



Maritime & Admiralty Practice

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Winston Maritime Clients Prevail In Key Judicial Decisions

U.S. District Court Upholds Coast Guard's Matson Foreign Rebuild Determinations

On December 4, 2009, a federal district court in Virginia entered judgment in favor of the U.S. Coast Guard and Matson Navigation Company, Inc. in a long-running vessel foreign rebuild case. Winston & Strawn LLP represented Matson.

The Shipbuilders Council of America, Inc. and Pasha Hawaii Transport Lines LLC sued the Coast Guard initially in November 2006 seeking to disqualify the *M/V Mokihana* from the U.S. coastwise trade because of work to be done to the vessel in China. That initial suit was dismissed in 2007, but then re-initiated on December 10, 2007 after the work on the *M/V Mokihana* was complete. The *M/V Mokihana*, a container ship, had work done in China to prepare the vessel for the addition of a roll-on/roll-off garage added to the stern of the vessel in Alabama.

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U.S. coastwise laws – commonly referred to as the Jones Act – generally restrict U.S. coastwise trade to U.S. constructed vessels. In connection with that U.S. build requirement, otherwise eligible coastwise vessels permanently lose their ability to participate in the U.S. coastwise trade if they are “rebuilt” foreign.

The Coast Guard determines whether foreign shipyard work is disqualifying pursuant to a regulation it issued in 1996. That regulation provides that a vessel is considered rebuilt foreign “when a major component of the hull or superstructure not built in the United States” is added to the vessel or if “work performed on its hull or superstructure constitutes more than 10 percent of the vessel’s steelweight.” Steel work in excess of 7.5 percent but less than 10 percent of the vessel’s steelweight can also be disqualifying unless the Coast Guard in its discretion approves the amount.

The regulations also provide a process for ship owners to approach the Coast Guard and obtain a preliminary rebuild determination in advance of the shipyard work being done in order to obtain some assurance that the work won’t be disqualifying. Matson sought and obtained both a preliminary and a final rebuild determination from the Coast Guard to the effect that the work to be done to the *M/V Mokihana* would not result in the vessel being considered “rebuilt.”

Shipbuilders and Pasha advanced a number of arguments claiming that the Coast Guard acted arbitrarily and contrary to law in issuing those determinations. Among other things, Shipbuilders/Pasha argued that the claimed addition of a deck in China was the addition of a “major component,” that the Coast Guard incorrectly excluded certain outfitting items from the steel calculation (such as auto platforms) and should have counted both removed and added steel in that calculation. Initially, Shipbuilders/Pasha also argued that the work done in Alabama should have been cumulated with the work done in China in determining whether a foreign “rebuilt” had occurred.

The “major component” issue was decided against the Coast Guard in a related case involving two Seabulk tank vessels which had been “double hulled” in China. However, the district court’s decision in the Seabulk case was reversed by the U.S. Court of Appeals for the Fourth Circuit in favor of the Coast Guard on August 21, 2009. On appeal, the Coast Guard’s view that a “major component” should be judged based on whether it is “separable” was validated. On that basis, the Coast Guard found that the addition of an inner hull piece-by-piece was not the addition of a “major component.”

On December 3, 2009, federal judge T.S. Ellis, III concurred and found that the addition of a deck piece-by-piece to the *M/V Mokihana*, none of which was “major,” did not constitute the addition of a “major component” within the meaning of the Jones Act. Judge Ellis also rejected Shipbuilders/Pasha’s other arguments, finding in each instance that the actions of the Coast Guard were reasonable and within its lawful discretion. Finally, Judge Ellis concluded the Coast Guard was correct in focusing on the foreign portion of the work in assessing whether there was a foreign “rebuilding” under the law.

