Business Challenges in the Coming Decade

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Problem: 10,000 “boomers” retiring every day.

- There is a deficit of skilled workers - and it’s growing.
- How do we make this industry a viable and attractive career path?
Recruiting & Retention

Hiring Challenges

- Low unemployment / talent shortage
- Lack of U.S. mariners?
- Generational differences – differing priorities
Recruiting & Retention

Hiring Solutions

- Flexibility, flexibility, flexibility
- Defined development paths
- Organizational mission & value
- Diversity & Inclusion programs
- “Build-a-Mariner” and like programs
Disrupting The Quietest Mode: The Problematic State of Inland River Infrastructure
Key Statistics (2016 Numbers)
557.8 Million Tons, $300 Billion Value

2016 US Inland Waterways Commodities
- Petroleum Products, 22%
- Aggregates, 14%
- Chemicals, 9%
- Others, 5%
- Ores & Minerals, 2%
- Iron & Steel, 4%
- Grain, 17%
- Coal, 21%
- Crude Petroleum, 6%
Barges > Trucks

Average Barge: 1500 tons

Average Truck Trailer: 22 tons
Massive Opportunity

1 15-BARGE TOW

1,050 LARGE SEMI TRACTOR-TRAILERS

216 RAIL CARS + 6 LOCOMOTIVES
Get the TRUCK out of here

49 Million Truck Trips Saved Each Year

Ability to Save Up To 98 Million Truck Trips*
The Most Fuel Efficient Mode

Units = Miles Traveled by 1 Ton of Freight on 1 Gallon of Diesel
Barge transport has the smallest carbon footprint among other inland transportation modes.
World-Class Inland River Access:

Nearly 12,000 Miles of Navigable Inland Waterways
176 Navigation Lock Sites

- NOLA to St. Paul = 26
- NOLA to Pittsburgh = 19
- NOLA to Chicago = 10
- NOLA to Nashville = 3
More than Half of Our Locks are > 50 years old
Our Challenge: Aging Infrastructure

*Includes all operational deep and shallow draft Corps and TVA navigation locks and control structures.
An Unscheduled Lock Outage has an Extensive Blast Radius
LONG Term Solution – Spend and Modernize
Temporary Solution – “Customer Cost Recovery”
Infrastructure

Land is a Navigational Hazard,
Ships Need Water
The Association of American Port Authorities:

$28 billion needed over next 10 years to fully maintain deep-draft navigation channels and $6 billion to modernize the channels.
Infrastructure

USACOE Budget:

$1 billion for specified construction projects

>$1 billion for channel work

>$20 billion shortfall
Infrastructure

Increased Dredging
Demand Strains Limited
U.S. Dredge Supply
Infrastructure

Solutions:

• Growth in U.S. Dredging
• Private Financing
• Government Action
Emissions: IMO 2020

• 30% ↑ fuel cost
• Expensive engineering solutions
• Reduce supply of ships
Government Regulations

Emissions: IMO 2020

- Cost transfer
- Market/demand shifts resulting from higher shipping costs
Government Regulations

Ballast Water
- High cost of water treatment systems
- Reduction in ship supply
- Compounding effects of IMO 2020
Government Regulations

Jones Act
Debate for the ages, balancing need to protect the domestic fleet and mariners from outside competition.
## Legal Market

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The Current Landscape of Punitive Damages under Maritime Law

I. Before the U.S. Supreme Court: Batterton, Tabingo and McBride

Having denied review in two cases raising the question of whether, and if so under what circumstances, a plaintiff can recover punitive damages based on a claim of unseaworthiness, the U.S. Supreme Court finally granted review, on December 7, 2018, to consider the issue.1

As nicely summarized by Judge Higginson in his dissent to the Fifth Circuit’s decision in McBride: 2

There are two primary sources of federal maritime law: common law developed by federal courts exercising the maritime authority conferred on them by the Admiralty Clause of the Constitution (“general maritime law”), and statutory law enacted by Congress exercising its authority under the Admiralty Clause and the Commerce Clause (“statutory maritime law”) ....

Traditionally, general maritime law afforded ill and injured seamen two causes of action against shipowners and employers. If a seaman became ill or injured while in the service of the ship, the seaman’s employer and the ship’s owner owed the seaman room and board (“maintenance”) and medical care (cure) without regard to fault, and, if not provided, the seaman had a claim against them for “maintenance and cure.” If a seaman was injured by a ship’s operational unfitness, the seaman had a cause of action for “unseaworthiness.” General maritime law did not provide seamen with a separate cause of action for personal injury resulting from employer negligence, The Osceola, 189 U.S. 158 (1903), nor did it permit wrongful death or survival claims on behalf of seamen killed during the course of their employment, The Harrisburg, 119 U.S. 199 (1886) ....

To remedy those perceived gaps in general maritime law, which, until then, had been filled by a patchwork of state wrongful death statutes, Congress in 1920 enacted the Jones Act and the Death on the High Seas Act, which created causes of action for employer negligence in navigable waters and on the high seas,

2 McBride v. Estis Well Service, 768 F.3d 382, 405-409 (5th Cir. 2014) (en banc) (Higginson, J., dissenting).
respectively, and authorized survival and wrongful death remedies. The Supreme Court has since recognized a parallel cause of action under general maritime law for employer negligence resulting in injury or death. See Norfolk Shipbuilding & Drydock Corp. v. Garris, 532 U.S. 811 (2001)…. 

Over the next century and a half [following the Court’s decision in The Amiable Nancy, 16 U.S. (3 Wheat.) 546 (1818)], the availability of punitive damages for unseaworthiness claims arising under general maritime law was largely unquestioned. In Complaint of Merry Shipping, Inc., 650 F.2d 622, 623 (5th Cir. 1981), our court confirmed the prevailing view that “punitive damages may be recovered under general maritime law upon a showing of willful and wanton misconduct by the shipowner in the creation or maintenance of unseaworthy conditions.” Our court based its holding on the historical availability of punitive damages under general maritime law, the public policy interests in punishing willful violators of maritime law and deterring them from committing future violations, and the uniformity of contemporary courts on the issue.…..

In Miles, we reiterated that “punitive damages are recoverable under the general maritime law ‘upon a showing of willful and wanton misconduct by the shipowner’ in failing to provide a seaworthy vessel,” but held, for the first time, that loss of society damages were not available to nondependent parents in a general maritime cause of action for the wrongful death of a Jones Act seaman. Judge Rubin, speaking for the court, was guided by the “twin aims of maritime law:” “achieving uniformity in the exercise of admiralty jurisdiction and providing special solicitude to seamen.”

The Supreme Court affirmed in a decision most significant for its announcement of a new age of maritime law:

We no longer live in an era when seamen and their loved ones must look primarily to the courts as a source of substantive legal protection from injury and death; Congress and the States have legislated extensively in these areas. In this era, an admiralty court should look primarily to these legislative enactments for policy guidance. We may supplement these statutory remedies where doing so would achieve the uniform vindication of such policies consistent with our constitutional mandate, but we must also keep strictly within the limits imposed by Congress. Congress retains superior authority in these matters, and an admiralty court must be vigilant not to overstep the well-considered boundaries imposed by federal legislation. These statutes both direct and delimit our actions.

Miles v. Apex Marine Corp., 498 U.S. 19, 27 (1990); see also id. at 36 (“We sail in occupied waters. Maritime tort law is now dominated by federal statute, and we are not free to expand remedies at will simply because it might work to the benefit of

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4 Miles v. Melrose, 882 F.2d 976, 989 (5th Cir.1989).
seamen and those dependent upon them”). Analyzing the issue presented with this guiding principle in mind, the Court reasoned that because DOHSA, by its terms, limits damages recovery to “pecuniary loss,” and the same limitation had been incorporated into the Jones Act, non-pecuniary damages, such as loss of society damages, should not be recoverable in a parallel cause of action for the wrongful death of a Jones Act seaman under general maritime law.

Applying the “Miles uniformity principle,” as it came to be known, our court, sitting en banc, held that Miles “effectively overruled” Merry Shipping, concluding that “punitive damages are not available in cases of willful nonpayment of maintenance and cure under the general maritime law.” Guevara v. Maritime Overseas Corp., 59 F.3d 1496 (5th Cir. 1995) (en banc) ....

Momentum in that direction was sea-tossed by Atlantic Sounding Co., Inc. v. Townsend, 557 U.S. 404 (2009), which explicitly abrogated Guevara and restored the availability of punitive damages for maintenance and cure claims under general maritime law. The Supreme Court reasoned that “punitive damages have long been an accepted remedy under general maritime law,” including for egregious maintenance and cure violations, and concluded, contrary to Guevara, that “nothing in the Jones Act altered this understanding.” The Jones Act, the Court reminded, “created a statutory cause of action for negligence, but it did not eliminate pre-existing remedies available to seamen for the separate common-law cause of action based on a seaman’s right to maintenance and cure.” Importantly, Justice Thomas writing for the Court reminded that “its purpose was to enlarge seamen’s protection, not to narrow it.”

Nevertheless, a majority of the U.S. Fifth Circuit, sitting en banc, concluded that a seaman could not recover punitive damages based on claims of unseaworthiness. With the U.S. Ninth Circuit in Batterton, and the Washington Supreme Court in Tabingo, going in the other direction, the availability of punitive damages arising from a claim of unseaworthiness could depend, or at least potentially depend, on – in addition to the court where the case is pending – whether the case arises out of a personal injury or a wrongful death, whether the plaintiff (or decedent) is a seaman or non-seaman, whether the defendant is the plaintiff’s employer or a third party, and/or whether the incident occurred in territorial waters or on the high seas.

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5 Townsend, 577 U.S. at 424.
6 Townsend, 577 U.S. at 415-416.
7 Townsend, 577 U.S. at 417.
8 McBride, 768 F.3d at 405-409 (Higginson, J., dissenting).
10 Batterton v. Dutra Group, 880 F.3d 1089 (9th Cir. 2018), cert. granted, No.18-266 (Dec. 7, 2018).
12 See, e.g., Warren v. Shelter Mut Ins. Co., 2016-1647 (La. 10/18/2017), 233 So.3d 568 (affirming punitive damages award to family of guest passenger who died in recreational boating accident); see also, e.g., In re Deepwater Horizon, No.10-2179, 2011 WL 4575696 at *11 (E.D.La. Sept. 30, 2011) (“B3” Order) (allowing punitive damage claims by non-seamen to go forward, while dismissing seamen’s exposure injury punitive damages claims).
In the meantime, the arguments and bases for allowing or declining claims for punitive damages that have been embraced or rejected by members of these courts include:

a. **Miles is (or is not) Controlling**

The majority of the U.S. Fifth Circuit concluded that *Miles* was controlling. With respect to the wrongful death claims, the Court held that: “In both cases, the personal representative of a deceased seaman sued the employer for wrongful death under the Jones Act and general maritime law. No maintenance and cure action was presented in either case. In both cases the seaman met his death in the service of his ship in state waters.” With respect to the personal injury claims, the Court stated that: “The Jones Act applies to both injured seamen and those killed through the negligence of their employer. Even though *Miles* was a wrongful death action, no one has suggested why its holding and reasoning would not apply to an injury case such as those asserted by Messrs. Suire and TTouchet. No case under FELA has allowed punitive damages, whether for personal injury or death. Because the Jones Act adopted FELA as the predicate for liability and damages for seamen, no cases have awarded punitive damages under the Jones Act. It follows from Miles that the same result flows when a general maritime law personal injury claim is joined with a Jones Act claim. So Miles’s conclusion that regardless of opposing policy arguments, ‘Congress has struck the balance for us’ in determining the scope of damages, applies to the personal injury actions.”

Judge Haynes, joined by Judge Elrod, concurred in *McBride*, with respect to the personal injury claims, on the basis that *Miles* was not controlling. “An action for wrongful death (in general) did not exist at common law.... It was Congress, not the courts, that created this remedy previously unavailable to the family of the deceased seaman.... It is therefore entirely logical as a matter of legal history (though not as a matter of social policy) that the family of a deceased seaman might not be able to recover punitive damages for his death, while the surviving injured seamen could.”

Nevertheless, the “general development of the federal common law by the only unelected branch of our federal government should be done (if at all) with great restraint.” While the cause of action for maintenance and cure and the cause of action for unseaworthiness may be analogous, “no one contends they are identical. Thus, allowing recovery of punitive damages would be an expansion of a remedy, a subject best left to Congress.”

The dissenting judges in *McBride* (which involved both claims for personal injury and wrongful death), as well as the courts in *Batterton* and *Tabingo* (which involved personal injury, but not wrongful death, claims), concluded that *Miles* was not controlling, noting one or more of the following: (a) *Miles*’ holding is limited to wrongful death claims; (b) *Miles*’ holding merely

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14 *McBride*, 768 F.3d at 386.
15 *McBride*, 768 F.3d at 388-389.
16 *McBride*, 768 F.3d at 401-402 (Haynes, J., concurring).
17 *McBride*, 768 F.3d at 403 (Haynes, J., concurring).
18 *McBride*, 768 F.3d at 404 (Haynes, J., concurring).
19 *Tabingo v. American Triumph*, 391 P.3d 434, 439 (Wash. 2017); see also, e.g., *Batterton*, 880 F.3d 1089, 1091 (9th Cir. 2018) (“Evich was a wrongful death case, not an injury case. But we did not speak to whether there might be any distinction regarding the availability of punitive damages according to whether the seaman had died. Generally, the availability of damages is more restricted in wrongful death cases than in injury cases. So without
limits the availability of damages for loss of society;\(^{20}\) (c) the Jones Act does not directly address damages under the general maritime law;\(^{21}\) and/or (d) Miles itself indicates that the Jones Act “does not disturb seamen’s general maritime claims for injuries resulting from unseaworthiness.”\(^{22}\)

Much of this analysis revolved around the U.S. Supreme Court’s intervening decision in Townsend.

\(\text{b. Townsend Limits (or does not limit) Miles}\)

The majority in McBride rejected the argument that Miles had been materially limited by the Court’s subsequent decision in Townsend.\(^{23}\) “Instead of overruling Miles, the Townsend Court carefully distinguished its facts from Miles and reaffirmed that Miles is still good law. In Townsend, the Court considered a seaman’s claim for punitive damages for the willful failure to pay maintenance and cure. In distinguishing its maintenance and cure case from Miles’s wrongful death action, the Court in Townsend recognized that ‘a seaman’s action for maintenance and cure is “independent” and “cumulative” from other claims such as negligence and that the maintenance and cure right is in no sense inconsistent with, or an alternative of, the right to recover compensatory damages under the Jones Act.’”\(^{24}\)

The dissenting judges in McBride, along with the Ninth Circuit and Washington Supreme Court, by contrast, deemed Townsend significant in limiting the Court’s prior holding in Miles. In Judge Higginson’s opinion, for example: “Townsend abrogated Guevara’s holding because of Guevara’s interpretation of Miles, not in spite of it. The petitioners in Townsend urged the Supreme Court to adopt the factual setting approach of Guevara, but the Court in Townsend declared that reading was ‘far too broad.’”\(^{25}\) That approach, the Court went on, ‘would give greater pre-emptive effect to the Act than is required by its text, Miles, or any of this Courts other decisions interpreting authority to the contrary, we have no reason to distinguish Evich and limit its holding to wrongful death cases. No party has suggested that we do so’); McBride, 768 F.3d at 419-420 (Graves, J., dissenting) (“Even under the majority’s view …. the pecuniary damages limitation recognized in Miles applies only to the wrongful death causes of action brought by McBride. It does not apply to Touchet, Suire, and Bourque, who are seamen asserting Jones Act negligence and general maritime law unseaworthiness causes of action on their own behalf. The pecuniary damage limitation was created in the context of wrongful death statutes, and by statute, history and logic, it applies only to survivors asserting wrongful death claims. This distinction is inherent in the text of the Jones Act itself, which allows a survivor or personal representative to sue in wrongful death only if the seamen dies from the injury. If the seaman survives, he must bring his own action, and the pecuniary damages limitation created by wrongful death statutes and case law should be inapplicable. It is well-recognized that the original source of the pecuniary damages limitation in maritime law is the Federal Employee Liability Act (FELA), which was incorporated into the Jones Act at its passage. However, the FELA limitation of recovery to ‘pecuniary’ damages originally applied only to survivors bringing wrongful death claims, and did not apply to plaintiffs asserting claims for their own injury”).

\(^{20}\) Batterton, 880 F.3d at 1091-1092; see also McBride, 768 F.3d at 410 (Higginson, J., dissenting).

\(^{21}\) Tabingo, 391 P.3d at 439. See also McBride, 768 F.3d at 410 (Higginson, J., dissenting) (quoting Townsend, 557 U.S. at 420-421).

\(^{22}\) Batterton, 880 F.3d at 1094-1096 (citing Miles, 498 U.S. at 29); Tabingo, 391 P.3d at 439 (citing Miles, 498 U.S. at 29).


\(^{24}\) McBride, 768 F.3d at 389 (citing Townsend, 557 U.S. at 423).

