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Joshua S. Force, Editor-in-Chief
Robert J. Zapf, Managing Editor

Inside This Issue

MAINTENANCE AND CURE UPDATE

By Aaron B. Greenbaum*

This article addresses recent developments in the ever-developing and often litigated area of maintenance and cure. Recent decisions issued between January 1, 2019 and December 31, 2019, are discussed herein, including those concerning the determination of the proper maintenance rate, the nature of maximum medical improvement, application of the *McCorpen*[1] defense, and a seaman's entitlement to recovery of punitive damages. Courts have also addressed procedural issues, such as the application of forum selection and foreign arbitration clauses, application of the doctrine of res judicata, and the statute of limitations for a maintenance and cure claim.

Determination of the Maintenance Rate

The issue of a contractually set maintenance rate was recently addressed in *Knudson v. M/V American Spirit*.[2] The plaintiff was a non-union seaman, who had been required to sign a 111-page Terms and Conditions of Employment document, which the employer revised from a previous version implemented through a collective bargaining agreement with the union.[3] The seaman was subsequently injured and under the employment

* Aaron B. Greenbaum a member of Pusateri, Johnston, Guillot & Greenbaum, LLC in New Orleans, Louisiana. He is admitted to practice in Louisiana, Texas, and Mississippi and may be contacted at Aaron.Greenbaum@pjgglaw.com.

[1] *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968).

[2] *Knudson v. M/V American Spirit,* 2019 U.S. Dist. LEXIS 8329 (E.D. Mich. Jan. 17, 2019).

[3] *Knudson* at *2-3.

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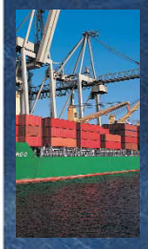


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Managing Editor's Introductory Note

In this edition we begin with an article by Aaron Greenbaum reporting on recent caselaw in the ever-developing and often litigated area of maintenance and cure. Aaron reports on cases concerning the determination of the proper maintenance rate, the nature of maximum medical improvement, application of the *McCorpen* defense, and a seaman's entitlement to recovery of punitive damages. Court have also addressed procedural issues, such as the application of forum selection and foreign arbitration clauses, application of the doctrine of res judicata, and the statute of limitations for a maintenance and cure claim.

We next present Bryant Gardner's column, Window on Washington, in which Bryant reports on the National Defense Authorization Act for fiscal year 2020 (NDAA), probably the single-most consistent legislative vehicle in the Congress. The NDAA includes a smattering of important maritime-related provisions on sealift, illegal fishing, coastwise-qualified offshore wind vessels, ports, and other matters, and Bryant succinctly addresses all of them.

In our Future Proctors section, we first submit an article by Amy Ferrugia Vella on the continuing problem of rescuing migrants at sea in the Mediterranean Sea.

This issue has been addressed in prior articles in this publication by Patricia Mallia, 'The Legal Regime Surrounding Irregular Migration and Europe's Response: A Crisis in Solidarity' 13 Benedict's Mar. Bull., 181 (Fourth Quarter 2015); by Felicity Attard, 'The Contemporary Significance of the Early Efforts to Codify the Duty to Render Assistance at Sea,' 15 Benedict's Mar. Bull. 62, 77 (Second Quarter 2017); and again by Patricia Mallia (Vella de Fremeaux) and Felicity Attard, 'Dehumanising the Human Element of Maritime Migrant Smuggling: A discussion of the Application of Human Rights in the Maritime Sphere,' 17 Benedict's Mar. Bull. 1 (First Quarter 2019).

Amy comprehensively discusses the obligations to render assistance at sea established by the UNCLOS, SOLAS, and SAR Conventions. Unfortunately, she concludes that "it is no longer tenable to rely exclusively on the law of the sea regime to address SAR activities." She proposes that "an effective system involving the cooperation and coordination among European States be implemented, in order to render disembarkation predictable and to ensure the swift disembarkation of persons rescued at sea in a place of safety, where the human rights of migrants and those involved in SAR operations are safeguarded."

