

# BENEDICT'S MARITIME BULLETIN

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## WE'RE NOT ALL IN THE SAME BOAT PART ONE: MARITIME MULTI-PARTY LIABILITY UNDER THE COLLATERAL SOURCE RULE

By: Carra Miller\*

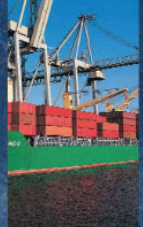
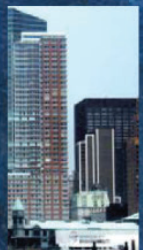
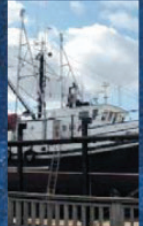
### A. Introduction

Maritime litigation is, more often than not, complex litigation involving multiple defendants, multiple plaintiffs, cross claims, and/or counterclaims. To add to its complexity, it is subject to its own rules in regard to how multi-party liability should be apportioned and offset. Some of these rules, like proportionate responsibility (addressed in the companion article published in this edition of Benedict's Maritime Bulletin) when one defendant (but not all) settles with a plaintiff, are relatively concrete and concise enough to allow for their broad application in a variety of fact patterns. Other rules, like the collateral source rule, are more amorphous, leading to intricacies in how they are applied in one type of case versus another.

The proportionate-responsibility-in-settlement cases and the collateral source rule cases all involve the common question of which party is entitled to offset damages, and by how much, under the general maritime law. However, the two lines of case law developed differently and are applied by courts in different ways.

\* Carra Miller is the Managing Partner of the Corpus Christi, Texas office of the firm Schouest, Bamdas, Soshea, BenMaier & Eastham, PLLC. She is also the Editor of Miller's Maritime Newsletter. Outside of her maritime practice in Texas and Louisiana, she enjoys scholarly writing, pro bono work, and bar association service in her spare time. This paper originally was presented, in part, at the 2021 Annual Seminar of the Southwestern Admiralty Law Institute and published as part of the seminar materials. It is used here with permission.

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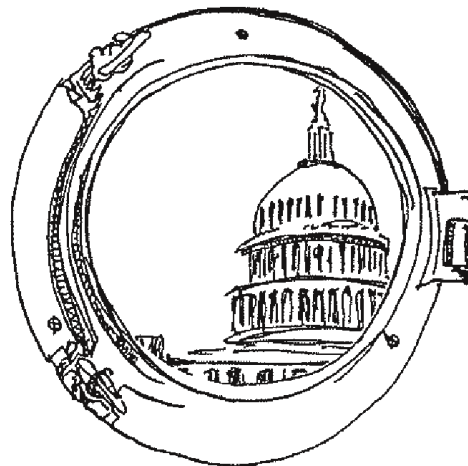
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## WINDOW ON WASHINGTON



### *New Year, New Maritime Laws*

By Bryant E. Gardner\*

The closely divided 117<sup>th</sup> Congress has tended to bunch its maritime policy changes into several large, consolidated “must pass” legislative vehicles at the close of the year. In late December 2022, Congress passed the James M. Inhofe National Defense Authorization Act for Fiscal Year 2023,<sup>1</sup> with the final, agreed version of the Coast Guard Authorization Act previewed in last quarter’s *Window on Washington* appended to it, and a final, year-end omnibus funding measure, the Consolidated Appropriations Act, 2023.<sup>2</sup> Both pieces of legislation include numerous provisions of consequence to the maritime industry.

#### **National Defense Authorization Act for Fiscal Year 2023**

The National Defense Authorization Act (“NDAA”) includes a boost for shipbuilding. The measure authorizes \$32.6 billion for Navy shipbuilding, an increase of \$4.7 billion, for the procurement of 11 battle force ships, three *Arleigh Burke*-class destroyers, two *Virginia*-class submarines, two expeditionary

fast transports, one *Constellation*-class frigate, one *San Antonio*-class amphibious ship, one *John Lewis*-class oiler, and one *Navajo*-class towing, salvage, and rescue ship. The measure also directs the Chief of Naval Operations and the Coast Guard to complete the design of a roll-on, roll-off cargo vessel to be used for the recapitalization of the National Defense Reserve (“mothball”) surge sealift fleet, with construction to begin in 2024.<sup>3</sup>

