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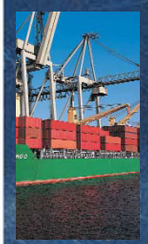

Inside This Issue

SEAMAN STATUS AND VESSEL STATUS UPDATE

Aaron B. Greenbaum*

This article addresses recent developments as to Jones Act seaman status and vessel status determinations. With respect to seaman status there have been several interesting decisions interpreting the "identifiable fleet" requirement. Vessel status remains a hot issue post-*Lozman*,[1] as courts continue to address whether moored structures, marine construction barges, and vessels taken out of navigation qualify as "vessels" under the Supreme Court's test. The cases discussed herein were issued between October 1, 2017 and October 7, 2018.

Several recent decisions have addressed seaman status with respect to shore-based employees who worked upon dock-side vessels. Courts have taken a restrictive view of the "identifiable fleet" requirement under the *Chandris*[2] test in denying seaman status. For example, in *Tilcon N.Y., Inc. v. Volk*, the plaintiff was a barge "maintainer" at a rock quarry processing facility located on the Hudson River.[3] He would inspect rock barges that were always moored, but sometimes were three or four deep, which required the plaintiff to "climb over" the barges to reach the one he needed to inspect.[4] While inspecting a moored barge, the plaintiff slipped

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[1] *United States v. Lozman,* 568 U.S. 115 (2013).

[2] *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

[3] *Tilcon N.Y., Inc. v. Volk,* 874 F.3d 356, 361 (2d Cir 2017).

[4] *Id.*

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The correct citation form for this publication is:
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Managing Editor's Introductory Note

We begin this edition with a review of cases addressing the questions of seamen and vessel status by Aaron Greenbaum. Aaron takes us through an analysis of the recent cases addressing seaman status with respect to shore-based employees working on dock-side vessels, and the issue of what constitutes a vessel, as courts continue to address whether moored structures, marine construction barges, and vessels taken out of navigation qualify as "vessels" under the Supreme Court's *Lozman* test.

We then present a review by Pamela Schultz of the United States Court of Appeals for the Third Circuit's *en banc* decision in *Joyce v. Maersk Line Ltd.*, 876 F.3d 502 (3d Cir. 2017) on seamen as "wards of the admiralty court." For long, we have always adopted this as a truism. However, Pamela points out that recent decisions seem to erode this principle, where other competing policies may apply.

In his regular column, Window on Washington, Bryant Gardner provides us with a detailed look at the responses to the Trump Administrations' Request for Information in the Federal Register on May 1, 2018, seeking public input on "how the Federal government may prudently manage regulatory costs imposed on the maritime sector." Many interests responded with specific ideas on how federal regulations on maritime industry could be reduced or eliminated.

Nest, we again visit the interaction between admiralty and bankruptcy jurisdiction and the power of the different courts with respect to *in rem* sales of vessels and the extinguishment of maritime liens. Brian Maloney gives a detailed analysis and discussion of the decision of the United States Court of Appeals for the Ninth Circuit in *Barnes v. Sea Hawaii Rafting, LLC,* 886 F.3d 758 (9th Cir. 2018), distinguishing questions left open by the United States Court of Appeals for the Second Circuit's 2005 ruling in *Universal Oil Ltd. v. Allfirst Bank (In re Millenium Seacarriers, Inc.),* 419 F.3d 83, 2005 AMC 1987 (2d Cir. 2005).

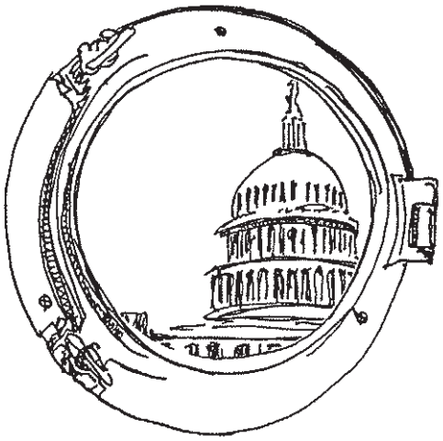
We follow with our Recent Developments case summaries to keep you informed on developments in various aspects of maritime law.