\(^{25}\) Townsend, 557 U.S. at 419.
the statute." 26 Indeed, the Court noted, it had already rejected that view in *Norfolk Shipbuilding*, 27 an intervening case holding that a wrongful death remedy is available under general maritime law for the death of a harborworker attributable to negligence, even though ‘neither the Jones Act (which applies only to seamen) nor DOHSA (which does not cover territorial waters) provided such a remedy.” 28

At the same time, a group of Fifth Circuit judges, in a concurring opinion authored by Judge Clement, advance the view that – irrespective of the interplay between *Townsend* and *Miles* – punitive damages were not available prior to the passage of the Jones Act in unseaworthiness cases.

c. Availability (or non-availability) of Punitive Damages in Unseaworthiness Cases

Judge Clement, joined by Judge Jolly, Judge Jones, Judge Smith, and Judge Owen, concurring in *McBride*, makes the case that the plaintiffs’ argument is premised upon (i) the Supreme Court’s discussions in *Townsend* and *Baker* 29 indicating that punitive damages were available in at least some maritime law cases before the Jones Act, (ii) the Fifth Circuit’s post-Jones Act, pre-*Miles* case law approving of punitive damages in unseaworthiness cases, and (iii) pre-Jones Act unseaworthiness cases awarding punitive damages; but that, “when examined closely, none of these arguments establish McBride’s ultimate contention.” 30 First, Judge Clement notes that “*Baker* only addressed whether the Clean Water Act preempted the punitive damages supposedly available at general maritime law – not whether punitives were available in unseaworthiness actions. And as for common sense, the narrowness of *Baker* explains why the *Townsend* Court actually had to address the issue of punitive damages in maintenance and cure cases rather than simply saying that they had already addressed the issue in *Baker.*” 31 Second, Judge Clement notes that *Merry Shipping* “primarily relied on (1) non-seaworthiness cases speaking to the damages available under general maritime law for maintenance and cure and trespass, and (2) then-contemporaneous court cases reaching the same result…. 32 Even though punitive damages are available in many other types of actions, and indeed in some maritime cases, that does not mean that unseaworthiness plaintiffs are entitled to punitive damages when such an award runs contrary

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28 McBride, 768 F.3d at 412 (Higginson, J., dissenting) (citing *Townsend*, 557 U.S. at 421); see also, Batterton, 880 F.3d at 1091-1092 (“*Townsend* reads *Miles* as limiting the availability of damages for loss of society and lost future earnings and holds that *Miles* does not limit the availability of punitive damages in maintenance and cure cases. By implication, *Townsend* holds that *Miles* does not limit the availability of remedies in other actions ‘under general maritime law,’ which includes unseaworthiness claims”); *Habing*, 391 P.3d at 439 (“The United States Supreme Court also analyzed *Miles* in *Townsend*, determining that it has limited applicability in the general maritime context. While the Court stated that the ‘reasoning of *Miles* remains sound,’ it also noted that the reasoning in *Miles* is not universally applicable. Because the cause of action in *Townsend* and the remedy sought were both ‘well established before the passage of the Jones Act,’ and because Congress had not spoken directly to the issue, punitive damages for maintenance and cure were appropriate”).
30 McBride, 768 F.3d at 391-392 (Clement, J., concurring).
31 McBride, 768 F.3d at 392 (Clement, J., concurring).
32 McBride, 768 F.3d at 394 (Clement, J., concurring); citing *Merry Shipping*, 650 F.2d 622, 624 n.9 (5th Cir. 1981).
Finally, according to Judge Clement, “a review of the cases cited in the briefs and at oral argument suggests the existence of only a single potential unseaworthiness case awarding punitive damages – The Rolph – which does not even pre-date the Jones Act.”

In Tabingo, the Washington Supreme Court explains that, “while maintenance and cure has been available for centuries, unseaworthiness arose as an independent cause of action in American maritime law in the 1870s…. Though the limits of an unseaworthiness claim were still developing when Congress passed the Jones Act, unseaworthiness was open to seamen before the passage of the act in 1920.” Indeed, the language of the act initially led courts to reason that seamen had to choose between a Jones Act negligence claim and a common law unseaworthiness claim, although the Court has since declared that a seaman can bring both claims and recover under both theories in the same action. Judge Higginson, dissenting in McBride, adds that “punitive damages for the willful violation of the duty to provide maintenance and cure appear to have been available, if sparingly awarded, during the pre-Jones Act era. It is less clear whether punitive damages were awarded for unseaworthiness violations during that period…. This distinction, if factually supported and not foreclosed by the Supreme Court, would change the inquiry: the question would not be whether the Jones Act was intended to displace existing remedies, but whether it was meant to foreclose future remedies. But the outcome would be the same. Our task is not to reconstruct maritime law as it existed in 1920, but to assess whether Congress, in passing the Jones Act and DOHSA, intended to displace pre-existing maritime remedies or foreclose them going forward. Let us assume for the sake of argument, contrary to Townsend, that maritime courts during the pre-Jones Act era had taken no position on the propriety of punitive damages in unseaworthiness actions; that Congress in 1920 was painting on a blank canvas. Had Congress ‘spoken directly’ on the matter, then I would follow its guidance. But the Jones Act does not mention unseaworthiness or its remedies nor has any legislative history to that effect been urged or identified to us.”

d. Special Protection for Seamen

The Washington Supreme Court notes, in further support of its holding, that “the policy of treating seamen with particular care suggests that seamen should be able to recover punitive damages under certain circumstances. Courts have historically identified seamen as ‘wards of the admiralty.’ Common law provided seamen special protection because they were ‘subject to the rigorous discipline of the sea, and all the conditions of their service constrain them to accept, without critical examination and without protest, working conditions and appliances as commanded by their superior officers.’ Allowing for punitive damages here is consistent with this policy of protecting seamen.”

33 McBride, 768 F.3d at 395 (Clement, J., concurring).
34 McBride, 768 F.3d at 395 (Clement, J., concurring).
35 Tabingo, 391 P.3d at 437-438.
36 Tabingo, 391 P.3d at 438.
37 McBride, 768 F.3d at 415 (Higginson, J., dissenting).
38 Tabingo, 391 P.3d at 440. See also, e.g., Batterton, 880 F.3d at 1093 (the principles of maritime law include “a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages”); McBride, 768 F.3d at 416 (Higginson, J., dissenting).
II. Application of McBride to Claims Against Third-Party Tortfeasors

Here in the Eastern District of Louisiana, several courts have wrestled with the question of whether McBride should be limited to claims by seamen against their employers for unseaworthiness, or whether the decision also precludes claims for punitive damages against a third-party tortfeasor.

Initially, in Collins, Judge Fallon allowed a claim for punitive damages asserted by the survivors of a seaman who died in an allision against the third-party owner of the Florida Avenue bridge. Distinguishing the case from McBride, Judge Fallon noted that “Miles and McBride involve claims for wrongful death of a seaman against a Jones Act employer. In other words, neither the Miles nor the McBride opinions address an action by a seaman against a non-employer third party tortfeasor. The Jones Act forecloses recovery for non-pecuniary loss in general maritime law cases only with respect to the relationship between a seaman and his employer. A seaman’s status is relevant only in actions under the Jones Act or, after Miles and McBride, under the general maritime law against his employer.”

In a case involving personal injuries, Judge Zainey followed the reasoning in Collins.

However, Judge Fallon later revisited the issue in a case called Wade. In that lawsuit, Judge Fallon concluded that: “It has become clear since the en banc opinion in McBride that in wrongful death cases brought under general maritime law, a survivor’s recovery from employers and non-employers is limited to pecuniary losses.... While the Scarborough decision at one time seemed to be undermined by Townsend, it has been given clarity and vitality by the en banc decision in McBride. Scarborough is based on Miles, which is the foundation for the Fifth Circuit’s en banc decision in McBride. Although the result may be different under another body of law, the Fifth Circuit has now made it clear that under both the Jones Act and general maritime law, a seaman's damages against both employers and non-employers are limited to pecuniary losses.”

Judge Morgan had come to a similar conclusion in Howard which was reaffirmed by Judge Fallon again in Rinehart, and by Judge Lemmon in Rockett with respect to both wrongful death and personal injury claims.

39 Collins v. A.B.C. Marine Towing, No.14-1900, 2015 WL 5254710 (E.D.La. Sept. 9, 2015) (emphasis supplied). Judge Fallon recognized that, in Scarborough, the Fifth Circuit held “that neither one who has invoked his Jones Act seaman status nor his survivors may recover nonpecuniary damages from non-employer third parties.” However, “the basis of Scarborough is Guevara, which was abrogated by Townsend. Thus, Scarborough has been effectively overruled.... Neither the Jones Act nor the Death on the High Seas Act apply to Plaintiff's claim against the Board. Plaintiff is asserting a non-seaman general maritime law claim for punitive damages. The general maritime law as created in Baker and Townsend no longer support denial of this remedy.”

45 Rockett, 260 F.Supp.3d at 692 (“Rockett argues that the holdings of Scarborough, McBride, and Wade
III. OPA Displacement

[In the BP Oil Spill / Deepwater Horizon Litigation, the Phase One Trial Appeal, No.14-31374, was dismissed, voluntarily, by agreement of all parties, shortly before the Plaintiffs and Claimants-in-Limitation filed their brief on the merits as Appellees. The following is excerpted from the last and final DRAFT of Plaintiffs’ Appellees’ Brief, dated October 19, 2016:]

1. The Language of the Statute Does not Support the Displacement of Traditional Maritime Law Claims.

First and foremost, the Act includes a savings clause, which expressly provides that, except as otherwise provided in the OPA statute, the Act does not affect either “admiralty and maritime law” or the U.S. District Courts’ “admiralty and maritime jurisdiction” with respect to civil actions, “saving to suitors in all cases all other remedies to which they are otherwise entitled.” 33 U.S.C. §2751(e).

Congress is presumed, in this regard, to know the state of the existing law when it passes new legislation. Miles v. Apex, supra, 498 U.S. at 32. See Townsend, supra, 557 U.S. at 414 (“punitive damages have long been available at common law,” which “extends to maritime claims”). And Congress has proven that it knows how to restrict traditional maritime claims or remedies when it wants to. See Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 106 (1987); see also Deepwater Horizon, supra, 808 F.Supp.2d at 962 (citing Death on the High Seas Act, 46 U.S.C. §30307(b) (“punitive damages are not recoverable”)). Yet the OPA statute is silent on the issue of punitive damages.

In addition, the Act contains a second set of savings clauses, which expressly preserve the right of the United States, any State, or any political subdivision thereof, from imposing additional requirements, additional liabilities, or additional fines or penalties (whether civil or criminal in nature) relating to the discharge of oil. See 33 U.S.C. §2718. If, as BP and its amici suggest, Congress intended to displace the entire field of oil spill related claims or causes of action, why would Congress have included these far-reaching savings provisions?

Finally, the Act eliminates the responsible party’s limitation of liability in the event of gross negligence or willful misconduct, 33 U.S.C. §2704(c) – the same type of egregious conduct that the imposition of punitive or exemplary damages are designed to punish and/or deter.

should be limited to wrongful death cases. However, none of those decisions articulated such a limitation. In Scarborough, the court broadly concluded that it affirmed the district court’s ‘holding that a Jones Act seaman or his survivors cannot recover nonpecuniary damages from a non-employer third party.’ Further, McBride involved both personal injury and wrongful death claims. Finally, in Wade, Judge Fallon held that ‘a seaman’s damages against both employers and non-employers are limited to pecuniary losses.’ Judge Fallon employed the same reasoning in Rinehart, which was a personal injury case, clearly indicating that this principle is applicable to personal injury claims”).

46 See also, e.g., Kirtsaeng v. John Wiley & Sons, Inc., 133 S Ct. 1351, 1363 (2013) (“When a statute covers an issue previously governed by the common law,” we must presume that ‘Congress intended to retain the substance of the common law’) (quoting Samantar v. Yousuf, 560 U.S. 305, 320 n.13 (2010)); U.S. v. Texas, 507 U.S. 529, 534 (1993) (if a statute is to “abrogate a common-law principle, the statute must speak directly to the question addressed by common law”); Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (“Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”).
2. Displacement of Traditional Maritime Law Claims is Inconsistent with the Purpose of the Statute

As noted by the District Court: “One significant part of OPA broadened the scope of private persons who are allow to recover for economic losses resulting from an oil spill.” Deepwater Horizon, 808 F.Supp.2d at 959. This occurred in the wake of the Exxon Valdez spill, which affected “large numbers of persons who suffered actual economic losses but were precluded from any recovery by virtue of the Robins Dry Dock 47 rule.” Deepwater Horizon, 808 F.Supp.2d at 959; see also, Bodenger, supra, 2003 WL 22228517, at *2 (citing S. Rep. No. 94, 101st Cong., 1st Sess. (1989); 1990 U.S.C.C.A.N. 722) (OPA was passed by Congress in response to then-existing federal and state laws that were deemed to provide inadequate remedies, and to present substantial barriers to victims’ recoveries such as legal defenses, corporate forms, and burdens of proof unfairly favoring those responsible for the spills). To eliminate one of the few avenues previously available for the prevention and deterrence of wanton or reckless conduct by the owner or operator of an off-shore well runs contrary to the entire purpose and intent of OPA.

3. Displacement of Traditional Maritime Law Claims is Inconsistent with the Legislative History

The legislative history further evidences Congressional intent to retain the traditional claim for punitive damages under the general maritime law. The Conference Report explains, for example, that the Senate bill had “no savings provision regarding admiralty and maritime laws or jurisdiction,” but the House bill clarified that it did “not affect admiralty and maritime law or the jurisdiction of the District Courts of the United States with respect to civil actions under admiralty and maritime jurisdiction, saving to suitors in all cases other remedies to which they are otherwise entitled.”48

The Conference adopted the House’s savings provision, and, notably, explained the interplay between the savings provision and the liability imposed in Section 1002 (the Section that provides the elements that must exist for a responsible party to be liable for damages), by noting that Section 1002 “establishes liability notwithstanding any other provision or rule of law . . . . Therefore, there is no change in current law unless there is a specific provision to the contrary.”49

Finally, the legislative history offers two additional arguments against preemption of maritime law: first, members of Congress compared the OPA to other federal laws and indicated that it should not have more of a preemptive effect than other federal laws, (such as the Clean Water Act); and second, Congress indicated that “Nothing in this Act shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to discharges of oil.”50

4. Even Assuming Arguendo a General “Presumption” in Favor of Displacement, (Which is Not Well-Supported), it Was Rejected by the Supreme Court in Exxon in the Oil Spill

Contrary to the notion of a “presumption” in favor of displacement of federal common law, a body of Supreme Court precedent indicates that, “when a statute covers an issue previously governed by the common law,” a court “must presume that ‘Congress intended to retain the substance of the common law’” Kirtsaeng, supra, 133 S.Ct. at 1363 (quoting Samantar v. Yousuf, 560 U.S. at 320 n.13); see also U.S. v. Texas, 507 U.S. at 534 (if a statute is to “abrogate a common-law principle, the statute must speak directly to the question addressed by common law”); Isbrandtsen, supra, 343 U.S. at 783 (“Statutes which invade the common law ... are to be read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”).

BP and its amici rely on Milwaukee II, which stands for the unremarkable proposition that, when an Act “does speak directly to a question, the courts are not free to supplement Congress’ answer so thoroughly that the Act becomes meaningless.” City of Milwaukee v. Illinois & Michigan, 451 U.S. 304, 315 (1981). The Court draws a distinction with preemption of state law analysis, noting that the same federalism concerns “are not implicated” and “accordingly the same sort of evidence of a clear and manifest purpose is not required.” Milwaukee II, 451 U.S. at 316-317. However, the Court was addressing the newly-discovered federal common law of nuisance, a wholly different animal from admiralty and maritime law, which dates from 1787. See, e.g., John R. Brown, Admiralty Judges: Flotsam on the Sea of Maritime Law? 24 J. MAR. L. & COM. 249 (1993); see also Exxon v. Baker, 554 U.S. at 489-490 (putting maritime law on the same constitutional footing as the common law within a state, and stressing the “great extent” to which admiralty and maritime law is judge-made). Milwaukee II only mentions admiralty and maritime law by way of analogy.52

Moreover, the absence of a presumption against the preemption of state law is not the same as a presumption in favor of displacement. The court may “start with the assumption” that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law,” but where, as here, Congress has decided to leave the admiralty and maritime law in place, except as otherwise provided, it is “presumed” that Congress intended to retain the substance of the general maritime law.

Indeed, the Court, in Baker v. Exxon did not employ a “presumption” in favor displacement. As noted by the District Court, the Supreme Court:

…employed a three-part analysis to determine if a statute preempts or displaces federal common law. First, is there a clear indication that Congress intended to occupy the entire field? Second, does the statute speak directly to the question addressed by the common law? Third, will application of common

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51 See Milwaukee II, 451 U.S. at 307 (tracing the recognition of such body of law to Illinois v. Milwaukee (“Milwaukee I”), 406 U.S. 91 (1972)).
52 See Milwaukee II, 451 U.S. at 315.
53 Milwaukee II, 451 U.S. at 317.
54 33 U.S.C. §2751(e).
55 Kirtsaeng, supra, 33 S.Ct. at 1363; Samantar v. Yousuf, supra, 560 U.S. at 320 n.13; U.S. v. Texas, 507 U.S. at 534; Isbrandtsen, supra, 343 U.S. at 783.
law have a frustrating effect on the statutory remedial scheme? 56

Just as the Supreme Court, in applying this analysis in Exxon, concluded that the Clean Water Act did not displace the pre-existing traditional general maritime law claim for punitive damages,57 the District Court correctly concluded that: (i) “when reading OPA and its legislative history, it does not appear that Congress intended to occupy the entire field governing liability for oil spills, as it included two savings provisions – one that preserved the application of general maritime law and another that preserved a State’s authority with respect to discharges of oil or pollution within the state”; 58 (ii) OPA is silent as to the availability of punitive damages; and (iii) allowing a claim for punitive damages would not frustrate the liability scheme established under OPA, as “the behavior that would give rise to punitive damages under general maritime law – gross negligence – would also break OPA’s limit of liability.”59

5. The Fifth Circuit’s ACL Decision Addressed a Fundamentally Different Situation, Specifically Covered by the OPA Statute

BP and its amici rely heavily upon this Court’s decision in United States v. American Commercial Lines, LLC (“ACL”), 759 F.3d 420 (5th Cir. 2014). In that case the designated “responsible party” hired two companies to assist with the clean-up and response effort. Pursuant to OPA’s express statutory provisions, the companies presented their claims for payment to ACL, the responsible party. See 33 U.S.C. §2713(a). When payment was not made within 90 days, the cleanup companies elected to pursue payment from the Oil Spill Liability Trust Fund, pursuant to 33 U.S.C. §2713(c)(2). The United States Government paid the costs that were necessary, reasonable, and adhered to the relevant statutory criteria,60 and was thereby subrogated to the rights of the claimants to seek reimbursement from the responsible party. See 33 U.S.C. §2712(f).

