ADMIRALTY PRACTICUM

WINTER 2011

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Marcus Araujo
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Thomas J. Greene
Anna Livshina
Richard Mayer
Shlomo Maza
Carlo Sciara

Co-Editor..... Ryan Adams
Co-Editor..... Andrei Pascariu

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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.

Note from the Editor:

Our longtime faculty advisor, Professor Joseph A. Calamari, is retiring from teaching at St. John's University. While I have only known Professor Calamari for a short time, his influence on the Admiralty Law Society has been absolute. Not only did he create the society and this publication, but he oversees every aspect of our publication. Because his influence on our society is so important and so great, we have decided to honor him by making this distinction known to all.

Henceforth, the St. John's Admiralty Law Society shall be known as the Joseph A. Calamari Admiralty Law Society; the *Admiralty Practicum* will be the *Joseph A. Calamari Admiralty Practicum.* The club and the paper have always belonged to him, and this will now be reflected in the title. This change is effective April 1, 2011. Accordingly, our Summer 2011 issue will reflect these changes.

Ryan Adams
Editor-in-Chief

THE STATE OF GEORGIA WAS NOT ENTITLED TO ELEVENTH AMENDMENT IMMUNITY FROM SUIT WHERE IT LACKED "ACTUAL PHYSICAL" POSSESSION OF THE RES IN QUESTION

The United States Court of Appeals for the Eleventh Circuit affirmed a district court decision holding that actual physical possession of the res is required to assert Eleventh Amendment immunity.

Aqua Log, Inc. v. Georgia
United States Court of Appeals, Eleventh Circuit
594 F.3d 1330
(Decided January 28, 2010)

The Eleventh Circuit Court of Appeals considered an appeal from the district court in two *in rem* admiralty actions. Aqua Log, Inc. ("Aqua Log") filed *in rem* actions against the State of Georgia seeking to salvage certain "deadlogs." Georgia intervened, claiming ownership of these logs and filed a motion to dismiss in each claim, arguing that the court lacked subject matter jurisdiction because the Eleventh Amendment prohibits the Federal Government from adjudicating the State's interest in the logs. The district court denied the motions to dismiss and Georgia appealed.

The objects in question, "deadlogs," were of a peculiar interest to Georgia. Georgia's rivers and streams, the Altamaha River in particular, are host to a small percentage of logs that were cut from old growth forests in the nineteenth and early twentieth centuries.[1] Because these logs are relics of old growth forests, they hold "certain valuable characteristics not found in modern timber."[2] Pursuant to a statutory scheme, Georgia governs the use and ownership of "submerged cultural resources" and is given title to these, empowering the Georgia Department of Natural Resources ("DNR") to enact rules and regulations to protect or cover such resources.[3] Georgia had a special permit system in place for the salvage of "deadlogs," and Aqua Log sought to circumvent this system by complaint in its *in rem* actions.[4] The district court held that the Eleventh Amendment "did not defeat federal jurisdiction because the state lacked actual possession of the res at issue in each case," from which Georgia appealed.[5]

Jurisdictional power over admiralty actions[6] is limited by the Eleventh Amendment to an extent, but does not "defeat federal jurisdiction over all *in rem* admiralty actions to which a state claims an interest."[7] For the Eleventh Amendment exception to apply, the state must: (1) not consent to federal jurisdiction; (2) have a "colorable claim to possession of the res," and (3) be in possession of the res.[8] Because Georgia neither waived immunity nor consented to jurisdiction, and had "at least" a colorable claim to ownership, the sole issue on appeal was whether Georgia had possession of the "deadlogs."[9]

As a preliminary matter, the Court noted that "a government can assert sovereign immunity in an *in rem* admiralty proceeding only when it is in possession of the res."[10] The Court noted that this possession requirement is ambiguous. Analyzing the possession requirement in precedent and other

[1] 594 F.3d 1330, 1332 (11th Cir. 2010).
[2] *Id.*
[3] *See* O.C.G.A. § 12-3-80–83.
[4] *See* Aqua Log, Inc. v. Georgia, 594 F.3d 1330, 1332 (11th Cir. 2010).
[5] *Id.* at 1333.
[6] *See* U.S. CONST. art. III, § 2, cl. 1 ("[a]ll cases of admiralty and maritime Jurisdiction.").
[7] *Aqua Log*, 594 F.3d at 1333.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 1334 (citing California v. Deep Sea Research, Inc., 523 U.S. 491, 506–07 (1998)).

areas of law, the Court determined that most important is the requirement that the state have "actual possession," notably physical control. [11]

Defining "actual possession" as " 'physical possession' or 'actual personal dominion' " the Court found that Georgia failed to meet this burden. [12] Because Georgia failed to show physical control or the exercise of dominion over the logs by state officers, Georgia could not claim Eleventh Amendment immunity. Although Georgia proffered an argument that it exercised control by using sonar and employing a statutory scheme of control, the Court held that at the most these only rose to "constructive possession of the logs."[13] Legal control over the logs was also held insufficient.

Ryan Adams
Class of 2012

[11] *Id.* at 1335 ("[a]fter reviewing this precedent, we conclude a state must exert some element of physical control over the res to satisfy the possession requirement.").

[12] *Id.* at 1336–37.

[13] *Id.* at 1337.

A COMMERCIAL SHIPPING VESSEL'S OWNER'S FAILURE TO PROVIDE A WRITTEN CONTRACT PROVIDING FOR THE CREW'S WAGES BEFORE LEAVING PORT IN VIOLATION OF 46 U.S.C. § 10601 WAS NOT A BASIS FOR COMPENSATORY OR PUNITIVE DAMAGES

The United States Court of Appeals for the First Circuit affirmed the United States district court's ruling that there was no basis for the award of additional or punitive damages.