The Capital Construction Fund (“CCF”) program run by the U.S. Maritime Administration (“MARAD”) permits the deferment of taxes on qualified earnings ultimately invested in the construction or reconstruction of vessels in the United States.<sup>4</sup> Following construction, the vessel’s depreciable basis is reduced to the extent of the tax-deferred earnings used for construction. Although the CCF has long been available to U.S.-foreign trade vessels and to vessels in the non-contiguous trades, the NDAA expands the CCF program to vessels in the “domestic trade of the United States,” presumably to include all manner of vessels in the U.S. cabotage trade. Previously, the CCF was not available to domestic trade “Jones Act” vessels, with limited exceptions including

\* 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.

<sup>1</sup> Pub. L. No. 117-263, 136 Stat. 2395 (“NDAA”).

<sup>2</sup> Pub. L. No. 117-328, 136 Stat. 4459 (“Omnibus”).

<sup>3</sup> NDAA § 3547.

<sup>4</sup> 46 U.S.C. Ch. 535.

those in the non-contiguous trades. Vessels operating in the U.S.-foreign or “registry” trades are not subject to the U.S.-build requirement, and consequently opted to trade foreign-built bottoms, which generally are more cost-effective than U.S.-built vessels, even with the CCF benefits. Therefore, the expansion of the CCF to the entire “domestic trade” is likely to increase participation in the program, adding new building and financing options for owners. The change raises questions as to how MARAD will apply the new law to existing CCF agreements, which contain restrictions regarding operation of financed vessels in the domestic trade.

The Department of Defense (“DOD”) has indicated a pressing need for additional U.S.-flag product tank vessel capacity as it pivots to Asia amid the shut-down of the massive Red Hill Bulk Fuel Storage Facility in Hawaii. To help address the shortfall in U.S.-flag capacity, Congress enacted the Tanker Security Program to establish a fleet of 10 commercially viable, militarily useful product tankers operating under the U.S. flag.<sup>5</sup> Under the program, operators may be awarded a contract by MARAD providing a \$6 million per-vessel annual stipend that is intended to help offset the costs associated with operating under the U.S. flag relative to open registries and thereby ensure commercial viability of the vessels. The program is not yet operational, although MARAD issued its implementing rule on December 7, 2022.<sup>6</sup> The NDAA authorizes expansion of the program from 10 vessels to 20 beginning in fiscal year 2024.<sup>7</sup> Concerns have arisen regarding the number of U.S. citizen mariners with sufficient tank vessel expertise to man the full complement of U.S.-flag vessels anticipated for enrollment in the program and whether such vessels will be commercially viable, particularly with the larger number of vessels diluting the pool of available “preference” cargoes shipped by the Federal government at premium rates and reserved for U.S.-flag vessels. The NDAA therefore directs that MARAD prepare a report by July 2023 regarding industry capacity needed to accommodate the expansion of the program, including a timeline for achieving both the 10 and 20 vessel targets, costs to train mariners and equip enrolled vessels for underway “CONSOL” refueling, and an analysis of whether the \$6 million stipend will be sufficient to sustain the full 20-vessel requirement.

In September 2022, the Government Accountability Office (“GAO”) released a congressionally-mandated report titled *Maritime Administration—Actions Needed to Enhance Cargo Preference Oversight* regarding MARAD’s enforcement of cargo preference laws.<sup>8</sup> In its report, GAO recommends increased program transparency, including MARAD annual public reports on cargo preference compliance, and that MARAD promulgate a rule to implement long-neglected statutory enforcement authority granted to the agency in 2008. The NDAA requires that MARAD issue its final rule to implement and enforce its cargo preference authority by September 23, 2023, with annual reports to Congress on the administration of cargo preference rules.<sup>9</sup>

As previously outlined in the last *Window on Washington*, the Coast Guard Authorization Act includes numerous new requirements taking aim at sexual harassment on board U.S.-flag vessels. Additionally, the NDAA includes new MARAD rules applicable to the carriage of maritime academy sea-year cadets on board vessels.<sup>10</sup> Operators must establish reporting, recordkeeping, and stateroom safety policies, and annually certify compliance with MARAD sexual harassment prevention rules. MARAD must also ensure that cadets receive appropriate training and reporting tools and calls for the establishment of sexual harassment prevention information management systems within the U.S. Merchant Marine Academy.<sup>11</sup> Moreover, the law authorizes MARAD to establish sexual harassment prevention rules for public vessels participating in the sea year program.

