JOSEPH A. CALAMARI ADMIRALTY PRACTICUM

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The Admiralty Practicum is published bi-annually by the Admiralty Law Society of St. John's University School of Law to bring to the attention of practitioners and other interested persons the highlights of recent court decisions in the admiralty field. The case summaries presented herein may not discuss all issues addressed by the various courts. Therefore, readers are advised to consult the original case sources.

RULE B OF THE SUPPLEMENTAL RULES IS NOT APPLICABLE TO THE ATTACHMENT OF ELECTRONIC FUNDS TRANSFERS.

The United States Court of Appeals for the Second Circuit affirmed a decision by the United States District Court for Southern District of New York rejecting attempts to gain *quasi in rem* jurisdiction by attaching electronic funds transfers of an originating foreign account; and a suspense account which was created to comply with a maritime attachment order was not attachable property; nor was a right of refund under the "money-back guarantee" provision of the New York Uniform Commercial Code.

Allied Maritime, Inc. v. Descatrade SA
United States Court of Appeals, Second Circuit
620 F.3d 70
(Decided September 3, 2010)

This case arose from damages sustained to a vessel that the defendant, Descatrade SA ("Descatrade" or "Defendant"), a Swiss company, chartered from plaintiff, Allied Maritime, Inc. ("Allied" or "Plaintiff") in July, 2008, to transport cargo from China to West Africa. On April 10, 2009, while arbitration was pending in London, Allied filed a complaint in the District Court for the Southern District of New York, seeking to attach Descatrade's assets in New York. Allied sought to attach these assets under Rule B of the Supplemental Rules ("Rule B") as a pre-judgment security for the anticipated London arbitration award.

On April 15, 2009, the District Court issued a process of maritime attachment and garnishment ("PMAG") against Descatrade's assets in the Southern District of New York, including accounts with BNP Paribas and HSBC Bank USA, N.A. The issuance was pursuant to Second Circuit law at the time, namely *Winter Storm Shipping, Ltd. v. TPI*,[1] which provided that under Rule B, an electronic funds transfer ("EFT") between two foreign banks that "cleared" momentarily through a so-called "intermediary bank" in New York was attachable property of the originator or the beneficiary of the transfer.[2] The PMAG was issued *ex parte* because under *ProShipLine, Inc. v. Aspen Infrastructures, Ltd.*,[3] a putative defendant would only receive notice after its property was attached.[4]

On June 25, 2009, Descatrade ordered BNP Paribas in Paris to transfer $400,000 electronically to another Descatrade account with HSBC in Paris. BNP Paribus arranged for the transfer of the EFT, which was routed through HSBC in New York. In compliance with the PMAG served on BNP Paribas in New York, BNP Paribas suspended the EFT and placed it into a suspense account. It was not clear from the record whether the suspense account was located in Paris or in New York.

The Second Circuit's decision in *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*,[5] overruled the precedent set in *Winter Storm*.[6] *Shipping Corp. of India* held that since EFTs for which the Defendant was a beneficiary were not property that could be attached under a PMAG, they could no longer provide jurisdiction over a defendant who was absent from that district.[7] In response to *Shipping*

[1] 310 F.3d 263 (2d Cir. 2002).
[2] *Allied Mar., Inc. v. Descatrade SA*, 620 F.3d 70, 72 (2d Cir. 2010)
[3] 585 F.3d 105, 111 (2d Cir. 2009).
[4] *Id.*
[5] 585 F.3d 58 (2d Cir. 2009).
[6] *Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.*, 585 F.3d 58, 61 (2d Cir. 2009) *cert. denied*, 130 S. Ct. 1896, 176 L. Ed. 2d 402 (U.S. 2010) ("We now conclude, with the consent of all of the judges of the Court in active service, that *Winter Storm* was erroneously decided and therefore should no longer be binding precedent in our Circuit.")
[7] *Id.*

Corp. and for want of jurisdiction, the District Court vacated the April 15, 2009, order of attachment.[8]

The issue on appeal was whether the District Court abused its discretion in finding that there was no *quasi in rem* jurisdiction over (1) Descatrade's bank account in Paris, (2) the suspense account in New York, and (3) Descatrade's right to repayment. At both the District Court and on appeal, Allied argued first that *Shipping Corp. of India* applied only to EFTs restrained at intermediary banks; and was therefore inapplicable to the Descatrade EFT becausee BNP Paribas, the originating bank, controlled that transfer that was maintained in a suspense account, not a third-party intermediary. Like the District Court, the Second Circuit rejected this argument, but they did not completely rely on *Shipping Corp. of India* to do so. The Second Circuit also applied New York's separate entity rule, which provides that each branch of a bank is treated as a separate entity for the purpose of attachment, thereby treating BNP Paribas in Paris as an entirely separate entity from a BNP Paribas in New York. [9] Therefore, the Second Circuit affirmed that Descatrade's account with BNP Paribas in Paris was not subject to *quasi in rem* jurisdiction.

