marine oil spills nor gave the CSB concurrent jurisdiction with the National Transportation Safety Board (NTSB).⁷

In finding that the *Deepwater Horizon* — a “mobile offshore drilling unit” capable of propulsion and most likely a vessel under general maritime law and the Jones Act⁸ — was legally a stationary source, the court did not rely on general maritime law but, instead, on the Clean Air Act,⁹ including the Clean Air Act Amendments of 1990 which established the CSB.¹⁰ In looking at 42

¹ On April 20, 2010, a drilling rig owned by Transocean and being operated for British Petroleum, the “*Deepwater Horizon*,” exploded in the Gulf of Mexico. The semi-submersible offshore drilling unit sank in the fire, leading to a massive offshore oil spill. The rig burned for more than a day before sinking. The resultant oil spill continued for 87 days before the well could be capped and released an estimated 4.9 million gallons of crude into the surrounding water.

² *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 488 (5th Cir. 2014).

³ *Id.*

⁴ Under 28 U.S.C. § 1345 and 42 U.S.C. §§ 7412(r)(6)(A)-(S) and 7607(a).

⁵ *United States v. Transocean Deepwater Drilling, Inc.*, 936 F. Supp. 2d 818, 820 (S.D. Tex. 2013) *aff’d*, 767 F.3d 485 (5th Cir. 2014)(moving under F.R.C.P.12(b)(6)).

⁶ *Transocean*, 767 F.3d at 488.

⁷ *Id.* at 488-9. Under the Clean Air Act, the CSB is authorized to investigate accidental releases of regulated or extremely dangerous substances into the ambient air from a stationary source. 42 U.S.C. § 7412 (r) (6).

⁸ *Id.* at 490 (“Transocean is correct that similar mobile offshore drilling units and other structures, and even the *Deepwater Horizon* itself, have been held to be vessels under maritime law. *See, e.g., Demette v. Falcon Drilling Co.*, 280 F.3d 492, 498–99 (5th Cir.2002), *overruled in part on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir.2009) (en banc).”).

⁹ *Id.* at 490.

¹⁰ *Id.* at 489 (“An administrative agency’s authority is necessarily derived from the statute it administers and may not be exercised in a manner that is inconsistent with the administrative structure that Congress has enacted. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000); *see also Texas v. United States*, 497 F.3d 491, 500–01 (5th Cir.2007).”); *and* at 490 (“The phrase ‘stationary source’ is expressly defined by the Clean Air Act. When Congress

U.S.C.A. § 7412(r)(2)(C),¹¹ which expressly defines a “stationary source,” the court held that nothing within that definition “precludes a vessel from satisfying the statutory requirements for a stationary source.”¹² It further found that a rig can perform a stationary activity as contemplated under the act, in part due to its being equipped with stabilizing thrusters which are used when conducting drilling operations to keep the rig in a fixed position.¹³ The fact that the *Deepwater Horizon* could also be a vessel did not preclude it from being considered a “stationary source if other statutory conditions are met,” and the rig can fall into the CSB’s jurisdiction.¹⁴

On the question of Congressional intent, Transocean argued that the Clean Air Act “specifically precludes the CSB from investigating all marine oil spills” and that the CSB lacked jurisdiction where the NTSB had jurisdiction to investigate.¹⁵ The court found neither argument availing.

The court held that the marine oil spill exclusion did not extend to an investigation of gases that result from a marine oil spill and that the release of airborne gases triggered the CSB’s authority.¹⁶ Recognizing that § 7412(r)(6)(E) states that the CSB “shall not be authorized to investigate marine oil spills, which the National Transportation Safety Board is authorized to investigate[,]” the court also pointed out that the statutory language prohibited CSB from “forego[ing] an investigation where an accidental release causes a fatality or serious injury among the general public, or had the potential to cause substantial property damage or a number of deaths or injuries among the general public.”¹⁷ The court held that “the best” reading of §7412(r)(6)(E) did not “categorically preclude CSB from investigating all incidents that happen to include a marine oil spill.”¹⁸

Therefore, the Fifth Circuit affirmed the decision of the District Court for the Southern District of Texas and held that a vessel, under maritime law and the Jones Act, may also be a stationary source under the Clean Air Act. This designation allows for the CSB to use its investigatory powers, including the power to issue valid subpoenas. Additionally, the court ruled that the fact that the accident is a marine oil spill does not preclude the CSB from making its own investigation where it would otherwise have jurisdiction.