We hope that her considered views and proposals may result in appropriate action to solve this difficult and recurring problem.

Our second offering from Future Proctors is an article on the Mekong River Commission by George Beck. While this article is not specifically geared toward admiralty law or practice, it does show the influence of China in Southeast Asia, an influence which is directly impacting geopolitical issues and maritime issues in the South China Sea.

George gives a detailed look at the make-up and powers (or lack thereof) of the MRC in its efforts to develop the Lower Mekong River Basin and "to manage the river such that all riparians are able to utilize their shares of the collective resource without compromising their neighbors' abilities to do so as well." He concludes that "the current Mekong River Commission is not adequately equipped to achieve that objective, especially given the disparate influence that China has over the basin."

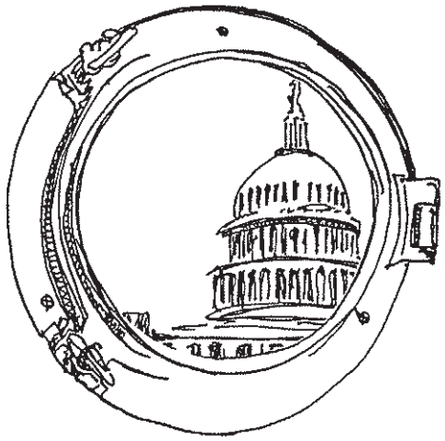
We urge our readers who may have summer associates or interns from law schools working for them to encourage them to submit articles for publication in our Future Proctors section.

Last but not least, we conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

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



A LOOK AT THE 2020 DEFENSE ACT: FISH PIRATES, CABLE SHIPS, WINDMILLS, AND MORE

Bryant E. Gardner*

Heading into the new decade, the US Congress is occupied with the impeachment inquiry, 2020 elections, and the blistering twitterstorm along Pennsylvania Avenue. However, for the 59th consecutive year, Congress came together and passed a compromise National Defense Authorization Act for fiscal year 2020 (NDAA),[1] probably the single-most consistent legislative vehicle in the Congress. The NDAA includes a smattering of important maritime-related provisions on sealift, illegal fishing, coastwise-qualified offshore wind vessels, ports, and other matters.

Sealift Programs

The NDAA reauthorizes the popular Maritime Security Program (MSP) through 2035, which provides a stipend to 60 militarily useful US-flag vessels in exchange for their participation in an Emergency Preparedness Agreement with the Department of Defense (DOD) ensuring availability to the Government for sealift purposes in times of war and national emergency.[2] Eligible vessels must be commercially viable, operated in the US international trade, and no older than 15 years. The reauthorization provides an annual stipend of $5.3 million for FY 2022-2025, $5.8 million for FY 2026-2028, $6.3 million for FY 2032-2035, and $6.8 million for FY 2032-2035 for each enrolled vessel. Under existing provisions of law, the Navy has a limited exception to buy-American rules to procure up to two foreign-built vessels for sealift purposes if such vessels previously participated in the MSP.[3] A new provision in the NDAA directs that the Navy "shall" enter into a contract for the procurement of two used vessels under that authority using amounts authorized for Operation and Maintenance, Navy, for fiscal year 2020.[4]

The new law also establishes a "Cable Security Fleet" aimed at ensuring reliable US-flag cable laying vessel

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* Bryant E. Gardner is a Partner at Winston & Strawn, LLP, Washington, D.C. B.A., summa cum laude 1996, Tulane University of Louisiana; J.D. cum laude 2000, Tulane Law School.

[1] National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, 133 Stat. 1190 (2019) ("NDAA").

[2] NDAA § 3502.

[3] 10 U.S.C. § 1032(f)(3).

