

# BENEDICT'S MARITIME BULLETIN

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## WHO DO YOU WORK FOR? A HARBOR PILOT'S STATUS UNDER THE LHWCA

By Vince C. Reuter\*

Harbor pilots have always played a special role in maritime activity. Stemming from state law, a harbor pilot's qualifications are tied to a licensing board and association that operates distinct from the vessel, the vessel owner, and the master and crew.<sup>1</sup> Courts face an ongoing challenge determining how to treat harbor pilots in the catalogue of federal admiralty law's duties and remedies. In *Rivera v. Kirby Offshore Marine, L.L.C.*,<sup>2</sup> the United States Court of Appeals for the Fifth Circuit addressed this question by deciding whether a harbor pilot is covered under § 5(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), and thus whether he or she is limited to bringing a claim for negligence against a third party. The Fifth Circuit held no. By extension, that court addressed whether a harbor pilot could instead constitute a *Sieracki* Seaman,<sup>3</sup> thus allowing him or her to bring a claim for unseaworthiness—and its benefits of strict liability. Here, the Fifth Circuit held yes.

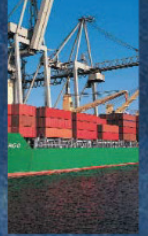
\* Vince C. Reuter is a partner in the Minneapolis office of Eckland & Blando LLP. Mr. Reuter received his J.D. *cum laude* from Mitchell Hamline School of Law and his LL.M. in Admiralty Law from Tulane University Law School. Mr. Reuter practices maritime law in the Upper Midwest. A version of this paper was presented at the Spring 2021 meeting of the Uniformity Committee of The Maritime Law Association of the United States.

<sup>1</sup> See, e.g., La. Stat. Ann. § 34:941 *et seq.*; N.Y. Nav. Law Chap. 37, Art. 6, § 87 *et seq.*

<sup>2</sup> *Rivera v. Kirby Offshore Marine, L.L.C.*, 983 F.3d 811 (5th Cir. 2020).

<sup>3</sup> See *Seas Shipping Co., Inc. v. Sieracki*, 328 U.S. 85 (1946).

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Matthew Bender®

## MANAGING EDITOR'S INTRODUCTORY NOTE

We begin this edition with an article by Vince C. Reuter on the split among the circuits concerning whether harbor pilots are covered under § 5(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), and thus whether they are limited to bringing a claim for negligence against a third party, or whether harbor pilots could instead be considered as *Sieracki* seamen, thus allowing them to bring a claim for unseaworthiness—and its benefits of strict liability. Vince analyzes the different approaches taken by the Fourth, Fifth, and Ninth Circuits and concludes that the correct way to analyze coverage under § 5(b) remains an open question, and thus harbor pilots across the United States have significantly different remedies at their disposal based solely on the waters they may oversee.

We follow with an article by Kristina M. Prete on another split among the circuits, this involving the doctrine of *uberrimae fidei*. Kristina reviews the history of the doctrine in the United States, and in the various circuits that have addressed it. She notes that despite the U.S. Supreme Court's *Wilburn Boat* decision that courts shall apply state substantive law for marine insurance issues if no federal admiralty law precedent exists, courts are split between applying state substantive law as opposed to federal admiralty law for marine insurance issues.

Next, we present a scholarly analysis by Lt. Cdr. Benjamin Robinson, currently serving us all with the United States Coast Guard, on the principle of "clear grounds" for inspection of vessels and enforcement of various international conventions by port state authorities. Ben traces the history of the development of the clear grounds concept and analyzes how the emergence of the modern port state control regime, under which maritime regulators inspect foreign ships in their ports for compliance with multilateral treaties setting standards for ships, is directly tied to the emergence of the clear grounds concept contained in those treaties.

Next is an article by Jeanne M. Grasso and Dana Merkel on the ongoing impact of COVID 19 on the cruise industry. Jeanne and Dana trace the effect of the "No Sail Orders" issued by the CDC and the changes to them as the fight against the virus progresses. They point out that the CDC continues to engage with the industry and modify its requirements when needed to allow cruising to resume while still mitigating the risk of COVID19 as best as reasonably possible.