D. Shawn Burkley
Class of 2015

provides a specific definition of a term, we must accept that meaning and limit our analysis to the prescribed definition. *See Stenberg v. Carhart*, 530 U.S. 914, 942, 120 S.Ct. 2597, 2615, 147 L.Ed.2d 743 (2000)”.

¹¹ 42 U.S.C.A. § 7412(r)(2)(c): “The term “stationary source” means any buildings, structures, equipment, installations or substance emitting stationary activities (i) which belong to the same industrial group, (ii) which are located on one or more contiguous properties, (iii) which are under the control of the same person (or persons under common control), and (iv) from which an accidental release may occur.”

¹² *Transocean*, 767 F.3d at 490.

¹³ *Id.* at 490-491.

¹⁴ *Id.* at 491.

¹⁵ *Id.* at 492.

¹⁶ *Id.* at 493.

¹⁷ *Id.* at 492-3; *see also*, 42 U.S.C.A. § 7412(r)(6)(E): “The Board shall coordinate its activities with investigations and studies conducted by other agencies of the United States having a responsibility to protect public health and safety. The Board shall enter into a memorandum of understanding with the National Transportation Safety Board to assure coordination of functions and to limit duplication of activities which shall designate the National Transportation Safety Board as the lead agency for the investigation of releases which are transportation related. The Board shall not be authorized to investigate marine oil spills, which the National Transportation Safety Board is authorized to investigate. The Board shall enter into a memorandum of understanding with the Occupational Safety and Health Administration so as to limit duplication of activities. In no event shall the Board forego an investigation where an accidental release causes a fatality or serious injury among the general public, or had the potential to cause substantial property damage or a number of deaths or injuries among the general public.”

¹⁸ *Id.* at 496.

SEAFARERS' ACTION FOR MAINTENANCE AND CURE DISMISSED OVER COURT'S LACK OF JURISDICTION OVER CARNIVAL CORPORATION AND CARNIVAL PLC AS A DUAL-LISTED CORPORATION

Sabo v. Carnival Corp.
United States Court of Appeals, Eleventh Circuit
762 F.3d 1330
(Decided August 12, 2014)

The Eleventh Circuit Court of Appeals affirmed the district court's dismissal of an action for maintenance and cure against Carnival Corporation and Carnival PLC because the companies were not suable as a dual-listed company or a joint venture and they were not estopped from denying that it was a corporation.

Zolt Sabo, Ilija Janev, and Stefan Vidojkovic ("Plaintiffs") worked aboard Cunard Line cruise ships.¹ According to their complaint filed in July 2012, they sustained back injuries during 2009 and 2010, while working with Cunard Celtic Hotel Services, Ltd. ("Cunard").² They claimed that, as injured sea workers, they were legally entitled to "maintenance and cure."³ Plaintiffs each received three months of wages and two months of medical expenses, as stipulated in their contracts with Cunard, a company operated under the corporate umbrella of Carnival Corporation & PLC. Carnival Corporation & PLC is a dual-listed company made up of Carnival Corporation and Carnival PLC.⁴ Plaintiffs were unsatisfied with the extent of their maintenance and cure, believing that their contracts wrongly limited their compensation.⁵

Plaintiffs filed a class action lawsuit against Carnival Corporation and Carnival PLC ("Carnival Corporation & PLC"), alleging Carnival & PLC failed to provide maintenance and cure in accordance with general U.S. maritime law and the Jones Act.⁶ Defendants moved to dismiss the action.⁷ In order to open the action to a larger pool of potential class members, plaintiffs opted to sue Carnival Corporation & PLC as a one dual-listed company to access employees of their entire cruise ship fleet.⁸ The district court granted defendants' motion holding that the dual-listed company structure did not overcome the individual corporate identity of Carnival Corporation and Carnival PLC in order to give the court jurisdiction over them as a dual-listed company.⁹ Plaintiffs appealed.