Borkowski v. F/V Madison Kate
United States Court of Appeals, First Circuit
599 F.3d 57
(Decided March 19, 2010)

Appellants were three commercial fishermen who served aboard the F/V Madison Kate, owned and operated by Sea Ventures, LLC, the appellee. In March 2006, appellants ventured on a commercial fishing voyage on appellee's vessel, which departed from Stonington, Connecticut. Contrary to federal maritime law, no written agreement explicitly stating the terms of appellants' employment was made before the ship left port. Upon return, each crew member was paid a portion of the boat's proceeds. This consisted of the value of what was caught, minus various expenses and the appellee's own share. The gross value of the vessel's cargo was $120,806, and the expenses incurred totaled $48,663. The appellee paid its crew under a "lay-share" system which consisted of the proceeds of the trip being divided into shares and then awarded, in whole or in part, to crew members based on each member's experience and performance. Appellants Borkowski and Wood each received a full share, which totaled to $2,231.48 minus certain expenses. Appellant Ayers received a 3/4 share, totaling $1,420.61. These three men sued, claiming violations of federal maritime law and Massachusetts wage laws.

The appellants filed suit against the appellee in district court of Massachusetts, claiming violations of federal maritime law and Massachusetts wage laws. Their claim alleged: (1) violation of 46 U.S.C. §10601, which requires a fisherman's wage agreements to be in writing; (2) violation of 46 U.S.C. §11107, which voids commercial fishing agreements if unlawful conduct transpires; (3) intolerable conduct warranting punitive damages and (4) violation of various Massachusetts wage laws. The Court awarded defendant Ayres an additional quarter share totaling $557.87, and nothing to the other two appellants. An appeal was then taken by appellants Borkowski and Wood.

The appellee readily conceded that it violated 46 U.S.C. §10601's written agreement requirement, so the only issue before the First Circuit Court of Appeals was the appellants' damages. The district court held that §10601 is a liability statute, with §11107 as its exclusive remedy statute. The appellants argued that their remedy was not limited to the compensation in §11107 alone and asked for an application of maritime common law to supply additional compensatory and punitive damages. Upon review of *Boston & Maine Corp. v. Massachusetts Bay Transportation Authority*,[1] the Court indicated it was not required to decide whether the remedy set forth in §11107 serves as the exclusive remedy for §10601, nor to decide whether federal maritime law preempted application of the Massachusetts wage laws. The Court affirmed the district court's judgment on the basis that the appellants failed to prove any other measure of compensatory damages or any basis for an award of punitive damages.[2]

The Court agreed that it would be difficult to pin down the precise nature of the damages claimed. The appellants argued that they were entitled to compensatory damages equal to their share of the amount of expenses deducted by the appellee without the written agreement required by §10601. In

[1] 587 F.3d 89, 98 (1st Cir. 2009).
[2] *Borkowski v. F/V Madison Kate*, 599 F.3d 57, 60 (1st Cir. 2010).

its decision, the district court had relied on language from *Doyle v. Huntress*.[3] It was stated there that where fisherman have already been paid a lay-share from the proceeds of the fishing voyage, there was no real remedy for vessel owners' failure to comply with §10601, absent §11107. The appellants argued that this is only *dictum*, but according to the Court their claim failed for lack of evidence. The compensatory relief sought under §10601 was premised on the claim that the appellee improperly deducted expenses. There was no evidence presented by the appellants that would warrant a conclusion that the deductions were improper other than their counsel's use of descriptive terms such as "incorrect" and "fraudulent." Moreover, as a result of an agreement between the district court and the parties' counsel, none of the appellants directly testified. Thus, the Court held that there was no evidence of damage to the appellants.

Regarding the appellants' claim for punitive damages, the Court agreed that the appellee's violation of the writing requirement was a mistake. The Court found that punitive damages do not automatically follow from a statutory violation. Moreover, the appellants were also paid under a lay-share system which was not illegal or unjust. The issue, therefore, was not that the appellants were not paid, but that there was no actual written agreement made between the appellants and the appellee. The Court held for these reasons that punitive damages against the appellee were not warranted.

The appellants also argued that the appellee breached Massachusetts wage laws. The district court ruled that appellee's failure to issue a written agreement did not constitute a failure to pay the appellants and thus did not violate any Massachusetts wage law. On appeal, however, the appellants did not address the district court's conclusion that no violation had transpired. For this reason, the Court of Appeals ignored as waived any argument that the district court wrongly decided the merits of the wage claim. Accordingly, the district court's decision was affirmed by the Court of Appeals insofar as it had denied the appellants' claims for compensatory and punitive damages.

Marcus Araujo
Class of 2013

[3] 419 F.3d 3, 9 (1st Cir. 2005).

THE "EMPLOYEE STATUS" REQUIREMENT OF THE LONGSHORE ACT IS NARROWLY DEFINED, AND REQUIRES THAT AN EMPLOYEE ENGAGE IN THE PROCESS OF UNLOADING AND LOADING VESSELS

Norfolk Southern Railway Company improperly removed an action to federal court, arguing that the Longshore Act, not FELA, applied to its claims. The district court remanded the case and the Defendant appealed. The Court of Appeals held that the Plaintiff did not fulfill the requirement for "maritime status" necessary for suit under the Longshore Act.

In re Norfolk So. Railway Co.
United States Court of Appeals, Eighth Circuit
592 F.3d 907
(Decided January 27, 2010)

The defendant, Norfolk Southern Railway Company ("Norfolk"), maintained a coal loading facility located at Lamberts Point Coal Terminal in Norfolk, Virginia ("Lamberts Point"). Coal cars would arrive at the facility and stored in the courtyard. These cars would be loaded and secured using manual brakes. Afterwards, they would be released individually and would slide down an incline onto rotary dumpers. These dumpers would rotate the conveyors and dump the coal into oceangoing containers located at Pier 6. The plaintiff, David Demay ("Demay"), was employed by Norfolk as a railroad switchman/conductor. On October 22, 2008, he was injured at Lamberts Point while working. It was his responsibility to place the rail cars and set the handbrakes. He climbed onto a loaded car to direct movement of the other loaded cars. While he was climbing down from the top of the car, he fell onto the track and broke multiple ribs.

Demay filed suit in St. Louis County, Missouri. His cause of action was under the Federal Employers Liability Act ("FELA"),[1] a statute which does not permit a defendant in state court to remove his case to federal court.[2] Despite this fact, the defendant removed the suit to federal court, asserting that the Longshore Act controlled the claim because Demay was a maritime employee. In order for the Longshore Act to apply, an employee must sustain an injury while working: "(1) at a maritime *situs*; and (2) in a maritime *status*."[3] Neither party contested that the plaintiff was working at a maritime *situs*. The district court held that FELA applied, not the Longshore Act, because Demay was not working in a maritime *status* and accordingly remanded the case to the state court since there was no removal jurisdiction. Norfolk appealed.