The responsible party then attempted to sue its own clean-up companies, the OPA claimants, presenting “the question of whether OPA provides the exclusive source of law for an action involving a responsible party’s liability for removal costs governed by OPA.” ACL, 759 F.3d at 424. Unlike the present case, “OPA directly speaks to the claims asserted by ACL.” ACL, 759 F.3d at 425, (emphasis supplied). While the responsible party may assert defenses to the Government’s claim for reimbursement, to allow the responsible party to bring a third-party complaint against a claimant “would risk avoiding the strict liability that OPA places on responsible parties to pay the cleanup and removal costs, and frustrate the statutory scheme and its goal of providing rapid cleanup and claim resolution.” ACL, 759 F.3d at 425; see, e.g., Robertson & Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 39 TUL. MAR. L.J. 471, 572-573 (2015) (noting that “OPA works no wholesale displacement of federal maritime law” and characterizing the ACL decision as an example where one of the “specific features of OPA that directly clash with specific features of the formerly applicable federal maritime law”). This is wholly distinguishable from the question of whether an OPA plaintiff with Robins Dry Dock standing can assert a traditional general

58 Deepwater Horizon, 808 F.Supp.2d at 961; citing 33 U.S.C. §§ 2718, 2751.
59 Deepwater Horizon, 808 F.Supp.2d at 962.
60 See ACL, 759 at 423; citing 33 C.F.R. ¶¶ 136.105, 136.201, 136.203 and 136.205.
maritime law claim for punitive damages against a responsible party that exhibited gross negligence and willful misconduct leading to the spill in question.

As noted by the Court in ACL, “OPA provides a procedure for submission, consideration, and payment of cleanup expenses by the Fund when the responsible party fails to settle such claims within 90 days – the situation presented here.” ACL, 759 F.3d at 426 (emphasis supplied). By contrast, OPA does not in any way speak to the recovery, nor the prohibition of, punitive or exemplary damages, except to say that, unless otherwise provided, the Act “does not affect admiralty or maritime law.”

6. The First Circuit’s pre-Townsend Decision in South Port Marine Fundamentally Misapplies Miles v. Apex

The only court of appeal to address the specific question of OPA’s potential displacement of punitive damages at maritime law was the First Circuit in South Port Marine, LLC v. Gulf Oil Ltd. Partnership, 234 F.3d 58 (1st Cir. 2000). While the court, in that case, held that OPA displaced the general maritime law with respect to punitive damages, the decision was based on a misunderstanding of Supreme Court precedent, and its reasoning is substantially discredited by the Court’s subsequent decisions in Exxon v. Baker and Townsend.

In particular, the First Circuit’s holding in South Park Marine misunderstands the implications and rationales of Miles v. Apex, which examined the damages recoverable under pre-existing wrongful death statutes – the Jones Act and DOHSA – to determine the scope of recovery allowable under the general maritime wrongful death action. Generally, the rationale behind Miles was twofold: (1) a common law cause of action (i.e., general maritime wrongful death) created to fill an unintentional gap in pre-existing statutory law (to provide uniformity in admiralty law) should not provide remedies inconsistent with the statutory framework; and (2) common law liability for harm without fault should not provide greater compensation than pre-existing statutory liability for identical harm as a result of negligence. Miles v. Apex, 498 U.S. at 32-33. South Port Marine is contrary to both prongs of the Miles’ rationale.

First, the South Port Marine decision creates the very sort of anomalies in maritime law that the Supreme Court sought to eliminate in Miles. The First Circuit acknowledged that Congress did not intend the OPA to bar the imposition of additional liability under state law. South Port Marine, 234 F.3d at 65; citing 33 U.S.C. §2718. Testing the South Port Marine interpretation demonstrates that it fails to provide a fair or consistent application of law. For example, interpretation does result in punitive damages being available under state law when reckless conduct results in an oil discharge from a fixed platform (adjacent state law would apply under the OCSLA choice-of-law provision). However, it does not permit the recovery of maritime punitive damages when the same reckless conduct results in an oil discharge from a drilling ship or floating platform (the OCSLA choice-of-law provision applies federal maritime law). Similarly, punitive damages would be recoverable for the reckless discharge of oil from a drilling vessel within the first three miles of territorial waters in the Gulf of Mexico (where OCSLA does not apply). However, punitive damages would not be recovered where the same conduct causes a discharge of oil from the same drilling vessel four miles from the coast. This interpretation would create the same disunity in maritime law that the Supreme Court sought to eliminate in Miles. Such strange anomalies might

be tolerable if Congress had expressly embraced them, but nothing in the text of the OPA or the rationale of Miles supports such an intent.

South Port Marine is also unsupported by the second rationale of Miles. In that case, the Supreme Court refused to allow broader damages under the strict liability common law cause of action than were available under the fault based statutes that preexisted and inspired the common law. Miles, 498 U.S. at 37. OPA creates statutory liability without fault for oil spills, but the damages are capped unless egregious fault is established. Consistently, liability is potential greater under both OPA and the general maritime law for gross negligence or willful misconduct.

Furthermore, South Port Marine completely fails to address the savings clause. Because the First Circuit mistakenly believed that Miles mandated the unavailability of punitive damages, the court never addressed why the plain language of 33 U.S.C. §2751(e) did not preserve traditional maritime punitive damage claims.

The Supreme Court, eight years after the South Port Marine decision, expressly held, in the context of an oil spill, that the Clean Water Act did not displace the general maritime law claim for punitive damages, because it did not speak directly to the issue addressed by the common law. See Exxon v. Baker, 554 U.S. at 486. The next year, the U.S. Supreme Court revisited Miles again, in Townsend. As noted by Judge Barbier: “The Townsend Court explained that Miles did not allow punitive damages for wrongful death claims because it was only as a result of federal legislation that a wrongful death cause of action existed…. The Court contrasted the situation in Miles with the question before it in Townsend, and it concluded that ‘both the maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act.”

OPA expressly contemplates recovery of damages beyond the cap provided by §2704 when gross negligence or willful misconduct is established. Either OPA has created such a cause of action or it intends recovery for such conduct to be governed by state and maritime substantive law. In either case, the recovery of punitive damages is consistent with the OPA. See 33 U.S.C. §2743(c)(1); see also, e.g., Commonwealth of Puerto Rico v. M/V Emily S, 1998 AMC 2726 (D.P.R 1998) (general maritime law in rem remedy is available under the OPA which expressly preserves admiralty and maritime law). For all of these reasons, South Port Marine is no longer persuasive authority.

7. Even Assuming Arguendo a “Comprehensive Compensation Scheme”, Punitive or Exemplary Damages Are Intended To Further a Distinctly Non-Compensatory Purpose

BP and its amici rely heavily upon the notion that OPA establishes a “comprehensive compensation scheme”, but disregard to the fact that punitive or exemplary damages are intended to further a distinctly non-compensatory purpose. See, e.g., Exxon v. Baker, 554 U.S. at 492 (“punitive are aimed not at compensation but principally at retribution and deterring harmful conduct”) (emphasis supplied) (citing Moskovitz v. Mount Sinai Medical Center, 69 Ohio St.3d 638, 651, 635 N.E.2d 331, 343 (1994) (“The purpose of punitive damages is not to compensate a

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62 See also Baker, 554 U.S. at 518 (Stevens, J., concurring) (TAPAA does not displace general maritime law claim for punitive damages).

63 Deepwater Horizon, 808 F.Supp.2d at 961 (emphasis in original) (quoting Townsend, 557 U.S. at 420 (citing Miles, 498 U.S. at 27)).
plaintiff, but to punish and deter certain conduct”) (emphasis supplied)); see also, e.g., BMW of North America, Inc. v. Gore, 517 U.S. 559, 568 (1996) (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition”).

BP contends that the “heightened culpability” for oil spills resulting from gross negligence or willful misconduct leaves “no room for general maritime law to address the same issue through the mechanism of punitive damages.” But the purpose of punitive damages is different than the purpose of compensatory damages. All the removal of the cap does is ensure that the responsible party compensates every OPA claimant for every dollar of damage that was incurred. It does not, however, punish the responsible party, nor does it, in and of itself, seek to further prevent spills by deterring the responsible party and those others in the industry from acting recklessly with respect to the exploration, transport, and containment of oil. Stated simply, gross negligence under OPA requires the responsible party to make everyone whole; it does not replace punitive damages.

There are minor spills which, fortunately and fortuitously, cause damages which are collectively less than the statutory cap. If a much smaller Macondo incident had cost only $100 million dollars, BP would have had to pay only $100 million in response costs and compensatory damages as the responsible party – irrespective of whether it was guilty of wanton and willful misconduct or whether it was completely without fault. Surely, the statutory scheme cannot incentivize reckless treatment of oil containment so long as the risk of the cost of a spill is not above some threshold cap amount. In that context, general maritime punitive damages are the perfect method to ensure that victims are made whole, while also encouraging oil transporters and drillers to maintain appropriate standards of compliance with the relevant safety protocols. Otherwise, responsible parties have less incentive to avoid reckless behavior.

Punitive damages fit squarely, but separately, into the overall scheme and purpose of OPA.

IV. Establishing Corporate Recklessness under the P&E Boat Rentals Test

[The following is excerpted from the Appellants’ Brief in the BP Oil Spill / Deepwater Horizon Litigation filed on behalf of the Plaintiffs and Claimants-in-Limitation as appellants in the Phase One Trial Appeal, No.14-31374 [5th Cir. Doc. 00513061358] (June 1, 2015):]

1. The Phase One Findings Are Legally Sufficient for the Imposition of Punitive Damages under P&E Boat Rentals

In P&E Boat Rentals, the question was whether a corporation could be held liable for punitive damages based on “the wrongful acts of the simple agent or lower echelon employee.” In the Matter of P&E Boat Rentals, 872 F.2d 642, 652 (5th Cir. 1989). This Court posited a dispositive distinction between situations in which an employee “decides on his own to engage in malicious or outrageous conduct” and situations in which “the corporation itself” can be “considered the wrongdoer.” P&E Boat Rentals, 872 F.2d at 652.

In the circumstances of the P&E case, it made sense to ask the question whether a policymaking official either had knowledge of, directed, or subsequently ratified the foreman’s reckless conduct. The injuries arose out of what was essentially a routine crewboat transit from

64 BP APPELLANT’S BRIEF, p.81.
the mouth of the river to a drilling platform, made one afternoon at high speeds in heavy fog. The events in question took place over a relatively limited time period, and the scope of the crew boat shuttle operation was only a narrow function within the overall scheme of Chevron’s business activities. See P&E Boat Rentals, 872 F.2d at 653 (describing the foreman as “a first level supervisor operating out of the remote Venice area”).

The operation of the Deepwater Horizon at the Macondo Well was, by contrast, a significant and substantial operation, requiring the full commitments and attentions of the BP defendants involved. Given the extensive pre-operation research, planning, development, and authorization of the project; the seven month time period over which drilling operations were conducted; the significant commitment of monetary resources; the size and complexity of the vessel and equipment utilized; the number of people involved in the various decision-making processes; the filings and other representations made by the organizations to governmental authorities; and the number of people aboard the vessel, whose lives and safety were, at any given time, in the defendants’ hands; it would be very difficult to conclude that BP, as a company, was not directly involved and implicated in the major decisions that were made in carrying out the drilling operations that led to the blowout, fire, and oil spill in question.

As the District Court found: “BP’s inshore engineers, geologists, and operational supervisors were tightly connected with the well.” The drilling of the Macondo well was at “the heart of” BP’s purpose. It involved both “extensive pre-operation planning” and “significant financial commitments.” “Data from the well was transmitted in real time to BP’s Houston office” and “many decisions, including operational decisions, were made in BP’s Houston office.” The trial court agreed that “imputing the reckless acts of BP’s Well Site Leader and onshore engineer to BP would not appear to conflict with the rationale behind P&E” and, under the circumstances, “BP should be viewed as the ‘wrongdoer’.”

Further distinguishing this case from P&E Boat Rentals is the fact that BP stipulated in a criminal guilty plea that BP, the company, was responsible for the conduct at issue. If BP is admittedly responsible for the conduct; and the conduct is willful, wanton, and reckless; then how can BP not be responsible for willful, wanton and reckless conduct?

65 Indeed, Chevron did not even own or operate the crewboat in question, which was chartered from P&E, and piloted by a P&E employee. P&E Boat Rentals, 872 F.2d at 645.

66 Plaintiffs note, in this regard, that the question of whether the conduct was known, directed or ratified by a formal corporate “official” seems particularly inappropriate in the context of representations (or particularly misrepresentations) to the Federal Government in formal applications, filings or other submissions. When BP makes a representation to the MMS about drilling margins, or a proposed casing plan, it should not matter whether the individual making the submission is characterized as an “officer” or an attorney, or a clerical assistant, or an engineer. These are the filings of the corporation. See 30 C.F.R. ¶250.146(c) (“Whenever the regulations … require the lessee to meet a requirement or perform an action, the lessee, the operator (if one has been designated), and the person actually performing the activity to which the requirement applies are jointly and severally responsible for complying with the regulation”); see also, e.g., In re Hellenic, Inc., 252 F.3d 391, 396 (5th Cir. 2001) (in the context of determining whether an employee’s knowledge is imputed to the vessel owner for limitation purposes, “it is the extent of the employee’s responsibility, not his title” that counts); see also, e.g., 10 Fletcher CYCLOPEDIA OF THE LAW OF CORPORATIONS §4906 at nn. 18 & 38 (Sept. 2012 update) (a basis for punitive damages against the corporate principal may exist when the tort-committing agent was engaged in the performance of an “absolute” or “nondelegable” duty).

67 See generally In re Oil Spill by the Oil Rig Deepwater Horizon, 21 F.Supp.3d 657, 749-751 (E.D.La. 2014).
Indeed, as noted, the seaman manslaughter statute draws an important distinction between individual and corporate liability. While a “captain, engineer, pilot, or other person employed” on a vessel can be found guilty upon a showing of mere negligence, when the owner of the vessel is a corporation, “an executive officer” of the corporation must have “knowingly and willfully caused or allowed such fraud, neglect, connivance, misconduct, or violation of law” in order for the corporate owner to be convicted. See 18 U.S.C. §1115. Although BP was not technically the “owner” of the Deepwater Horizon at the time of the blowout, the statute certainly implicates the knowing or willful involvement of a corporate officer when a corporation is found guilty.

BP, moreover, submitted to the probationary requirement that the company retain a Process Safety Manager for “any entity controlled, directly or indirectly, by BP plc” and ensure Cement Design and Competency with respect to “the defendant, BP plc, or the Affiliates.” The criminal guilty plea agreement is ratified by a Resolution of the BP plc Board of Directors, and Mr. Hayward appeared for the corporation before Congress, to answer questions regarding the explosion, fire, and resulting oil spill, as “the Chief Executive of BP plc.”

As the District Court concluded, “BP’s conduct warrants the imposition of punitive damages under general maritime law.”

2. When BP’s Intentional Misconduct from Phase Two is Properly Considered with BP’s Phase One Conduct and Findings, the P&E Boat Rentals Test for Corporate Conduct and Responsibility is Clearly Satisfied

Under the law of this Court, “the ‘mental attitude of the defendant’ is what turns ordinary negligence into gross negligence.” Clements v. Steele, 792 F.2d 515, 516-517 (5th Cir. 1986). In determining whether the defendant’s conduct is egregious enough to warrant the imposition of punitive damages, the Court looks to the entirety of the record to determine whether the defendant acted with willful or wanton disregard. Clements v. Steele, 792 F.2d at 517. In this case, however, the District Court erred by considering the events leading up to the Deepwater Horizon explosion in isolation from the totality of BP’s wrongful conduct with regard to the Oil Spill.

Because a defendant’s liability for punitive damages turns on the defendant’s state of mind, two related corollaries emerge: First, that the court should consider all of the defendant’s tortious conduct occurring over the entire series of events causing harm to the plaintiffs. Second, that some of these tortious acts or omissions, while not directly resulting in damages to the plaintiffs, will nevertheless be relevant to the ultimate question regarding the defendant’s level of conscious disregard.

In this case, BP itself argued to the District Court that “A Court May Not Consider A Particular Act Or Omission In Isolation,” acknowledging, rather, that “a court may consider a series of related culpable acts or omissions by the defendant.” Indeed, as the District Court noted, BP’s “entire

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68 In re Deepwater Horizon, 21 F.Supp.3d at 757.
69 Clements v. Steele, 791 F.2d at 517 (emphasizing the centrality of “the defendant’s state of mind” to the punitive damages analysis); see also Exxon Shipping Co. v. Baker, 554 U.S. 471, 512-513 (2008) (discussing a hierarchy of blameworthy states of mind in the context of imposing punitive damages, both generally and under general maritime law in particular).
70 BP POST-TRIAL BRIEF, p.13.
explanation for this tragedy and overarching theme at trial was that there was a series of failures.”  

As numerous courts have held, an accumulation or series of negligent acts or omissions can and should be viewed together in order to determine whether the defendant has acted out of gross negligence, willful misconduct, or a wanton or reckless disregard. See, e.g., Clements v. Steele, 792 F.2d at 517 (recognizing that gross negligence may be established where the defendant’s acts of ordinary negligence demonstrated that the defendant was consciously indifferent); Kuykendall v. Young Life, 261 F.App’x 480, 489 (4th Cir. 2008) (multiple acts of simple negligence can amount to gross negligence where the cumulative effect of the negligent acts demonstrates an utter disregard of prudence amounting to an indifference to others’ health and safety); In re Tug OCEAN PRINCE, 584 F.2d 1151, 1164 (2d Cir. 1978) (“While any one of the faults ... alone ... may not constitute ‘willful misconduct,’ on the entire record the various inactions and gross disregard of the potential harm amount ... to willful misconduct”); Water Quality Ins. Syndicate (re Barge Morris J. Berman) v. United States, 522 F.Supp.2d 220, 228-230 (D.D.C. 2007) (district court “should have looked at the ‘series of occurrences’ or events that together constitute the ‘incident’ that led to the spill.... [W]illful misconduct was based on no single proximate cause, but on an ‘accumulation of acts,’ ‘a chain of circumstances which [were] a contributing cause even though not the immediate or proximate cause of the casualty’”); Adams v. Phillips, No.01-3803, 2002 WL 31886737 at *4, 2002 U.S. Dist. LEXIS 24888 at **9-10 (E.D.La. Dec. 19, 2002) (defendant’s “pattern of brazen misconduct” and the “entirety of his actions” were grounds for imposing punitive damages).