The NDAA imposes new restrictions on waivers of the Jones Act cabotage rules. Under existing law, a waiver may be issued under 46 U.S.C. § 501(a) at the request for the Secretary of Defense “to address an immediate adverse effect on military operation,” or under section 501(b) pursuant to a determination made by the Secretary of Homeland Security. As amended, subsection (b) requires a determination by the President that a waiver is necessary in the interest of national defense. Additionally, the waiver must be supported by a MARAD determination of non-availability of qualified U.S.-flag capacity to meet national defense requirements, which assessment must not be made retroactively after the date on which the waiver was requested. A new 48-hour waiting period will apply

<sup>5</sup> 46 U.S.C. Ch. 534.

<sup>6</sup> MARAD, Tanker Security Program, Interim Final Rule, 87 Fed. Reg. 74,977 (Dec. 7, 2022).

<sup>7</sup> NDAA § 3501.

<sup>8</sup> GAO-22-105160.

<sup>9</sup> NDAA § 3502.

<sup>10</sup> NDAA § 3513.

<sup>11</sup> NDAA § 3531.

following publication of the waiver request and no waiver shall be issued for a vessel if, at the time of the waiver request, such vessel is already laden with cargo that, pursuant to the requested waiver, could be unladen at points or places to which the coastwise laws apply.<sup>12</sup> This last provision appears to be a reaction to a Jones Act waiver issued in September 2022 for the transportation of fuel to Puerto Rico following Hurricane Fiona. The waiver sparked the ire of Jones Act supporters insofar as the foreign-flag vessel was already on route toward Puerto Rico with fuel at the time the waiver was requested and issued, laying open the question of what efforts were undertaken to procure U.S.-flag transportation compliant with the Jones Act before seeking a waiver.

The NDAA calls for the establishment of a new grants program for technical education and training programs related to the U.S. maritime industry.<sup>13</sup> The law directs MARAD to issue a notice of funding opportunity within 90 days and to award grants within 270 days. Grants will be competitively awarded and proposals must describe how the project will be suited to maritime industry workers, the experience of the applicant in providing such education, how the project will address existing educational shortcomings, and the extent to which employers have committed to employing workers who would benefit from the project. Additionally, the law authorizes a competitive grants program to develop emerging marine technologies to improve environmental performance.<sup>14</sup>

MARAD's popular Port Infrastructure Development Program, authorized at \$750 million, receives some tweaks in the NDAA. The law authorizes MARAD to consider the geographic isolation and economic dependence of noncontiguous states and territories in making awards, and to consider the strategic importance of seaports identified in section 3515 of the National Defense Authorization Act for Fiscal Year 2020.<sup>15</sup>

The NDAA also requires new reports on programs to support the U.S. merchant fleet, federal efforts to enhance port infrastructure resiliency and disaster preparedness, foreign investment in shipping, alternate marine fuel bunkering facilities, and national security threats posed by foreign manufactured cranes at U.S.

ports.<sup>16</sup> Lastly, the law requires MARAD to prepare an updated national maritime strategy to meet the objectives of carrying "a substantial part" of U.S.-foreign trade cargo and meeting the defense and national emergency needs of the nation, together with a publicly available implementation plan.<sup>17</sup>

The NDAA authorizes numerous navigational improvements projects, including \$3.2 billion for the New Soo Lock Construction Project, Michigan; \$6.3 billion for New York-New Jersey Harbor Deepening Channel Improvements; \$175 million for Port of Long Beach Deep Draft Navigation, California; \$16 million for Brunswick Harbor, Georgia; and \$344 million for the Tacoma Harbor Navigation Improvement Project, Washington.<sup>18</sup>

### Consolidated Appropriations Act, 2023

The massive year-end "Omnibus" spending bill weighs in at 4,155 pages and carries a \$1.7 trillion price tag. The Senate passed the bill and left town during a brief one-week continuing resolution, with House passage following just before the lower chamber headed home for the holidays. The bill continues last year's return of congressionally directed spending, sometimes referred to as "community projects funding" or "earmarks," after the Senate rejected, 34-63, an amendment that would have removed such provisions from the bill. Total earmarked funds include 7,234 projects totaling \$15.3 billion, including many transportation infrastructure and water resources projects.