Like the District Court, the Second Circuit also rejected Allied's argument that the BNP Paribas suspense account was located in New York, and, therefore, was attachable in the jurisdiction. Although the Court noted that the record on appeal was unclear regarding whether the suspense account had been created in a BNP Paribas in Paris or in New York, the Court followed *Scanscot Shipping Services (Deutschland) GmbH v. Metales Tracomex LTDA*,[10] and held that the suspense account would not be subject to attachment as Descatrade's property because the funds contained in an EFT cease to be the property of the originator once the EFT is initiated, and do not become the beneficiary's property until the EFT is completed when the beneficiary's bank accepts the payment order.[11]

Finally, the Second Circuit rejected Allied's argument that Descatrade retained an attachable interest in the suspense account pursuant to the Uniform Commercial Code's "money-back guarantee" provision of N.Y. U.C.C. § 4-A-402, which allows an originator to recover its funds in the event a funds transfer cannot be completed. The Second Circuit determined that an attachment could not be justified based on a right of refund that would not have existed but for the attachment as effected by a suspense account, and therefore, the Court lacked jurisdiction over the right to repayment.

The Second Circuit held that the District Court properly concluded that it lacked jurisdiction over Descatrade's bank account in Paris, the suspense account created by the bank in response to the PMAG, and Descatrade's right to repayment arising from the EFT.

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[8] *Allied*, 620 F.3d at 73.
[9] *See* Cronan v. Schilling, 100 N.Y.S.2d 474 (Sup. Ct. 1950).
[10] 617 F.3d 679 (2d Cir. 2010).
[11] *Allied*, 620 F.3d at 75 (citing Scanscot Shipping Serv. (Deutschland) GmbH v. Metales Tracomex LTDA, 617 F.3d 679 (2d Cir. 2010)).

A SETTLING TORTFEASOR WHO HAS OBTAINED A RELEASE OF ALL OTHER POTENTIAL TORTFEASORS FROM A PLAINTIFF MAY BRING A CLAIM OF CONTRIBUTION AGAINST NON-SETTLING POTENTIAL TORTFEASORS. MOREOVER, THE *LOUISIANA* RULE AND THE PASSING VESSEL PRESUMPTION DO NOT PROVIDE PRESUMPTIONS OF SOLE LIABILITY; JOINT TORTFEASORS ARE ENTITLED TO ALLOCATE DAMAGES IN ACCORDANCE WITH THEIR RELATIVE FAULT.

The United States Court of Appeals for the Fifth Circuit held that a contribution action is not moot where a settling tortfeasor has obtained a release of all other potential tortfeasors from a Plaintiff. In addition, the District Court mistakenly applied: the *Lousiana* Rule and the passing vessel presumption between co-defendants; the wrong standard of proof for rebutting the presumptions; and wrongly interpreted the presumptions as presumptions of sole liability.

Combo Maritime, Inc. v. U.S. United Bulk Terminal, LLC
United States Court of Appeals, Fifth Circuit
615 F.3d 599
(Decided August 23, 2010)

This case stems from an allision between a drifting unmanned barge and an anchored vessel. The defendant, U.S. United Bulk Terminal LLC ("United" or "Defendant"), operated a barge fleeting facility on the Mississippi River, where it managed and moored several barges. In the early morning of February 28, 2008, one of United's barges broke free of its moorings, drifted downstream, and allided with the anchored *M/V Alkman*, a vessel that belonged to Combo Maritime Inc. ("Combo"). Combo filed a complaint against United, the *M/V Marlene Ellis,* and the *M/V Brenda Koestler* on July, 14, 2008, alleging that the damage to the *M/V Alkman* was caused by United's negligence in its failure to properly and safely maintain and secure its barging fleet.

On September 10, 2008, United answered and asserted a third party complaint for indemnity and contribution against Carnival Corporation ("Carnival") and the cruise ship *M/V Fantasy*. United alleged that the *M/V Fantasy*, navigated past these barges in close proximity and at full speed thereby creating "wave action, wheel-wash, suction, and other effects"[1] and caused the moorings to fail and the barges to break free.

Carnival filed its motion for partial summary judgment on March 17, 2009, asking the Eastern District of Louisiana to hold United liable for Combo's damages and dismiss United's claims against Carnival and the *M/V Fantasy*. After applying both the *Louisiana* Rule[2] and the passing vessel presumption, the District Court found that United had not satisfied its burden of disproving fault by a preponderance of the evidence and dismissed United's claims against Carnival. The court also prohibited United from arguing or presenting any evidence that Combo's damages were in any way caused by Carnival.

Following the District Court's decision for the dismissal of claims against Carnival, United settled with Combo. In the settlement agreement, Combo released all of its claims against all parties and assigned all of its claims against Carnival to United. Soon after, United filed an appeal of the District Court's order on summary judgment and judgment on United's third-party claims to the Court of Appeals for the Fifth Circuit.

[1] *Combo Mar., Inc. v. U.S. United Bulk Terminal, LLC,* 626 F.Supp.2d 635, 636 (2009), *reversed by*, Combo Mar., Inc. v. U.S. United Bulk Terminal, LLC, 615 F.3d 599 (5th Cir. 2010).
[2] *See* The Louisiana, 3 Wall. (70 U.S.) 164, 18 L. Ed. 85 (1865) (applying a presumption of fault when to a vessel that allides with a stationary vessel).

The Court of Appeals first considered the issue of mootness in light of Combo's settlement with United.[3] United sought contribution, a recognized right of retribution for damages paid in excess of the parties respective degrees of fault. United's contribution request, however, may have been deemed untenable because the tortfeasor seeking contribution had settled its claim with the plaintiff. The court noted precedent indicated that a settling tortfeasor may not seek recovery from a non-settling tortfeasor based on an assignment of the property damage claim by the plaintiff.[4] Yet, mootness was avoided because United obtained a total release of all potential joint tortfeasors and the rights against all tortfeasors from Combo. According to the proportionate share rule, each defendant should only pay his share of the judgment.[5] In obtaining the full release, United settled the entirety of the claim and had a live case in seeking contribution.