We are pleased to present two submissions in our Future Proctors Section, the first an article by Elise K. McCanless on hurricane damage in a world of climate change. Elise provides a history of cases dealing with hurricane damages and how those damages are addressed by courts dealing with various defenses asserted by vessel owners and operators. The second submission is a review of recent salvage cases by Grayson Szczepaniak.

Next, in his regular column, Window on Washington, Bryant Gardner discusses recent hacking of U.S. infrastructure and how the government responded in efforts to provide relief from fuel shortages. Bryant describes the reactions of the United States Department of Transportation's (USDOT) Federal Motor Carrier Safety Administration and MARAD, and the reactions of the Jones Act community to waivers issued based on MARAD's determination that there were insufficient coast-wise qualified vessels available to meet the emergency needs. He concludes "[s]hould stakeholders consider further amendments promoting transparency, requiring the Secretary of Homeland Security to disclose to the public why the requested Jones Act waiver is necessary in the interest of national defense, and why MARAD's U.S.-flag alternatives do not meet that need, that would be a good place to start."

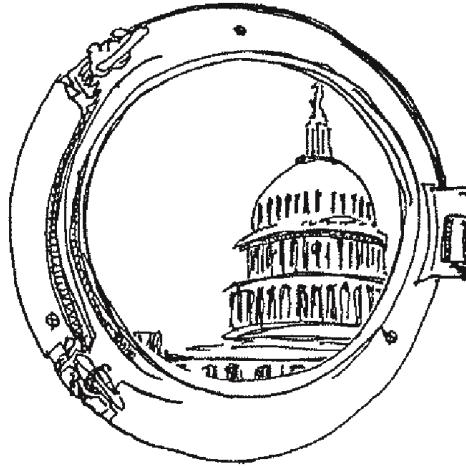
We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

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.

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



### *Hacking the Jones Act*

By Bryant E. Gardner\*

The Colonial Pipeline carries about 45% of the oil for the U.S. East Coast, running 5,500 miles from Houston up to New Jersey. It was also protected by only a single password when hacked by a group of Russian-based cybercriminals known as Darkside. Darkside locked Colonial out of parts of the pipeline's computer network and threatened to release its sensitive network to the public, prompting a temporary shutdown of the pipeline, panic buying, and fuel shortages over the coming days. Working with the Federal Bureau of Investigation, Colonial paid a \$4.4 million ransom to the hackers, but not before significant supply disruptions had taken root throughout the South and up the East Coast. Among the hardest hit areas: Washington, D.C., where over 80% of filling stations ran out of gas and the phone and Zoom lines lit up with calls from concerned constituents demanding immediate relief.

President Biden called for a "whole of Government" response to the ransomware cyber-attack. The White House offered sweeping assistance and promised regulatory relief, but also frankly acknowledged that under the U.S. model, key infrastructure such as the

Pipeline is owned and operated by private interests and those private interests have been relied upon to adequately protect their infrastructure without far-reaching oversight by Federal authorities. The day after the hack and ransom payment were revealed, White House Press Secretary Jen Psaki responded to questions about whether the Jones Act, which requires carriage in U.S.-flag vessels between U.S. ports,<sup>1</sup> would be waived. In response, she stated: "[W]e have an interagency process that was stood up this weekend and is meeting regularly, many times a day, about a range of options. I'm not going to get ahead of those options. At this point in time, I would just reiterate we don't see a supply issue."<sup>2</sup>

The first waivers were not aimed at the Jones Act. On May 9, 2021, the United States Department of Transportation's (USDOT) Federal Motor Carrier Safety Administration (FMCSA), which regulates the

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<sup>1</sup> The "Jones Act" is a popular term generally used to refer to a collection of U.S. laws reserving domestic maritime commerce to qualified U.S.-flag vessels, including for the transportation of passengers or merchandise between two U.S. coastwise "points in the United States," and for the conduct of certain dredging, towing, salvage and fishing operations. See 46 U.S.C. Ch. 121 & 551; 46 U.S.C. § 80104.