The first issue on appeal was whether the Court of Appeals had power to review the district court's decision, where 28 U.S.C. § 1447(d) precludes a Court of Appeals from evaluating a remand order based on lack of subject matter jurisdiction.[4] The plaintiff argued that remand based on improper subject matter jurisdiction under § 1445(a) prohibited appellate review under §§ 1447(c) & (d). Conversely, the defendant argued that in remanding the case the district court made no decision regarding subject matter jurisdiction and therefore, the decision was reviewable.

This was a matter of first impression for the Court. In analyzing the issue, the Court cited *Filla v. Norfolk Southern Railway Company*,[5] which specified that a court's capacity for review is dependent on "the district court's basis for remand," and that where the basis for remand is lack of subject matter

[1] 28 U.S.C. § 1445(a).
[2] *See* Demay v. Norfolk S. Ry. Co., 592 F.3d 907, 910 (8th Cir. 2010).
[3] *Id.* (quoting Ne. Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 265 (1977). *See* 33 U.S.C. §§ 901–950.
[4] *See* Demay, 592 F.3d at 910–12; 28 U.S.C. § 1447.
[5] 336 F.3d 806, 809 (8th Cir. 2003).

jurisdiction, the case is "not reviewable on appeal."[6] The Court then went on to cite two cases, *Bloom v. Metro Heart Group of St. Louis, Inc.*,[7] and *Phillips v. Ford Motor Co.*,[8] where it was held that 1445(c) could not involve subject matter jurisdiction because parties waived their remand to state court arguments when they failed to timely move for remand.[9] Positing that 1445(a) and (c) should be interpreted in the same light, the Court held that 1445(a) similarly does not involve subject matter jurisdiction. Therefore, the Court held that the district court's decision to remand could not have been based on lack of subject matter jurisdiction and, consequently, the Court had the power to review the district court's remand and § 1447 was not applicable.

The second issue on appeal was whether the district court properly determined that Demay's injury was not covered by the Longshore Act and instead was covered by FELA. To fulfill the *situs* requirement, the injury must occur, "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."[10] Here, this requirement was conceded by both parties.

The requirement in contention was the *status* requirement. Congress defined an "employee" under the Longshore Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, ship-builder, and ship-breaker."[11] The United States Supreme Court extended Congress' definition in other contexts, focusing on the nature of the employee's occupation. It cited an example that indicated that the intent of Congress was to cover employees who unloaded vessel cargo within their definition.[12] Therefore the test for whether the "*status*" requirement is met involves an inquiry into whether the employee loaded and unloaded vessels. The United States Supreme Court also stated that "the loading process begins when a hopper is rolled down an incline to a mechanical dumper which is activated by trunnion rollers and which dumps the coal through the hopper onto the conveyer belts."[13] Here, Demay was not involved in the loading process but rather in the process prior to the carts' descent. Accordingly, the Longshore Act did not provide him with different jurisdictional coverage. The fact that his actions were essential to the loading process was held not sufficient to provide coverage under the Longshore Act. Therefore, the Court held that the plaintiff's claim was properly brought under FELA, and the district court properly remanded the case to the state court.

Jackie Bokser
Class of 2012

[6] *Id.*
[7] 440 F.3d 1025, 1025 (8th Cir. 2006).
[8] 83 F.3d 235, 235 (8th Cir. 1996).
[9] *See* Demay 592 F.3d at 911.
[10] 33 U.S.C. § 903(a).
[11] 33 U.S.C. § 902(3).
[12] *See* Demay 592 F.3d at 913 (citing Chesapeake & Ohio Ry. Co. v. Schwalb, 493 U.S. 40, 48 (1989)).
[13] *Schwalb*, 493 U.S. at 42–43.

THE SIXTH CIRCUIT COURT OF APPEALS REFUSED TO ADOPT A FUNCTIONAL DEFINITION OF CARRIERS UNDER COGSA

The Court of Appeals for the Sixth Circuit affirmed a district court judgment and refused to adopt a functional definition of "carrier" under COGSA.

Fortis Corporate Insurance, SA v. Viken Ship Management AS
United States Court of Appeals, Sixth Circuit
597 F.3d 784
(Decided March 10, 2010)

In 1998 FedNav International ("FedNav"), a Canadian Company, entered into a time-charter agreement with Viken Lakers to charter the Inviken for a period of several years. In 2002, Metallia subchartered the Inviken from FedNav in order to transport a cargo of 176 steel coils from Szczecin, Poland to Toledo, Ohio. Fortis Corporate Insurance ("Fortis") insured the transport of Metallia's cargo. Seawater entered the ship and resulted in rust damage to ninety-nine of the steel coils.

As the insurer of the cargo, Fortis paid Metallia $375,000 for the damage to its steel coils. Fortis then brought an action as Metallia's subrogee against Viken Lakers, along with the ship's manager, Viken Ship Management ("VSM"), to recover this amount. The complaint alleged negligence and breach of bailment against both defendants.

The action was initially dismissed by the United States District Court for the Northern District of Ohio for lack of personal jurisdiction over the defendants. *Fortis* appealed the district court's judgment and the United States Court of Appeals for the Sixth Circuit reversed, remanding the case to the district court for further proceedings.

On remand, both defendants moved for summary judgment on the ground that the suit was filed after the one-year statute of limitations provided for by COGSA. Fortis conceded that the suit was filed after the one-year statute of limitations, but argued that COGSA did not apply because neither of the defendants were "carriers" within the meaning of the Act.

The district court held that Viken Lakers was a "carrier," and therefore the suit against it was barred by the statute of limitations. The district court also concluded, however, that VSM was not a "carrier," the statute of limitations was not applicable and the suit proceeded to trial. At trial, the district court found that VSM was negligent in investigating and failing to remove the seawater from the cargo hold and that this negligence was the proximate cause of the rust damage to the steel coils.

VSM then appealed once again to the Sixth Circuit, raising two issues. The first was whether the district court erred in concluding that VSM was not a "carrier," thereby making COGSA's one-year statute of limitations inapplicable. The second issue was whether the district court erred in finding VSM negligent.

