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Inside This issue

Revisiting the Seaman's Manslaughter Statute After the *P/V Conception* Tragedy

By: Kenderick Jordan*

Introduction

Since the inception of 18 U.S.C. § 1115 and its predecessor, commonly known as the Seaman's Manslaughter Statute (the "Statute"), many seafarers and shoreside personnel having duties to perform connected to management and navigation of a vessel have been subject to the lenient standard of simple negligence for the unintentional death of passengers or crew aboard vessels. As of the date of this article, there have been at least thirty-two indictments against ship's officers, pilots, owners, and vessel management employees pursuant the Statute.[1] With the most recent indictment of the captain of the *P/V Conception*, in the U.S. District Court for the Central District of California, ship's officers, vessel owners and operators should revisit their own responsibilities pertaining to the safety of a vessel's passengers and crew.

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1 *United States v. Mitlof*, 165 F. Supp. 2d 558, 570 n.1 (S.D.N.Y. 2001) (as of the decision in *Mitlof*, there were twenty-two (22) reported prosecutions or convictions under the Seaman's Manslaughter Statute or its predecessor). Additionally, there have been seven (7) reported prosecutions or convictions pursuant the Statute, and at least two (2) cases with charges pending, or under appeal, against ship's officers and/or ship management. *See United States v. Boylan*; *United States v. McKee, et al.*

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Managing Editor's Introductory Note

In this edition, we present an article on the Seaman Manslaughter Statute, 18 U.S.C. § 1115, by Kenderick Jordan. Kenderick provides an historical overview and analysis of the cases applying the Statute to seafarers and shoreside personnel having duties to perform connected to management and navigation of a vessel. Kenderick points out that, although this is a criminal statute, simple negligence alone is sufficient to trigger exposure to culpability under the Statute. He suggests that ship's officers, vessel owners and operators should revisit their own responsibilities pertaining to the safety of a vessel's passengers and crew.

Next, in his regular column, Window on Washington, Bryant Gardner reports on legislative, regulatory, international, and private efforts to address greenhouse gas emissions and the goal of de-carbonizing the shipping industry. More broadly, he also reports on efforts by companies making claims and disclosures related to environmental, social, and governance (ESG) compliance, some of which have only a passing relationship with actual compliance, and regulators' efforts to reign in fanciful claims. Bryant concludes that "[t]he sustainability movement is upon us and its waves will soon break on our shores."

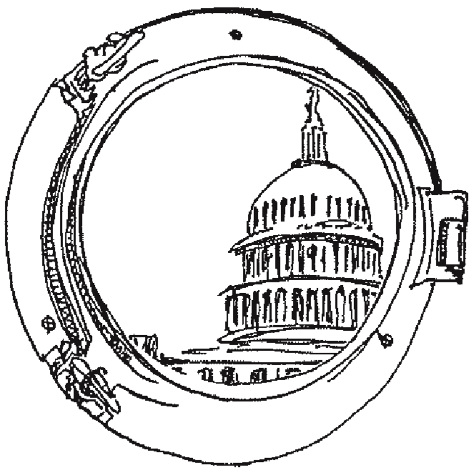
We conclude with the Recent Development case summaries. We are grateful to all those who take the time and effort to bring us these summaries of developments in maritime law.

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



Green Wave

By Bryant E. Gardner*

Green shipping and the decarbonization of the industry have been coming for a long time. When Democrats took control of both houses of Congress and the White House earlier this year, it was no surprise that global warming and climate change concerns began sprouting up all around the beltway. Early executive actions, congressional hearings, and legislative proposals all took on a verdant hue, and the maritime industry has not escaped notice. With container shipping capacity extremely tight, supply chains stretched to the breaking point, and record industry profits, policymakers in Washington are looking at new rules and new ways to enforce old rules to decarbonize shipping.

House Lawmakers Look Toward A Carbon-Free Maritime Industry

Earlier this year, the House Committee on Transportation and Infrastructure, Coast Guard and Maritime Transportation Subcommittee held a hearing on a "Carbon-Free Maritime Industry".[1] At the outset of the hearing, the Chairman of the full Committee on Transportation and Infrastructure Rep. Peter DeFazio (D-OR) reported that he has tasked every subcommittee to look at ways to reduce carbon emissions within its jurisdiction, and stated that ocean shipping accounts for 3% of global carbon emissions today, increasing to 10% without significant changes. Subcommittee Chairman Salud Carbajal (D-CA) noted the International Maritime Organization (IMO) goal of reducing carbon dioxide emissions 50% before 2050, and expressed hope that American industry would be able to innovate and lead the way into new energy technologies, creating green jobs at home and eliminating carbon emissions from vessels entirely.