<sup>2</sup> Jen Psaki, White House Press Secretary, White House Press Conference, CQ Newsmaker Transcripts (May 10, 2021).



safe operation of over the highway trucks, announced relaxation of certain Federal regulations, including driver hours of service rules, applicable to highway deliveries of fuel to the affected areas.<sup>3</sup> Shortly thereafter, on May 12, USDOT announced additional waivers providing added flexibility to transport overweight loads of gasoline and other fuels on the interstate highways.<sup>4</sup> On May 11, the U.S. Environmental Protection Agency (EPA) issued two waivers under the Clean Air Act loosening rules requiring lower volatility gasolines in order to boost eligible supplies of fuel in affected areas.<sup>5</sup>

The Colonial hack became public on Friday, May 7, and on Tuesday, May 11, the Secretary of Homeland Security Alejandro Mayorkas announced that his department had been working over the weekend with USDOT to be ready should any request for a Jones Act waiver be made to inject foreign-flag vessels into the U.S. domestic trade.<sup>6</sup> In response to questions at a White House press briefing, the Secretary explained the process: “[W]hen we receive a request for a waiver the Department of Transportation engages in an analysis to determine whether any U.S.-flag vessels are available to deliver what is needed. And if in fact they are then of course they are called upon under the Jones Act statute to deliver accordingly. But if there...are not U.S. flags available then we analyze the need for foreign flag vessels and apply the statutory requirements correctly.”<sup>7</sup> Also on May 11, USDOT announced that “Today, USDOT’s Maritime Administration [MARAD] initiated a survey of Jones Act-qualified vessels to begin the process of evaluating what vessels are available in the Jones Act fleet to carry petroleum products within the Gulf, and from the Gulf up the Eastern Seaboard. This step is being taken to determine whether there is sufficient capacity on Jones Act-qualified vessels to carry the product and determine if a waiver is warranted. Responses have been requested today. The Maritime Administration’s role in the Jones act waiver process is

to determine the availability of Jones Act vessels to carry the products for which a waiver is sought. Authority to receive requests for and to approve waivers to the Jones Act belongs to the Department of Homeland Security.”<sup>8</sup>

The following day, May 12th, Homeland Security announced approval of “a temporary and targeted waiver request to an individual company” in consultation with the Departments of Transportation, Energy, and Defense “in order to assess the justification for the waiver request and ensure the approval of the waiver is in the interest of national defense.”<sup>9</sup> The waiver was premised upon MARAD’s determination that insufficient Jones Act-qualified vessels were available for eight cargoes consisting of ~300,000 barrels each, loading May 11-19 from Corpus Christi, Texas and St. Charles, Louisiana to Stapleton, New York with some lots transshipping via Montreal, Canada.<sup>10</sup> Subsequently, on May 13, Secretary Mayorkas approved “a temporary and targeted Jones Act waiver request for a second company,” again made in consultation with the Departments of Transportation, Energy, and Defense, to ensure approval of the waiver was “in the interest of national defense.”<sup>11</sup> The second waiver was premised upon MARAD’s same-day determination that there were insufficient coastwise-qualified vessels to load up to 160,000 barrels of jet fuel, 125,000 barrels of gasoline, and 15,000 barrels of ultra-low sulfur diesel at CITGO Lake Charles, Louisiana for discharge at CITGO Linden, New Jersey for a load date of May 13, shipping by May 14 for delivery May 20-21.<sup>12</sup>

<sup>3</sup> Federal Motor Carrier Safety Administration, Regional Emergency Declaration Under 49 CFR 390.23, No. 2021-002 (May 9, 2021).

<sup>4</sup> Federal Motor Carrier Safety Administration, Additional Measures Taken to Help States Affected by Pipeline (May 12, 2021).

<sup>5</sup> U.S. Environmental Protection Agency, May 2021 Fuel Waivers Concerning the Colonial Pipeline Shutdown (May 11, 2021) (after an initial waiver for the Mid-Atlantic states, EPA expanded it to cover most of the Southern states).

<sup>6</sup> U.S. Secretary of Homeland Security Alejandro Mayorkas, White House Press Conference, CQ Newsmaker Transcripts (May 11, 2021).

<sup>7</sup> *Id.*

<sup>8</sup> U.S. Department of Transportation, USDOT Details Ongoing Efforts to Help Mitigate Potential Impacts of the Colonial Pipeline Disruption (May 11, 2021).