Once again, we encourage our readers to submit photos, artwork, poems, or thought pieces to enhance the enjoyment of reading our publication.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

WINDOW ON WASHINGTON



FEDS HUNT FOR ANCHORS FOULED IN RED TAPE

Bryant E. Gardner*

Longstanding conservative political doctrine holds that, if Government would just get out of the way and cut all the regulatory red tape, industry would thrive in a competitive, free-market environment. Along this line, the Trump Administration published a Request for Information in the Federal Register on May 1, 2018, requesting public input on "how the Federal government may prudently manage regulatory costs imposed on the maritime sector."[1] More specifically, the Request aims to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; or create serious inconsistency or otherwise interfere with regulatory reform initiatives and policies.

Throughout the summer of 2018, comments poured in from all quarters of the regulated community, including vessel owners and operators, ports, marine manufacturers, individual mariners, offshore construction companies, and shippers. Although some commenters submitted targeted ideas for reforming Federal regulations, just as many seized upon the opportunity to comment more broadly upon matters of maritime policy, including many ideas that would require legislative changes beyond the scope of the request and beyond the scope of what any administration can do without congressional action. Also noteworthy, many comments actually called for increased or improved regulations, throwing some water on the fire of the initial request seeking to identify regulations that can be put on the chopping block, so that industry can get back to work and flourish without government interference.

Major vessel operating and carrier associations submitted comments to the President's Office of Management and Budget ("OMB") on a variety of topics, reflecting their differing priorities and interests. The International Chamber of Shipping ("ICS"), a global trade association of 37 different national shipowners' associations, submitted comments calling for regulations promoting a competitive, flag-neutral, secure and environmentally conscious transportation system. ICS called broadly for the alignment of U.S. regulations with, and U.S. ratification of, international standards and conventions

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[1] Office of Information and Regulatory Affairs, Office of Management and Budget, Request for Information, *Maritime Regulatory Reform*, 83 Fed. Reg. 22,993 (May 17, 2018). All comments are available for public viewing under Docket OMB-2018-0002-0001, https://www.regulations.gov/document?D=OMB-2018-0002-0001 (*last visited October 19, 2018*).

promulgated by the International Maritime Organization ("IMO"), including by way of illustration, the International Convention for the Control and Management of Ships' Ballast Water and Sediments, the International Convention for the Prevention of Pollution from Ships ("MARPOL"), the International Convention on the Control of Harmful Anti-fouling Systems in Ships, the Hong Kong International Convention on the Safe and Environmentally Sound Recycling of Ships, and the United Nations Convention on the Law of the Sea ("UNCLOS"). Therefore, in its comments ICS strongly endorses the recently controversial U.S. Commercial Vessel Incidental Discharge Act ("CVIDA"), which if enacted would establish uniform U.S. Federal ballast water standards, primarily under Coast Guard purview, aligning them with IMO standards and preempting a patchwork of state requirements. Ballast water is big this year in D.C. The ICS also encourages the Administration to streamline and make uniform among the states procedures for the issuance of crew visas, and flexibility with respect to the extension of shore leave passes. Additionally, the association encourages the Coast Guard to move forward expeditiously with its rulemaking concerning Seafarers' Access to Maritime Facilities, through which the Coast Guard proposes to implement a system to provide seafarers and other individuals with access between vessels moored at the facility and the facility gate in a timely and cost-free manner. Many of the ICS proposals were also echoed in submissions of individual owners, including Dynacom and Maersk, and by the Union of Greek Shipowners.

The World Shipping Council, which represents 20 liner carriers moving 90% of containerized trade, submitted comments addressing Federal Maritime Commission ("FMC") filing requirements, Customs and Border Protection ("CBP") container clearance rules, and vessel and crew clearance processes, and offshore wind farm planning. The Shipping Council proposes to eliminate the requirement that carriers file their shipper service contracts with the Commission, in keeping with similar relief recently granted by the FMC to non-vessel operating common carriers. The CBP changes would streamline export and crew clearances through CBP's "Automated Commercial Environment," cutting back on duplicative data submissions and red tape that can cause delays. The submission also suggests moving Coast Guard navigational safety exclusions further ahead into the offshore wind farm planning process and ensuring minimum 2-mile safety buffers between high-density marine traffic areas and wind farms.