VSM argued that the district court's conclusion that it was not a carrier was based on the unnecessarily formalistic approach that it was not the owner or charterer of the contract for carriage in this case. VSM argued that this formalistic approach overlooked the realities of the modern day shipping environment because now managers often carry out the duties that traditionally belonged to ship owners or charterers when COGSA was first enacted in 1936. Instead, VSM asked the Court to adopt a functional approach where an entity is treated as a carrier under COGSA if it carries out a function traditionally carried out by a carrier, even if the entity is not an owner or charterer. VSM further contended that the language of the statute supports this functional approach by providing that "the term 'carrier' includes the owner and the charterer,"[1] but does not limit the application to these two

[1] 46 U.S.C. § 30701 (2010).

entities. Therefore, VSM maintained that the language of the statute was consistent with the functional approach.

The Court, citing *Robert C. Herd & Co. v. Krawill Machinery Corp.*[2], rejected this functional approach. In that case, the United States Supreme Court unanimously held that the language of COGSA provides that the Act only applies to carriers; not to agents of carriers. VSM distinguished the present case by arguing that the stevedoring company in *Herd* did not contend that it was a carrier, only that it was an agent of the carrier, whereas in this case VSM contends that it is a carrier itself. The Court rejected this argument, reasoning that it would completely undermine the decision in *Herd*. Under VSM's rationale, although the Court in *Herd* held that COGSA does not apply to agents of carriers, the holding would not be controlling because VSM did not argue that COGSA should apply to it as an agent of a carrier, but instead that it was in fact a carrier. The Court held that the decision in *Herd* was clear: agents of carriers are not covered by COGSA, and VSM's attempt to get around this holding by arguing that it was itself a carrier because it performs the functions of a carrier was unavailing; it was still an agent, and therefore, COGSA does not apply.

Another reason the Court gave in support of its holding was that VSM and Fortis were free to extend the application of COGSA in their contract to VSM. They had the ability to do this through a Himalaya Clause if they wished to do so. As a result of this opportunity for VSM to ensure coverage under COGSA through contract, the Court found no reason to depart from the precedent of the Supreme Court.

On the issue of VSM's negligence, the district court had held that VSM was negligent in its investigation of the cause of the high bilge soundings and in failing to take adequate remedial measures to prevent the damage to the steel coils. VSM argued that these finding were based on "clearly erroneous factual findings." In support of this argument, VSM contended that the district court's holding was erroneous because it runs contradictory to the evidence of inspection in the ship's log books.

The Court rejected this argument, holding that the district court did not fail to acknowledge the ship's log book entries, but instead concluded that the inspection was inadequate to discover the cause of the problem. The Court held that the findings by the district court were reasonable, and therefore the conclusion that the rust damage to the steel coils was proximately caused by VSM's negligence was supported by the evidence. As a result, the Court of Appeals affirmed the district court's judgment.

Nicholas Fink
Class of 2012

[2] 359 U.S. 297 (1959).

A YACHT IS A "VESSEL" AND THEREFORE IS SUBJECT TO MARITIME LIENS AND ADMIRALTY JURISDICTION; DRYDOCKING A VESSEL DOES NOT NECESSARILY DIVEST IT OF A "VESSEL" STATUS

The Eleventh Circuit Court of Appeals reversed the judgment of the district court, holding that the Betty Lyn II was a "vessel" subject to maritime liens and admiralty jurisdiction because although taken out of water for repairs, she was never temporarily disabled, and therefore was capable of transportation on water, and the extent of repairs was not so great as to virtually transform the repair work into new construction.

Crimson Yachts v. Betty Lyn II Motor Yacht
United States Court of Appeals, Eleventh Circuit
603 F.3d 864
(Decided on April 12, 2010)

Plaintiff-appellant Crimson Yachts appealed the verdict of the United States District Court for the Southern District of Alabama, which found that the Betty Lyn II was not a "vessel," and was not subject to maritime liens. Since the maritime lien was a prerequisite to the court's admiralty jurisdiction, the district court concluded that it lacked jurisdiction over an *in rem* proceeding against the Betty Lyn II.

The defendants, Betty Lyn II Holding LLC, and Betty Lyn II Motor Yacht, agreed to have their 132-foot yacht, the Betty Lyn II, undergo a major overhaul performed by Crimson Yachts. This overhaul was to include an extension of the yacht's docks along with a replacement of its engines, generators, electronics, navigation, equipment, plumbing, and wiring. The Betty Lyn II's engines, propellers, propeller shafts, generators, and most of its furniture and equipment were removed, and it was towed to Crimson Yachts' shipyard. The overhaul and repairs required Crimson Yachts to remove the Betty Lyn II from the water and place her in a covered shed. The work and corresponding payments continued for a year and a half until the defendants ceased payment.

Crimson Yachts claimed the defendants owed it 1.2 million dollars in unpaid invoices, so they commenced suit in district court, bringing *in rem* and *in personam* actions. The defendants filed a motion to vacate a lien against the Betty Lyn II, and to dismiss the *in rem* claim for lack of admiralty jurisdiction. The court concluded that the Betty Lyn II was out of navigation due to the major overhaul. Because of this finding, the yacht was not a "vessel" and thus, the district court did not have admiralty jurisdiction over her pursuant to the Federal Maritime Lien Act.[1]

The question presented to the Eleventh Circuit was whether the Betty Lyn II was a "vessel" subject to maritime liens and the court's jurisdiction, or whether the major overhaul revoked her "vessel" status due to her lack of engines, generators, navigation, equipment, and the status of her repairs being conducted on land.

On appeal, the Court of Appeals reviewed the purpose of maritime liens, which originated in part to encourage necessary services to ships whose owners are unlikely to make payment while the ship was away from its home port.[2] Maritime liens also allow injured repairers or suppliers to obtain payment by allowing them to proceed directly against the vessel *in rem*. Thus, maritime liens could benefit both parties in this litigation.