The District Court correctly found BP guilty of gross negligence and willful misconduct based on a series of negligent acts. However, in deciding whether the conduct of a corporate official with policy-making authority participated in, approved of, or subsequently ratified egregious conduct under P&E Boat Rentals, the District Court failed to consider the admittedly intentional misconduct that occurred with the knowledge, participation, direction, authorization, and approval of a number of corporate officials with policy-making authority during the spill. Moreover, the District Court failed to consider BP’s criminal liability for acts beginning with the lead up to the explosion and continuing through the massive spill.

It was the three-month-long oil spill, and not merely the tragic events of April 20, 2010, which caused such widespread and devastating environmental and economic damages to the appellant businesses, individuals and local governments.

“There is no dispute” the District Court found, “that BP lied about the amount of oil that flowed from the well.” However, because the court found that such conduct, in and of itself, did not directly delay the capping efforts, the court presumably did not factor such evidence of willful and

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71 In re Deepwater Horizon, 21 F.Supp.3d at 690 (emphasis supplied).  
72 In re Deepwater Horizon, 21 F.Supp.3d at 742-743 (citing OCEAN PRINCE, 584 F.2d at 1163-1164, and quoting 57A Am. Jur. 2d NEGLIGENCE §229 (“[S]everal connected or successive acts of simple negligence may support a finding of gross negligence, due to their compounding effect”)).  
73 P&E Boat Rentals, 872 F.2d at 652-653.  
74 PHASE TWO FINDINGS, p.32 ¶228. The District Court also found that BP made a “patently false” representation, intentionally omitting critical information, in BP’s corporate Accident Investigation Report. See In re Deepwater Horizon, 21 F.Supp.3d at707.
wanton disregard into its ultimate determination.\(^{75}\)

Regardless of whether BP’s conduct during the spill materially affected the nature or length of the Government’s source control effort, such intentional misconduct is nevertheless directly and significantly relevant to the ultimate question of whether BP, as a corporation, acted with willful, wanton or reckless disregard.\(^{76}\)

As the District Court itself recognized in Phase One, while BP’s decision to proceed with the cement job without a valid foam stability test did not directly cause any damages, it was nevertheless relied upon as “another instance of BP proceeding in the face of a known risk and therefore lends further support to the conclusion that BP’s conduct was reckless.”\(^{77}\)

Indeed, this Court in \(P&E\) itself recognized that a company’s liability for punitive damages can be established where the decision, conduct or policy in question is subsequently ratified by an official with policymaking authority. \(P&E\) Boat Rentals, 872 F.2d at 651-652; quoting, \(U.S.\) Steel \(v.\) \(Fuhrman\), 407 F.2d 1143, 1148 (6th Cir. 1969) (must be shown that “the owner authorized or ratified the acts of the master either before or after the accident”) (emphasis supplied), cert. denied, 398 U.S. 958 (1970). The evidence to establish such ratification, although not causal to the injuries, is admissible and relevant to the defendant’s state of mind, and punitive culpability.\(^{78}\)

It is undisputed that BP intentionally lied to the Government, as well as its own stockholders, and members of the general public – including the businesses, individuals and local governments that suffered physical property damages and other economic losses as a result of the spill. Further, while the District Court did not feel it was necessary to elaborate in its Phase Two Findings beyond the criminal guilty plea,\(^{79}\) just a brief sampling of the record evidence reveals knowledge, direction

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\(^{75}\) While this seems implicit from the PHASE TWO FINDINGS AND CONCLUSIONS, (see ¶242), Paragraph 248, in answering the specific question posed by Paragraph 247, appears to focus solely on BP’s pre-spill planning, and not the post-spill intentional misrepresentations.

\(^{76}\) See, e.g., Kolstad v. Am. Dental Assn., 527 U.S. 526, 538 (1999) (“Most often… eligibility for punitive awards is characterized in terms of a defendant’s motive or intent”) (citing T. Sedgwick, MEASURE OF DAMAGES §§ 366, 368, pp. 526, 528 (8th ed. 1891); C. McCormick, LAW OF DAMAGES 280 (1935)); see also Clements v. Steele, supra, 792 F.2d at 516-517.

\(^{77}\) Deepwater Horizon, 21 F.Supp.3d at 743.

\(^{78}\) See also, e.g., Bergeson v. Dilworth, 959 F.2d 245 (table), 1992 WL 64887 at *3 (10th Cir. 1992) (“subsequent conduct is admissible on the issue of punitive damages when it is probative of the defendant’s state of mind at the time of the event giving rise to liability”); Eaves v. Penn, 587 F.2d 453, 464 (10th Cir. 1978) (evidence of defendant’s subsequent conduct admissible under Rule 404(b) to show defendant’s intent at the time of the alleged breach of fiduciary duty); Wolfe v. McNeil-PPC Inc., 773 F.Supp.2d 561, 575-576 (E.D.Pa. 2011) (post-incident concealment of information from the FDA relevant to the question of defendant’s state of mind relative to the imposition of punitive damages); Hilliard v. A.H. Robins Co., 148 Cal.App.3d 374, 398-401 (1983) (concluding that evidence of post-injury conduct should have been admitted into evidence because it tended to prove that the defendant acted willfully); Coale v. Dow Chem. Co., 701 P.2d 885, 890 (Colo.App. 1985) (explaining that evidence of post-injury conduct was admissible for purposes of showing that the defendant acted wantonly in connection with a claim of punitive damages); Palmer v. A.H. Robins Co., 684 P.2d 187, 204 (Colo. 1984) (observing that post-injury conduct is relevant for purposes of determining punitive damages); Hoppe v. G.D. Searle & Co., 779 F.Supp. 1413, 1424–1425 (S.D.N.Y. 1991) (admitting evidence of post-injury conduct because it was relevant to pre-injury evidence supporting an award of punitive damages). In each of the foregoing cases, the post-incident conduct was found to be relevant and admissible, going to the defendant’s state of mind, even though the post-accident acts or omissions could not have led to the injuries suffered by plaintiffs.

\(^{79}\) See PHASE TWO FINDINGS, p.32, ¶228.
and participation at the highest levels of the company….

Finally, BP’s Guilty Plea itself establishes willful and intentional misconduct at the corporate level. The factual allocution regarding BP’s violation of 18 U.S.C. §1505 repeatedly refers to the conduct of “BP” and expressly acknowledges that “BP’s former vice president’s knowledge and actions are attributable to BP.” The guilty plea, as noted, is not just signed for BP Exploration & Production, but also for the parent corporation, BP plc.

The Supreme Court decisions, while wrestling with the exact contours of exposure, clearly establish that the magnitude of the threatened harm (even where the actual harm turns out to be less) as well as the magnitude of the total harm (even where some of the damages were suffered by others than the particular plaintiff) are of central relevance to the assessment of the defendant’s state of mind, and consequent punitive culpability. See, e.g., Exxon v. Baker, 554 U.S. at 515 (2008); Philip Morris v. Williams, 549 U.S. 346, 355 (2007) (“counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public”); BMW v. Gore, 517 U.S. 559, 582 (1996) (discussing a formula “that compares actual and potential damages to the punitive award”).

In this case, the BP defendants clearly exhibited an egregious and conscious indifference to public health and safety in connection with the ongoing and continuing series of events that not only threatened but actually caused widespread and devastating environmental and economic damages to the plaintiffs and claimants-in-limitation.

3. In the Alternative, the P&E Boat Rentals Test Should Be Modified to Bring Fifth Circuit Precedent More in Line with the U.S. Supreme Court and Other Circuits

While the U.S. Supreme Court was divided 4-4 on the issue in Exxon v. Baker, there is significant authority for the proposition that it is not necessary to show that a formal corporate official with policymaking authority specifically participated in, approved of, or subsequently ratified the egregious conduct in question in order to impose punishment on the corporation.

Indeed, when the Oil Pollution Act of 1990 was passed, the Clean Water Act was amended to

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80 In Exxon, the Court adopted the district court’s calculation of the total relevant compensatory damages, which included not only the plaintiff class’ compensatory jury verdict, but a series of settlements made by both Exxon and third parties to individuals, groups, and entities both inside and outside of the class. Exxon v. Baker, 554 U.S. at 515 (affirming, in pertinent part, In re Exxon Valdez, 236 F.Supp.2d 1043, 1058-1060 (D. Alaska 2002)).

81 In Philip Morris v. Williams, the question was whether a State could impose punitive damages for injuries caused to people beyond the State’s borders. The Court explained that: “Respondent argues that she is free to show harm to other victims because it is relevant to a different part of the punitive damages constitutional equation, namely, reprehensibility. That is to say, harm to others shows more reprehensible conduct. Philip Morris, in turn, does not deny that a plaintiff may show harm to others in order to demonstrate reprehensibility. Nor do we. Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible – although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse.” Philip Morris v. Williams, 549 U.S. at 355.

82 In Exxon v. Baker, the Ninth Circuit found Exxon responsible for the acts and omissions of the vessel’s Captain, as a “managerial agent” of the corporation. Because the U.S. Supreme Court was equally divided, (Justice Alito did not participate), the Ninth Circuit’s holding was left undisturbed, and the issue was left unresolved. Exxon v. Baker, 554 U.S. at 482-484.
eliminate the former “privity and knowledge” requirement for the imposition of enhanced penalties against the owner or operator of the facility. *See Deepwater Horizon*, 21 F.Supp.3d at 743-744 (*comparing* 33 U.S.C. §1321(b)(6)(B) (1988) with 33 U.S.C. §1321(b)(7)(D) and *citing* 135 CONG. REC. 27,980); *see also*, *e.g.*, 33 U.S.C. §2704(c)(1) (removing limited liability under OPA where the incident is proximately caused by the gross negligence or willful misconduct of “an agent or employee of the responsible party”). This evidences a Congressional intent that, at least within the context of an oil spill, the responsible corporate entity can and should be punished for the grossly irresponsible and egregious conduct of an agent or employee.

Under the Restatement, moreover, punitive damages are generally imposed where the agent or employee in question was employed in a “managerial” capacity. *RESTATEMENT (SECOND) OF TORTS §909(c) (1977).* This approach is followed in the maritime context by the Ninth Circuit. *See*, *e.g.*, *Exxon v. Baker*, supra, 554 U.S. at 482-484; *Protectus Alpha Nav. Co., Ltd. v. V. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1386-1387 (9th Cir. 1985).

In *P&E* itself, this Court recognized that a majority of courts have held that “the vicarious liability of the master for acts within the scope of employment extends to punitive as well as compensatory damages, even in the absence of approval or ratification.” *P & E Boat Rentals*, 872 F.2d at 650; *citing*, *American Society of Mechanical Engineers v. Hydro Level Corp.*, 456 U.S. 556, 575 n.14 (1982); *Prosser, LAW OF TORTS 12* (4th ed. 1971).

Two years after the *P&E* decision, the U.S. Supreme Court recognized the Alabama common law rule holding a corporation liable for both compensatory and punitive damages for a fraud committed by an employee within the scope of his or her employment. *See Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 14-15 (1991) (“Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position ‘to guard substantially against the evil to be prevented’ …. Imposing liability without independent fault deters fraud more than a less stringent rule…. These and other cases in a broad range of civil and criminal contexts make clear that imposing such liability is not fundamentally unfair”).

In 1995, the First Circuit observed that most courts outside of the maritime context hold corporations responsible for the egregious conduct of their employees, (*citing* PROSSER & KEETON 13 (5th ed. 1984)), and commented that “this growing body of precedent is significant because we discern no reason, and defendants point to none, why vicarious liability should be treated differently on sea than on land.” *CEH Inc v. F/V Seafarer*, 70 F.3d 694, 702-705 (1st Cir. 1995). In this case, the trial court expressly found that Hafle and Vidrine were acting in a “managerial capacity” and that BP had exhibited, at the very least, “some level of corporate responsibility for the misconduct,” in satisfaction of the *CEH* test. Expressly finding that “BP’s conduct warrants the imposition of punitive damages under general maritime law” and that BP is liable for punitive damages to the extent that the First Circuit or Ninth Circuit Rules might apply, the District Court reasoned as follows:

imputing the reckless acts of BP’s Well Site Leader and onshore engineer

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83 The First Circuit ultimately concluded that “strict adherence to the complicity approach would shield a principal, who, though not guilty of direct participation, authorization or ratification in his agent's egregious conduct, nevertheless shares blame for the wrongdoing. Therefore, we believe that some features of the Restatement approach are helpful here. In our view, imposing vicarious liability on a principal for the act of an agent employed in a managerial capacity and acting in the scope of employment represents an appropriate evolution…. at least when linked to requiring some level of culpability for the misconduct.” *CEH*, 70 F.3d at 705.
to BP would not appear to conflict with the rationale behind *P&E Boat* – that a corporation should be liable for punitive damages only when the corporation is itself the wrongdoer – given that BP entrusted these employees with such a critical part of a massive operation. Ultimately, some *person* within BP had to determine the outcome of the negative pressure test. Who that person is should have little legal significance. The pressurized hydrocarbons presumably do not react differently when a corporate executive, as opposed to a Well Site Leader, misinterprets the negative pressure test. Under the circumstances, BP should be viewed as the “wrongdoer.”²⁴

To the extent that *P&E* does not currently allow for such an interpretation, it should be modified.

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²⁴ *Deepwater Horizon*, 21 F.Supp.3d at 750-751, 757, and 757 n.300.
The uniqueness of maritime law and admiralty procedures give rise to equally unique ethical and professionalism issues for lawyers and parties to litigation. Steering clear of the unauthorized practice of law is a common concern due to the multijurisdictional nature of admiralty practice.

I. Limits of state licensure

The state-based process by which lawyers are authorized to practice law geographically limits their rights to practice. Lawyers may not represent a client or otherwise practice in a jurisdiction unless specifically licensed to do so. Defining and regulating the practice of law – what it means to “practice law” and what it means to be “in” a particular jurisdiction – is primarily a state function and differs from one jurisdiction to the next. Bar admissions and rules authorizing lawyers to practice law within a state are determined by state statutes and ethics and disciplinary rules. Efforts to standardize across jurisdictions are complicated because interpretation of these rules is also determined at the state level. Different criteria (of course, none dispositive) are preferred by different courts: whether an attorney held herself out as engaged in the general practice of law; whether an unlicensed person was insulated from the public and from tribunals; whether an

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1 Rick Beaumont is a Claims Executive with Thomas Miller (Americas) Inc., the U.S. manager for the UK P&I Club. In that role, he handles matters such as collisions, allisions, pollution risks, and cargo liabilities for the UK P&I Club, and for the UK Defense Club he handles assorted charter party disputes and costs liabilities. He can be reached at richard.beaumont@thomasmiller.com. Jeanne L. Amy is an Associate with Jones Walker. A member of the firm’s Maritime Practice Group, she focuses on maritime litigation, regulatory, and transactional matters. She can be reached at jamy@joneswalker.com.

2 MODEL RULES OF PROF’L CONDUCT R. 5.5 cmt. 2.
attorney acted only as a consultant providing advice or research to other lawyers, neither meeting clients nor appearing in court.3

State bar admissions are intended to protect the public, specifically clients, by ensuring an attorney’s threshold-level of competence in laws of a particular state and the attorney’s general character and fitness to practice law. The threshold question for issues related to the unauthorized practice of law is whether a person has, in fact, engaged in the practice of law. Unauthorized practice of law (UPL) statutes, enacted by each state and the District of Columbia, purport to limit who may practice law in their respective jurisdictions as well as offer some definition of what it means to “practice law”. Without exception, these definitions range from unsatisfying to useless—some admit that the definition is not fixed and instead is subject to interpretation on a case-by-case basis, depending on the facts. Some activities obviously fit within the definition: representing a client in court; filing documents on behalf of a client as part of a formal proceeding; taking a deposition; or drafting a will for someone else. Most other tasks quickly become discursive on the question, but it appears to be generally accepted that “the practice of law” involves applying legal principles to specific circumstances.

II. The multijurisdictional nature of admiralty practice

Admiralty practice and procedure and maritime law inherently cross borders and the practice typically involves geographical considerations and multijurisdictional elements. It is common for a New York attorney to be asked to opine on a dispute arising between parties, one located in Texas, another in Hong Kong, involving a charter party calling for English law and venue, and

bills of lading calling for application of the flag state’s limitation of liability regime and clause paramount applying the Hague Rules as enacted in the country of shipment, all related to a voyage from the Eastern Mediterranean to Brazil. Every jurisdiction permits pro hac vice admission; but there is no counterpart for transactional and counseling work. Before a proceeding commences, it is very difficult to know which jurisdictional rules will apply to an admiralty attorney, giving us particular exposure to UPL.

Many of us cross our fingers and hope that the Professional Rules take a common-sense approach to practical questions of legal practice and geography - we decided to take one for the team and look into the issue.

III. So why does it matter?

The Rule every lawyer with a multijurisdictional practice must consider is Model Rule 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law. Penalties imposed for the unauthorized practice of law are wide-ranging and can be severe, including the following:

- **Criminal Penalties** - not often brought in response to UPL allegations, but they remain a chilling possibility. There are examples of misdemeanor criminal charges being brought against out of state attorneys even in states where Model Rule 5.5 has been adopted.

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- **Civil Damages** - there are recent cases in which states have allowed plaintiffs the opportunity to bring tort actions against their out-of-state lawyers and law firms for engaging in UPL.

- **Nullifying acts of unauthorized practice** - courts have voided appeals filed by out-of-state attorneys, and their clients’ cases have gone unreviewed.

- **Professional discipline in the host state and reciprocal discipline in the home state** - professional discipline and even disbarment has occurred in response to UPL allegations. Most states require attorneys to report professional discipline imposed by other states. Where a host state levies discipline for UPL, it is common for the home state to reciprocate against the offending attorney.

- **Professional discipline in the home state** - even where the host state does not take disciplinary action, the home state may discipline the offending attorney for activity in another jurisdiction, even when there was no harm to the client.  

- **Denial of legal fees** - there are numerous examples of courts denying attorneys their claims for legal fees (sometimes brought in response to an action by a client for malpractice, or vice versa) on UPL grounds. At least one court granted legal fees for an attorney who succeeded on behalf of his clients for the work completed while admitted *pro hac vice*, but denied the

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6 James W. Jones, Anthony E. Davis, Simon Chester, and Caroline Hart, *Reforming Lawyer Mobility—Protecting Turf or Serving Clients?*, 30 GEO. J. LEGAL ETHICS 125, 135-40 (2017) citing *In re Bolte* 699 N.W.2d 914, 916 (Wis. 2005). Here, the attorney disclosed to the client he was not licensed to practice in the state, not able to appear in court, client would need to hire local counsel to pursue local legal redress, and despite these disclosures the client pursued this attorney, and even still the attorney faced discipline.
legal fees for the attorney’s preparatory work on the same matter completed prior to *pro hac vice* admission.