The Chamber of Shipping of America ("CSA"), which represents over 30 U.S.-based companies that own, operate, or charter vessels in the domestic and international trades, submitted comments broadly calling for uniformity of U.S. and international standards. The CSA calls for levelling the playing field among vessels calling at U.S. ports, regardless of flag, and uniformity of Federal and State requirements domestically, including enactment of CVIDA. It also calls for review of the Oil Pollution Act ("OPA 90") salvage and marine firefighting requirements, continuation of the Coast Guard's Alternative Compliance Program delegating functions to recognized classification societies, greater transparency in CBP ruling, review of current whale protection requirements administered by the National Oceanic and Atmospheric Administration ("NOAA") impacting navigation, and prioritization of the Coast Guard's Seafarer Access to Maritime Facilities rulemaking, which would help facilitate access between vessel and shoreside facilities for mariners.

USA Maritime, the coalition of mariner unions and vessel operating companies sailing internationally under the U.S.-flag registry, submitted sweeping comments targeting areas of regulatory reform. First, the coalition submitted proposals to reform U.S. Maritime Administration ("MARAD") regulations consistent with changes to the cargo preference statute over a decade ago, which still have not been implemented by the agency. These changes confirm MARAD's primacy over the administration of cargo preference statutes, which require that at least a portion of cargoes shipped by the Federal government move in American bottoms provided they are available at fair and reasonable rates. Additionally, USA Maritime suggested clear reaffirmation of longstanding Defense Department policy which requires that the Government employ commercial vessels first, before activating organic grey-hulled assets to satisfy sealift needs.

USA Maritime's comments also seek modernization of the Federal Maritime Commission's ("FMC's") administration of the Shipping Act of 1984, as amended. Specifically, the coalition seeks greater clarity as to when an agreement must be filed with the FMC before holding preliminary discussions among carriers, and a more practical approach to the oversight of space charters among carriers, which currently require filings with

the Commission for even the most minor space sharing, resulting in costly delays and legal costs, and clogging of the Commission's docket. And like their open registry competitors, the USA Maritime operators suggest conforming ballast water and other provisions of U.S. law to international standards promulgated by the IMO, including ballast water and MARPOL. Moreover, the coalition suggests increasing the role of classification societies in U.S.-flag vessel inspections, and de-prioritization of U.S.-flag vessels in Coast Guard security boardings.

The American Waterways Operators ("AWO"), an association which represents the U.S. tugboat, towboat, and barge industry, submitted comments broadly calling for Federal uniformity of maritime law, including support for CVIDA. The AWO also reiterated an array of comments previously submitted to the Coast Guard during its regulatory review in 2017. Addressing safety regulations, AWO called for equivalency between electronic and paper charts; relaxation of Automatic Identification System ("AIS") encoding requirements for towing vessels not well equipped for the required reporting; harmonization and streamlining of the mariner credentialing process; raising the monetary threshold for marine casualty reporting; reducing inspection fees for towing vessels using the Towing Safety Management System option to document compliance with Subchapter M; repealing survival craft for near-shore operated vessels; relaxation of rules regarding storage of paints and coatings; review of fire pump water pressure requirements for towing vessels, and an overall review of Coast Guard policy regarding articulated tug-barge units ("ATBs"), eliminating the requirements to carry day shapes, physical bells, and bridge-to-bridge radio telephone certificates, and other changes.

AWO also proposed reconsidering burdensome security requirements imposed by the Maritime Transportation Security Act of 2002 which are less appropriate to low security risk vessels such as smaller inland waterways tugs. Finally, AWO took issue with a handful of environmental requirements imposed upon its members, including "person in charge" requirements for fuel transfers and tank barge cleaning facilities; ballast water reporting; response plan exercises; and emergency towing contract requirements.