The Eleventh Circuit affirmed the district court's holding.¹⁰ While Cunard operated "under the corporate umbrella of Carnival & PLC" as a dual-listed company, the Carnival Corporation & PLC were not subject to suit as a single entity because of their lack of incorporation.¹¹ The court explained,

¹ *Sabo v. Carnival Corp.*, 762 F.3d 1330, 1332 (11th Cir. 2014).

² *Id.*

³ *Id.*

⁴ *Id.* Carnival Corporation is a Panamanian corporation headquartered in Miami, FL. Carnival PLC is a British corporation headquartered in Southampton, England. *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* Defendants claimed that: (1) the district court lacked *in personam* jurisdiction over Carnival PLC; (2) Carnival Corporation was an improper party; and (3) the complaint failed to meet federal pleading standards. *Id.* at 1332-3.

⁸ *Id.* at 1334.

⁹ *Id.* at 1333. The district court noted that it may have jurisdiction over a dual-listed company where the controversy arises from the corporate structure "(i.e. shared asserts of investments [of the DLC])." *Id.*

¹⁰ *Id.* at 1334.

¹¹ *Id.* at 1332-5.

that while these companies had qualities common to a corporation, “it is not properly subject to treatment as a corporation absent incorporation, the fundamental act of corporate creation and the dividing line between corporations and non-corporations.”¹²

Plaintiffs further argued that Carnival Corporation & PLC represented themselves publically as a single entity, and, therefore, should be estopped from denying that it was a corporation.¹³ The court explained that “the doctrine of corporation by estoppel is most appropriately used to maintain the expectations of parties to a contract, allowing a ‘corporation [to] sue and be sued as if it existed if the parties to the contract behaved as if it existed.’ ”¹⁴ The court found that plaintiffs’ employment contracts were with Cunard, not Carnival Corporation & PLC, and plaintiffs did not allege that they had reason to believe that they were contracting with Carnival Corporation & PLC.¹⁵ With no claims of a contract between the plaintiffs and Carnival Corporation & PLC, the court held the doctrine did not apply.¹⁶

Finally, plaintiffs argued that the dual-listed company could be sued as a joint venture, but the court rebuffed this attempt, determining that Carnival Corporation & PLC were not “an association of persons or legal entities to carry out a single business enterprise for profit” under Florida law.¹⁷ The court explained that the dual-listed company and the joint venture are distinct.¹⁸ Under Florida law, a joint venture follows one main enterprise as a business.¹⁹ The dual-listed company approach of Carnival Corporation & PLC has a wider range of objectives and influence.²⁰

Accordingly, the Eleventh Circuit concluded that Carnival Corporation & PLC as a dual-listed company was not properly suable in the action.²¹

Robert Kaftari
Class of 2016

¹² *Id.* at 1335.

¹³ *Id.* at 1335.

¹⁴ *Id.* at 1336 (quoting *Harry Rich Corp. v. Feinberg*, 518 S.2d 377, 379 (Fla. 3d DCA 1987)).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 1337.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1337.

**EMPLOYER’S DUTY TO PROVIDE SAFE INGRESS AND EGRESS OF THEIR
EMPLOYEES IN CERTAIN CIRCUMSTANCES DOES NOT NECESSARILY EXTEND TO
NON-EMPLOYERS**

Richard v. G4S Government Solutions, Inc., et al.
2014 WL 3341386

United States District Court for the Western District of Louisiana (Lake Charles Division)
(Decided July 7, 2014)

United States District Court, Western District of Louisiana, held that a vessel owner does not owe a duty to provide for ingress and egress of others to their own vessel using the same pier.

Matthew Richard (“Plaintiff”) sued Orion Marine Construction, Inc. (“Defendant”), among others, for personal injuries sustained when he slipped and fell while working for G4S Government Solutions, Inc.¹ Plaintiff was a security officer assigned to patrol the pumping station on the United States Intracoastal Canal near Hackberry, Louisiana.² Plaintiff alleged that while he was aboard the vessel SPR10 in United States navigable waters SPR10’s captain, a DM Petroleum Operations Company employee, ordered plaintiff to disembark in an undesignated area because a barge was tied to the dock, preventing access to the dock or accommodation ladder.³ Plaintiff alleged that the barge, owned and operated by Orion, was in front of the only accessible dock from the Intracoastal Canal to the pumping station.⁴ The order of the captain of the SPR10 caused plaintiff to disembark onto a “rock jetty/embankment” that was not a designated area for crews to embark or disembark.⁵ When plaintiff crossed the rocky area, he alleged that he slipped and fell on the rocks and sustained injuries.⁶ Plaintiff filed suit and invoked the court’s federal admiralty jurisdiction under 28 U.S.C. §1333, in the United States District Court for the Western District of Louisiana.⁷ Defendant filed a motion to dismiss plaintiff’s claims pursuant to Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted.⁸