<sup>9</sup> U.S. Department of Homeland Security, Statement by Secretary Mayorkas on the Approval of a Jones Act Waiver in Response to Eastern Seaboard Oil Supply Constraints (May 12, 2021).

<sup>10</sup> Letter from L. Lessley, Acting Maritime Administrator, U.S. Maritime Administration, to Lisa Burnley, Chief/Supervisory Attorney-Advisor, U.S. Customs and Border Protection (May 12, 2021) (the non-availability determination was subsequently amended to clarify that the Montreal-destined cargoes were ultimately destined for delivery at a point in the United States thereby implicating cabotage restriction).

<sup>11</sup> U.S. Department of Homeland Security, Statement on the Approval of an Additional Jones Act Waiver in Response to Eastern Seaboard Supply Constraints (May 13, 2021).

<sup>12</sup> Letter from L. Lessley, Acting Maritime Administrator, U.S. Maritime Administration, to Lisa Burnley, Chief/Supervisory Attorney-Advisor, U.S. Customs and Border Protection (May 13, 2021).

Jones Act community reactions ranged from tepid to concerned. The American Maritime Partnership, which bills itself as “the voice of the domestic maritime industry,” stated:

Any waiver of U.S. law, including the Jones Act, should be done with precision and demand transparency and accountability of those who seek to benefit from such waiver. The Jones Act strengthens our industrial base and readiness, supports U.S. jobs and infrastructure, and protects homeland and national security. It should not be waived unless, and only to the extent that, a waiver would respond to an urgent national security need that cannot reasonably be met with American ships. The American Maritime Partnership does not object to the targeted approach of the Administration, but strenuously encourages all policymakers to hold accountable those who seek to benefit from any waiver to avoid undermining American jobs and consumers.<sup>13</sup>

The Marine Engineers' Beneficial Association called the waiver “questionable” and indicated that Jones Act tankers not in active service were not broken out to assist in the effort before the waiver was granted.<sup>14</sup> The Seafarers' International Union stated “we have never objected to waiving the Jones Act if doing so is a truly necessary response to national emergencies. Any waiver must not come at the expense of American jobs.... [T]he SIU supports a close examination by Congress regarding whether there has been any gaming of the system for crisis arbitrage that enriches foreign interests.”<sup>15</sup> Elsewhere in Washington, the libertarian Cato Institute characterized the Colonial Pipeline hack as a “further indictment” of the Jones Act and called for new rules allowing waivers based upon commercial considerations.<sup>16</sup>

The Jones Act waiver process, as tightened in the National Defense Authorization Act passed January 1, 2021, permits waiver in two scenarios.<sup>17</sup> First, when requested by the Secretary of Defense when necessary in the interest of national defense to address an immediate adverse effect on military operations, with notice to the committees of jurisdiction in Congress within 24 hours of making the request explaining the circumstances requiring such a waiver in the interest of national defense and confirming that there are insufficient qualified vessels to meet such needs without a waiver.<sup>18</sup> Second, when requested by the Secretary of Homeland Security, which was the waiver process used in connection with the Colonial Pipeline incident.<sup>19</sup> The Homeland waiver process requires that the Secretary find the waiver “necessary in the interest of national defense” following a determination by MARAD of non-availability of qualified vessels necessary to meet such national defense requirements.<sup>20</sup> Each such MARAD determination must “identify actions that could be taken to enable qualified United States flag capacity to meet national defense requirements,” be provided to Homeland, and be published on the MARAD website within 48 hours.<sup>21</sup> Additionally, Homeland Security must notify the committees of jurisdiction in Congress within 48 hours of receiving a request and again within 48 hours of the issuance of a waiver, including the reasons why a waiver is necessary and why the actions which were identified as options to enable qualified U.S.-flag capacity to meet national defense requirements were not undertaken in lieu of a waiver.<sup>22</sup> Finally, within ten days of conclusion of the voyage pursuant to the waiver, the owner or operator of the foreign-flag vessel must submit a report to MARAD detailing the voyage, and MARAD must publish the report on its website within 48 hours of receipt.<sup>23</sup>

<sup>13</sup> American Maritime Partnership, Statement on Issuance of Jones Act Waiver (May 13, 2021).