- *Use by state courts of UPL rules as a deterrent to out-of-state lawyers* - each state may prevent out-of-state attorneys from opening law offices to interact with clients in that state. Even after widespread adoption of Model Rule 5.5, some states have used their UPL statutes as deliberate deterrents to out-of-state attorneys in order to parochially protect the turf of in-state lawyers with a consequence of harming in-state clients from added costs and restricted choice of counsel.

IV. Practicing within the framework of Model Rule 5.5

Most states have a version of Model Rule 5.5 enacted into their professional conduct rules.

Below is the Model Rule, copied in full:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

    (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or 
    (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

    (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;
(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if
the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;
(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or
(4) are not within paragraphs (c) (2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction or in a foreign jurisdiction, and not disbarred or suspended from practice in any jurisdiction or the equivalent thereof, or a person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction, may provide legal services through an office or other systematic and continuous presence in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates, are not services for which the forum requires pro hac vice admission; and when performed by a foreign lawyer and requires advice on the law of this or another U.S. jurisdiction or of the United States, such advice shall be based upon the advice of a lawyer who is duly licensed and authorized by the jurisdiction to provide such advice; or
(2) are services that the lawyer is authorized by federal or other law or rule to provide in this jurisdiction.

(e) For purposes of paragraph (d):

(1) the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent, and subject to effective regulation and discipline by a duly constituted professional body or a public authority; or,
(2) the person otherwise lawfully practicing as an in-house counsel under the laws of a foreign jurisdiction must be authorized to practice under this Rule by, in the exercise of its discretion, [the highest court of this jurisdiction].
The Model Rule follows the familiar structure of first stating the general rule, then following with specific exceptions and clarifications. Under Rule 5.5(a), a lawyer shall not violate or assist another to violate the UPL rules of another jurisdiction. Then Rule 5.5(b) clarifies that establishing an office or a systematic and continuous presence and soliciting clients by holding oneself out to the public for the general practice of law is UPL if that attorney is not admitted in the jurisdiction. The brief takeaway from Rule 5.5(b): don’t establish an office in a state where you are not licensed to practice. But there are exceptions to this section.

The Federal Government Attorney exception to Rule 5.5(b)(1) permits the Attorney General to send any officer of the U.S. Department of Justice to any State or district in the United States to attend to any interest of the United States.7 By the Supremacy Clause of the Constitution, this supersedes any state law limitation imposed through licensing or other restriction.

Other exceptions include the Federal Law exception. Certain areas of the law are fully preempted by federal law. By the Supremacy Clause, states are prohibited from restricting practice in those areas by lawyers who are otherwise licensed to practice. Substantive practice areas included within this exception are patent law and immigration law. But what about admiralty law, which is generally federal in nature? Admiralty is the only substantive practice area named in the Constitution - certainly it is federal in nature. However, the body of law has grown to include many matters of purely state law: ship construction, ship sale, marine insurance, ship brokerage, insurance brokerage, pilotage, oil pollution, the doctrine of laches, Outer Continental Shelf Act

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cases, personal injury claims arising in state territorial waters, whether to commence a Jones Act suit in state court, which cannot be removed to a federal court.  

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\[A. \textit{The admiralty specialization}\]

Admiralty practitioners do enjoy certain special benefits under the professional rules. \[9\] Generally, claiming to specialize in a particular field of law is not permitted by the ethics rules. \[10\] Admiralty is an exception—the Proctor in Admiralty exception. \[11\] Only two groups are exempted from any certification process before being permitted to identify themselves as specialists. \[12\] Rule 7.4(c) states “[a] lawyer engaged in Admiralty practice may use the designation ‘Admiralty,’ ‘Proctor in Admiralty’ or a substantially similar designation.” The official comments give credit to history: “Paragraph (c) recognizes that designation of Admiralty practice has a long historical tradition associated with maritime commerce and the federal courts.” \[13\]

While Admiralty bears a specialist exception for purposes of attorney communication and solicitation under the ethics rules, I am aware of no \textit{admiralty specialist} exception applicable among the state bars or federal courts that grant admiralty practitioners an exemption under local UPL rules for admission to practice in a jurisdiction where the attorney is not otherwise authorized to practice. If anyone is aware of a case to the contrary, please let me know. \[14\]

\[10\] \textit{Model Rules of Prof’l Conduct} R. 7.2 (c).
\[11\] \textit{Model Rules of Prof’l Conduct} R. 7.4
\[12\] “Patent Attorney” is the other exception.
\[13\] \textit{Model Rules of Prof’l Conduct} R. 7.4 cmt. 2.
\[14\] richard.beaumont@thomasmiller.com
B. Temporary practice in a foreign jurisdiction

Model Rule 5.5(c) governs a variety of different situations where an attorney may engage in the practice of law in a foreign jurisdiction on a “temporary basis.”

One common situation is when an attorney travels to a foreign state to take depositions, investigate, or conduct discovery with the possibility of litigation arising inside or outside of the foreign state. It is conceivable that a Louisiana-based maritime attorney will find the need to travel to Houston or Galveston to investigate an incident. Model Rule 5.5(c)(2) permits that type of investigation “if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized.” So the rules embrace this form of discovery if the foreign attorney can “reasonably expect” to be authorized to appear in the forthcoming proceeding, pro hac vice or otherwise. Again, this applies in jurisdictions that have adopted Rule 5.5(c)(2), so it is important to check the foreign state’s local rules.

With a growing number of cases invoking arbitration, mediations, or other resolution proceedings, Model Rule 5.5(c)(3) provides a means for an attorney not admitted in the forum state for the arbitration to participate in the arbitration “if the services arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission.” This rule may be particularly relevant for attorneys trying to collect their fees in states that have not fully adopted this rule.15

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Michael Marks Cohen advises that it may be prudent for an attorney to associate local counsel or pursue *pro hac vice* admission.\(^{16}\)

The rules provide a safe harbor exception at Rule 5.5(c)(4) for temporary legal services that “arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice.” This rule requires there to be some nexus between the out-of-state matter and the foreign lawyer’s practice in a jurisdiction where she is admitted to practice.\(^{17}\) Look to local interpretations to determine the scope of the nexus because the rule has not been uniformly adopted.\(^{18}\)

As it pertains to Rule 5.5(c)(4), some states require a “tighter nexus” between the forum state and the state where the attorney is admitted to practice to satisfy the “reasonably related” requirement.\(^{19}\) For example, in Connecticut, Kentucky, Maine, North Carolina, South Carolina, Tennessee, and Virginia, the case must not only be “reasonably related” to the attorney’s home-state practice, but also must be services provided to an existing client where the prior representation is in a jurisdiction in which the attorney is licensed to practice.\(^{20}\) California also adopted this rule with the variation that requires that a “material aspect” of the matter occurs in another jurisdiction where the attorney is licensed to practice. Cal R. Ct. 9.48(c)(1).

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\(^{16}\) *Id.*

\(^{17}\) Donald R. Lundberg; Caitlin S. Schroeder, Multijurisdictional Practice, 60 Res Gestae 19 (October 2016).


\(^{19}\) *Id.* at 132.

\(^{20}\) *Id.* (citing various states’ rules of professional conduct adopting Rule 5.5(c)(4)); Connecticut has a variation on the rule where the representation must be “substantially related,” rather than “reasonably related.” CONN. RULES R. 5.5(c)4.
Other states require that foreign attorneys practicing temporarily under Rule 5.5 complete a verified statement\textsuperscript{21} or registration process, designate in-state agents for service of process,\textsuperscript{22} or submit to the state’s tax regimes,\textsuperscript{23} to comply with the rule.

C. Paradigms for providing state law advice

Admiralty practitioners are particularly exposed to UPL risk due to the multi-jurisdictional likelihood of the practice. But no special protective status is granted, even to Proctors in Admiralty. Thus, some paradigms to be aware of:\textsuperscript{24}

An attorney not licensed to practice in a second state and traveling to that second state not in connection with possible litigation but simply to counsel the client there about the attorney’s home-state law is generally permitted if there is no advertising or attempt to solicit clients while in the second state. It is to the attorney’s benefit if the client is an existing client domiciled in the jurisdiction where the lawyer is admitted to practice. The risk here is one of fee collection and this risk can be mitigated by collecting a fee retainer in advance or extending credit only to existing, long-term clients. Such travels, if taken to counsel a client about the law of the second state are not authorized except in association with a local lawyer actively participating. For protection, the out-of-state lawyer should notify the client that she is not authorized to give legal advice about the law of the second state and the client should likely incur additional fees for local counsel.

\textsuperscript{21} Rules Regulating Fla. Bar R. 1-3.11 (requiring foreign attorneys to submit a verified statement with the Florida Bar while engaged in arbitration proceedings and serve it upon opposing counsel, certifying that the foreign attorney is eligible to practice law in another state among other things).

\textsuperscript{22} S.C. App. Ct. R. 404 (designating the Clerk of the South Carolina Supreme Court as agent for service of process for attorneys appearing in South Carolina pro hac vice).

\textsuperscript{23} S.D. RULES OF PROF’L CONDUCT R. 5.5(c)(5) (requiring foreign licensed attorneys to obtain a South Dakota Sales tax license and pay sales tax in South Dakota).

\textsuperscript{24} See generally Michael Marks Cohen, Ethics in the Multijurisdictional Practice of Admiralty Lawyers, 32 FORDHAM INT’L L.J. 1135 (2009).
An out-of-state lawyer communicating from her home state with a client in a second state should consider whether the matter is governed by the law of that second state or not. Where the matter is governed by the law of the second state, there is a risk the attorney may violate the second state’s UPL rules. Even where this may not be considered “practicing law” in the second state, there is a risk of malpractice in the home state where an attorney gave advice about the laws of a jurisdiction where she is not admitted to practice. Of course, there may be additional problems for the attorney who advertises in the second state. Where communicating with a client in a second state from a home state about a matter that does not concern the second state, the Model Rules do not give clear guidance, and the situation will be governed by the local rules of the respective states involved. A practical tip for lawyers in this situation who may need to bring suit for payment of fees against a client seated in a second state is to commence suit in the lawyer’s home state to avoid what local prejudice could exist in the second state against out-of-state lawyers.

A maritime attorney’s potential exposure for a UPL claim may require her to proceed cautiously in engaging in activities in a foreign state. However, investigating whether a foreign state has adopted Model Rule 5.5 is a good start. Most scholars counsel that pro hac vice admission upon the commencement of an action in a foreign state is the safest course, especially in saving the client money in not having to pay duplicate fees to a local attorney and saving the attorney the headache of recovery of her own fees from the client.\textsuperscript{25} While seeking full admission in a foreign state is

beyond the scope of these materials, there are resources that have compiled and analyzed the benefits of seeking admission in additional jurisdictions.\textsuperscript{26}

V. Conclusion

The issues inherent in multijurisdictional practice highlight the unique nature of admiralty and maritime law. Attention to the rules that govern various aspects of this practice, thoughtful consideration about the reasons those rules exist, and engagement and candor with the courts and clients, can help admiralty practitioners avoid many of the potential pitfalls that the rules were designed to prevent.

\textsuperscript{26} See Abigail L. DeBlasis, Another Tile in the Jurisdictional Mosaic of Lawyer Regulation: Modifying Admission by Motion Rules to Meet the Needs of the 21st Century Lawyer, 38 N. Ill. U. L. REV. 205 (2018) (exploring the admission by motion rules and the requirements for working “full-time” to obtain admittance).
Ethical Issues in Vessel Arrests and Attachments

Vessel arrests and attachments under the Supplemental Admiralty Rules are an area where admiralty practitioners must be alert to ethical issues, due to the *ex parte* nature of these proceedings. These types of property seizures typically occur without any notice to the vessel owner—the court’s decision to issue a warrant for arrest or writ of attachment will be based solely on the plaintiff’s filings. Because a vessel may only be within a particular district for a short time, vessel seizures necessarily occur quickly. Consequently, plaintiff’s counsel may have only a few hours to investigate the claim and prepare the necessary pleadings. Similarly, a judge or magistrate will have a limited amount of time to review plaintiff’s filings before deciding whether the seizure should occur. If a vessel is seized, the ramifications on the vessel owner, charterer, and/or other third parties can be enormous. Nevertheless, plaintiff’s burden is comparatively low, while a vessel’s owner’s burden of proving a claim for wrongful arrest is quite difficult to meet.

The law does impose several safeguards that are particularly applicable to vessel arrests. For example, Federal Rule of Civil Procedure 11 obligates the seizing attorney to perform an “inquiry reasonable under the circumstances” that the arrest or attachment is not brought for an improper purpose, that factual contentions have evidentiary support, that legal contentions are warranted by existing law (or nonfrivolous argument for modifying the law), etc. Courts have imposed Rule 11 sanctions against plaintiffs and their counsel who knew that the grounds for arrest were likely baseless. However, Rule 11’s duty to investigate is usually considered in light of the time constraints involved, which can be a benefit to plaintiff’s counsel.

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1 This document was prepared in connection with the ABA TIPS Admiralty & Maritime Law Committee’s *Admiralty Disruption* conference, New Orleans, LA, March 22-23, 2019.
3 *Id.*
Both Supplemental Admiralty Rules B (attachment) and C (arrest) require that a complaint be verified, which is atypical for federal practice.\(^4\) Ostensibly, the verification requirement is imposed in light of the *ex parte* nature of the proceeding. What, then, constitutes a proper verification? Neither Rule B nor C gives any indication. The Ninth Circuit has required that “the signator ‘must satisfy himself that the averments in the complaint are true, based upon either his own knowledge or upon information and belief.’”\(^5\) An unsworn statement under penalty of perjury that the allegations in the complaint are true and correct, in accordance with 28 U.S.C. § 1746, is probably sufficient unless a local rule requires a specific format. Who should provide the verification? Some districts’ local rules explicitly require that the verification be from the party, not the attorney, unless the attorney states why the party cannot make the verification.\(^6\) But even if a local rule does not explicitly state who must provide the verification, there are good reasons that, absent extenuating circumstances, it should come from the party and not the attorney. For one thing, a verification by the attorney seems to add little, if anything, beyond an attorney’s obligations under Rule 11. Furthermore, when an attorney provides a verification, she risks running afoul of the bar against an attorney acting as a witness in a case.\(^7\) The best practice, then, is to have the party provide the verification, unless impractical under the circumstances.\(^8\)

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\(^4\) Federal Rule 11(a) sets the default rule that a pleading need not be verified unless required by a rule or statute.

\(^5\) *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287, 1295 (9th Cir. 1997).

\(^6\) See, e.g., S.D. Fla. Local Admiralty Rule A(5).

\(^7\) See ABA Model Rule of Prof’l Conduct 3.7; 7 West’s Federal Forms, Admiralty § 10677 (4th ed.) (“However, an attorney verifying a pleading would be well advised to do so only ‘on information and belief,’ lest he be deposed upon his purported knowledge.”).

\(^8\) *Accord Amstar Corp. v. M/V Alexandros T*, 431 F. Supp. 328, 337 (D. Md. 1977) (where plaintiff had no officers within the district and local rule did not explicitly require that the verification be from the plaintiff, attorney was permitted to provide verification); oHutson v. Jordan, 12 F. Cas. 1089, 1091 (D. Me 1837) (“The libellant is required to verify the debt or claim, on which the action is founded, by his oath . . . . Cases have happened, in which, in the absence of the party, the oath of his agent or attorney, has been admitted from necessity, but the verification of the debt by oath has always been held to be indispensable, when it was insisted upon.”); Thomas A. Russell, *The Foreclosure of Preferred Ship Mortgages*, 48 Consumer Fin. L. Q. Rep. 136, 138 (1994) (“Although the rule does not state who must verify the complaint, it would be best if made by an officer or an authorized attorney having knowledge of the particular facts.”).
Finally, some of the rules of professional conduct are applicable to arrests and attachments. Among these is Model Rule 3.3, “Candor Toward the Tribunal,” which imposes a heightened duty of truthfulness in *ex parte* proceedings:

“(a) A lawyer shall not knowingly:
   (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
   (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
   (3) offer evidence that the lawyer knows to be false. . . .

   (d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.”
Preventing and Defending Personal Injury Claims Arising from Mental Health Issues and Drug Use

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Introduction

Our industry is a microcosm of the country. Seafarers suffer from mental health issues and drug use, too. Recent maritime industry statistics confirm that mental illness is a growing concern on shore and at sea where accidents or incidents resulting from a seafarer’s mental breakdown have had significant consequences for companies and ship’s crew. The stressors unique to shipboard life can become acute for some seafarers who already bring pre-existing trauma aboard the ship. These stressors are exacerbated by potential shipboard trauma such as:

- navigating through extreme weather and the threat of sinking;
- facing the threat of piracy or experiencing a piracy attack;
- experiencing a ship fire or other threats to the vessel’s integrity;
- discovering death aboard ship by injury, natural cause, suicide, or homicide;
- witnessing the death or severe injury or illness of a crewmate; or
- experiencing acts of abuse, bullying and harassment while on board.

This panel will draw from their unique perspectives as employers, insurers, experts, and lawyers in a discussion on how to avoid, minimize, and defend claims for injury/illness flowing from mental health issues and drug/alcohol dependencies. Through pre-employment loss prevention, risk mitigation during employment, and lessons learned post-incident, employers can manage their exposure to these often expensive and sometimes preventable risks.

I. Best practices in Pre-Employment Loss Prevention

When people think of safety, it is typically physical safety. However, mental health is just as important, if not more so. Poor mental health can affect the physical capabilities of seafarers. Whether shoreside or onboard, company leaders probably worry more about injuries and death than anything else. This includes more than just company presidents; direct supervisors also worry about the lives of their crews. In turn, the worry on these people can take their own toll and lead to physical problems.