Comments submitted by the A.P. Moller – Maersk Group (USA) track the ICS, CSA, and USA Maritime in some respects, but also present additional issues. Maersk proposes ending the 50% ad valorem duty upon repairs to U.S.-flag vessels performed in overseas yards, relaxation of restrictions upon the use of foreign riding gangs on U.S.-flag vessels, and migration of seaman's personal injury compensation from current Jones Act maintenance and cure standards to a more standardized shoreside-type workers' compensation formulary system, similar to the Longshore and Harbor Workers' Compensation Act. Additionally, the Group proposes the availability of Jones Act cabotage law waivers when containers are inadvertently misdelivered to a U.S. port, so that they can be put on the next Maersk ship, rather than railed, trucked, or subcontracted to a U.S.-flag Jones Act qualified coastwise service. The line also proposes taking the Environmental Protection Agency ("EPA") out of the process of issuing Engine International Air Pollution Prevention Certificates which are precursor to the Coast Guard's issuance of International Air Pollution Prevention certificates—a challenge for many operators in the U.S.-flag international trades. In keeping with the World Shipping Council comments, Maersk would drop the requirement for carriers to file shipper service contracts with the FMC. Finally, Maersk proposes tax exemptions for U.S. mariner wages, bunkers and stores purchased in the U.S., and corporate profits invested in new U.S.-flag vessels.

Crowley Maritime Corporation also submitted comments reinforcing support for CVIDA and endorsing Maersk's proposal to reduce vessel owning common carrier filing requirements with the FMC, noting that active VOCCs will have thousands of shipper service contracts amended annually, leading to tens of thousands of submissions which represent an extraordinary burden. Crowley also suggested that the proliferation of "no discharge zones" in state waters under the Clean Water Act has presented a challenge for many vessels lacking sophisticated waste treatment systems because of the scarcity of shoreside discharge facilities. Like many others, Crowley observes that the Transportation Worker Identification Card ("TWIC") is not working out well, in part because of confusing and costly rules pertaining to readers for the cards.

The Passenger Vessel Association, which represents U.S.-flagged passenger vessels operating domestically, submitted comments targeting a handful of burdensome regulatory requirements. These include excessive Federal Communication Commission requirements requiring frequent radiotelephone inspections; annual

reporting requirements under the EPA's Vessel General Permit for incidental discharges of wastewater during normal operation; exemption of TWIC reader requirements for facilities that only receive passenger vessels exempt from carrying TWIC readers; relaxation of the non-tank vessel response plan rule to permit more passenger vessels to comply using an approved alternative training and exercise program more appropriate to smaller passenger vessels; elimination of redundant restricted vessel mobility marking requirements and requirements to carry flares; greater flexibility to extend five-year drydock intervals; extension of inflatable buoyant apparatus servicing from annually to biannually; and updating the requirement to carry a Coast Guard approved first aid kit to permit modern approaches to first aid using commercially available kits. Although the suggestions are relatively granular, they generally correspond to requests to permit greater flexibility to account for the nature of small passenger vessel operations, and a drive toward the elimination of redundant or outdated requirements, consistent with the original OMB request.

A coalition of Great Lakes maritime interests, including the Great Lakes St. Lawrence Governors & Premiers, Chamber of Marine Commerce, and American Great Lakes Ports Association, submitted comments focusing primarily on the costs of pilotage in the Great Lakes and St. Lawrence waterways. The coalition states that the Coast Guard found that pilotage costs jumped 91% between 2015 and 2016, with pilotage costs representing 10% of voyage costs. Therefore, they call for a review of the costs and benefits of eliminating the "regulated monopoly system," improved transparency of costs, user oversight and involvement in governance, a dispute resolution system, and consolidation of service providers. Separately, the St. Lawrence Shipoperators, a coalition of fifteen Canadian vessel owners and operators, submitted a comment imploring the United States to achieve at least national, if not international, uniformity with respect to ballast water regulation, and note that the U.S. Environmental Protection Agency's administration of ballast water requirements has tended to put Canadian Lakers at a disadvantage relative to U.S. Lakers