For plaintiff’s claim to survive a Rule 12(b)(6) motion, the complaint must contain facts, accepted as true, sufficient to “state a claim to relief that is plausible on its face.”⁹ The court must accept well-pleaded facts as true and construe the complaint in the light that is most favorable to the plaintiff.¹⁰ Conclusory allegations, unwarranted factual inferences, or legal conclusions are insufficient.¹¹

Analyses of maritime tort claims are guided by general principles of negligence law.¹² To establish maritime negligence, a plaintiff must “demonstrate that there was a duty owed by the defendant to the plaintiff, breach of that duty, injury sustained by [the] plaintiff, and a causal

¹ *Richard v. G4S Government Solutions, Inc., et al.* 2014 WL 3341386 2331 (W.D. La.2014).

² *Id.* at 2329-2330.

³ *Id.* at 2330.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 2331.

⁹ *Id.* at 2332; See *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 570)).

¹⁰ *Id.* (citing *In re Great Lakes Dredge & Dock Co. LLC*, 624 F.3d 201, 210 (5th Cir. 2010)).

¹¹ *Id.* (quoting *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007)).

¹² *Id.* (quoting *Consol. Aluminum Corp. v. C.F. Bean Corp.*, 833 F.2d 65, 67 (5th Cir. 1985)).

connection between the defendant's conduct and the plaintiff's injury."¹³ The Fifth Circuit has affirmed that a "legal cause" standard is appropriate to assess maritime tort claims.¹⁴ In order to give rise to liability, a culpable act or omission must have been "a substantial and material factor in causing the injury."¹⁵ The meaning of substantial is " 'but for' the negligence, the harm would not have resulted, and more than merely negligible negligence."¹⁶

In maritime torts, "a foreseeability inquiry addresses whether 'the alleged harm bear[s] some proximate relationship with the negligent conduct such that it can reasonably be said to be within the 'scope of the risk' created by that conduct.'"¹⁷ Foreseeability is not based upon the risk of danger created by the defendant's actions, but upon whether the effects of those actions could be reasonably anticipated.¹⁸

Defendant argued that plaintiff failed to allege a legally cognizable claim for negligence.¹⁹ Defendant argued that plaintiff claimed that it negligently blocked the dock and violated the "duty of good seamanship" without explanation for the contentions.²⁰ Defendant noted that the captain of plaintiff's vessel failed to notify anyone aboard defendant's barge that the barge had allegedly blocked the dock.²¹ Accepting all of plaintiff's allegations as true, the court found that defendant could not have reasonably foreseen that plaintiff's injuries would be the probable result of defendant's occupation of the dock.²² Defendant's action, although inhibiting the ingress and egress of plaintiff, did not constitute the act of negligence.²³

Although employers have a court-recognized duty to provide their employees with egress and ingress, defendant maintained that there is no duty to provide ingress or egress to the crewmembers of other vessels.²⁴ The court found that this duty does not necessarily extend to non-employees.²⁵

Plaintiff failed to allege facts sufficient to find either that defendant breached any duty owed to plaintiff or that defendant's conduct was the proximate cause of plaintiff's alleged injuries.²⁶ The court granted defendant's motion to dismiss with prejudice.²⁷

Brian G. White
Class of 2016

¹³ *Id.*; *See Canal Barge Co. v. Torco Oil Co.*, 220 F.3d 370, 376 (5th Cir. 2000) (quoting *In re Cooper/T. Smith*, 929 F.2d 1073, 1077 (5th Cir. 1991)).