Reviewing the ruling of the District Court *de novo*, the Court of Appeals found that the *Louisiana* Rule and the passing vessel presumption were inappropriately applied. The *Louisiana* Rule, akin to *res ipsa loquitor*, creates a rebuttable presumption of fault for a drifting vessel which allides with a stationary object.[6] Similarly, the passing vessel presumption places the burden of proof on the vessel that navigates closely to a moored vessel.[7] Generally, to overcome either presumption of fault a defendant must use contributory negligence, a reasonableness test, or an Act of God test.

The Court found that the *Louisiana* Rule was incorrectly applied between injurers, holding that the presumption is meant to allocate damage between injurers and their victims, and has no controlling weight in the third party injurer context.[8] Furthermore, the District Court inappropriately applied the Act of God test, which asks whether the vessel can show that the "accident could not have been prevented by human skill and precaution and a proper display of nautical skills,"[9] rather than the reasonableness test, which considers that "[t]he appropriate standard of care in this regime is based upon (1) general concepts of prudent seamanship and reasonable care; (2) statutory and regulatory rules . . . ; and (3) recognized customs and usages.' "[10]

In addition, these presumptions were erroneously construed by the District Court to allow the *Louisiana* Rule to surpass the passing vessel presumption. Instead, the Court of Appeals found that these presumptions were not to be used to determine the comparative fault between parties or causation; rather each presumption should be used to determine breach on the part of the alliding or passing vessel. Therefore, United should be allowed to present evidence of comparative fault at trial as it had originally intended before being disallowed by the lower court.

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[3] *Combo*, 615 F.3d at 602 (quoting Bailey v. Southerland, 821 F.2d 277, 278 (5th Cir. 1987) ("Whether an appeal is moot is a jurisdictional matter, since it implicates the Article III requirement that there be a live case or controversy.")).
[4] *See* Lexington Ins. Co. v. S.H.R.M Catering Servs., Inc. 567 F.3d 182, 185 (5th Cir. 2009).
[5] *See* United States v. Atlantic Research Corp., 551 U.S. 128, 139, 127 S. Ct. 2331, 168 L.Ed.2d 28 (2007).
[6] *See supra* note 2.
[7] *See* New Orleans Steamboat Co. v. M/T Hellespont Glory, 562 F. Supp. 391, 392 (E.D. La.1983).
[8] *Pasco Marketing, Inc. v. Taylor Towing Serv., Inc.*, 554 F.2d 808 (8th Cir. 1977).
[9] *Combo*, 615 F.3d 599, 608 (5th Cir. 2010) (citing James v. River Parishes Co., Inc., 686 F.2d 1129, 1132 (5th Cir. 1982) (internal citations omitted)).
[10] *Combo*, 615 F.3d at 605–06 (quoting Fischer v. S/Y Neraida, 508 F.3d 586, 594 (11th Cir. 2007) (internal citations omitted)).

AN ELECTRONIC FUNDS TRANSFER TEMPORARILY IN THE POSSESSION OF AN INTERMEDIARY BANK IS NOT SUBJECT TO ATTACHMENT UNDER RULE B, AND CANNOT BE USED TO ESTABLISH PERSONAL JURISDICTION OVER THE BENEFICIARY OR ORIGINATOR OF THE TRANSACTION. MOREOVER, WHERE A PARTY HAS NOT APPEARED TO CHALLENGE JURISDICTION, A COURT MAY RAISE THE ISSUE OF PERSONAL JURISDICTION *SUA SPONTE*.

The United States Court of Appeals of the Second Circuit held that an Electronic Funds Transfer was not an attachable property under Federal Rules of Civil Procedure Rule B(1)(a). Moreover, the attachment of such a transfer could not be used, by itself, to establish personal jurisdiction over the originator or beneficiary of the transfer.

Sinoying Logistics Pte Ltd. v. Yi Da Xin Trading Corp.
U.S. Court of Appeals for the Second Circuit
619 F.3d 207
(Decided August 31, 2010)

On January 18, 2008, plaintiffs Sinoying Logistics Pte Ltd. and Acoaxet 1 Shipping Pte Ltd. (jointly, "Sinoying"), a foreign-based charter company, and Yi Da Xin Trading Corporation, Yi Da Xin Trading Co. Ltd., and Yi Da Xin Limited (jointly, "YDX"), a Philippines and Hong Kong based shipping company, entered into a charter party, under which Sinoying agreed to deliver the vessel *M/V Acoaxet Lady* to YDX in the Port of Santa Cruz, Philippines. Sinoying alleged that shortly before delivery, YDX attempted to cancel the charter party and refused to pay Sinoying for delivery of the vessel.