It is well-established practice for prospective crewmembers to undergo a pre-employment medical examination prior to being declared medically fit to sail. Traditionally these examinations focus on physical well-being. Given the increasing awareness of mental health disorders in
seafarers, it is perhaps not surprising that screening personnel for potential vulnerability to develop mental health problems seems like an attractive option for shipowners and their insurers. Selection screening refers to the administration of some combination of questionnaires and/or formal assessments by a mental health professional in order to identify who is, or is not, suited to be at sea. Valid and reliable pre-screening would allow unsuitable prospective seafarers to avoid risking their mental health, help avoid costly mental health repatriations and reduce the risk of mental health related poor performance, and the consequential risk of accidents.

Leaving aside the issue of an individual’s right to medical privacy, the value in selection screening is questionable. Recent studies carried out in other occupational groups, most notably the armed forces, have shown that selection screening processes do not work. The reasons for the failure of a pre-screening process are varied but include personnel not wishing to answer questions about their psychological health honestly because they fear being stigmatized.

Most maritime jobs, whether on the waterfront or sailing are inherently dangerous. In order to mitigate that risk, drug testing may be done for pre-employment screenings, random testing, suspicious behavior, and post-accident. It is important to understand the laws of your state in regards to drug testing and to be sure that no one individual or group of people are being singled out for testing. An employee may even test positive for an illegal substance, but have a valid prescription for that drug. While that employee may not be fired for those reasons, it is important to know whether that substance affects the employee and how they carry out work tasks. If a work environment is already dangerous, employers do not want to add contributing factors that puts the lives of their employees at risk. Some employees may be very open with the prescriptions they have and share their conditions, while others do not want anyone at work to know what they are going through and regularly need in order to make it through the day. If an employee is prescribed a pain medication that would prohibit them performing their usual work duties in a safe manner, alternative assignments, such as light-duty, could be made for that period of time in order to accommodate. If the prescription is long-term, more assessment may be needed in order to determine if a reassignment could be made in order to make the necessary accommodations.

II. Risk Mitigation during Employment

A. Mental Health Issues

Working at sea exposes seafarers to a number of factors that can push them towards the higher-risk areas for mental health problems. These factors include:

1. **Social isolation**: Long periods spent alone in cabins allows seafarers to ruminate over perceived problems.
2. **Long voyages**: The rigors of life at sea without a break can take a toll on even the most robust seafarer.
3. **Fatigue due to the watch system**: Lack of rest has been linked to a host of physical/emotional problems.
4. **Separation from family and friends**: Lack of contact with loved ones who can provide a sympathetic ear in times of stress can have a profound impact on some individuals.
5. **Increased pressure**: Lower crewing levels places the burden of onboard tasks on the shoulders of fewer seafarers, who will inevitably feel the strain.

6. **Lack of crew cohesion**: Crews often do not mix socially as they did 20 years ago; problems concerning language and culture may also exacerbate this problem.

7. **Lack of shore leave**: Shorter turnaround times often deprive seafarers of the benefits of a run ashore.

8. **Harassment and bullying**: Seafarers subjected to bullying and harassment live in close proximity to those who are bullying and harassing them.

9. **Precarious employment**: With employment after the completion of their contracts not guaranteed, many seafarers experience anxiety when their current contracts come to an end.

Rather than trying to identify a seafarer who might be prone to mental health issues, it has been found to be more effective to focus on good social support and effective supervision whilst on board a vessel. There is very good evidence that effective social support provided by colleagues, and more importantly a seafarer’s day-to-day supervisor, strongly influences their mental health.

Companies can help by: (1) providing general educational programs for ship staff to help remove the stigma around mental health; (2) teaching ship staff the signs when someone is having a mental health problem, particularly for officers/senior officers; (3) promoting knowledge organizations that can provide counselling to seafarers on board their ships; and (4) taking steps to try to address some of the risk factors that are known to contribute to mental health problems amongst seafarers.

With regard to mental health, there can be no doubt that life as a sailor can be stressful and isolating. To the degree that mental health issues affect job performance, mental health issues can be disabling. Regulators have stepped up their requirements in the area of mental and physical fitness greatly in recent years. The Maritime Labor Convention increased the requirements for medical certificates, requiring that a medical review and certification occur every two years. The Coast Guard issued NVIC 04-08 to provide guidelines on issuance of medical certificates for Jones Act mariners. Because of the nature of mental health issues, the medical certification process relies on self-reporting in order to diagnose and address mental health issues. As a result of the increased scrutiny and consequences, seafarers have an incentive to conceal potentially disqualifying conditions or medications.

One benefit employers can provide to their employees is counseling. However, it is crucial that employees feel safe in seeking help, especially if it is provided by his or her employer. There is a global stigma around mental health and employers need to ensure the trust of their employees. There are many different avenues that employers could use to provide help to their employees. Mentoring relationships could be created for those who are interested, even if the relationship was only there to provide a forum to vent or talk out any problems that an employee may not feel comfortable talking about with his or her supervisor or human resources. Counseling could be given offsite by qualified, reputable professionals. Even if employers do not provide the counseling themselves, if there are local resources, the information could be shared with employees so they would know where they could go. In the event that an employer would cover any expenses related to employee counseling, it is imperative that the employer does not receive
any identifiable information as to which employees may be taking advantage of the benefit offered to them. If any information were to become available to the employer about the employees seeking assistance, the trust between employee and employer, and employee and provider is not only lost, but more distress has now been placed on that employee which may have been the reason for their counseling in the first place.

Seafarer wellbeing is a holistic concept combining physical, mental and social wellbeing. People regularly forget how mental and physical wellbeing are linked. The Maritime Labour Convention (MLC) 2006 sets clear responsibilities for shipowners/managers in relation to food for seafarers. It has three basic principles/minimum standards regarding the provision of food on board: (1) Catering staff shall undergo the necessary training for their positions; (2) Meals provided should be adequate, varied, nutritious and served under hygienic conditions; and (3) Food should meet religious requirements and cultural practices, and ‘shall be suitable in respect of quantity, nutritional value, quality and variety’.

When one exercises, there is a release of the ‘happy hormones’ serotonin and endorphins, promoting a sense of happiness, well-being and contentment. Exercise increases physical and mental stamina, and is an immediate energy booster. The offshore drilling industry has begun to fit drilling rigs with gyms. While this is not an option for most ocean-going ships, it behooves the shipowner to ensure there is both time and space for crew to work out between shifts. Things like weight loss challenges or and fitness based challenges including pedometer steps, miles run or cycled on treadmill/exercise bikes creates a feel good factor if people have goals, achieve them and are rewarded.

Shipping operators may promote mental health by:

1. Designating a director responsible for the ‘mental health policy’
2. Developing a ‘top-down’ approach
3. Raising awareness over the issue
4. Providing details of advisors who can discuss with individuals mental health issues
5. Eliminate harassment and bullying
6. Team building events (most people seek help from friends when they have an issue to do with mental health. Statistically doctors are the last people they go and see)
7. Reduce stigma by having confidential avenues for staff to seek help (confidential means being able to speak with someone who does not have regulatory or managerial responsibility for them).

Another potential grounds for risk mitigation is to make the crew less stressed by making the ship more comfortable. The major class societies offer various comfort class and habitability notations, such as:

ABS  Guide for Crew Habitability on Ships
LR   Rules & Regulations for the Classification of Ships, Part 7, Chapter 12
DNV  Rules for the Classification of Ships, Part 6, Chapter 33, Comfort Class
BV   Rules for the Classification of Ship, Part f, Chapter 6
Further Title 3 of the Maritime Labour Convention (MLC) 2006 provides requirement for crew accommodations and specifically addresses considerations of physiological or psychological problems created by the shipboard environment and problems arising from physical stress on board a ship. Further, with respect to investigations, the MLC provides the following guidance:

Guideline B4.3.6 – Investigations
1. The competent authority should undertake investigations into the causes and circumstances of all occupational accidents and occupational injuries and diseases resulting in loss of life or serious personal injury, and such other cases as may be specified in national laws or regulations.
2. Consideration should be given to including the following as subjects of investigation:
   (a) working environment, such as working surfaces, layout of machinery, means of access, lighting and methods of work;
   (b) incidence in different age groups of occupational accidents and occupational injuries and diseases;
   (c) special physiological or psychological problems created by the shipboard environment;
   (d) problems arising from physical stress on board a ship, in particular as a consequence of increased workload;
   (e) problems arising from and effects of technical developments and their influence on the composition of crews; and
   (f) problems arising from any human failures

B. Drug Use

Proper and improper drug use present new safety and compliance challenges for maritime employers. Similarly, increased sensitivity to mental health issues raises new opportunities to increase safety and wellness in the maritime domain, but again present employment law challenges. Addressing these issues requires care and attention. In both contexts, missteps can complicate issuance of merchant mariner credentials or generate liability for wrongful termination.

Drug and alcohol rules are safety regulations. The regulations requiring drug testing for mariners are intended to discourage drug use by commercial vessel personnel, reduce the potential for marine casualties related to drug use, and enhance the safety of the maritime transportation industry. Whenever you have a violation of safety statute or regulation on a vessel, you are going to run up against the Pennsylvania Rule. Under the Pennsylvania Rule, a vessel that violates a statute or regulation must show “not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been” one of the causes of the collision or accident. The Pennsylvania, 86 U.S. (19 Wall.) 125 (1873). The Pennsylvania Rule is meant to encourage strict compliance with maritime regulations pertaining to the safe operation of ships.

There has been a proliferation of drugs that affect mood, memory, sleep, reaction time, judgment, or other safety related attributes. Mariners taking antidepressants, antipsychotic medication, attention disorder medication, and pain medication are subject to having their medical condition reviewed by the Coast Guard. Meanwhile, a number of states have recently
decriminalized various drugs under state law, giving people the impression that it is appropriate to use these drugs, though they may be inappropriate in a marine transportation context. However, federal law continues to prohibit various types of drug or alcohol use for transportation workers in very specific terms, with an overriding interest in promoting safe operations.

As a clarification, improper drugs include prescription and over the counter medicine. Maritime personnel taking or in possession of prescription or over the counter drugs are responsible for obtaining a notice of clearance from a Designated Health Care Practitioner prior to reporting to work. In order to assure professionalism and protect confidentiality of employee health information, many maritime employers outsource medical review to an outside consultant.

U.S. DOT regulations continue to require pre-employment and random testing. Regulations on post-incident testing have recently been modified. Following a “Serious Marine Accident” drug tests of all maritime personnel aboard should be reported on the new Coast Guard Form 2692B, issued on April, 2018. Specimens for drug testing must be collected within 32 hours of incident; and alcohol testing must be conducted within 2 hours of incident. If there are safety concerns, drug testing specimens should still be collected as soon as possible and alcohol within 8 hours of incident. If these time limits are not met, it will be important to document the reasons for any delay contemporaneously. Refusal or failure to perform testing will result in future consequences for the company and the individuals involved.

Under 46 CFR 4.03-1 and 46 CFR 4.05-1, reportable Serious Marine Incidents have been limited with a higher threshold than previously was in place. The new definition only includes the following: (1) One or more fatalities. (2) An injury to a crewmember, passenger, or other person which requires professional medical treatment beyond first aid and, in the case of a person employed on board a vessel in commercial service, which renders the individual unfit to perform routine vessel duties. (3) Damage to property, as defined in 46 CFR 4.05-1, in excess of $100,000. (4) The actual or constructive total loss of any vessel subject to Coast Guard Inspection. (5) The actual or constructive total loss of any self-propelled vessel, not subject to inspection by the Coast Guard, of 100 gross tons or more. (6) A discharge of oil of 10,000 gallons or more, into a navigable waterway. (7) A release of a hazardous substance equal to or greater than its reportable quantity into the navigable waters of the United States, or into the environment of the United States, whether or not the release resulted from a marine casualty.

This new definition is material because for lesser incidents, a Non-DOT form must be used in connection with the incident. Recent precedent established that using the DOT form for non-DOT required incident testing renders the test unusable by the Coast Guard. If the test is not admissible, then the Coast Guard will not take action on the substance abuser’s license, even though there has been a positive test.

Reasonable Suspicion testing happens when there is a reasonable and articulable belief that the individual is under the influence of an inappropriate drug or is intoxicated. When possible, two supervisors should document their observations prior to ordering a test. The practical application of this rule is the "judge test." If you would feel confident in your ability to tell a judge exactly what physical, behavioral, emotional, or job performance cues indicated to you that a
mariner needed to be drug or alcohol tested for reasonable cause, then you probably have reasonable cause.

A number of new laws have been passed relating to the handling of positive results. A best practice is to provide job applicants and current employees receiving a positive test with a Substance Abuse Professional (SAP) Referral Letter. Failure to provide a referral may violate various state laws. The Coast Guard must be notified if the individual holds a Merchant Mariner Credential (MMC) or Certificate of Registry (COR) issued by the USCG (regardless of whether applicant was hired or not).

These new regulations present a significant challenge for companies attempting to follow a zero tolerance policy. Some employers may take a view that individuals confirmed as having a drug or alcohol problem must be terminated immediately from safety sensitive duties. This approach, while promoting safety in the workplace, can give rise to wrongful termination claims under new state laws.

Under some circumstances, such as a voluntary deposit of credentials with the Coast Guard, it may be possible to return to work after completing a substance abuse rehabilitation program involving further testing and monitoring. The costs of these programs are to be paid by the individual. Some maritime employers will not allow mariners to return to work even after their credentials are restored. Canadian authorities sometimes require that individuals with restored credentials be removed from crews in international service.

As companies get more involved in addressing the wellness of their workforce, finding ways to address mental health has become a higher priority. The recommended approach to addressing these issues is to work towards breaking the stigma around addressing them, include wellness in regular discussions of safety in the workplace, educate mariners on stressors and treatment, and encourage self-reporting. Obviously, self-reporting in this highly regulated workplace raises issues for continued employment. For mariners struggling with thoughts of suicide, the pressure to internalize the issues and discouragement against reporting are particularly acute. One significant recommendation is that employers engage in mental health and suicide prevention training, helping to implement a compassionate approach.

These policies are not only required by law, but they help assure safe and reliable operations. Companies with an overall goal of zero tolerance for improper drug use, injuries, spills, or other incidents may be inclined to take a hard-line approach on these issues at the risk of facing wrongful termination claims. Ultimately, the issue of mental health calls for a balancing of the interests in a fit workforce with the need to provide mariners with a heathy career path and predictable job security.

III. Litigation and Lessons learned Post-Incident

P&I cover will respond to the member’s legal liabilities towards ill or injured crew. Cover will extend to mental health issues if the member is liable at law. For example, a crewmember who suffers with post-traumatic stress disorder after being held hostage by pirates will be entitled to compensation for his/her mental health injuries.
There are several other cover factors to consider, including:

- Liability for maintenance and cure to a crewmember who suffers injuries as a result of abusing drugs;
- Liability towards other crewmembers or third parties on the ship who have been injured as a result of the presence of a mentally unstable seafarer;
- P&I liabilities arising as a result of a higher likelihood of casualties at sea when the ship is under the control of someone who is impaired due to a mental health or addictive crisis;
- A vessel can be liable in rem for fines arising from operation by a crewmember whilst under the influence of drugs;
- Punitive exposure in the event that a lackadaisical company procedure for ensuring a drug and alcohol free ship results in a major incident;
- A ship operator can be held liable for failure of the ship’s master and officers to guard and prevent the suicide of a seaman who was observed to be experiencing psychiatric difficulties;

Notwithstanding any liabilities in tort, there may be a contractual entitlement to a death in service benefit; in which case does the employer have to pay?

Whether compensation is payable under the employment contract in the case of suicide will depend on the terms of the employment contract and/or any applicable collective bargaining agreement. Any contracts seeking to exclude compensation in the case of suicide will need to be drafted clearly to this effect. Will the P&I Club cover? Some policies, life insurance policies for example, will likely exclude coverage where the cause of death is suicide. P&I Clubs insure a member’s legal liabilities and so where they have a legal liability to pay a contractual benefit due to death by suicide the Clubs will cover that.

The number of seafarer suicides has increased. Evidence collected from maritime organizations has highlighted that seafarers may be considered an especially ‘at risk’ group. For instance, between 1960 and 2009, around 6% of seafarer deaths were due to suicide. This figure excludes those who ‘disappeared’ at sea, many of whom are likely to have taken their own life. Whilst tragic, suicide is likely to be only the tip of the mental health iceberg, with cases of depression, post-traumatic stress disorder (PTSD) and other anxieties disorders (together referred to as common mental health disorders or CMHDs) being likely to be causes of sickness, absence and poor performance on board.

It is not uncommon for personal injury lawsuits to include PTSD either in conjunction with physical injuries, or even in isolation. PTSD is a mental health disorder which follows exposure to actual or threatened death, serious injury or sexual violation. The disorder may follow a single significant incident or come on as a result of an accumulation of traumatically stressful incidents over time. Some occupations, such as military personnel or emergency service workers, are at increased risk of suffering from PTSD. How common PTSD is in seafarers is unknown.

Absence caused by mental health issues can cost a business money, however what is known as “presenteeism” is just as big an issue because most people with mental health problems remain
at work and inevitably underperform or make mistakes leading to accidents. But will crew volunteer information relating to past mental health issues? Most people will not want to disclose this for fear of harming their employment prospects.

**Conclusion**

It is the responsibility of all stakeholders in the maritime industry to care for its people. The role of the insurer is traditionally perceived as writing the checks following the onset of a medical or mental health condition. However, the P&I Clubs recognize that in encouraging and enabling their members to create positive work environments for crew members, everyone does better in the long run. It is beneficial to everyone if the company takes a stand supporting mental health and providing the resources necessary for employees to live their best lives, both physically and mentally.
ABA TIPS Inaugural Admiralty Committee Conference
Admiralty Disruption: In-House Counsel
Roundtable CLE Paper

Stephanie S. Penninger, Partner & Chair of Maritime Transportation at Benesch, Friedlander, Coplan & Aronoff LLP, Chicago, IL, will moderate From Blue to Brown Water: Maritime In-House Counsel Roundtable as part of the Admiralty Disruption conference being held at the Sheraton in downtown New Orleans on March 23, 2019. Panelists include:

- Carrol Hand —Associate Counsel— Ocean Network Express (North America), Inc., Richmond, Virginia.
- Alex Smith—Associate General Counsel—TPG Marine Enterprises, Indianapolis, Indiana.
- Tim Woodard, Head of Office, Lockton Companies, Houston, TX.