The Offshore Marine Service Association ("OMSA") and several operators in the offshore segment also submitted comments. Suggestions included eliminating requirements for portable accommodation modules for OSVs, tightening restrictions on foreign citizen mariners in U.S. waters, reducing some of the regulatory burdens connected with vessel layups, scrapping the "large OSV" (over 6,000 tons) interim rule published in 2014, and relaxing some training requirements. Comments also suggested reducing costly tail shaft inspection requirements for lift boats which spend most of their time out of the water, lengthening the validity of Coast Guard vessel certificates of documentation from one year to five, and near-term implementation of rules governing the training of mariners operating dynamic positioning systems.

The International Marine Contractors Association ("IMCA"), which represents offshore, marine, and underwater engineering companies supporting energy-related projects, submitted relatively targeted comments touching upon Jones Act cabotage matters as applied to offshore construction projects. What is, and is not, a Jones Act movement restricted to coastwise qualified vessels is determined by letter rulings issued by CBP. At times, according to IMCA, these rulings have been difficult to interpret and seemingly inconsistent. Additionally, in recent controversial rulings regarding determinations of what constitutes exempt vessel equipment (as opposed to merchandise which must be moved on qualified vessels) CBP moved to revoke years of precedential rulings, then indicated it would withdraw the revocation, and then took no further action. IMCA's comments express concern with business uncertainty IMCA submits is inherent to the letter rulings process, highlighting the uncertain state of the revocation as Exhibit A, and call for replacing the letter rulings process with an expedited rulemaking process under the Administrative Procedures Act. IMCA proposes that the rule distinguish Jones Act "transportation," restricted to U.S.-flag vessels, from construction and related "incidental movements" of construction vessels. Additionally, IMCA proposes that the Coast Guard revise its regulations to clarify its ability to regulate "offshore activities" in the renewable energy sector and to resolve inconsistency between the manner in which the Bureau of Ocean Energy Management ("BOEM") and the Coast Guard interpret their regulatory authority over renewables. According to IMCA, the lack of clarity regarding Coast Guard authority in this area inhibits the issuance of exemption letters necessary for the employment of foreign crews on installation vessels.

The American Petroleum Institute ("API") also weighed-in. The oil and gas industry association, like others, advocated Federal supremacy in all regulatory matters. API also proposes clearer, more codified

Federal rules. Specifically, API suggests that Coast Guard navigation and vessel inspection circulars ("NVICs"), which purport only to clarify existing regulations, often create new regulatory burdens without the full transparent benefit of notice and comment and at times conflict with existing regulations. Therefore, API proposes codifying current policy. API also proposes new rulemakings governing the interpretation of the Jones Act, like IMCA, moving some of the interpretation of what constitutes a U.S.-flag Jones Act movement outside of the current CBP letter ruling process. API suggests that this would provide for engagement by all stakeholders, interagency review, cost offsetting, and consideration of potential economic impacts of proposed interpretations of the law. The Institute also proposes relaxing some regulatory burdens on lightering, including requirements that there be a "person in charge" in the immediate cargo area (as opposed to at an effective monitoring location) and that Coast Guard headquarters be notified in cases of hazardous cargoes transfers, not just the local sector. API was joined by the International Association of Drilling Contractors and the Offshore Operators Committee in its comments.

The Charleston Branch Pilots' Association, in comments endorsed by the Savannah Bar Pilots, raised concerns regarding speed restrictions put in place to protect the North Atlantic Right Whale, indicating that the regulation presents a safety challenge because vessels moving too slowly are difficult to control, potentially resulting in groundings and long-term port entrance obstructions and pollution incidents. To strike a balance, the Charleston Pilots' comments recommend excluding federally-maintained dredged channels and pilot boarding areas from New York to Jacksonville from speed management zones and/or NOAA enforcement action in connection with the regulations. According to the group, the exemption would impact only one tenth of one percent of the protective area.