Under the terms of the original charter party, the parties agreed that all aspects of any dispute would be resolved in arbitration in Hong Kong. Nevertheless, on April 21, 2008, Sinoying filed a complaint in the United States District Court for the Southern District of New York, seeking to attach YDX's property in New York banks as pre-judgment security for the pending arbitration in Hong Kong. Also on April 21, 2008, pursuant to the law in the Second Circuit at the time, the District Court time-signed an order of maritime attachment and garnishment under Rule B(1)(a).[1]

The order attached electronic funds transfers ("EFTs") at several banks in the Southern District of New York that originated from or were intended for YDX. Between July 16, 2008, and September 4, 2009, four EFTs were restrained pursuant to the order of attachment by three intermediary banks. Each of the EFTs were either originated by or intended for YDX, and were transmitted by banks in Hong Kong, Vietnam, China, and the Philippines to banks in those same respective countries. In each case, the EFT was required to be routed, momentarily, through the Southern District of New York in order for the intermediary bank in New York to clear a foreign dollar-denominated interbank transaction. The funds restrained from the EFTs totaled $649,480, leaving Sinoying fully secured in the event of recovery in the Hong Kong arbitration. This included arbitral costs and interest on the principal owed to Sinoying by YDX.

The restrained EFTs provided the District Court with personal jurisdiction over YDX based solely upon four wire transfers between two foreign banks processed momentarily at a bank in New York. YDX, however, did not appear in the District Court to raise or waive an objection to the District Court's personal jurisdiction over it, or to argue the merits of the case.

On October 13, 2009, a Hong Kong arbitration panel found YDX fully liable for breach of the charter party, and issued an Interim Final Arbitration Award in favor of Sinoying. Shortly thereafter, on October 16, 2009, the United States Court of Appeals, Second Circuit decided *Shipping Corp. of India*

[1] FED. R. CIV. P. B(1)(a).

Ltd. v. Jaldhi Overseas Pte Ltd.,[2] which overruled *Winter Storm Shipping, Ltd. v. TPI*.[3] The Court in *Jaldhi* held that EFTs temporarily in the possession of an intermediary bank may not be attached under Rule B, because under New York law such EFTs are not attachable property of the originator or beneficiary. Following the decision in *Jaldhi*, the District Court ordered Sinoying to show cause why it should not vacate the order of attachment.

Sinoying responded to the District Court's order to show cause by arguing that *Jaldhi*: (1) was incorrectly decided; (2) should not be applied retroactively; and (3) was inapplicable where the intermediary bank had secured funds associated with the restrained EFT in a suspense account within the Southern District of New York. Sinoying did not contend that it could establish personal jurisdiction on any alternative basis.

The District Court rejected each of Sinoying's arguments and concluded that the rule announced in *Jaldhi* had a retroactive effect, based upon *Hawknet Ltd. v. Overseas Shipping Agencies*.[4] Accordingly, on December 15, 2009, the District Court vacated the attachment and dismissed the complaint for lack of personal jurisdiction. Also on December 15, 2009, the Hong Kong arbitration panel issued a Final Arbitration Award in favor of Sinoying.

Following the Final Arbitration Award, Sinoying appealed the judgment of the District Court. On appeal, Sinoying argued that the District Court erred (1) by vacating the attachment order in its entirety; (2) by dismissing the complaint for lack of personal jurisdiction after raising the issue *sua sponte*; and (3) by applying the *Jaldhi* rule retroactively.

With respect to Sinoying's first argument, the Second Circuit noted that Sinoying did not dispute that the District Court had the power to revisit and vacate *sua sponte* the order attaching YDX's assets in New York, only that it had abused its discretion by doing so in this case. The Court held that the District Court correctly followed the precedent of *Jaldhi* by vacating the order of attachment because the attached property consisted of EFTs temporarily suspended at intermediary banks in New York. Therefore the District Court did not abuse its discretion by vacating the order of attachment in its entirety.

With respect to Sinoying's second argument, that the District Court erred by raising its lack of personal jurisdiction *sua sponte*, Sinoying argued that the waiving or raising of personal jurisdiction is a right of a defendant alone. The Court held that the District Court was correct in raising its lack of personal jurisdiction. The Court reasoned that although personal jurisdiction can be waived, and a dicstrict court should not raise personal jurisdiction *sua sponte*, when a defendant declines to appear a court may assure itself that it has personal jurisdiction over the defendant before granting such motion. Therefore, because YDX failed to appear, it was not an abuse of discretion for the district court to raise the issue of personal jurisdiction *sua sponte*. As a result, in addressing the issue of personal jurisdiction, it was proper for the District Court to order Sinoying to show cause why it should not vacate the order of attachment and dismiss the complaint. Subsequently, Sinoying's failure to sustain its burden to show cause confirmed that the District Court lacked personal jurisdiction over the defendant.

The final argument asserted by Sinoying was that the *Jaldhi* rule should not apply retroactively. The Court rejected Sinoying's argument, concluding that the holding in *Hawknet* did not allow for equitable considerations by the District Court. Therefore, the Court held that under *Hawknet* District Courts must vacate any attachment orders granted before the decision in *Jaldhi* to the extent that those orders are inconsistent with that decision.

As a result, the Second Circuit affirmed the judgment of the District Court.

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[2] 585 F.3d 58 (2d Cir. 2009).
[3] 310 F.3d 263 (2d Cir. 2002).
[4] 590 F.3d 87 (2d Cir. 2009).

OWNERS OF A TEMPORARILY NON-OPERATIONAL VESSEL WERE NOT ENTITLED TO COMPENSATORY DAMAGES FOR THEIR UNILATERAL ACTIONS TO MITIGATE DAMAGES.

The Eight Circuit Court of Appeals upheld the United States District Court's holding that it was improper to compensate a party for voluntary payments made to employees during a vessel's closure, where the employer acted to mitigate damages or make payments without legal obligation.