The Omnibus provides \$896.1 million for MARAD, \$56 million above the President's budget request, including \$318 million for the Maritime Security Program, \$60 million for the Tanker Security Program, \$130.7 million for State Maritime academies (\$75 million of which is to accommodate the new school training ships), and \$212 million for the Port Infrastructure Development Program, on top of \$450 million in fiscal year 2023 advance appropriations.<sup>19</sup> The measure also includes \$11.6 billion for Coast Guard operations and assets, an increase of \$140 million. Funding for the service includes \$83 million for increased fuel costs and \$1.7 billion for major acquisition investments, including

<sup>12</sup> NDAA § 3541.

<sup>13</sup> NDAA § 3532.

<sup>14</sup> NDAA § 3543.

<sup>15</sup> NDAA §§ 3523 & 3524 (citing to Pub. L. No. 116-92, 133 Stat. 1985).

<sup>16</sup> NDAA §§ 3525-3529.

<sup>17</sup> NDAA § 3542.

<sup>18</sup> NDAA § 8401.

<sup>19</sup> House Appropriations Committee, Transportation, and Housing and Urban Development, and Related Agencies, Fiscal Year 2023 Appropriations Bill Summary.

\$918 million for vessels.<sup>20</sup> Moreover, the bill includes \$8.66 billion for the Army Corps' civil works program, meeting the Harbor Maintenance Trust Fund target for the second year in a row and providing \$2.318 billion to maintain and modernize American waterways.<sup>21</sup>

The legislation provides full funding for each of the Tanker Security, Cable Security, and Maritime Security Programs. Similar to the Tanker Security Program, the Maritime Security Program, first enacted in the 1990s, provides an annual stipend to 60 militarily useful, commercially viable dry cargo vessels documented under U.S. law in exchange for their availability in times of war and national emergency. The newer Cable Security Program stipend ensures the availability of two U.S.-flag cable laying vessels. Additionally, the Omnibus includes \$20 million for the small shipyard grant program, \$6 million for maritime training and education grants, and \$10 million for MARAD's marine highways program.

The Omnibus appropriates \$32 billion for Navy shipbuilding programs, including \$6.9 billion for three destroyers and authority to enter into multiyear procurement contracts for up to 15 more, \$4.5 billion for two *Virginia*-class submarines, \$3.1 billion for the *Columbia*-class ballistic missile submarine, \$3.1 billion for two amphibious assault ships, \$2.5 billion for continued funding of two *Ford*-class aircraft carriers, \$1.1 billion for a *Constellation*-class frigate, \$782 million for a T-AO fleet oiler, and \$645 million for two additional expeditionary medical ships.<sup>22</sup>

The Army Corps of Engineers received construction funding for scores of projects. Among the major construction projects are \$447 million for South Florida Ecosystem Restoration, \$157 million for the Corpus Christi Ship Channel, Texas; \$90 million for Freeport Harbor, Texas; and \$167 million for the Sabine-Neches Waterway, Texas.<sup>23</sup> Larger operation and maintenance projects are \$44 million for Mobile Harbor, Alabama;

\$71 million for the Black Warrior and Tombigbee Rivers, Alabama; \$177 million for the McClellan-Kerr Arkansas River Navigation System, Arkansas and Oklahoma; \$63 million for the Illinois Waterway, Illinois and Indiana; \$162 million for the Mississippi River between the Missouri River and Minneapolis, Illinois and Minnesota; \$40 million for Savannah Harbor, Georgia; \$81 million for the St. Marys River, Michigan; \$46 million for the Delaware River, New Jersey, Pennsylvania, and Delaware; \$58 million for New York and New Jersey Harbor, New York and New Jersey; \$109 million for Ohio River Locks and Dams, Pennsylvania, Ohio, and West Virginia; \$58 million for the Gulf Intracoastal Waterway, Texas; \$40 million for the Houston Ship Channel, Texas; and \$74 million for the Columbia and Lower Willamette Rivers, Washington and Oregon.<sup>24</sup>