In 1989 Congress passed the most recent version of the Federal Maritime Act.[3] Congress "did not intend to effect any dramatic substantive change" pursuant to this act.[4] Its goal, however, was to

[1] *See* Crimson Yachts v. Betty Lyn II, 603 F.3d 864, 868 (citing 46 U.S.C. §§ 31341–43).
[2] *Id.* at 869–70.
[3] *See* 46 U.S.C. § 31342.
[4] *See* Crimson Yachts, 603 F.3d at 872.

resolve misunderstandings that had developed about the meaning of the Act. In addition, Congress intended that "the literal language of the statute" would control the reasoning of the courts interpreting the Act.[5] The Federal Maritime Act provides that "only repairs performed on a 'vessel' generate a maritime lien."[6] So the ship's status as a "vessel" is a prerequisite to the attachment of a maritime lien. Furthermore, 1 U.S.C. § 3 provides the definition of a "vessel" to include "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[7]

Reviewing precedent, the Court noted that the United States Supreme Court made clear that a ship towed into port for extensive repairs, despite its dilapidated state, may remain a vessel subject to admiralty jurisdiction during the overhaul.[8] In *Pleason v. Gulfport Shipbuilding Corp.*,[9] the former Fifth Circuit held that a steamship, capable of being towed before and after its repairs, was capable of being used as a means of water transportation. Thus the *Pleason* court held the steamship to be a vessel. In *Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans*,[10] the Court held that ships which are temporarily stationed in a particular location are vessels and ships which are permanently affixed to shore or resting on the bottom of the ocean are not vessels. This principle established that a ship is a "vessel" if the ship's use as a means of transportation is a practical possibility and not a mere theoretical possibility.

Here, the Court of Appeals held the Betty Lyn II was a vessel. Despite her massive overhaul and repairs she was not temporarily disabled because the legislative language demonstrates that maritime liens were designed to encourage repairs on ships in great need. Furthermore, the Betty Lyn II was capable of transportation on water which demonstrated her status as a "vessel" because the law does not require her to be able to self-propel and she was always able to be towed upon 24 hours notice during her massive overhaul. In addition, Betty Lyn II was only temporarily stationed for repair so her use as a means of transportation on water was a practical possibility. Finally, the Court held the fact that the Betty Lyn II was dry docked did not revoke her status of "vessel" because all serious repairs of vessels are made in dry docks. Furthermore, policy reasons found the Court not wishing to deprive courts of their most important jurisdiction in connection with repairs: the connection between the owner of the vessel and the injured repairmen or supplier.

Accordingly, the Court reversed and remanded the case to the district court, holding that the Betty Lyn II was indeed a "vessel," which subjected her to maritime liens and admiralty jurisdiction.

Thomas J. Greene
Class of 2013

[5] *Id.* (quoting H.R. Rep. No. 100-918, at 16 (1988).
[6] *Crimson Yachts*, 603 F.3d at 872.
[7] 1 U.S.C. § 3.
[8] *Crimson Yachts*, 603 F.3d at 872 (citing N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co., 249 U.S. 119, 123 (1919)).
[9] 221 F.2d 621, 622–23 (5th Cir. 1955).
[10] 535 F.3d 1299, 1310 (11th Cir. 2008).

A LAKE OWNER'S TRESPASS CLAIM AGAINST HIS NEIGHBOR FOR BUILDING A DOCK RESTS UPON A DETERMINATION OF THE NON-NAVIGABILITY OF THE LAKE

The Supreme Court of New York, Appellate Division, Second Department, reversed a denial of summary judgment, holding that plaintiff's lake was non-navigable, and, therefore, defendant was not a riparian owner and had no right to build a dock on the lake.

Julie Schafler Dale v. Andy Chisholm, et al.
Supreme Court of New York, Appellate Division, Second Department
67 A.D.3d 626
(Decided November 4, 2009)

The plaintiff, Dale, acquired ownership of a parcel of land that included the Lower Lake Nimham ("the lake"). The defendant, Chisholm, purchased a parcel of property adjacent to that of the plaintiff's and obtained a deed that granted him rights to use the lake for recreational activities, but prohibited the use of power boats on the lake. Sometime after the purchase, defendant installed a dock on the lake, prompting Dale, to commence an action to recover damages for defendant's alleged trespass on her property.

Defendant counterclaimed, alleging that the deed did not restrict the installation of a dock on the lake. Dale moved for summary judgment on the complaint, dismissing the defendant's counterclaim. On September 24, 2008, the Supreme Court, Putnam County, denied plaintiff's motion, finding that issues of fact existed as to whether or not the lake was a navigable body of water. Plaintiff appealed to the Appellate Division, Second Department, which reversed the lower court's decision.

The Court held that the plaintiff made a prima-facie showing that the body of water here was non-navigable.[1] Upon characterizing the lake as non-navigable, the Court proceeded to determine the defendant's right of use. Citing *Town of Oyster Bay v. Commander Oil Corp.*,[2] the Court stated that, since the lake was non-navigable, the defendant was not a riparian owner and, therefore, did not have a right to build the dock on the lake.

Finally, the Court noted that, although defendant asserted that the lake could be used for recreational canoeing and kayaking, defendant failed to proffer any evidence as to the lake's capacity for transport, whether for trade or travel.[3]

Thus, the Appellate Division reversed the Supreme Court's denial of Plaintiff's summary judgment motion.

Anna Livshina
Class of 2012

[1] Navigation Law § 2(4)–(5); Morgan v. King, 35 N.Y. 454, 459 (1866).
[2] 96 N.Y.2d 566, 571, 734 N.Y.S.2d 108 (2001).
[3] Adirondack League Club v. Sierra Club, 92 N.Y.2d 591, 603, 684 N.Y.S.2d 168 (1998).

THE SECOND CIRCUIT COURT OF APPEALS VACATED AND REMANDED A RULING THAT DENIED AN APPELLANTS' MOTION TO DISMISS OR TO STAY AN ACTION AND COMPEL ARBITRATION

The United States Court of Appeals for the Second Circuit vacated and remanded the United States District Court for the Eastern District of New York's ruling that denied appellants' motion to dismiss or, in the alternative, to stay the action and compel arbitration. The Court held that the arbitration agreement between the parties was not unenforceable, under FELA, and that the appellee bore the burden of proving the arbitration agreement was not valid, and that the arbitration agreement was not substantively unconscionable.