¹⁴ *Id.*; *See Chavez v. Noble Drilling Corp.*, 567 F.2d 287, 289 (5th Cir. 1978) (citing *Spinks v. Chevron Oil Co.*, 507 F.2d 216, 222–23 (5th Cir. 1975)).

¹⁵ *Id.* at 2333; *See Am. River Transp. Co. v. Kavos Kaliakra SS*, 148 F.3d 446, 450 (5th Cir. 1998) (quoting *Inter-Cities Navig. Corp. v. United States*, 608 F.2d 1079, 1081 (5th Cir. 1979)).

¹⁶ *Id.* (citing *Chavez*, 567 F.2d at 289).

¹⁷ *Id.*; *See In re Great Lakes Dredge & Dock Co. LLC*, 624 F.3d 201, 212 (5th Cir. 2010) (citing *Consol. Aluminum Corp.*, 833 F.2d 65, 67 (5th Cir.1985)).

¹⁸ *Id.*

¹⁹ *Id.* at 2334.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 2335.

²⁴ *Id.*; *See Superior Oil Company v. Trahan*, 322 F.2d 234, 235 (5th Cir. 1963) (recognizing an employer's duty under the Jones Act to provide "a seaman a reasonably safe means of boarding and departing from the vessel).

²⁵ *Id.* at 2336; *See Koserkoff*, 427 F.2d 1049.

²⁶ *Id.*

²⁷ *Id.*

**SECOND CIRCUIT DOES NOT RECOGNIZE TORT OF FINANCIAL
UNSEAWORTHINESS BUT PLAINTIFF MAY RECOVER ECONOMIC LOSSES UNDER
CONTRACT THEORY**

Thyssenkrupp Materials N.A., Inc. v. Western Bulk Carriers A/S
27 F.Supp.3d 400
United States District Court for the Southern District of New York
(Decided June 16, 2014)

United States District Court granted defendant’s motion for summary judgment on plaintiff’s tort claim of financial unseaworthiness due to the validity of the claim being unsettled in the Second Circuit and because plaintiff failed to allege the type of damages required under the tort. However, defendant’s motion for summary judgment on the contract claim was denied as premature due to incomplete discovery at the time of filing the motion.

Thyssenkrupp Materials N.A., Inc. (“Thyssenkrupp”) brought an action to recover economic losses arising from a three-month delay in shipping cargo from Western Bulk Carriers A/S (“WBC”) caused by the seizure of the chartered vessel by creditors.¹ The parties had entered into a charter party contract under which Thyssenkrupp chartered from WBC the vessel M/V Sanko Mineral, which was owned by The Sanko Steamship Company of Japan, to carry approximately 7,415 metric tons of steel from Turkey to the ports of New Orleans and Houston.² However, during the course of the voyage, creditors attached the vessel pursuant to an *ex parte* order issued by the District Court for the District of Maryland.³ The ship was held in Baltimore for approximately three months before being released and completing its voyage.⁴

Thereafter, Thyssenkrupp asserted multiple theories of liability, including a tort claim of financial unseaworthiness, as well as, a breach of contract claim as its business was negatively affected by the delay.⁵ It claimed that the intended purchaser rejected the steel because of the delay, and Thyssenkrupp then sold the steel at a discounted price.⁶ This resulted in a \$577,212 loss from the difference between the market value of the steel at the scheduled arrival date and the compensation Thyssenkrupp received after selling the steel to different buyers for a reduced price.⁷ Additionally, plaintiff alleged that four plates of steel, with a claimed value of \$10,834.20 each, were missing upon discharge in Houston.⁸ No physical damage to the cargo was alleged.⁹ Following plaintiff’s complaint, WBC moved for summary judgment on both the tort and contract claims of financial unseaworthiness.¹⁰

¹ *Thyssenkrupp Materials N.A., Inc. v. Western Bulk Carriers A/S*, 27 F.Supp.3d 400, 401 (S.D.N.Y. 2014).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 402 (claimants asserted that “the cargo . . . was lost, damaged and depreciated by defendants, due to the fault, neglect, deviation, unseaworthiness, maritime tort, tortious interference with contract, breach of warranty, sinking, stranding, salvage expenses, general average, delay, financial unseaworthiness, breach of contract and conversion of defendants, their agents and servants, and delivered by the defendants in non-conforming and contaminated condition, mis-delivered and non-delivered.”).