[4] NDAA § 1032.

capability.[5] Like MSP, the vessels are commercially operated by US citizens and must be commercially viable, but must be made available to the US Government when needed under pre-negotiated contingency contracts. Currently, there are two vessel contracts authorized, each providing a $5 million annual stipend through 2035. Vessels must be operated in "cable services" defined as "installation, maintenance, or repair of submarine cable and related equipment, and related cable vessel operations," and be less than 40 years of age. Applications will be awarded to those vessels determined by DOD, in its sole discretion, to best meet national security requirements, after which priority shall be granted to "Section 2" citizens under the Shipping Act.[6]

The House bill included a 10-vessel tanker program modeled after the MSP. In its proposal, the House made specific note of a recent study by the Center for Strategic and Budgetary Assessment (CSBA) which issued a report warning that "decades of downsizing and consolidation with the goal of achieving greater efficiency have left US defense maritime logistics forces brittle while simultaneously contributing to the decline of the US shipbuilding industry and the Merchant Marine. Failing to remedy this situation when adversaries have US logistics networks in their crosshairs could cause the United States to lose a war and to fail its allies and partners in their hour of need."[7] Vessels would have been required to be flagged under the laws of the US, available to the US Government when needed, commercially viable, operate in foreign commerce, and less than 25 years old. Stipend payments would not be reduced for the carriage of US government preference cargoes other that bulk civilian preference cargo, and payments would be suspended during participation in the US noncontiguous domestic trade with Hawaii, Puerto Rico, and Alaska—other than points in Alaska north of the Arctic Circle.

Although the House program did not survive into the final NDAA, DOD's need for additional tanker capacity is real, and the NDAA calls for a report on current US-flag tanker capacity, tanker capacity needed to meet mobility requirements, risks to military objectives from reliance on foreign bottoms, and options to reduce such risks including a tanker program modelled on MSP.[8] In a further attempt to strengthen US-flag tanker capacity, the law includes a tweak to the Military Cargo Preference Act which would require military shippers of fuel to provide a minimum variance of three days on the shipment date, thereby making it more practical for US-flag vessels to be available for fuel shipments by DOD.[9] In the past, some carriers have asserted that shipper agencies set shipping windows to avoid the requirement to use US-flag vessels; this amendment aims at reducing US-flag non-availability shipments on foreign flag vessels, and also clarifies that DOD agencies beyond just the Army, Navy, Air Force, and Marine Corps, such as the Defense Logistics Agency, fall within the Act.

Lastly, the law requires the United States Transportation Command (TRANSCOM), which is the combatant command charged with overall global logistics for DOD, to prepare a mobility capability requirements study in coordination with the Joint Chiefs of Staff to be completed no later than January 1, 2021.[10] The study will look at the sealift requirements, capability gaps, overlaps, and excesses in sealift, and articulate assumptions made in preparing the study, including the availability of commercial sealift capabilities, adversary actions to degrade US mobility capabilities, and anticipated attrition rates for sealift capabilities. Until recently, US sealift readiness assessments generally did not factor in loss of vessels to adversaries, but the shift to a near-peer combat scenario is challenging this assumption and requiring DOD to reconsider the minimum volume of sealift assets and mariners needed to project power.

The legislation also includes changes to the Title XI Maritime Guaranteed Loan Program for vessels constructed in US shipyards.[11] The amendments appear to let go of the idea of realistically promoting "export vessels" built in US yards, pivoting focus to build "vessels of national interest". Additionally, the US Maritime Administration (MARAD) is now authorized to use third party experts, including outside counsel, to process and review applications, document

[5] *Id.* § 3521. The provision originated in the House bill, H.R. 2500, § 3521.

[6] 46 U.S.C § 50501.

[7] H. Rep. 116-120 at 347, Tit. XXXV, Items of Special Interest (2019).

[8] NDAA § 3519.

[9] *Id.* § 1033.

[10] *Id.* § 1712.

[11] *Id.* § 3506.

the guarantees, recommend financial covenants, financing structures, and ratios, and otherwise represent MARAD to protect the security interests of the Government under the program. The legislation also modifies fees chargeable to include such third-party assistance in both processing and monitoring obligors' compliance.