Harrington v. Atlantic Sounding Co., Inc.
United States Court of Appeals, Second Circuit
602 F.3d 113
(Decided April 16, 2010)

Defendant-appellants Atlantic Sounding Company., Inc., Weeks Marine, Inc., and the vessel M/V Candace ("Defendants"), appealed the denial of their motion to dismiss, or, in the alternative, to stay an action and compel arbitration by the district court, in a personal injury action brought by the plaintiff-appellee ("Harrington"). Harrington, an employee of the defendants, sought recovery in district court for injuries he had suffered in April 2005, pursuant to the Jones Act,[1] while working aboard the M/V Candace, a vessel owned and operated by Defendants. Harrington, however, had previously signed a post-injury arbitration agreement in return for cash advances against his claim.

Defendants paid for all medical expenses related to his injury, and in early July 2005 Harrington contacted Defendants to ask for further financial support in anticipation of an upcoming surgery. In response, on July 11, 2005, Defendants sent him a "Claim Arbitration Agreement" in the mail, which he signed. The agreement provided for a cash advancement of 60 percent of gross wages he would have earned based on his earnings history, "[a]s an advance against settlement until [Harrington was] declared fit for duty, and/or at maximum medical improvement, and/or October 10, 2005, whichever occur[ed] first. . . ." in exchange for Harrington's agreeing to arbitrate his claims.[2] As of October 10, he was still unable to work and contacted Defendants for further support.

In response, Defendants sent Harrington the Addendum Claim Arbitration Agreement ("Addendum") which extended the partial payment of his wages until January 10, 2006 and specified that aside from this amendment, the prior Claim Arbitration Agreement remained in effect. On December 8, 2005, Harrington—who had testified later to drinking two quarts of vodka and six beers everyday when he had received the Addendum—brought the Addendum to the same notary who had notarized the first agreement. The notary testified that on neither occasion did Harrington appear intoxicated, and that when asked Harrington stated that he understood what he was signing. Defendants terminated Harrington's employment on January 27, 2006, and in June 2006 he filed the instant action. Defendants moved to dismiss or compel arbitration in July 2007 and two months after an evidentiary hearing to determine the validity of the agreement, the court found the agreement to be invalid and denied the defendants' motion in the entirety. The district court found that under section 2 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 2, "questions of contractual validity...under the underlying arbitration agreement must be resolved first as a matter of state law. . . ."[3] Applying New Jersey's law,

[1] 46 U.S.C. App. § 688 (2000).
[2] Harrington v. Atlantic Sounding Co., 602 F.3d 113, 116 (2d Cir. 2010).
[3] *See id.* at 118 (citing Cap Gemini Ernst & Young, U.S., LLC. v. Nackel, 346 F.3d 360, 365 (2d Cir. 2003)).

which the district court found to have "the most significant relationship to the arbitration agreements…" the court found the agreement both procedurally and substantively unconscionable and unenforceable.[4]

On appeal, the Court of Appeals found in favor of Defendants. The Court examined the agreement under the Federal Employers' Liability Act ("FELA").[5] The Court noted that the Supreme Court of the United States held that the Jones Act incorporates the doctrine of liability under FELA. The Court also found that following the adoption of the FAA a liberal federal policy favoring arbitration applied, and that the FAA broadly applies to "maritime transaction[s]."[6] Although employment contracts were exempt under the FAA, the arbitration agreement constituted a separate agreement to which the arbitration policy applies.[7] The Court also noted that nothing in FELA § 6 referred to the subject of arbitration agreements, and that § 5 does not bar seamen arbitration agreements.[8] The Court found that the agreement was not unenforceable as a matter of law.

Next, the Court considered the question of unconscionability. As a general rule, a party to an arbitration agreement seeking to avoid arbitration has the burden of showing the agreement to be inapplicable or invalid. The plaintiff argued that under *Garrett v. Moore-McCormack Co.*[9] the burden is shifted to the party that sets up the seaman's release. Here, however, the Court distinguished the facts. In *Garrett*, the issue was a release of rights, whereas here the issue was an agreement to arbitrate those rights, not to relinquish them. Having established who bears the burden, the Court then shifted the discussion to what constitutes unconscionability. Applying New Jersey law, the Court found that a sliding scale approach is favored, considering "relative levels of both procedural and substantive unconscionability."[10] Procedural unconscionability, however, does not by itself typically render an arbitration agreement unenforceable.[11] New Jersey law requires that for an agreement to be unconscionable it must include, "an exchange of obligations so one-sided as to shock the court's conscience."[12]

The district court held that misleading language in the agreement was substantively unconscionable; however the Court of Appeals disagreed. The Court held that misleading language is procedural in nature, and that in order to be substantively unconscionable it would have to "shock the court's conscience."[13] The Court did not find the language to have this effect. The Court also found that the alleged "unconscionable" provision was open to different interpretations, which in itself and without more does not make it substantively unconscionable. The Court did not find the bargain "so one-sided as to shock . . . the conscience," and stated that to find the bargain so one-sided would contravene the "liberal federal policy favoring arbitration agreements."[14] For the foregoing reasons, the district court's judgment was vacated and the case remanded.

Richard Mayer
Class of 2012

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[4] *Id.* at 118.

[5] *Harrington*, 602 F.3d at 119 (citing Am. Dredging Co. v. Miller, 510 U.S. 443, 456 (1994)); 45 U.S.C. § 51 et seq. (1908).

[6] *Harrington*, 602 F.3d at 121

[7] *See* Harrington, 602 F.3d at 121 (citing Gilmer v. Interstate/Johnson Lane Corp, 500 U.S. 20, 35 (1991)).

[8] *See* Harrington, 602 F.3d at 121 (citing George v. Watts & Son, Inc v. Tiffany & Co., 248 F.3d 577, 583 (7th Cir. 2001); *see also* Terrebonne v. K-Sea Transportation Corp., 477 F.3d 271, 280 (5th Cir. 2007).

[9] 317 U.S. 239, 248 (1942).

[10] *Harrington*, 602 F.3d at 125 (quoting Delta Funding Corp v. Harris, 912 A.2d 104, 111 (N.J. 2006)).

[11] *Id.*

[12] S*itogam Holdings, Inc v. Ropes*, 800 A.2d 915, 921 (N.J. Ch. Div. 2002).

[13] *Harrington*, 602 F.3d at 125.