American Milling Co. v. Trustee of the Distribution Trust
United States Court of Appeals, Eighth Circuit
623 F.3d 570
(Filed on October 19, 2010)

Plaintiff-Appellant Trustee of the Distribution Trust ("President Casino")[5] appealed the decision of the United States District Court for the Eastern District of Missouri, which denied President Casino's claims for relief to recover promotional expenses incurred for extra advertising and "cash coupon[s]"[6] that it allegedly acquired after The Admiral's closure. Additionally, President Casino sought to recover wages and tips owed to its hourly employees during the closure. The Eight Circuit held that the District Court did not err in its findings since it found no sufficient evidence to support President Casino's claims for relief.

On April 4, 1998, Appellee American Milling's ("Appellee") towboat, towing fourteen barges, collided with the Eads Bridge located near St. Louis, Missouri. The collision caused the tow to break apart and resulted in several barges floating uncontrolled downstream. Consequently, President Casino's casino boat, *The Admiral*, closed for twenty-six days. At trial it was determined that the Appellee was eighty percent at fault for the accident. The remaining twenty percent of fault was attributed to President Casino for their failure to protect *The Admiral* despite past accidents where the casino boat was moored.[7]

The first issue the Circuit Court considered was whether the District Court clearly erred in denying President Casino's claim for extraordinary advertising and cash coupon expenses. Where the District Court sits in admiralty, the Eight Circuit Court of Appeals may only reverse if left with a definite and firm conviction that an error has been committed.[8] President Casino argued that the Court's denial of damages was clearly erroneous because both sides' expert witnesses found an increase in President Casino's advertising and promotion expenses in the month following the accident. Accordingly, President Casino argued that there were some damages incurred. Nevertheless, the District Court was not required to accept the opinion of either expert, as the weight accorded to an expert opinion is left to the discretion of the Judge in these cases.[9]

Here, the Court of Appeals held that it was not clearly erroneous for the District Court to infer against President Casino's position. First, President Casino failed to introduce their expense budget for the months after the accident. President Casino not only had access to the budgets, but also introduced this budget to prove revenues lost during *The Admiral's* closure. The selective unwillingness to disclose warranted an inference that those figures were unfavorable to the casino's advertising and cash coupon

[5] Plaintiff-Appellant is referred to as "President Casino," even though the claim is now pursued by a trustee in bankruptcy.
[6] "A 'cash coupon' is a promotional coupon that is mailed to potential customers who can redeem the coupon at The Admiral for chips to be used in various casino games." *See* Am. Milling. Co. v. Tr. Distrib. Trust, 623 F.3d 570, 572 (8th Cir. 2010).
[7] *In re Am. Milling Co.*, 270 F. Supp. 2d 1068, 1111 (E.D.Mo. 2003), *aff'd in part, rev'd in part,* 409 F.3d 1005 (8th Cir. 2005).
[8] *Anderson v. Bessemer*, 470 U.S. 564, 575 (1985).
[9] *Pittman v. Gilmore,* 556 F.2d 1259, 1261 (5th Cir. 1977) (noting that a Judge has discretion when sitting without jury).

claims.[10] Second, Appellee argued that President's Casino's cash coupon expenditures were significantly higher after the allusion than previous fiscal years because the casino changed their marketing strategy, not because the expenditures were a result of the accident. Finally, President Casino's total advertising expenditures were lower in the fiscal year after the accident than in previous fiscal years. Although the advertisement expenditures increased the month after the accident, the overall decrease in advertising expenditures for the year warranted the conclusion that any estimated increase in advertising expenses resulting from the accident were speculative.

The second issue the Circuit Court considered was whether the District Court erred in determining that President Casino's decision to pay wages and tips to its employees during The Admiral's closure was voluntary. President Casino contended that damages should contain paid wages and tips for the following reasons. First, President Casino maintained that it paid $799,535 in wages and $172,169 in tips to retain its hourly employees. Second efforts were taken to mitigate future damages that would have resulted from a staffing shortage. Third, President Casino was fearful that certain "key employees" would seek alternative employment, potentially causing a costly delay in *The Admiral's* reopening. Fourth, the Missouri Gaming Commission only allowed twelve people a week to apply for a casino license, and if President Casino could not retain its employees, it would be further delayed in reopening by waiting for new employees to apply for casino licenses. Finally, President Casino alleged that employees reported to work during the closure and therefore, the casino had a legal duty to pay them for their time, despite the absence of any contractual obligation to pay its employees during *The Admiral's* closure.

The Court of Appeals stated that an Admiralty Court would not compensate a party for either voluntary payments made to mitigate damages, or payments made without legal obligation.[11] Again the burden was on President Casino to show sufficient evidence that the circumstances gave rise to a legal duty.[12] President Casino could not identify any specific employees who did or might have gone elsewhere, nor could they identify the probability of their departure. Additionally, they failed to establish how many employee departures could be tolerated without delaying the reopening of the casino. Consequently, the Court was left without an important piece of information in determining whether the company's payments were necessary to mitigate damages. Furthermore, the Court said that "key employees" had less incentive to leave President Casino because they received higher wages than "regular employees." Finally, Appellee argued that the casino labor market in St. Louis was operating at full capacity at the time of the accident. Thus, there would be no available work for the employees even if they wanted to leave. President Casino produced no evidence to refute this claim.

Accordingly, the Court of Appeals held the District Court did not clearly err in finding that President Casino was under no legation obligation to pay its employees' wages and tips during The Admiral's closure. Therefore, American Milling was not liable for any of the extraordinary damages sought by the appellant. The District Court's holding was affirmed.