The new year will introduce the 118th Congress, with Republicans taking the House majority and Democrats maintaining a slightly improved majority in the Senate. Congressman Rick Larsen (D-WA) will take over as the ranking member of the House Transportation and Infrastructure Committee. Congressman Sam Graves (R-MO), the ranking member of the Transportation Committee in the 117th Congress, will take over as Chairman with the new majority. Senator Roger Wicker (R-MS) is expected to replace retiring Senator James Inhofe (R-OK) as the ranking member of the Senate Armed Services Committee. Senator Ted Cruz (R-TX) is expected to replace Senator Wicker as the ranking member of the Senate Commerce Committee with jurisdiction over maritime matters. Although Senator Wicker's presence on the Commerce Committee will be missed by many in the maritime industry, his new assignment on Armed Services promises support for the industry in sealift logistics and U.S. Transportation Command matters.

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<sup>20</sup> Senate Committee on Appropriations, Summary, Subcommittee on Homeland Security Fiscal Year 2023 Appropriations Bill.

<sup>21</sup> Senate Committee on Appropriations, Summary, Energy and Water Development Subcommittee Fiscal Year 2023 Appropriations Bill.

<sup>22</sup> Senate Committee on Appropriations, Summary, Subcommittee on Defense Fiscal Year 2023 Appropriations Bill.

<sup>23</sup> Joint Explanatory Statement, Division D—Energy and Water Development and Related Agencies Appropriations Act, 2023.

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<sup>24</sup> *Id.*

**Contributors**

GS	Gordon Smith Kennedys Gordon.Smith@kennedyslaw.com
JAP	Joni Alexis Poitier Moseley, Prichard, Parrish, Knight & Jones JPoitier@mppkj.com
PS	Pamela Schultz Kennedys Pamela.Schultz@kennedyslaw.com
SMM	Shea Michael Moser Moseley, Pritchard, Parrish, Knight & Jones SMoser@mppkj.com
SPB	Samuel P. Blatchley Holbrook & Murphy SBlatchley@HolbrookMurphy.com
SW	Shain Wasser Kennedys Shain.Wasser@kennedyslaw.com

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## Contact Information

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(Editor-in-Chief)  
Sher Garner Cahill Richter Klein & Hilbert, L.L.C.  
New Orleans, LA  
jforce@SHERGARNER.com

Robert J. Zapf  
(Managing Editor)  
Rancho Mirage, CA  
RJZapf1@verizon.net

Bruce A. King  
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Financing Committee)  
Maritime Law Association  
bkingseattle@msn.com

Dr. James C. Kraska  
Howard S. Levie Professor of International Law  
The Stockton Center for the Study of International Law  
United States Naval War College  
686 Cushing Road  
Newport, Rhode Island 02841-1207  
James.Kraska@usnwc.edu

Dr. Norman A. Martinez-Gutiérrez  
(International Maritime Law; Scholarly Notes and Papers)  
IMO International Maritime Law Institute  
P.O. Box 31, Msida MSD 01 MALTA  
Norman.Martinez@imli.org

Francis X. Nolan, III  
(Former President, Maritime Law Association)  
Vedder Price P.C.  
1633 Broadway, 47th Floor  
New York, NY 10019  
fnolan@vedderprice.com

Anthony J. Pruzinsky  
Hill Rivkins LLP  
45 Broadway, Suite 1500  
New York, NY 10006-3793  
APruzinsky@hillrivkins.com

**CONTRIBUTING AUTHORS TO THIS ISSUE****Contact Information**

*Carra Miller*  
*Schouest, Bamdas, Soshea, BenMaier & Eastham, PLLC*  
*Corpus Christi, TX*  
*cmiller@sbsb-eastham.com*

*Mino Daryanani*  
*IMO IMLI*  
*Kolkata, India*  
*mdaryanani5@hotmail.com*

**Window on Washington**

*Bryant E. Gardner*  
*Winston & Strawn LLP*  
*Washington, DC*  
*bgardner@winston.com*

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