Hearing witnesses presented contrasting views. A witness from the nonprofit research group International Council on Clean Transportation (ICCT) stated that meeting the IMO goal of a 50% reduction in greenhouse gas (GHG) emissions by 2050 relative to 2008 levels will require net zero emission deep sea ships on the water no later than 2030. The witness opined that the technologies to achieve this will include battery-electric ships for near-port operations and short sea routes, hydrogen pressured or cryogenic fuel cells, and ammonia as a hydrogen carrier. He also suggested that wind propulsion and hull air lubrication may be deployed to aid in the competitiveness of zero-carbon fuels. However, the ICCT witness cautioned against reliance on liquefied natural gas (LNG) because of

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1 *Carbon-Free Maritime Industry: Hearing Before the Subcomm. on Coast Guard and Maritime Transp. of the House Committee on Transportation*, 117th Cong. (2021).

methane released during upstream LNG production and from the engine itself downstream, which may make LNG worse for the climate than conventional fuels when accounting for full life-cycle emissions. He also cautioned against reliance upon biofuels because of limited supply, the need to generate them from limited waste, and deforestation concerns.

The ICCT witness suggested that the U.S. Government take action to encourage the development and deployment of zero-emission vessels and fuels along with supporting port and electrification infrastructure, using the Jones Act fleet as a protected market launch platform for new technologies. He also suggested that the development of these technologies in the U.S. would position U.S. businesses to compete for the global deep sea vessel fueling market, contrasted with conventional bunkering hubs often located in overseas ports such as Singapore. Lastly, he advised the Committee that the U.S. should work with key trading partners, including China, Mexico, the European Union (EU), and Canada, to establish zero-emission vessel corridors and associated infrastructure, in addition to the zero-emission vessel cabotage trades proposal.

Striking a similar tone, a witness from the U.S.-based naval architecture firm Glosten called for significant new Federal investments led by the U.S. Department of Energy (DOE) and the U.S. Maritime Administration (MARAD). Also focusing on the domestic Jones Act fleet, the witness suggested that the DOE and MARAD together develop a strategic plan and timeline for achieving low GHG vessel technologies. First, he proposed significant new DOE funding of port infrastructure for electric vessel fueling and alternative fuel bunkering. Second, he proposed MARAD lead and fund collaborative technology development consortia among government, academia, vessel operators, and vessel developers such as Glosten, which was recently awarded a grant by the Federal Transit Administration to design an all-electric passenger ferry in cooperation with MARAD.

The World Shipping Council (WSC), which represents major container carriers in international liner service, also testified before the Subcommittee. WSC offered a marked channel forward to decarbonization through proposals pending before the IMO. Specifically, the industry has proposed to establish an International Maritime Research and Development Board (IMRB) and International Maritime Research Fund (IMRF) under IMO oversight to develop and fund the research work needed to create the technology needed for ships to use low and zero-carbon fuels. Industry advanced the IMRF/IMRB proposal in December 2019, further expanded and detailed in 2021, and it is slated for consideration by the IMO Marine Environment Protection Committee (MEPC) in Fall 2021.

Although meeting the IMO's 2030 GHG goal of increasing overall fleet efficiency by 40% is achievable by operational and design modifications to the current fleet based on fossil fuels, WSC asserted that achieving the 2050 IMO goal of a 50% absolute reduction in emissions will require new fuels and related propulsion, fuel storage, and fuel infrastructure systems not yet in existence. None of the current candidate fuels available today can power large ships in trans-oceanic routes, indicated WSC. Even the rosiest forecasts admit that battery solutions do not work at those ranges. Hydrogen, ammonia, and other fuels have been identified as potential replacements for fossil fuels, but present safety, storage, handling, and production challenges that must be overcome before they are practically available. Overcoming those challenges, or finding other alternatives technologies not yet conceived, will require a well funded, centralized research effort.