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[10] *See* Tupman Thurlow Co. v. S.S. Cap Castillo, 490 F.2d 302, 308 (2d Cir. 1974).
[11] *Crain Bros. v. Duquesne Slag Prods. Co*., 273 F.2d 948, 953 (3d Cir. 1959).
[12] *Am. Milling*, 623 F.3d 570 at 575.

MUNICPAL BOAT OWNER WAS NEGLIGENT WHEN IT BREACHED ITS DUTY TO FURNISH A SEAWORTHY VESSEL AND APPURTENANCES, RESULTING IN A SEAMAN'S HAND INJURY

Deckhand sued ferry owner for a hand injury sustained while lowering a ramp from a terminal dock. The Court found that the ferry owner breached its duty to furnish a seaworthy vessel, and that the Plaintiff was not comparatively negligent.

Paul Wesley v. City of New York
Supreme Court, Appellate Division, First Department
76 A.D.3d 925
(Decided September 28, 2010)

Paul Wesley ("Plaintiff"), a deckhand, sustained a hand injury while he was lowering a ramp from a terminal dock on City of New York's ("Defendant") ferryboat, "Michael Cosgrove."[13] This ramp contained a pulley system, known as "chain falls," with each chain fall consisting of an upper pulley system and a lower block.[14] The entire chain falls system was suspended from a single wire rope, which was attached to an overhead gallows. Plaintiff lowered a ramp which had a chain fall connected on each side, with two chains twisted around one another. While attempting to untwist the chains, the lower block spun and struck Plaintiff in the hand, causing injury. Plaintiff brought an action against City of New York seeking to recover damages for this injury.[15]

On August 31, 2009, the Supreme Court, Bronx County, issued an order denying Plaintiff's motion for partial summary judgment.[16] It found that issues of fact existed as to whether the chain falls were seaworthy, and whether Plaintiff was comparatively negligent in his handling of them.[17] Plaintiff appealed this judgment.

Relying on *Mitchell v. Trawler Racer, Inc.*,[18] the Appellate Division, First Department, concluded that Defendant breached its duty to furnish a seaworthy vessel and appurtenances "reasonably fit for their intended use."[19] In *Mitchell*, the Supreme Court outlined the origins of a seaman's right to recover for injuries sustained due unseaworthiness and noted that a ship owner's duty to provide a seaworthy vessel is absolute.[20] The Appellate Division also relied on *Barlas v. United States,*[21] in its judgment, explaining that a ship owner must provide a ship, crew and appurtenances reasonably fit for their intended use and services.[22]

To determine whether the chain fall equipment was seaworthy, this Court relied on the Plaintiff's uncontroverted expert testimony. Plaintiff's expert identified two causes for the spinning chains that resulted in Plaintiff's injury: (1) the failure to use an anti-rotational wire rope, and (2) the suspension of

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[13] *Wesley v. City of New York*, 76 A.D.3d 925, 925, 908 N.Y.S.2d 43 (App. Div. 1st Dep't 2010).
[14] *See id.* at 926.
[15] *See id.*
[16] *See id.* at 925.
[17] *See id.* at 926.
[18] 362 U.S. 539, 550 (1960).
[19] *Wesley*, 76 A.D.3d at 926 (quoting *Mitchell*, 362 U.S. at 550)).
[20] *See Mitchell*, 362 U.S. at 540 (describing the absolute warranty of seaworthiness and affirming its application). This case recounts an excellent history of the warranty of seaworthiness through a historical and international comparative analysis.
[21] 279 F. Supp. 2d 201, 206 (S.D.N.Y. 2003).
[22] *Wesley*, 76 A.D.3d at 926 (citing *Barlas*, 279 F. Supp. 2d at 206)).

the system from a single wire. The expert labeled the latter of the two causes as a "failure to use due care" and "bad practice."[23]

Finally, the Court determined that the Plaintiff performed his duties in an appropriate manner and, thus, was not comparatively negligent. Neither the Defendant's expert nor the Defendant's safety officer indicated that Plaintiff acted unreasonably or did anything improper when he tried to untwist the wires while the chain fall bore weight. Furthermore, the Court took note that Defendant's "Troubleshooting Guide" for the chain fall system did not caution against, and was silent, on the issue of untwisting chains while they sustained weight.[24]

Based on the foregoing, the Appellate Division, First Department reversed, holding that Plaintiff was entitled to judgment in his favor on the issue of liability.

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[23] *Wesley*, 76 A.D.3d at 926.
[24] *Id*. at 926-27.

IN ESTABLISHING A LIMITATION FUND, SECURITY RULE F(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT PROHIBIT A COURT FROM DECIDING, WITHIN ITS DISCRETION, WHETHER TO REQUIRE THE ACCRUAL OF SIMPLE INTEREST OR COMPOUND INTEREST.

The United States Court of Appeals of the Eighth Circuit held that statutory language of interest at six percent per annum did not mandate simple interest. Where equitable, a court may allow the statutory interest to be compounded. Moreover, where a party has elected to post monies for a limitation fund by one statutory method there is no absolute right to later switch to a different method; equity allows a court to preclude a method that would be detrimental to claimants.

American Milling Company v. Brennan Marine, Inc.
United States Court of Appeals, Eighth Circuit
623 F.3d 1221
(Decided Oct. 22, 2010)

American Milling ("Milling") appealed a lower court's ruling, which allowed compound interest to be assessed against a surety bond posted in a limitation of liability proceeding, and refused to allow Milling to convert the surety bond to a cash deposit.