<sup>14</sup> Marie Engineers' Beneficial Association, M.E.B.A. Telex Times, No. 19 (May 13, 2021).

<sup>15</sup> Seafarers International Union, Statement by SIU Regarding Jones Act Waivers (May 13, 2021).

<sup>16</sup> Colin Grabow, Cato Institute, Recent Pipeline Problem Further Indict the Jones Act (May 23, 2021); Colin Grabow, Cato Institute, The Jones Act Should be Waived, but More Substantive Changes Are Needed (May 12, 2021).

<sup>17</sup> Pub. L. 116-283, Div. C, Title XXXV, § 3502, 134 Stat. 4397 (2021).

<sup>18</sup> 46 U.S.C. § 501(a).

<sup>19</sup> *Id.* § 501(b).

<sup>20</sup> *Id.* § 501(b)(1).

<sup>21</sup> *Id.* § 501(b)(3).

<sup>22</sup> *Id.* § 501(b)(4).

<sup>23</sup> *Id.* § 501(c).

Despite the rigorous standards of transparency, disclosure, and justification enshrined in the Jones Act waiver statute, the Colonial Pipeline waiver remains somewhat shrouded in mystery, which is *de rigueur* for a process fraught with political risks and condemnation from one side or another. Like previous waivers, the Colonial waivers merely conclude the waiver is “in the interest of national defense,” but Homeland’s proclamations stop short of finding the waiver “necessary” in such interest, nor do they provide any explanation of how or why the waivers further national defense. Homeland’s “Jones Act Waiver Request” internet portal does not even request from applicants any information regarding the waiver’s purported necessity for national defense, nor is there any indication such evidence was submitted prior to issuance of the waiver.<sup>24</sup> Furthermore, the MARAD non-availability determinations underpinning the Homeland Security-issued waivers following the Colonial incident conclude that qualified U.S.-flag vessels are unavailable, but do not identify actions that could be taken to enable qualified U.S.-flag ships to meet national defense requirements as required by the statute.<sup>25</sup>

Jones Act advocates have criticized the waiver process for its lack of transparency and for granting waivers in the interest of political expediency.<sup>26</sup> Notably, blanket

waivers were issued for transportation to Puerto Rico in the wake of devastating hurricanes, yet all evidence at the time supported that ocean service to the island was adequate to handle all relief supply, but inland distribution remained hampered by the storms’ damage to local infrastructure. Consequently, the statute has been incrementally amended to require that the national defense justification be documented and subjected to public scrutiny by stakeholders. To date, that has not happened with the Colonial waivers. The waivers submitted to the committees of jurisdiction in Congress should have included the national defense justifications, even if Homeland decided to withhold them from its public announcements. These bases may still be made public if disclosed by the Congress, and additional clarity could be achieved by requiring that MARAD amend its determinations to comply with the law, outlining actions that could be taken to enable U.S.-flag capacity to meet the identified national defense requirements. Should stakeholders consider further amendments promoting transparency, requiring the Secretary of Homeland Security to disclose to the public why the requested Jones Act waiver is necessary in the interest of national defense, and why MARAD’s U.S.-flag alternatives do not meet that need, that would be a good place to start.

<sup>24</sup> The Customs and Border Protection Jones Act Waiver Request site updated the same day calls for requesters to submit: Cargo description, available load date, required shipping date, required delivery date, preferred port of embarkation, preferred port of debarkation, name of shipper, name of consignee, and any special instructions for the cargo, such as hazardous characteristics. Customs and Border Protection, Jones Act Waiver Request (May 12, 2021), <https://www.cbp.gov/trade/jones-act-waiver-request>. Notably, the waiver request submission guidance does not call for information regarding national security grounds for the requested waiver.

<sup>25</sup> 46 U.S.C. § 501(b)(3).

<sup>26</sup> See generally Constantine G. Papavizas and Brooke F. Shapiro, *Jones Act Administrative Waivers*, 42 TUL. MAR. L.J. 317 (Summer 2018).

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