[14] *Id.* at 126 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

IN A DAMAGE TO GOODS DURING SHIPPING CASE UNDER COGSA, A COURT MAY RELY ON PRE-LOADING SURVEYS TO DETERMINE THE GOODS WERE UNDAMAGED AT LOADING; FURTHERMORE, A COURT NEED NOT REQUIRE AT-DISCHARGE MARKET VALUATION FOR DETERMINING DAMAGES

The United States Court of Appeals for the Fifth Circuit affirmed the district court by holding that Plaintiff shipper need not prove receipt by carrier of goods in actual undamaged condition to recover damages; those damages may be calculated in multiple appropriate methods, and are only limited by COGSA if carrier provides shipper opportunity to declare higher value; and carrier can be sole party liable as private carriage even if carrying cargo for multiple shippers.

TradeArbed Inc. v. Western Bulk Carriers
United States Court of Appeals, Fifth Circuit
374 F. App'x 464
(Decided Jan. 26, 2010)

Western Bulk Carriers (Western Bulk) appealed an award of damages in favor of TradeArbed Inc. (TradeArbed), arising out of an agreement for Western Bulk to ship hot and cold rolled steel coils for TradeArbed, and moisture damage to those coils.

Western Bulk was a time charterer of the Medi Trader, owned by Seafarers Shipping. The coils were to be shipped from Bourgas, Bulgaria, to New Orleans. Although the coils were unloaded at New Orleans, they were not unwrapped until reaching their final destination up the Mississippi River, where the damage was discovered. On appeal, Western Bulk challenged: the district court's finding that the coils were undamaged when loaded, but damaged when unloaded; its damages assessment; and its finding that this was a private, not common, agreement of carriage, and that therefore Western Bulk was the sole party liable.

A prima facie case for damages requires a showing of Western Bulk's receipt of the coils in good condition, and delivery in damaged condition. Western Bulk pointed to the bills of lading for the coils, which took note of defects in the packaging. A clean bill of lading, however, is not the only way to show that a carrier received goods free of damage. Other evidence, such as loading surveys, can be used to prove good condition. Western Bulk contended that in absence of a clean bill of lading, TradeArbed bore a considerable burden to prove actual condition. The district court noted, however, that this burden of proving actual condition only applies where the cargo is a wrapped perishable good, which has been expressly distinguished from wrapped steel coils.[1] The district court examined photographs taken at the loading, and other evidence, based on which the court concluded that any rust was actually on the hot-rolled coils, not the cold rolled coils. The Circuit Court ruled that this was a sufficient basis for the district court's finding of fact.

To support Western Bulk's assertion that the damage to the coils was sustained post-delivery and offloading, the evidence in the record must make an adverse finding clearly erroneous. For the coils governed by bills of lading seven and eight, the court looked to three different surveys, all of which concluded that the damage was sustained on the "ocean carrier." The bill six coils, while the subject of some amount of conflict, were also concluded by some of the surveys to have been damaged during the ocean transit. For both of these groups of coils, therefore, the district court's ruling was based on numerous surveys, and not clearly erroneous.

Western Bulk also challenged the district court's calculation of damages. The district court awarded damages based on the difference between the price TradeArbed had originally contracted for and the price at which TradeArbed actually sold the coils after mitigation. Western Bulk contended that

[1] *Steel Coils, Inc. v. M/V Lake Marion*, 331 F.3d 422, 429 (5th Cir. 2003).

damages must be determined based on market value at discharge. Taking note of a United States Supreme Court ruling recognizing that there are occasions where other methods of calculation are required, and that the market value test is no more than a convenient methodology which may be discarded where inappropriate,[2] the Court disagreed with Western Bulk. At-discharge market value, the Court explained, was obviously not helpful because the coils were shipped packed, damage could not be ascertained until they were unpacked. Because the ultimate destination was upriver from the New Orleans discharge, they were not unpacked at discharge. Further, an expert witness at trial testified as to the fairness of the salvage price TradeArbed obtained for its damaged coils. The district court used this salvage price as the basis for its award, because this salvage agreement was made after the discovery of the damage, TradeArbed was not in a position to present any evidence of the at-discharge market price for this type of coil and number of defects.

The Court also denied Western Bulk's claim that the damages should have been limited by COGSA's $500 per-package limitation.[3] The Court explained that this limitation only applies where the carrier provides adequate notice and fair opportunity for the shipper to declare a higher value for its goods. Contrary to Western Bulk's assertion, this is not satisfied merely by incorporation of COGSA into the charter agreement.[4] Rather, the carrier bears the burden of providing specific further evidence, such as giving the shipper a choice of rates and valuations.[5]

Western Bulk's final contention was that this shipment was one of common, not private, carriage, and that therefore Seafarers (the ship's owner) should also be liable. Charter parties, explained the Court, are the contracts of carriage in private carriage; bills of lading are such contracts in common carriage. The district court's ruling, therefore, flowed from its finding of fact that the charter party agreement, not the bills of lading, was the relevant contract between TradeArbed and Western Bulk. Because only Western Bulk was a party to that contract, and because privity is required for liability under COGSA,[6] only Western Bulk was held liable. Accordingly, the issue turns on whether this factual finding was clearly erroneous.

Western Bulk asserted that because the Medi Trader was carrying cargo for more than one shipper it was engaged in common carriage. The Court, however, found this contention to be against the weight of precedent which clearly held that a voyage charter, not the bills of lading, was the contract of carriage, even though the ship also carried other cargo on behalf of another cargo shipper.[7]

Accordingly, the Court of Appeals rejected all of Western Bulk's contentions, and affirmed the ruling of the district court.

Shlomo Maza
Class of 2011

[2] *Illinois Cent. R.R. Co. v. Crail*, 281 U.S. 57, 64-65 (1930).
[3] 46 U.S.C. § 30701 (2006).
[4] *Couthino, Caro & Caro v. M/V Sava*, 849 F.2d 166, 171 n.6 (5th Cir. 1988).
[5] *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415, 424 (5th Cir. 1983).
[6] *Thyssen Steel Co. v. M/V Kavo Yerakas*, 50 F.3d 1349, 1353 (5th Cir. 1995).
[7] *Thyssen, Inc. v. Nobility MV*, 421 F.3d 295, 304 (5th Cir. 2005).