Milling owned and operated the towboat M/V Anne Holly ("Holly"), which towed barges up the Mississippi. One or more of the barges broke free from the towboat, and caused damage to vessels owned by several parties, among them President Casino ("Casino"). Shortly thereafter, Milling filed a complaint seeking to limit its liability to the value of its vessel, pursuant to the Limitation of Shipowners' Liability Act[25] (the "Limitation Act"). In accordance with the Rule F(1)[26], American Milling also submitted security to establish a limitation fund. The sale of the Holly for $2.2 million was ruled to be as fair market value, and the limitation fund was therefore set at $2.2 million.[27]

The district court directed Milling to establish the fund either by posting a corporate surety bond in the amount of 2.2 million, or by depositing an equal amount in cash into the court registry.[28] American Milling elected to post a bond. By electing to give security, Milling obligated itself to pay statutory interest "at the rate of six percent per annum."[29] It was against this fund that Casino, and other claimants, filed suit to recover their damages.

After lengthy litigation, it was determined that Milling was eighty percent at fault for the collision, and was entitled to limit its liability to the $2.2 million. Milling moved to deposit the cash value of the limitation fund, along with the simple interest accrued on its security, into the registry of the court. Casino opposed the motion, and instead requested that the interest be compounded annually, and that the lower court not allow Milling to switch from a surety bond to a deposit of the cash value with the court's registry.

The court first observed that the statutory language of "per annum" simply dictates that the interest be on an annual basis, but gives no indication that the calculation has to be on a simple, as opposed to compounded, basis. The plain language, then, allows for compounding.

The court then observed limitation of liability proceedings have long been recognized as an administration of equity. Before the adoption of Rule F and its predecessors, courts had complete discretion to determine how much interest, if any, should be awarded and the date from when it should

[25] 46 USC § 30505 (2011).
[26] FED. R. CIV. P. F(1).
[27] *In re Am. Milling Co.*, 125 F.Supp.2 981 (E.D.Mo.2001).
[28] *Id*.
[29] FED. R. CIV. P. F(1).

accrue. The purpose of the statutory interest provision was to take from the courts discretion upon the question allowing interest, and to fix a rate of interest.[30] Nevertheless, the rules are silent on the issue of compounding.

Although the six percent rule has removed some of the court's equitable discretion, the court has retained considerable discretion outside of that specific rule. The absence of a rule on a specific issue such as compounding merely indicates that the question is governed by traditional judge-made principles, particularly in admiralty, which has a long history and tradition of wide judicial discretion in crafting flexible and fair rules and remedies.

Considerations of equity support the award of compounded interest, the court explained. Casino was forced to finance its own repairs through the course of lengthy litigation, as opposed to investing the funds elsewhere to earn a compound rate of return. At the same time, Milling's ability to post a security enabled it to invest the $2.2 million with the prospect of generating compound returns. Limiting the statutory interest to a simple rate of return would have the result of allowing Milling to profit by its wrong.

The court also added that the award of compound interest is not against the common law rule that compound interest is not allowed to be computed upon a debt. This rule, explained the court, has long been recognized to not apply to equity proceedings. Nor was the court persuaded by *Isthmian Steamship*,[31] where in an admiralty case involving a statute with "per annum" language the Supreme Court found nothing to authorize the accumulation of interest and ruled that "compound interest is not presumed to run against the US."[32] The court explained that the holding in *Isthmian Steamship* was limited by its terms to claims for compound interest against the Government, where there is an especially strong presumption against compounding.

Milling's second contention was that the district court erred in not allowing it to change the nature of its limitation fund deposit from a surety bond to the cash value of the vessel deposited into the court's registry. They argued that because the statute allows for such a cash deposit, the lower court was obligated to accept the cash value at any time.

Milling, the court said, initially chose to post a security, which imposed on it the obligation to pay interest on the security at six percent. In the meantime, Milling had the full use of the 2.2 million it would have had to deposit with the court had it chosen that option. As the litigation came to an end years later, and it was clear to Milling that it would have to pay the 2.2 million, it was no longer advantageous for it to post a security instead of depositing the cash value. Accordingly, Milling contended that the allowance provided in the statute to deposit the cash value with the court is an absolute and permanent right.

Again emphasizing the equitable nature of a limitation proceeding, the court disagreed. While allowing Milling to deposit with the Court would have been in the company's best interests, it would have been detrimental to Casino; the investments of the deposited funds would almost certainly have generated less than six percent. Casino had been forced to finance its own repairs, thus lending to itself through the course of the litigation. As such it was reasonable for the lower court to give substantial weight to the detrimental impact of Milling's switching to a deposit. Milling could have chosen to deposit cash with the court at the start of proceedings, but it did not. However, given the equitable nature of the limitation proceedings, it was not an abuse of discretion for the lower court to refuse to allow Milling to change its decision at such a late stage of the litigation.

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[30] *The Fairwill*, 56 F. Supp. 887, 889 (E.D. Va.1944).
[31] 359 U.S. 314 (1959).
[32] *Id.*, at 325.

NEW YORK HARBOR WATERFRONT COMMISSION'S DECISION NOT TO CREDIT HOLIDAY PAY TOWARD WORKER'S ELIGIBILITY FOR LONGSHOREMEN'S REGISTRY HAD A RATIONAL BASIS

New York Harbor Waterfront Commission decision not to credit holiday pay of a longshoreman toward work requirement minimums did not violate Waterfront Commission Act and was neither arbitrary nor capricious.