Section 3512 requires a Department of Transportation (DOT) Inspector General's report on the progress being made by MARAD to address recommendations in the November 2017 National Academy of Public Administration (NAPA) report "Maritime Administration: Defining its Mission, Aligning its Programs, and Meeting its Objectives." Specifically, the law requires the audit to focus upon mission clarity, agency transparency, finalization of the National Maritime Strategy, sealift mariner requirements and monitoring, and evaluation of a merchant marine "reserve program."

Ports Initiatives

Within the NDAA is the "Ports Improvements Act," which codifies a competitive grants program for improving the safety, efficiency, or reliability of the movement of goods through ports and intermodal connections to ports.[12] Applicants may be state and local governments, public agencies established by one or more states, special purpose districts with transportation functions, Indian tribes, or groups of the foregoing. Projects may be within ports, or outside the ports but directly related to intermodal connections and used to improve the movement of goods into and out of the port. The Act authorizes up to $500 million for such projects, provided that no funds may be used to grant awards to purchase fully automated cargo handling equipment that is remotely operated or monitored if such equipment would result in a net loss of jobs within a port.[13]

There are 17 designated strategic seaports across the US in a variety of states including Washington, California, Texas, Mississippi, Florida, Georgia, and Virginia, among others. Because of concern regarding the infrastructure integrity at these ports, the law requires DOD to deliver a report in conjunction with MARAD and the port's leadership assessing improvements needed to meet national security and readiness, the impact upon readiness if such improvements are not undertaken, funding resources available to make such improvements, and DOD's role in the implementation of DOT port improvements grants for such ports, if any.[14] Additionally, within 180 days DOD must submit to Congress a report evaluating sites for one or more strategic ports in the Arctic capable of supporting at least one each of a Navy Arleigh Burke class destroyer, a Coast Guard National Security Cutter, and a heavy polar ice breaker.[15]

MARAD's Small Shipyard Grant Program has also been amended to include a "Buy American" provision limiting the use of grant funds to items produced or manufactured in the United States, with limited exceptions including where domestic content will increase the cost by more than 25%.[16]

Personnel and Training

The NDAA codifies into law the "Military to Mariner" executive order, requiring the Coast Guard and other relevant agencies to identify all training and experience within their service that may qualify for merchant mariner credentialing and submit a list of such training to the Coast Guard National Maritime Center to determine whether it will count toward maritime credentials.[17]

The law also includes several provisions related to the United States Merchant Marine Academy at King's Point. In addition to the 50 slots the Secretary of Transportation can use to appoint candidates of value to the Academy, the Secretary will have 40 new slots available to individuals sponsored by the Academy to attend preparatory school during the academic year prior to entrance in the Academy.[18] Another provision directs the Secretary of Transportation to enter into an agreement with NAPA to evaluate the US Merchant Marine Academy to help it "keep pace with more modern campuses."[19] Lastly, Congress requires an update on the Academy's implementation of sexual assault prevention and response program measures mandated under prior provisions of law.[20]

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[12] *Id.* § 3514.

[13] *Id.* § 3501(a)(9).

[14] *Id.* § 3515.

[15] *Id.* § 1752.

[16] *Id.* § 3507.

[17] *Id.* § 3511.

[18] *Id.* § 3504.

[19] *Id.* § 3513.

[20] *Id.* § 3517.

Maritime Safe Act

In May of 2019, Senators Roger Wicker (R-MS) and Chris Coons (D-DE) reintroduced the Maritime Security and Fisheries Enforcement Act (Maritime SAFE Act) to promote a whole-of-government strategy to combat illegal, unreported, and unregulated (IUU) fishing globally. In reintroducing the bipartisan legislation, Senator Coons reported that IUU fishing is a multibillion dollar industry that contributes to instability and food insecurity in areas important to United States interests. Senator Wicker also observed that IUU may put at risk the livelihoods of US fishermen and fund other criminal activities.[21] One recent release from the Center for Strategic and International Studies (CSIS) estimates that IUU accounts for between 20%-30% of global catch and costs legal fishers and governments between $15.5 billion and $36.4 billion per year, diverting these funds to finance criminal networks that engage in arms dealing, drug running, human trafficking, and terrorism.[22] Therefore, the passage of the Maritime SAFE Act within the 2020 defense law is more than symbolic. The use of fishing vessels by China as a maritime militia in the South China Sea and the use of fishing vessels by pirates off East Africa are direct representations of the intersection between IUU and other maritime security threats.