The National Marine Manufacturers Association, the leading national recreational vessel marine trade manufacturers' association, suggested that the administration provide a larger role for industry standards such as those established by the American Boat & Yacht Council ("ABYC"). Citing the inability of agency regulations to keep pace, the association suggested greater flexibility for the Coast Guard to partner with industry by accepting industry standards as equivalent to Coast Guard regulations. Conceptually, this would permit alternative compliance, avoid costly exemptions for each particular model of vessel, and permit industry standards to address topics not in alignment with current Federal requirements, allowing pursuit of more innovative, modern technologies.

The Marine Industries Association of South Florida submitted two comments to the docket, pertaining to repair and maintenance of recreational vessels. First, the Association requests relief from a Department of Labor rule of interpretation which negates repair yards' longstanding relief from requirements to purchase higher-cost workers' compensation insurance under the Longshore and Harbor Workers' Compensation Act (instead of state plans). Second, the association requests relief from rules requiring foreign-flag yachts to obtain B1/B2 visas for their crews, arguing that the requirements are onerous and therefore incentivize owners to reroute their vessels to cruise outside the United States, resulting in lost economic activity. Specifically, the association notes that lack of coordination between CBP and Department of State consular officials has resulted in confused and inefficient administration of the visa program, unfairly denying access to crewmembers. The Association also joined comments submitted by the International Yacht Brokers Association which take issue with the stringency of regulations pertaining to the sale of foreign-flag yachts to U.S. citizens while in U.S. waters, collection of duties in connection with yacht sales, and byzantine restrictions on cruising licenses.

Comments by the American Association of Port Authorities ("AAPA") emphasized the need to streamline and make more transparent the process ports must endure to maintain and develop port infrastructure, including U.S. Army Corps of Engineers and EPA permits. Specifically, the association requested shorter timelines, clear permitting milestones, and limitations on extensions for permitting actions. The port association also requested consistent application of requirements under the Ocean Dumping Act, Clean Water Act, and Marine Protection Research and Sanctuaries Act. Finally, AAPA expressed concerns with the specter of trade wars, and endorsed CVIDA.

A potpourri of commenters weighed-in passionately for and against the application of the Jones Act and related cabotage laws which require U.S. built, owned, operated, and crewed vessels in the domestic trades. Offshore Marine Service Association, Tidewater, Odyssea Marine, Galliano Marine Service, Candy Fleet,

Edison Chouest, Vigor, Offshore Liftboats LLC, Crowley, American Maritime Partnership, Lake Carriers' Association, AWO, the Dredging Contractors of America, the Shipbuilders Council of America, and individual mariners all presented arguments in favor of robust Jones Act enforcement, citing economic and national security, as well as the economic benefits of continued U.S. domination of the U.S. domestic trade. Several fringe commenters, including a grassroots group from Hawaii and a professor from North Carolina, advocated for relaxing or repealing cabotage requirements. A comment submitted by European dredging interests and some manufacturers argued for opening up the Dredge Act to foreign operators, alleging foreign interests could conduct dredging operations cheaper and more quickly.

Lastly, many individual mariner submissions, and some vessel operator submissions, argued for the elimination of TWIC cards on the ground that they are largely redundant of Merchant Mariner Credentials and ineffective insofar as they are not accepted at many ports, docks, and airports without verification by state-issued driver's licenses, and that there are problems with availability of TWIC readers at many locations. As one submitter put it "The running joke in the industry is that the only time your card is read in a CAC reader is the day you are issued it, and the day you turn it in to get it renewed." Furthermore, a number of mariners advanced the propositions that the TWIC should be valid for a longer period, and that the expense and burden of obtaining a TWIC should be reduced.

This is not the first time the maritime industry has received requests from an Administration seeking ideas on how to improve the regulatory climate and strengthen our nation's keel-print on the waterways and on the high seas. In the past, outpourings of ideas from industry have been met mostly with benevolent inaction. Hopefully, this time will be different, and the Administration will mark the channel to make the American maritime industry great again, or at least, even greater than it already is.