To meet the 2050 goal on time, the WSC stated that action must be taken immediately to set the standards for new builds today with a useful life extending 20-25 years. Furthermore, the industry is keen on ensuring that there is a level playing field for all with shared low-carbon fuel technology, shared international standards, and shared research and development costs allocated by a mandatory charge on each ton of vessel GHG emissions, expected to generate approximately $500 million per year over a 10-year period—or $5-$6 billion of industry funding. The WSC indicated that nation-based initiatives or regional initiatives are likely to lead to slower development, patch-work methods, and patch-work rules which may further delay development of the needed technologies and make compliance more challenging. For example, WSC noted that in the absence of prompt forward movement by IMO, the EU has begun unilaterally seeking to extend its own Emissions Trading System (ETS) to the global shipping sector by imposing extraterritorial GHG rules on the last voyage leg into the EU and last voyage legal out of the EU for all vessels calling EU ports. While some observers have suggested the EU's move is intended to spur IMO's progress, the threat is real and another reason to expeditiously move toward a global standard.

U.S. Enforcers Clamping Down on Sustainability Disclosures, Greenwashing

In Washington, it has become fashionable to paint every new policy idea as a green one, in hopes of giving it more appeal to the Democratically controlled legislative and executive branches— even in cases of proposals that are not really that green to begin with. Companies have also ventured out on this limb with marketing and investment materials, sometimes without sufficiently verifying and vetting the truth of environmental and sustainability claims made, and always amid varying interpretations of what disclosures are appropriate. Regulators have taken note, and are now beginning to clamp down on claims and disclosures related to environmental, social, and governance (ESG) compliance.

On May 20, 2021, President Biden issued an Executive Order calling for a comprehensive government-wide strategy aimed at climate-change financial risks.[2] The Order will require enhanced reporting and disclosure obligations regarding climate risks and expanding scrutiny of those subject to the Order. It will also require new sustainability disclosures by Federal contractors. The Securities and Exchange Commission (SEC) announced the creation of a Climate and ESG Task Force within the Division of Enforcement, and solicited comments regarding new disclosure rules. Senator Elizabeth Warren (D-MA) and Representative Sean Casten (D-IL), who have introduced the Climate Risk Disclosure Act of 2021,[3] submitted comments calling for new climate-related disclosures tracking those which would be required under the Act, including governance structures to identify climate risks, actions being taken to address climate risks, and likely financial impacts. A dozen Democratic State Attorneys General submitted comments encouraging the SEC to "mandate that both public and private companies provide specific, standardized climate-related disclosures as part of their securities filings."[4] Furthermore, they opined that "a majority of public companies are failing to publicly reckon with the likely impact of climate change on their businesses."[5] By contrast, comments submitted by a group of 16 Republican State Attorneys General questioned the SEC's authority to require expanded ESG disclosures and called on the SEC to "remain focused on its historic mission and role rather than seeking to expand its congressional mandate into unrelated social matters—particularly where companies are showing themselves adept to provide the type of information that customers and investors actually demand in this area."[6]

Senator Rubio (R-FL), introduced the "Mind Your Own Business Act of 2021"[7] which would empower shareholders to sue corporations and their executives if their business strategies deviate from fiduciary duties to maximize investor returns in pursuit of "'woke' social policy actions."[8] The SEC has announced it expects to issue proposed new disclosure rules in late 2021.

Regulators are moving forward with legal action on climate-related ESG without waiting for new rules. Connecticut, Delaware, Minnesota, Massachusetts, New York, and the District of Columbia have all commenced legal action against corporate defendants alleging failures to disclose climate-related risks in violation of existing laws, including consumer protection, fraud, and unfair trade acts.[9] Last summer, the Federal Trade Commission issued a final report on its settlement with Volkswagen stating that the automaker had repaid a total of more than $9.5 billion to car buyers from the company's deceptive "clean diesel" advertising.[10] Shortly thereafter, the SEC announced that Fiat Chrysler agreed to settle charges it made misleading disclosures about its emissions control systems under a $9.5 million civil penalty.[11]

Private litigants have also commenced actions pursuing companies for alleged "greenwashing" of their businesses through false sustainability and decarbonization claims. Greenpeace and other environmental groups recently filed a complaint against Chevron before the Federal Trade Commission alleging deceptive advertisements overstating the energy company's investment in renewable energy and commitment to reducing fossil fuel pollution.[12] Moreover, plaintiffs filed a class action

[2] Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 25, 2021).

[3] S. 1217, 117th Cong. (April 19, 2021); H.R. 2570, 117th Cong. (April 15, 2021).

[4] Letter from R. Bonta, Attorney General, State of California et al. to Hon. Gary Gensler, Chair, Securities and Exchange Commission (June 14, 2021).

[5] *Id.*

[6] Letter from P. Morrissey, Attorney General, State of West Virginia et al. to Hon. Gary Gensler, Chair, Securities and Exchange Commission (June 14, 2021).