In the Matter of John Cambio v. Ronald Goldstock and Barry Evenchick
Supreme Court of New York
29 Misc.3d 888, 908 N.Y.S.2d 333
(Decided September 7, 2010)

The primary obligation of the Waterfront Commission of New York Harbour ("Waterfront Commission"), a bi-state agency, is to investigate criminal activity and ensure fair labor practices by maintaining a register of longshoremen in the Port of New York and New Jersey.[33] While only people on the register are eligible to work as longshoremen in the New York harbor, the Waterfront Commission is also required to remove from the list those, who "failed to work or apply for work during six-month intervals for a minimum number of days that are established by the Commission."[34] § 8.1(a) of the Waterfront Commission's Rules and Regulations proscribes that retention on the register requires a person to work " as a longshoremen or as a checker, or make himself available for work . . . a minimum of 90 days in each half-calendar year . . . ."[35]

The petitioner, John Cambio ("Cambio"), was a "checker," and for the purposes of the register, was qualified as a longshoreman. During the months of February, March, and April of 2009, Cambio worked less than the fifteen-day minimum required to remain on the register—in February and March of 2009, he worked fourteen days, and was given five days credit for vacation pay in April. After Cambio applied for work as a checker for the six months period in 2009, he was notified by the letter, dated August 5, 2009, that he failed to meet requirements for work. On September 8, 2009, Cambio submitted a Request for Retention on the Longshoremen's Register on the basis that he undertook additional employment outside the harbor, which, allegedly, constitutes a "good cause" to reinstate him to the registry.[36] On December 1, 2009, the Waterfront Commission made the determination to deny Cambio's Request for Retention, explaining that Cambio's additional employment did not constitute a good cause to reinstate him. He was removed from the registry system on December 8, 2009.

On April 5, 2010, Cambio instituted an Article 78 action against the respondents, each Commissioners of the Waterfront Commission, alleging that the determination letter was arbitrary and capricious. The Waterfront Commission filed a cross-motion to dismiss as time barred. Under Article 78, proceedings must be commenced "within four months after the determination to be reviewed becomes final . . . ."[37] Although The Waterfront Commission argued that Cambio filed four days after the statute of limitation expired, the court dismissed this cross-motion because the determination becomes binding only when the aggrieved party receives such notice; not when it was mailed.[38] Since Cambio received the determination letter on December 5, 2009, the four months period expired on April

[33] *See* New York Unconsolidated Laws § 9801 et. seq.; *see also* Waterfront Commission Act § 9827 [hereinafter WCA].
[34] *Cambio v. Goldstock*, 29 Misc.3d 888, 891–92, 908 N.Y.S.2d 333, 336 (2010 N.Y. Sup. Ct.); WCA § 9834.
[35] *Cambio*, 29 Misc.3d at 892, 908 N.Y.S.2d at 336 (citing N.Y. Comp. Codes R. & Regs. 21 § 8.1).
[36] WCA § 9837 (Reinstatement of a registrant must be made upon proper showing that "the registrant was engaged in the military service . . . or other good cause.")
[37] CPLR § 217(1).
[38] *Metro. Museum Historic Dist. Coalition v. Demontebello*, 20 A.D.3d 28, 796 N.Y.S.2d 64 (1st Dep't 2005).

5, 2010, which was the precise date when the petitioner filed the Article 78 action. Thus, the court found that the petition was timely.

According to the Waterfront Commission Act ("WCA"), The Waterfront Commission must "count as actual work the compensation received by any longshoreman pursuant to the guaranteed wage provisions of any collective bargaining agreement."[39] Cambio contended that because under the Collective Bargaining Agreement ("CBA") he was entitled to receive a holiday pay, the Waterfront Commission was obligated to count it toward minimum work requirements.[40] The Waterfront Commission, however, countered that the language in the WCA did not apply to holiday pay, but only to the Guaranteed Annual Income ("GAI"), under which no payments had been made for years.[41] The court determined that the Waterfront Commission correctly interpreted WCA, and the decision not to count holiday pay toward work requirement minimums therefore did not violate WCA. The court further reasoned that since GAI refers to a specific type of income, the "guaranteed wage" provision of the WCA related only to GAI because such construction of the WCA would reflect specialized knowledge of the operational practices in the harbor.[42] Therefore, the court held that the Waterfront Commission decision not to credit holiday pay was not arbitrary.

The court also noted that because the Waterfront Commission credits vacation pay towards minimum work requirements, this does not change the court's decision because vacation pay is mandatory under the CBA. Further, the court stated that the fact that the Waterfront Commission lowered the minimum work requirements for certain periods of time would not justify a change in the outcome in this case, because the WCA permits the Waterfront Commission to make such changes.[43]

The court was also not persuaded by Cambio's argument that his outside business commitments constituted a good cause for his reinstatement on the registry list. The court reasoned that the purpose of the minimum working requirements was to have list of longshoremen who were available for work while weeding out casual laborers.[44] The court dismissed the Article 78 petition with prejudice.

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[39] WCA § 9907.
[40] *Cambio*, 29 Misc.3d at 894, 908 N.Y.S.2d at 337.
[41] *Id.* at 895.
[42] *Id.* at 893.
[43] WCA § 9835.
[44] *Cambio*, 29 Misc.3d at 893, 908 N.Y.S.2d at 336.

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