The Maritime SAFE Act establishes improved processes among the US and its allies aimed at combatting IUU.[23] It directs the Secretary of State to coordinate with regional intergovernmental fisheries management organizations and to engage in diplomatic missions with priority regions suffering from IUU and with priority flag states known to have vessels engaging in IUU activities, in an attempt to curtail IUU. The law also establishes an interagency working group and directs US Federal agencies, including the Coast Guard, Navy, and Department of Commerce, to improve law enforcement activities within such priority regions and flag states, through expanded training, increased stakeholder outreach, and assessment of existing resources available to combat IUU and other illegal trade including weapons, drugs, and human trafficking. The agencies must expand existing mechanisms to combat IUU fishing, including counter-IUU shiprider agreements in which the US is a party, entering into new shiprider agreements with priority flag states, adding IUU drills to annual DOD and Coast Guard at-sea exercises, and including counter-IUU activities in the mission of the Combined Maritime Forces, the 33-nation naval partnership established in February 2002.

The Maritime SAFE Act also pursues increased transparency among consumers and seafood suppliers regarding the ethical and legal sourcing of seafood products, improved information sharing and transparency, and better traceability systems to strengthen fisheries management, enhance domain awareness, and deter IUU fishing. The law requires the development of an overall IUU strategy, and various reports on the progress being made to combat IUU, including specifically human trafficking in the seafood supply chain.

Offshore Wind and Coastwise Laws

The US offshore wind industry appears to be on the verge of very significant growth, especially in the northeast. US cabotage laws, including the Jones Act, restrict many offshore activities to US-flag vessels qualified for the coastwise trades. Currently, many specialty offshore wind installation and maintenance vessels are operated by European interests, where offshore wind is more mature and consequently these vessels are not US coastwise qualified. This situation has sparked discussions about whether there is a shortage of such vessels needed to ensure the unimpeded growth of the US industry.

Section 3518 of the NDAA pursues clarity in directing the Government Accountability Office (GAO) to prepare a report within six months that examines the inventory of coastwise qualified vessels for emerging offshore energy needs, projected vessel needs for the offshore wind industry over the next decade, actions taken or proposed by offshore wind developers to ensure sufficient capacity in compliance with US coastwise laws, and the potential benefits to the US maritime and shipbuilding industries and the US economy associated with the use of US coastwise qualified vessels to support offshore energy development and production.

Each of the foregoing are important maritime provisions that bear further watching. In some cases, such as the

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[21] Press Release, *Wicker, Coons Reintroduce SAFE Act*, May 1, 2019, https://www.wicker.senate.gov/public/index.cfm/press-releases.

[22] Dr. Whitley Saumweber, Director of the Stephenson Ocean Security Project, Center for Strategic and International Studies, *Fishing in the National Defense Authorization: Unpacking the Maritime SAFE Act*, August 14, 2019, https://www.csis.org/analysis/fishing-national-defense-authorization-unpacking-maritime-safe-act.

[23] NDAA §§ 3531-3572.

Maritime SAFE Act, the tanker study, TRANSCOM mobility requirements study, offshore wind GAO report, the NAPA King's Point report, and the strategic seaports report, there is a clear next step worth tracking. Each of these may, in turn, lay the groundwork for new programs and new authorities in the next Congress. Also worth watching is the Coast Guard Authorization Act, which normally takes near-final form late in the year but is still under negotiation as of this writing. Although Congress as a whole is even more bogged-down in partisan politics and election tactics than usual, bipartisan maritime legislation still finds a way to wend its way through the process thanks to great staff and Committee leadership.