Below are excerpts of observations of the panelists:

Topic: What is keeping transportation and logistics in-house counsel up at night? What is outside counsel doing to cause or help their insomnia?

One theme that will be discussed among the panelists is the dwindling availability of maritime talent. Especially on the insurance side of transportation, companies are seeing a reduction in the number of skilled maritime attorneys and claims professionals. There is a prevalent gap between less and more seasoned maritime professionals; experienced executives and counsel are experiencing difficulty in finding mentees whom they can train to “fill their shoes.” The panelists suggested that the maritime industry as a whole has not sufficiently marketed itself as a lucrative career and that there is a need for efforts to attract and retain maritime industry talent.

Another issue to be discussed by the panelists is the current state of contract negotiations. Carriers and transportation intermediaries have been experiencing an increase in shipper contracts imposing non-transportation-related terms. Shippers are tendering contracts to carriers and related service providers that are not truly transportation service agreements. Instead, by signing these contracts, shippers are requiring brokers and other transportation entities to abide by various health, safety and environmental responsibilities that can be difficult, if not impossible, to achieve. Further, some shippers are expecting that contracting parties abide by their codes of conduct. These contractual obligations place additional responsibilities on transportation service providers that

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1 This paper is co-authored by Stephanie S. Penninger and John C. Gentile, Associate, Benesch, Friedlander, Coplan & Aronoff LLP, Wilmington, DE on behalf of the Panel. The views herein are theirs alone but will be used as a platform for the March 23, 2019 conference panel. Part of this paper uses portions of a paper that was also co-authored by Ms. Penninger and Mr. Gentile and submitted for CLE credit in connection with the Transportation, Logistics and Insurance Roundtable held in Chicago on April 3, 2018 by the ABA TIPS Admiralty & Maritime Law Committee. Re-purposed and used for this conference by permission.
can be challenging to monitor and abide by. Also to be discussed is balancing risk mitigation with commercial business interests, particularly when addressing new statutes or regulations, *e.g.*, IMO2020 and CA SB 1402, in service contracts.

Other concerns related to contract drafting and negotiation to be discussed are overly-broad contractual provisions and outside counsel not being sufficiently familiar with the industry or business or company strategy to advise on and draft agreements effectively. Outside counsel provides real value when they understand the industry and the culture of the business they are advising. In-house counsel is looking for outside counsel to be quick and concise with answers, and possess an awareness of the pros and cons of a particular situation.

The issue of personal injury claims is also giving companies, particularly those with operations in the U.S. southern states, a headache. Recently, these claims have been skyrocketing in value due to efforts by plaintiff’s attorneys, especially in Texas and Louisiana. Claims have been hitting companies so hard that they are looking at whether operations in the American south are worth the investment. Admittedly, there was no indication that moves out of the American south were imminent; however, it is clear that this is a concern throughout the transportation and maritime industry. Insurance companies and other risk related entities are exploring ways to tamp down the value of some of the less merited claims. Further, at least one panelist is concerned about whether Subchapter M changes or has any bearing on the “unseaworthiness” definition or legal standard to be applied in maritime cases involving personal injury and the Jones Act. This too will be discussed.

Another issue that is giving many in house attorneys sleepless nights is the possibility of negative publicity that damages the reputation of their company. Other pressing issues include: slowdown of the global economy, increase in competition, increase in regulations, cyber-attacks, failure to evolve or innovate, retention of talented workers, business interruption and political issues. In house counsel are looking to outside counsel to assess risk and assist in preventing public relations nightmares.

*Topic: What can outside counsel do better to help in-house counsel and their clients?*

One thing that can be done that is often overlooked until it is too late is addressing and planning for unforeseen circumstances. Talking to clients about a worst-case scenario can make a difference when unfortunate situations arise. By planning or having a procedure in place to deal with an unforeseeable event, clients will be able to react faster to contain damage and get counsel involved to help.

Of course, not every situation that arises is foreseeable. With that said, it is important to remember to take a big picture look at a transaction or particular shipping contract, and evaluate if the client is in the best possible situation to handle anything that may come their way.

Clients also want counsel to “be part of the solution, not part of the problem.” This means a number of different things but clients want their outside counsel to keep them moving forward while handling problems along the way. Outside counsel can prove their worth by advising their clients of potential pitfalls in contracts and issue spotting in their daily business operations. Clients
have certain goals and need the assistance of counsel to achieve them. The relationship between outside counsel and their clients works best when counsel thinks of himself or herself as a “business partner” and sees the objectives of the business as their own so that they use their legal skills to help the business get there.

*Topic: Examples of Outside Counsel being a Part of the Solution?*

Panelists will share examples of how outside counsel have proved to be instrumental in providing creative solutions to achieve multiple client goals. One panelist will talk about how his company was looking to scrap a large vessel but wanted to do it in an environmentally friendly manner and without the use of child labor, which can be rampant in certain parts of the world that have ship scrapping yards. Outside counsel was able to assist in locating a shipyard that would comply with the client’s demands and was able to draft an agreement that assured compliance from the scrapping shipyard. Another panelist will discuss her experience in working with outside counsel to alleviate a situation where a vessel caught on fire. Her outside counsel was innovative, and able to work quickly enabling the panelist to be able to focus her attention on alleviating customer concerns.

**Recent Case Law Highlighting the Need to Plan for the Unanticipated**

*In re Larry Doiron, Inc., 879 F.2d 568 (5th Cir. 2018).*

In October 2005, Apache Corporation (“Apache”) entered into a blanket master services contract (the “Contract”) with STS. The Contract included an indemnity provision running in favor of Apache and its contractors. Fast forward to 2011 and Apache issues a work order directing STS to perform “flow-back” services on a gas well in waters of Louisiana to remove obstructions hampering the well’s flow. Upon engaging the task, STS decided it needed a vessel equipped with a crane to lift equipment to help remove the obstructions. Apache agreed with Larry Doiron, Inc. (“LDI”) to provide a crane barge. During the removal of the equipment, the LDI crane operator struck and injured one of the STS workers.

In the aftermath of the accident, LDI claimed indemnity from STS. Unfortunately for LDI, Louisiana law does not enforce indemnity provisions in this context as being against public policy. However, if maritime law applied, then the indemnity provision would be applied. *Id.* at 570. The parties had not contemplated using a vessel when the Contract was drafted—illustrative of the need to plan with clients about unforeseen events.

The Court adopted a two-pronged test to determine whether the Contract is maritime or should apply state law. First, one must ask is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters. Second, if the answer to the first question is “yes,” does the contract provide or do the parties expect that a vessel will play a “substantial role” in the completion of the contract? If the answer is yes to both questions, then the contract is maritime in nature. *Id.* at 574.

The Contract was determined to be non-maritime and the case was remanded to apply Louisiana state law—which rendered judgment in favor of STS and dismissed LDI’s third-party complaint.
against STS. The Fifth Circuit held that the use of the vessel was unexpected and that the use of the barge to lift the equipment was an “insubstantial” part of the job and work the parties did not expect to be performed. *Id.* at 577.

One may think that the use of the vessel may be necessary to work on a gas well in open water off the shores of Louisiana. However, the parties here did not consider it and the Court determined that the eventual use of the barge was insubstantial. This is an example of how parties should be open-minded and considerate of all risks that may come into play.

**Know the Language in Your Contracts and Other Governing Documents**


This case from the U.S. District Court for the Southern District of Texas highlights the importance of knowing the contractual language binding your company’s operations.

Danmar agreed to delivered 28 of Caddell’s air handling units from Norfolk, Virginia to a U.S. Embassy in Kabul, Afghanistan. Caddell alleged that the cargo was damaged in transit between Pakistan and Afghanistan. Caddell sued Danmar for breach of contract, negligence and breach of bailment obligations. *Id.* at *1.

Danmar responded by filing a motion to transfer to the Southern District of New York because the applicable bills of lading included a form-selection clause specifying the SDNY as the venue where any claims against Danmar should be determined.

The forum-selection clause stated:

14.2. U.S. Carriage - The contract evidenced by or contained in this bill of lading or otherwise arising from the Carriage or in relation to the Goods shall be governed by and construed in accordance with the laws of the United States of America and particularly 46 USC Section 1300 et seq. of US COGSA. Any claim against the Carrier under this bill of lading or otherwise arising from or in relation to the Services or the Goods shall be determined exclusively by the United States District Court for the Southern District of New York to whose jurisdiction the Merchant irrevocably submits. The Merchant agrees that it shall not institute legal proceedings in any other court and shall indemnify the Carrier for all legal costs and expenses incurred by the Carrier to transfer or to remove a suit filed in another forum. *Id.* at *2.

Caddell argued that the “purchase orders” which were a separate and prior agreement, controlled and it did not contain a forum selection clause. Caddell did admit that neither party formally executed the purchase orders but argued the bills of lading were merely receipts and the purchase orders should control. *Id.*

The Court held that the bills of lading controlled and thus transfer to the Southern District of New York was appropriate. There was no acceptance of the purchase orders by Danmar. Further,
Caddell’s claim it did not see the terms and conditions of the bills of lading did not preclude enforcement of the forum-selection clause. *Id.* at *7.*

The terms and conditions of the bills of lading were publicly available. Regardless, the Fifth Circuit does not require that a shipper receive bill of lading terms and conditions in order to be held by them. *Id.* Caddell had constructive notice of the bills of lading terms and conditions, which included the forum-selection clause.


Plaintiff Ergon Oil sued Canal Barge Co., Southwest Shipyard, L.P., and Saybolt related to a shipment of 48,000 barrels of crude oil from Texas City, Texas to Vicksburg, Mississippi. The cargo had been contaminated in route to Vicksburg. Ergon Oil sued defendant Saybolt, alleging failure to provide inspection and monitoring services on Ergon’s behalf, and, failure to timely notify Plaintiff of the existence of potential contaminants aboard the barges, such that Ergon was prevented from taking appropriate action to protect the oil. *Id.* at *2.*

Saybolt filed a motion to dismiss, arguing Plaintiff did not notify Saybolt of its claim within “45 days of delivery of the Saybolt report” and alternatively, that damages were limited to $20,000. *Id.* The applicable limitation of liability provision stated:

7. LIMITATION OF LIABILITY

All claims must be made in writing within 45 days after delivery of the Saybolt report regarding the work/services or such claim shall be deemed as irrevocably waived. Saybolt's liability under this Agreement or in connection with any service hereunder will not exceed the amount equal to ten times the charges payable for the services which are the subject matter of the alleged liability or the amount of USD 20,000, whichever is less. This remedy shall be the sole and exclusive remedy against Saybolt arising out of its work. *Id.* at *3.*

Saybolt relied on the above provision from the Preferred Rate Agreement entered between Ergon and Saybolt in 2014. The Court held that the language banning claims unless made within 45 days after Saybolt delivers its report was contrary to Texas law, which governed the dispute by agreement of the parties. Under Texas law, a notice of a claim for damages as condition precedent to sue is not valid if less than 90 days. Ergon’s damages were limited to $20,000, however, as the Court held that limitation of liability provision was valid in that regard.

This case is another example of how outside counsel must communicate with in-house counsel and their clients to ensure compliance with local, state and federal laws.

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MASTERING ETHICS MASTERING ETHICAL ISSUES IN THE MARITIME CYBER SECURITY SPACE

MARCH 23, 2019

American Bar Association • Tort Trial & Insurance Practice Section
ADMIRALTY DISRUPTION

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Admiralty Disruption
March 22, 2019

CLE Paper for Panel:  FIRE! IT WAS ALWAYS BURNING SINCE THE WORLDS’ BEEN TURNING

From containerships to tankers to every ship in between, our industry is facing a notable increase in fires aboard vessels. We tackle the legal, business, and crew issues straight on, with speakers from a C Suite, P&I Insurance, containership risk management, and an expert perspective. The MSC Flaminia casualty and legal battle will be used as a backdrop and is the focus of this paper.

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I. Introduction

Despite the alleged softening of the maritime industry since 2008-09, the volume of waterborne trade continues to rise. The ebbs and flows of the industry mean changing partnerships and alliances, more complicated logistics chains, increased customer demands and added competition to retain market shares in the face of decreasing profit margins. When companies are focused on their bottom lines, a patchwork of understandings, partnerships and daily practices between maritime shipping interests can emerge. The ambiguities in corporate relationships and weaknesses in internal practices may go unnoticed during daily commercial transactions. But when disaster strikes, it is too late to discern the strength of your corporate documentation process and policies.

¹This paper is authored by Chris Nolan on behalf of the Panel. The views herein are those of his alone but will be used as a platform for the conference panel. Part of this paper uses portions of the Holland & Knight LLP alert issued on July 27, 2017, entitled Shippers, Freight Forwarders, NVOCCs and Carriers’ Maritime Incident Warning Signs, Lessons Learned and Action Items for In-House Counsel, co-authored by Chris Nolan and Blythe Daly. The authors served as counsel for a party in In re M/V MSC Flaminia before obtaining dismissals from parties with claims before trial. Reprinted and used for this conference by permission.
Disaster did strike on July 14, 2012, when an explosion and fire broke out aboard the M/V MSC FLAMINIA (vessel) in the Atlantic Ocean (incident). The incident caused loss of life and significant damage to the vessel and cargo in excess of $100 million. In the subsequent years, actions were initiated in various international jurisdictions in an effort to determine liability, compensate the decedents' families, and recover for cargo loss and damage. The vessel's owner filed the principal Limitation of Liability Act suit in the U.S. District Court for the Southern District of New York. To date, the action has required two full years of fact discovery, more than a year of expert discovery, and five different judges to adjudicate disputes. Several opinions have been issued and phases of trial completed. Four of the key rulings will be assessed in order to provide a framework for the types of issues that arise in a fire incident at sea. Before doing so, however, a foundational understanding of cargo documentation and companies is informative.

II. The Cargo Goods Document Chain

There are numerous companies and documents involved in the cargo logistics process before cargo is placed aboard a vessel. While the types of documents and responsibilities of parties vary depending on the goods being shipped, this paper will use the example of a dangerous goods chemical cargo like the one at the center of the MSC Flaminia dispute.

The documentation process from the booking to the vessel's departure is short. Generally, the cargo shipper sends a booking request, together with cargo instructions, to the NVOCC and the freight forwarder. The NVOCC, in turn, books the cargo with the ocean carrier. The NVOCC, after confirming the booking with the ocean carrier, provides the shipper with a booking confirmation. The shipper then sends the freight forwarder its letter of instruction for preparation of the express bill of lading, the commercial invoice and certificate of origin. The letter of instruction typically provides chemical product handling warnings.

Upon receiving the shipper's letter of instruction, the freight forwarder generates the master bill of lading (or master bill of lading instructions). The freight forwarder also enters the information into the federal government automatic exporting system which provides a control number for the shipments which is subsequently affixed to documents. The freight forwarder then sends the master bill of lading to the NVOCC who in turn prepares the draft express bill of lading. The express bill of lading is sent by the NVOCC to the ocean carrier for its sea waybill.

III. Cargo Breaking Bad and the Legal Claims That Follow

Not all cargo container shipments have happy endings. When an incident occurs, potential causes of action against entities in a cargo chain include negligence, failure to warn, breach of contract, strict liability and indemnity. Four rulings arising out of the MSC Flaminia incident merit further consideration.
a. The MSC Flaminia Freight Forwarder Ruling

The documentation process described above is similar to that in *In re M/V MSC Flaminia*. The key difference is that the NVOCC therein retained its own freight forwarder to act as its in-house document preparer and coordinator. The companies entered into a "Logistics Alliance Agreement" which provided the companies were to act as "partners" and jointly marketed in the industry, but with each entity having its own, defined role internally. From documentation, to pricing, to logistics vendors, the process was collaborative in nature to all "mutually agreed customers."³

The contract is relevant because the NVOCC and freight forwarder handled logistics for the dangerous good 80% grade divinylbenzene (DVB80), which is one of the cargos in the vessel’s hold that caught fire. The shipper provided specific stowage instructions for the DVB to be kept away from heat sources and to stow above deck for temperature monitoring. These instructions were conveyed by the NVOCC to the ocean carrier for the preparation of the sea waybill. However, the NVOCC's freight forwarder admitted during deposition testimony that it neglected to notice that the stowage instructions were not included in the carrier's sea waybill.⁴

The Court considered the breach of contract and negligence causes of action brought by the shipper and the NVOCC against the NVOCC's freight forwarder and dismissed most of the claims. For the NVOCC’s negligence claim, the Court held that there was no triable issue of fact concerning the causation element. In particular, while there could have been a duty, there was no showing that the breach in neglecting to notice the lack of stowage instructions on the sea waybill was "causally related to the casualty aboard the vessel."⁵ The dangerous goods declaration – not sea waybill – determined how the ocean carrier stowed the DVB80.

Concerning the NVOCC's contract claim with its freight forwarder, the failure to notice the stowage instructions on the sea waybill constituted a breach of the duty owed as to document processing duties delineated in the contract between NVOCC and its freight forwarder. While the NVOCC still must overcome the difficult causation issue addressed by the Court, the Court accepted at the summary judgment stage that the negligent omission led to legal claims the NVOCC had to defend which increased its transaction costs and "litigation risks."⁶

Concerning the shipper's contract claim, there was no contract between the shipper and the NVOCC's freight forwarder. However, the shipper claimed to be a third-party beneficiary of the NVOCC agreement. The Court found credence in the argument that it was a disclosed principal and that the agreement states the parties will work as "partners" with "mutually agreed customers."⁷ However, its argument concerning damages was lacking. Unlike the NVOCC who alleged increased usage of resources and litigation risk because of the omission, the shipper did not and could not credibly claim breach of contract damages and the claims were dismissed.⁸

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³ 2017 WL 3738726 at *2.
⁴ Id. at *3.
⁵ Id. at *5-6.
⁶ Id. at *6.
⁷ Id. at *7.
⁸ Id.
This summary judgment ruling was notable in that the cargo chain parties learned key insight into the Court’s initial views of the parties actions and responsibilities. All the more critical when a bench trial would decide the culpabilities of the parties.

b. The Expert Testimony Landscape

In a major fire casualty at sea, it is logical that some of the best evidence will be lost in the fire and / or resultant explosion. Discerning causation will involve a battle of the experts. Judges sitting in admiralty could be tempted to decline to exclude a broad range of expert testimony and instead sort through the opinions at trial, affording the evidence the weight it deserves then. Judge Katherine B. Forrest close a different path.