⁶ *Id.* at 401.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 402.

The court first addressed defendant's motion for summary judgment as to the tort claim. It found that the issue of a maritime tort of financial unseaworthiness was at minimum unsettled, if not one of first impression to the Second Circuit.¹¹ Although other Circuit Court decisions suggested the viability of such a tort claim, there was no binding authority on the court to recognize a maritime tort of financial unseaworthiness.¹² One court that recognized the tort of financial unseaworthiness found a carrier liable where the cargo "was damaged not only by the breach of contract of carriage by the vessel but also by the physical and financial unseaworthiness of the vessel and the negligence of the owners and/or operators."¹³

The court stated that, even if it was willing to be the first court within the Second Circuit to recognize a tort of financial unseaworthiness, the claimant "fail[ed] to demonstrate a valid claim because it has not suffered the type of damages required to assert the tort," and would be barred by the economic loss doctrine established in *Robins Dry Dock*.¹⁴ In order for Thyssenkrupp to have such a valid tort claim, he must have alleged: (1) a duty to provide a seaworthy vessel; (2) foreseeable termination or interruption of the intended voyage due to the financial condition of the vessel's owners; (3) actual termination or interruption resulting from the financial condition; and (4) damages which are commonly the loss of prepaid freight or physical damage to the cargo.¹⁵

The court found that plaintiff failed to allege valid damages of loss of prepaid freight or physical damage to the cargo, which is consistent with the general rule against awarding purely economic damages in unintentional maritime tort cases.¹⁶ Plaintiff sought only to recover the difference between the market value of the steel at the scheduled delivery date and the value at the actual delivery.¹⁷ Therefore, because the validity of the claim was not settled in the Second Circuit or in any other binding precedent and because Thyssenkrupp failed to allege all the elements of financial unseaworthiness, the court granted defendant's motion for summary judgment on the tort claim of financial unseaworthiness.

Defendant also moved for summary judgment on plaintiff's claim that WBC breached the charter party by failing to exercise due diligence and/or by providing a financially unseaworthy vessel. Thyssenkrupp's alleged breaches of the charter party included WBC's guarantee that the chartered vessel be free from financial obligations that would interfere with its performance and that WBC would be responsible for damages caused by interruption of the vessel's performance.¹⁸ Additionally, plaintiff alleged that defendant's summary judgment motion to the breach of contract claim was premature as discovery had not been completed and factual issues remained that could bear further development.¹⁹ These issues included whether the vessel itself was financially unseaworthy and whether WBC took diligent steps to ensure the financial security of the vessel and its owner, which may give rise to disputed issues of material fact.²⁰ Lastly, Thyssenkrupp indicated the intention to submit expert reports in connection to the contract claim, which it could not timely do so with respect

¹¹ *Id.* at 405 (looking to eight cases that directly addressed financial seaworthiness and finding that "[n]one of these cases . . . arose in this Circuit, where the viability of the tort is at least an open question, if not one of first impression.").

¹² *Id.*

¹³ *Id.* See also *Associated Metals & Minerals Corp. v. Alexander Unity's MV*, 41 F.3d 1007, 1017 (5th Cir.1995).

¹⁴ *Id.* at 406. See also *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927).

¹⁵ *Id.* See also *In re Ocean Club Servs., LLC*, 355 B.R. 886 (Bankr.S.D.Fla. 2006).

¹⁶ *Id.* at 407. See also *Robins Dry Dock & Repair Co.*, 275 U.S. 303 (1927); *Am. Petroleum & Transport, Inc. v. City of New York*, 737 F.3d 185, 195-96 (2d Cir.2013).

¹⁷ *Id.* at 408.

¹⁸ *Id.*

¹⁹ *Id.* at 409. See also Fed.R.Civ.P. 56 (d) (1).

²⁰ *Id.*

to the motion.²¹ Thus, the Court denied WBC's summary judgment motion as to the contract claim without prejudice to renew the motion at a later date.²²

Based on these findings, defendant's motion for summary judgment on the tort claim was granted and its motion for summary judgment on the contract claim was denied.

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²¹ *Id.*
²² *Id.*

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