[7] S. 2829, 117th Cong. (Sept. 23, 2021).

[8] *Id.*

[9] *State of Connecticut v. Exxon Mobil Corp.*, Docket No. HHDCV206132568S (Conn. Super. Ct. Sept. 14, 2020); *State of Delaware v. BP Am., Inc. et al.*, Docket No. N20C-09-097 (Del. Super. Ct. Sept. 10, 2020); *Dist. of Columbia v. Exxon Mobil Corps., et al.*, 2020 CA 002892 B (D.C. Super. Ct. June 25, 2020); *State of Minnesota v. Am. Petroleum Institute et al.*, Docket No. 62-CV-20-3837 (Minn. Dist. Ct. June 24, 2020); *Commonwealth of Massachusetts v. ExxonMobil Corp.*, Docket No. 1984CV03333 (Mass. Super. Ct. Oct. 24, 2019); *People of the State of New York v. Exxon Mobil Corp*., Docket No. 452044/2018 (N.Y. Sup. Ct. Oct. 24, 2019).

[10] Federal Trade Commission, *In Final Summary, FTC Reports Volkswagen Repaid More than $9.5 billion to Car Buyers Who Were Deceived by "Clean Diesel" Ad Campaign* (July 27, 2020).

[11] Securities and Exchange Commission, *Fiat Chrysler Agrees to Pay $9.5 Million Penalty for Disclosure Violations* (Sept. 28, 2020).

[12] R. Schleeter, Greenpeace, *Greenpeace jointly files FTC complaint against Chevron* (Mar. 16, 2021).

in the United States District Court for the Southern District of New York alleging that Oatley, a vegan milk maker, misled consumers about its green credentials, causing shares to tumble by 7%.[13] Management will face challenges from both sides of the issue. Tracing the concepts outlined in Senator Rubio's "Mind Your Own Business Act of 2021," private litigants are also sharpening their pencils in preparation for actions against companies allegedly pursuing social goals at the expense of fiduciary duties to maximize investor returns under state law.

Retail and institutional investors such as Blackrock, Inc., have also doubled-down on the ESG movement and committed to increase sustainable investing. Recently, Blackrock suggested ESG investing will become a $1 trillion category by 2030.[14] Commentators from Deloitte predict that ESG-mandated assets in the U.S. will grow at triple the rate of non-ESG assets and will comprise half of all professionally managed assets by 2025.[15] Morningstar, among others, offers a suite of ESG products intended to assist investors with selection of sustainable and socially conscious ventures.[16] ESG investor ratings differ in their emphasis on whether the evaluated company is one an investor might consider for ethical reasons, versus whether the company has substantial financial or structural risk arising out of a changing ESG and sustainability landscape. Moreover, this Spring the SEC issued a "risk alert" warning that in many cases investment portfolio practices are not keeping up with ESG claims and investment advisers' internal controls to track ESG compliance are often inadequate.[17]

Private capital flows, increased disclosure rules, mounting enforcement efforts, and new litigation risks all point towards additional ESG disclosures. But hand in glove with such disclosures are the risks of navigating the different interpretations advanced by regulators, investors, environmental groups, and the courts amid accusations of "greenwashing" and violations of securities disclosure rules, fiduciary duties to investors, and consumer protection rules. The maritime industry, particularly tanker operators, offshore service providers, and others dependent upon traditional fossil fuels as part of their business model and not just for bunkers, should take note and review their current ESG disclosure policies. The sustainability movement is upon us and its waves will soon break on our shores.

13 *Bentley v. Oatly Group AB*, No. 1:21-cv-06485 (S.D.N.Y. July 30, 2021).

14 L. Gurdus, *ESG investing to reach $1 trillion by 2030, says head of iShares Americas as carbon transition funds launch*, CNBC (May 8, 2021), https://www.cnbc.com/2021/05/09/esg-investing-to-reach-1-trillion-by-2030-head-of-ishares-americas.html.

15 S. Collins & K. Sullivan, *Advancing environmental, social, and governance investing* (Feb. 20, 2020), https://www2.deloitte.com/us/en/insights/industry/financial-services/esg-investing-performance.html.

16 *See* https://www.morningstar.com/products/esg-investing.

17 Securities and Exchange Commission, *The Division of Examination's Review of ESG Investing* (April 9, 2021), https://www.sec.gov/files/esg-risk-alert.pdf.

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