In connection with the first phase of the trial on the issue of causation, set to begin less than two months after this decision was rendered, the Court considered the numerous motions to preclude expert testimony. It welcomed expert testimony to assess how the fire started in a particular cargo hold, the likely cause of that initial fire, and whether it was one cargo or a number of cargoes that led to the fire. Thereafter, testimony as to crew actions.

In order to determine the reliability of experts, the Court first assessed their qualifications. This included a combination of training and experiences, key education, and data-gathering skills. She noted that an expert must then base its opinions on reliable data-gathered using a methodology accepted in the industry. The testing of the methodology and assessing whether it has been subjected to peer review are critical in the process. Finally, the Court noted her disfavor for proposed expert testimony based on models or testing conducted by assistants; there is no substitution for direct engagement.

While the opinion provides an in-depth analysis of each report, a few findings merit reference as a refresher to maritime practitioners. The Court struck portions of expert reports which provided factual summaries based on favorable portions of the record; this method is not permitted under the law and is best served for advocacy by counsel at the trial. And factual conclusions in an expert report as to what caused the casualty is the work of the judge, not the expert. One expert’s report was stricken concerning crew training and drilling because attending drills – as opposed to being a trained drill instructor – was an insufficient expert foundation. The remainder of Court analysis was not notable or cumulative. But as one of the most thorough analyses of expert reports in a decade, the ruling will have a lasting impact.

c. The Phase 1 Trial – Causation

Five years after the explosion aboard the vessel, the Court held the phase 1 trial on causation, to be followed by an assessment of fault and damages in the remaining two phases. Subsequent to

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10 2017 AMC at 2533.
11 *Id.* at 2538-39.
12 *Id.* at 2540-41.
13 *Id.* at 2546.
14 *Id.* at 2549.
15 *Id.* a 2582.
summary judgment dismissals and settlements of a number of parties (including the wrongful death and bodily injury claims), the cargo loss and vessel damage claims remained. The scope of the Phase 1 bench trial was notable; 54 witnesses testified at trial in various forms and over 100 documents and videotape were admitted into evidence.

In this classic “battle of the experts” at trial, there was one baseline. The explosion occurred because a dangerous goods cargo, DVB80, experienced runaway auto-polymerization when contained within isocontainers aboard the vessel. But why? Candidly, the Court noted she and the experts could not be certain of the cause of the explosion but in a civil trial the “preponderance of the evidence” standard is king. And the evidence pointed to key causation findings for all three sets of parties interests: (i) for the shipper and NVOCC, the DVB80 was delivered in a proper state to the port. Though the selection of shipping from the port of New Orleans during the summer season as opposed to a port in New Jersey (per the shipper’s normal protocol) was fatal; (ii) for the ocean carrier, who has disputed levels of the terminal landscape, the 10-day storing of DVB80 in an uncovered area of the terminal and the heightened ambient temperature in the vessel’s hold played a role in the DVB80 auto-polymerization; (iii) for a chemical shipper whose product naturally emitted heat, being placed in containers adjacent to DVB80 at the port and in the vessel’s hold also contributed to the auto-polymerization; and (iv) for the owner and operator of the vessel, charged with crew training, the crew missed the final chance to prevent the explosion when it lacked information concerning the conditions of the hold and took steps which created the spark that triggered the explosion (even though those steps were a reasonable crew response).

In reaching the conclusions, the Court’s statements as to the persuasiveness of certain experts over others provides practitioners points to consider when selecting experts. The judge noted the shipper and NVOCC experts particularly offered sterling credentials, as well as a heightened “engagement, rigor, and consistency with which they approached their work and opinions” as critical in her ruling. For one expert, his work over 2 ½ years on different modelling and testing of scenarios involving DVB80 were compelling indicia of the rigorousness of the work. For another expert, her determination of temperature history and polymerization of DVB80 was impressive and her in-depth experience in this area and being a first-time testifying expert provided her added credibility for the Court.

The Court’s analysis of experts she found to be less persuasive are just as valuable for practitioners. For one expert, she noted his answers were “overreaching” at trial and “unnecessarily argumentative, distracting from any persuasive force in his arguments.” It is a reminder that when preparing an expert, even the most knowledgeable and highly credentialed, comportment matters and courts or arbitrators will take actions into account when weighing how much to rely on conclusions proffered.

17 2017 AMC at 2851.
18 Id. at 2853.
19 Id. at 2851.
20 Id. at 2852.
21 Id. at 2854.
22 Id. at 2855-56.
23 Id. at 2857 and fn. 6.
24 Id. at 2863.
Another point of interest for practitioners is the evidence as to similar shipments. The Court noted with interest that the DVB80 shipment was produced during the same manufacturing batch as a batch that was then loaded aboard another vessel that traveled trans-Atlantic without incident. Analyzing other shipments and vessel engagements that did not have auto-polymerized product supports a finding that the manufacturing process was sound. Focusing on ancillary factors such as travel time, product sitting at the port, and chemicals adjoining the DVB80 were variables different than the voyages where no DVB80 incident occurred.25

After a thorough analysis of the factual and expert testimony, the Court concluded that “[i]n order for a party to be found liable on any claims against it, the claimants must establish causation.”26 That is, the claimants must prove both the cause in fact and the legal cause of the incident. Persuasive evidence was proffered to find four contributing factors as to cause of the heated DVB80 product; port selection for shipment, period the goods were at the dock, placement within the hold, and the lack of ventilation in the hold.27 Who bears responsibility for these causative factors would be determined in the Phase 2 trial.

d. The Phase 2 Trial – Apportionment of Fault28

Before the Phase 2 trial, the Court’s Phase 1 ruling should have provided all of the remaining parties a reason to be concerned. Each party had some action that played a role in the cause of the explosion. The Phase 2 trial would apportion fault among the remaining parties in an unexpected manner. In the Phase 1 ruling, the Court found experts for the shipper and NVOCC interests most credible and relied on their exhaustive work when issuing her causation findings. And yet after the Phase 2 trial, the Court would find those same shipper and NVOCC interests 100% at fault, apportioned 55% to 45% between shipper and NVOCC to the exclusion of fault of all other parties.29 Judge Forrest did so after receiving evidence from 82 witnesses and the receipt of hundreds of documents into evidence.30

As this is a panel concerning fire incidents aboard ships, a brief note concerning defenses to shipowners is important. The shipowner in In re MSC Flaminia asserted three key defenses: (1) Limitation of Shipowner’s Liability Act (the “Limitation Act”). 46 U.S.C. §§30501-30512, and in particular the Limitation Act’s “Fire Statute” which exonerates a shipowner from liability to cargo damage from a fire incident unless the fire was caused by the “design or the neglect of the owner.” 46 U.S.C. §30504; (2) COGSA (the remedy for a cargo claimant against an ocean carrier), 46 U.S.C. §30701 (note), which has a “Fire Exception” in Section 4(2)(b), providing a similar exoneration if the fire is not caused by the actual fault of the shipowner and privity with the carrier is not a causative factor; and (3) the provisions of the bill of lading can extend

25 Id. at 2873, 2886.
26 Id. at 2907.
27 Id. at 2908.
28 In re M/V MSC Flaminia, 2018 AMC 2113 (September 10, 2018).
29 2018 AMC 2119, 2209.
30 Id. at 2122.
defenses. These defenses were critical for the shipowner as the Court found the fire aboard the vessel “was not caused by the design or neglect of the owner.”

In its summary of findings, important conclusions are made with regard to the shipper and NVOCC that the industry should be mindful of. In regard to the shipper, it bore the most responsibility because it disregarded its own safety protocols and shipped DVB80 out of the New Orleans terminal in the middle of the summer. Moreover, the ISO tanks holding the product were loaded earlier than necessary for the voyage which resulted in the product sitting in the summer sun for longer than it should. These decisions led to the DVB80 auto-polymerizing.

The shipper’s NVOCC also bore responsibility because it was charged with the logistics in transporting the DVB80 from the shipper to the port and the product sitting in the New Orleans sun for longer than it should. Moreover, the NVOCC had information concerning the heat exposure issues with these particular DVB80 shipments which it should have properly conveyed to the ocean carrier and failed to.

The Court’s analysis of the remaining parties’ actions come to the conclusion that they bore no legal responsibility for the losses resulting from the explosion. It does so after a full legal analysis of the claims sounding in both contract and tort.

IV. Lessons Learned and Action Items for Companies and Their In-House Counsel

A common thread throughout the Flaminia decisions is that the parties could have done a better job communicating risks concerning the DVB80 and transshipment logistics. This ranged from communicating internally at the shipper concerning the shipment of goods throughout the summer months to having a protocol in place when a key employee is missing in the process due to emergencies. Moreover, periodic maintenance of company documents is aspirational but often difficult for in-house counsel to undertake in light of the daily commercial and legal headaches that occur. In considering the issues, below are certain measured, cost-effective steps that can be taken to better protect the company.

1. Confirm the Contractual Landscape Between Parties: The relationships among and between shippers, freight forwarders and NVOCCs are often informal and rely on a patchwork of terms and conditions sent at the time of shipment. When the terms conflict, which control? More importantly, do you want to be litigating this threshold, costly issue? Certainly not. Ensure that the parties have an agreement in place akin to the NVOCC and freight forwarder did in the Flaminia.

2. Pressure Test the Agreement: The courtroom is not a good place to test the strength and weaknesses of an agreement, terms and conditions, or new language in a bill of lading for the first time. Invest the time and money in pressure testing your

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31 Id. at 2121.
32 Id.
33 Id. at 2122.
34 Id. at 2123.
35 See generally, 2018 AMC 2123-2125.
company's most critical agreements. Even if outside counsel drafted the agreement, it is prudent to have another set of eyes review the documents to uncover ambiguous or fuzzy language. Whether it be another outside counsel or the new law school intern, a different perspective can raise different potential weaknesses.

3. **Consider the Business Implications**: Congratulations. You've convinced the powers that be that an agreement is sound. You've pressure tested it and made revisions to shore up your legal position. Done. Not yet. Talk to the company's underwriter or risk management person. Make sure the business people know the potential liabilities at stake and the potential issues that may impact insurance coverage. Note in the initial ruling here concerning freight forwarder liability the Court's analysis of the term "partners" and "mutually agreed customers" when considering whether the shipper was a third-party beneficiary of the NVOCC or freight forwarder agreement. How would such a ruling impact insurance coverage when a non-contracting party is seeking relief? It's better the insurance team considers the issue now than after being subject to a judgment.

4. **Training Opportunity**: The rulings by the *Flaminia* court can serve as a valuable training tool for the company's cargo documentation team. During a periodic or annual training session, it may be beneficial to provide a copy of portions of the rulings and emphasize the details used by the court to address the cargo document chain process, the communication failures and/or fail safes that should have been in place, and the potential implications of these errors both for the company and individuals concerned.

The *Flaminia* incident is the most recent reminder of the significant exposure a party can face notwithstanding the small margins for the work performed on each shipment. Good employee training as to communications between cargo chain companies, corporate document maintenance, and pressure testing can make all the difference in disputes large and small.

**For copies of the decisions cited, please contact Chris Nolan at chris.nolan@hklaw.com.**
Broker, Insurer and Insured Relationships:
Successfully Tackling a Natural Disaster Large Loss Event
By: Pamela A. Palmer

This outline accompanies the slide show and presentation by panel members concerning the relationship between brokers, insurers and insureds in preparing for and responding to a natural disaster. Our panel focuses primarily on working with brokers, insureds and insurance carriers relating to maritime claims and damage arising from hurricanes and other natural disasters.

I. Relationships

The basic concept is that the insured, or policyholder, purchases and therefore enters into a contract of insurance with the insurer. The broker acts on behalf of the policyholder and its actions are not binding on the insurer (See Cal. Ins.C. §§ 33) as it acts as an agent for the insured. (Certain Underwriters at Lloyds, London v. Giroire, 27 F. Supp. 2d 1306, 1313 (S.D. Fla. 1998), citing Dreiling v. Maciuszek, 780 F.Supp. 535, 540 (N.D.Ill.1991); Washington Intl Ins. Co. v. Mellone, 773 F.Supp. 189 (C.D.Cal.1990).) The broker therefore can bind the insured with its conduct. (Giroire, 27 F.Supp.2d at 1313 (finding that material misrepresentation placed on application by broker voided policy ab initio); QBE Seguros v. Morales-Vazquez, No. CV 15-2091 (BJM), 2018 WL 3763305 (D.P.R. Aug. 7, 2018) (stating a marine insurance broker that “negotiates with different insurance companies to get . . . the best deal possible” is not agent of a marine insurer and, thus, knowledge is not imputable.); Certain Underwriters at Lloyd's, London Subscribing to Policy 200-451-8464 v. Johnston, 124 F. Supp. 2d 763 (D.P.R. 1999) (surplus lines broker was vessel owners' agent, and thus marine insurance policy procured by broker was void due to broker's failure to reveal that survey found vessel to be unseaworthy.).)

The broker can be an invaluable part of the relationship between the insured and insurer as an experienced broker can use its expertise to manage difficult claims and provide assistance in loss prevention. (See e.g., Aon: Marine Risk Management, https://www.aon.com/industry-expertise/marine.jsp, last visited on March 7, 2019, explaining services offered to the insured).

II. Natural Disaster Emergency Planning

Generally, not only is disaster emergency planning important but also required by law under certain sectors of the maritime industry. (See e.g., 29 CFR 1917.30 (mandating emergency action plans for marine terminal operations). Emergency planning checklists for the marine sector, be it for personal watercraft or large marine operations can be provided or even mandated by insurance carriers and can provide information on resources available should a natural disaster event occur. (See e.g., https://www.travelers.com/resources/boating/emergency-preparedness-tips-and-checklist-for-boaters, last visited on March 7, 2019 (providing insurers list of tips for recreational boat...
owners in the event of a hurricane or other natural disaster; https://www.osha.gov/SLTC/emergencypreparedness/gettingstarted.html, last visited March 7, 2019 (providing checklists from OSHA for maritime industry where employees are impacted.)

Even under the best circumstances however, an emergency plan can fall short and not anticipate how large or devastating the impact of the initial natural disaster. For example, Superstorm Sandy demonstrated how crucial natural disaster emergency planning can be particularly with respect to inland marine and equipment policies as many insureds (and carriers for that matter) did not anticipate how unanticipated storm surge and flooding would impact the storage of fine art as well as saltwater damage to equipment that was thought to be safe in inland warehouses. (See e.g., § 49:9.Nature of Inland Marine Insurance, 3 Casualty Insurance Claims § 49:9 (4th ed.)) (“The storm showed that insureds cannot initiate a loss control plan after the fact or during an event” when the impact of the storm surge was discovered.)

Accordingly, emergency plans and proactive risk management are crucial in preparing for and recovering from a natural disaster event. This includes determining what stakeholders are necessary to be involved in responding to a disaster. Some examples of such stakeholders are:

- Insured/Policyholder
  - Risk Manager
  - Finance Manager
  - In-house Counsel
  - Off-site client team (if loss location is outside US)

- Carrier (aka Insurer – there may be many if policy is a slip/subscription or pollution/excess layers are involved)
  - Carrier A
  - Carrier B
  - Carrier C
  - Excess Carrier
  - Pollution Carrier
  - P&I Club
  - Reinsurer

- Broker
  - US Account Executive
  - US Broker
  - US Claim Manager
  - London Broker
  - London Claim Advocate
  - Local Aon team at loss location site outside US
• Surveyor(s)
• Engineer(s)
• Salvors/divers
• Forensic Accountant
• Carrier’s appointed TPA (Vericlaim, W.K. Webster, W.E. Cox, etc.)
• Government Officials (military, local government, etc.)
• Attorneys
• Third party claimants or their representatives (liability for 3rd party damages / injuries that may have been caused)
• Contractual counterparties to Owners/charterers of the vessels involved i.e., charterers, cargo owners, etc.
• Community players – local government, local community organizers and their official and non-official spokespersons
• Environmental groups – Sierra Club, Green Peace, etc.
• Outside counsel of vessels and property interests involved
• Likely class action counsel on behalf of affected community
• Public/press relations team/ personnel
• Scientific community – surveying environmental impacts – both contracted for and not contracted for
• Clean-up response – ranging from traditional deployment of a clean-up/response firm to deployment of a local flotilla of skimming/recovery vessels

These parties and stakeholders are only a small sampling of the myriad type of entities needed to respond to a disaster and many impact how an insurance claim for damage due to a natural disaster can be managed, presented and even litigated.

III. Managing the Loss

Proper management of the loss can make or break claim presentation and payment of the loss. This includes a comprehensive presentation of damages including not only calculation of property damage but also calculation of the claim for business interruption and extra expense coverage which can be difficult to quantify depending on the nature of the insured’s
business and whether a complete cessation of operations can be demonstrated related to the hurricane or other natural disaster event. (See e.g., Buxbaum v. Aetna Life & Cas. Co., 103 Cal.App.4th 434, 126 Cal.Rptr.2d 682, 690–94 (Cal.Ct.App.2002) (“necessary suspension of operations” means total cessation of business activities instead of a business slowdown such that insured professional services operation which continued operations at another office was not entitled to business interruption coverage).

Most importantly, presentation of the loss must be done in compliance with all policy terms and conditions which can include time suit limitations and arbitration clauses (See e.g., Int'l Sch. Servs., Inc. v. Nw. Nat. Ins. Co., 710 F. Supp. 86, 87 (S.D.N.Y. 1989) (failure to comply with time suit limitation in marine policy); In The Matter Of The Arbitration Between Frank Montecalvo, As Owner Of M/Y Waste Knot, Claimant Ace American Insurance Company, As Respondent Under A Recreational Marine Insurance Policy Dated May 9, 2012, 2015 WL 3826959, at *1) (this comprehensive Society of Maritime Arbitrators decision is an interesting example of arguments concerning the right of the insurer to invoke suit time limitations in a recreational boating policy in which a claim involving Superstorm Sandy was submitted.)