U.S. Court of Appeals Upholds Government Contractor Defense In Hurricane Katrina Mass Tort Litigation

On November 25, 2009, the U.S. Court of Appeals for the Fifth Circuit upheld the lower court decision that dredging companies which performed maintenance dredging in the Mississippi River Gulf Outlet (MRGO) navigational canal for the U.S. Army Corps of Engineers (“Army Corps”) were not legally responsible for the Hurricane Katrina flooding of New Orleans because of the government contractor’s defense. Coming as the decision did on the heels of federal judge Stanwood R. Duval’s recent decision holding the Army Corps liable for the MRGO flooding, the decision of the Court of Appeals is especially significant. While the dredging contractors still await another key Hurricane Katrina appeal pending before the Fifth Circuit in related cases, this decision provides an important measure of relief to the U.S. dredging industry, which has been awaiting the outcome for over two years.

Following Hurricane Katrina, class action law suits flooded the U.S. District Court for the Eastern District of Louisiana. The plaintiffs targeted a wide variety of government and private defendants alleging many billions of dollars of liability in connection with the flooding of New Orleans. Some of these suits alleged that the United States, state and municipal entities, and their contractors negligently cut and maintained MRGO, contributing to the hurricane’s destruction of New Orleans. Specifically, plaintiffs alleged that MRGO contributed to Katrina’s effect on New

Orleans by speeding the loss of the wetlands, which provided a defensive barrier, and that its negligent design intensified the hurricane’s effects by increasing the ferocity of storm surge as it hit the city’s protective levees.

MRGO was conceived and created in the mid-twentieth century as a means of permitting more direct access between the City of New Orleans and the Gulf of Mexico and ensuring strategic military access to the Mississippi River. Congress authorized the canal in the Rivers and Harbors Act of 1956, explicitly adopting detailed specifications prepared by the Secretary of the Army, including the location and depth of the canal. The United States cut the canal in the 1960s, and maintained it initially with Army Corps dredges and later through contract services with various private dredging companies, who were named as defendants for performing the contracts.

In a motion to dismiss authored by Winston & Strawn’s maritime team, the dredging defendants argued that plaintiffs’ claims should be dismissed under the doctrine expressed by the U.S. Supreme Court in *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940), because they were a direct challenge to Congress’s decision to build MRGO. The motion also argued that the dredging defendants were protected by the government contractor’s defense because nowhere did the complaint allege that the dredging defendants had deviated from their contractual obligations in any way. Rather, the complaint alleged that the dredgers were negligent *because* they faithfully executed contracts to dredge MRGO which was the product of detailed congressional direction.

Adopting arguments advanced by Winston’s maritime and appellate teams, the Court of Appeals upheld Judge Duval’s decision and reasoning and agreed that *Yearsley* provides that where the authority to carry out the project was validly conferred by an act of Congress, “there will be no liability on the part of the contractor for executing Congress’s will.” Furthermore, the Court of Appeals rejected plaintiffs’ argument that the dredging contractors had to establish an “agency” relationship with the government to benefit from the *Yearsley* defense.

The Court of Appeals explained that *Yearsley* contained no such requirement and that all that was necessary was that “To the extent that the work performed by [the contractor defendant] was done under its contract, . . . and in conformity with the terms of the contract, no liability can be imposed upon it for any damages claimed to have been suffered by the appellants.” Importantly, the Court of Appeals emphasized that “The Supreme Court has not abrogated or overturned *Yearsley*” but has referenced it favorably in its important modern decision *Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988).

The Court of Appeals also rejected the plaintiffs' attempt to amend their complaint explaining that "Plaintiffs proffered amendment does not go beyond the conclusory allegation that the Contractor Defendants [*sic*] activities somehow violated various laws and regulations at some unspecified time and place . . . [and] the factual allegations in the remainder of the original complaint go to the alleged damage from the existence and state of the MRGO, not the Contactor Defendants' activities in maintaining it."

In conclusion, so far, both Judge Duval and the Court of Appeals have released Winston & Strawn's dredging client from the potential liability implicated in these lawsuits. While another important decision remains pending before the Court of Appeals, Judge Duval's recent decision holding the U.S. Army Corps of Engineers liable for the MRGO flooding suggests that as he opined in his initial decision, "If there is any recovery to be had, it must be against the Government and not the contractor."

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