THE REGULAR NEGLIGENCE STANDARD OF CARE APPLIES TO DETERMINING WHETHER A CAPTAIN WAS NEGLIGENT

The Court of Appeals for the Fifth Circuit affirmed the district court's ruling that the defendant, Chios Beauty M/V, was guilty of negligence by not retreating to another port in the Gulf when Hurricane Katrina was predicted to hit New Orleans. The case was remanded, however, to address questions concerning the total amount of pre- and post-judgment interest the plaintiffs are to receive.

Crescent Towing & Salvage Company, Inc. v. Chios Beauty M/V
United States Court of Appeals, Fifth Circuit
610 F.3d 263
(Decided June 23, 2010)

At 6:30 a.m. on August 25, 2005, Chios Beauty M/V launched from Vera Cruz, Mexico bound for New Orleans. Chios Beauty was owned by Chios Shipping, a Panamanian corporation, and operated by Harbor Shipping & Trading, S.A. ("Harbor Shipping") whose agent in New Orleans was Sunrise Shipping Agency, Inc. ("Sunrise"). Tropical storm Katrina turned into a hurricane later that day, and Ntouslazis, the captain of Chios Beauty, was mistaken where the storm was located.

On August 26, a Sunrise representative asked a Harbor Shipping representative whether the ship should come into New Orleans. Harbor Shipping told Sunrise to bring the ship into New Orleans and claimed they could not track the path of the storm. That day the National Hurricane Center ("NHC") issued two advisories predicting the hurricane would make landfall somewhere within a 400-mile stretch of coastline that included New Orleans. [1] At 4 a.m. on August 27, NHC issued another advisory with New Orleans being at the center of where the hurricane will hit. At 8:30 a.m., Chios Beauty arrived at Southwest Pass (the navigable mouth of the Mississippi River) and twenty-five minutes later took on a pilot and entered the river. Later that day, the ship was moored at a wharf opposite several barges and tugboats owned by plaintiffs. Katrina hit the port, snapping Chios Beauty's lines. The storm surge carried the vessel across the river, where it collided with plaintiffs' barges and grounded several tugboats.[2]

Plaintiffs filed their claim against the Chios Beauty *in rem*, Harbor Shipping, and Chios Shipping in United States District Court for the Eastern District of Louisiana. The American Owners Mutual Protection and Indemnity Association, Incorporated:

> [U]ndertook to pay Plaintiffs any sum . . . which either may be agreed between the parties and approved by the Association, or which is adjudicated to be due . . . in the matter pending in the . . . district court . . . from the vessel, *in rem*, and/or its Owner by final judgment . . . provided that the total of our liability here under shall not exceed the sum of US $3.75 million . . . inclusive of interest and costs.[3]

The district court, after a five day bench trial, ruled in favor of plaintiffs, holding the defendants had been negligent "by failing to prudently monitor and interpret the available weather information concerning Hurricane Katrina and for sailing the vessel into the Port of New Orleans and directly into the path of Hurricane Katrina" when there was adequate time to divert to a safer port.[4] The amount of the security provided by the Association's letter was increased to $5.5 million, which was determined to

[1] Crescent Towing & Salvage Co., Inc. v. Chios Beauty MV, 610 F.3d 263 (5th Cir. 2010).
[2] *Id.* at 266.
[3] *Id.*
[4] *Id.* at 266-277.

be the value of Chios Beauty. Defendants were found to be jointly and severally liable to plaintiff, Cooper Consolidated, for $279,000.00 and to Crescent Towing for $4,638,487.40. Plaintiffs were also entitled to prejudgment interest from August 29, 2005 to August 15, 2008 and post judgment interest pursuant 28 U.S.C. § 1961.[5]

Crescent Towing made a motion for an amended judgment in part setting the rate of prejudgment interest at four percent which was granted, but its motion to alter the standard of care to which the court had held the defendant was denied. Plaintiffs made a motion to amend the judgment so that interest could run in excess of the $5.5 million provided by the note. This motion was denied as the plaintiffs' total *in rem* recovery was limited to $5.5 million. Both parties appealed.[6]

Defendants claimed that the district court erred in applying a regular negligence standard of care, rather than the heightened *in extremis* standard, in judging whether the captain of Chios Beauty was negligent in continuing to travel to New Orleans. The *in extremis* standard of care is used in admiralty cases "where, without prior negligence, a vessel is put in the very center of destructive natural forces and a hard choice between competing courses must immediately be made, the law requires that there be something more than a mere mistake of judgment by the master in that decision."[7] The Court of Appeals ruled that the *in extremis* standard should not apply because the captain could have avoided the danger. The captain had access to constantly updated weather information through devices on board and could have acted accordingly. The Court held none of the facts used in the district court's rejection of the *in extremis* standard to be clearly erroneous.

Concerning the *in rem* interest, the Court of Appeals applied Rule E(5)(a) of the Supplemental Rules for Admiralty and Maritime Claims. This provision states "in the event of the inability or refusal of the parties so to stipulate the court shall fix the principal sum of the bond or stipulation at an amount sufficient to cover the amount of the plaintiff's claim fairly stated with accrued interest and costs."[8] The Court ruled the "inclusive of interest and costs" language in the letter is consistent with the Rule E(5) mechanism. The rule is that the letter "shall be conditioned for the payment of interest at 6 percent per year."[9] With this rule, the Court held Plaintiffs' cannot recover a sum greater than the principal sum plus Rule E(5) interest accrued since September 12, 2005.

The Court of Appeals affirmed the judgment of the district court as to the standard of care it employed, but remanded:

> [T]o (1) determine the present value of the letter of undertaking, which is the principal sum of $5.5 million plus interest accrued on that amount at 6 percent per annum since September 12, 2005; (2) determine the present value of Plaintiffs' judgment, which is their damages, plus pre-judgment interest awarded by the district court, plus post-judgment interest pursuant § 1961; and (3) based on these calculations, enter an order setting the total amount of recovery Plaintiffs can recover *in rem*, which is the amount calculated in (2), subject to the maximum calculated in (1).[10]

Carlo Sciara
Class of 2013

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[5] *Id.*
[6] *Id.* at 267
[7] Employers Ins. Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752, 771 (5th Cir. 1989).
[8] Crescent Towing & Salvage Co., Inc. v. Chios Beauty MV, 610 F.3d 263, 269 (5th Cir. 2010) (quoting Supplemental Rules for Admiralty and Maritime Claims, Rule E(5)(a)).
[9] *Id.*
[10] *Id.* at 270.

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