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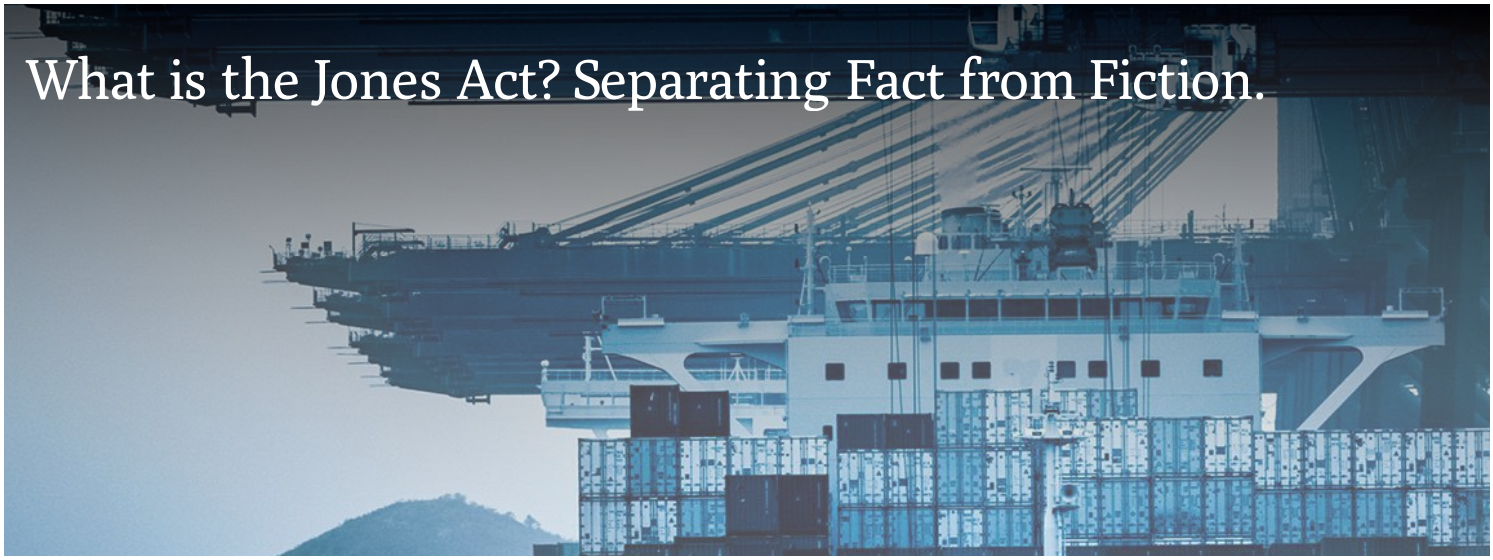

What is the Jones Act? Separating Fact from Fiction.

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The active 2017 hurricane season has put a spotlight on the "Jones Act," a section of the Merchant Marine Act, 1920. The issuance of Jones Act waivers after Hurricanes Irma and Maria is receiving much attention, but like most information circulating during a crisis, much of it is inaccurate. So what is the Jones Act? And why does it matter so much?

The Jones Act regulates U.S. domestic maritime commerce by restricting the transportation of "merchandise" between points in the United States to U.S.-flag vessels built in the United States and owned and operated by U.S. citizens. U.S.-flag vessels are registered and operated under U.S. law and are generally required to have U.S. citizen crews.

Following are some facts about the federal statute.

The Jones Act is not a World War I creation.

The law we call the Jones Act is a section (section 27) of the Merchant Marine Act, 1920. Senator Wesley Jones, a Republican from the State of Washington, was the Act's chief sponsor. The main purpose of the Merchant Marine Act, 1920, was to deal with a huge surplus of vessels that the U.S. had built in WW I, which were costing the government a fortune to maintain and operate, and were no longer needed. The section of the law that we call the Jones Act was largely an afterthought, and Senator Jones stated in the Congressional proceedings that section 27 was not intended to make substantive changes in existing law.

Restricting U.S. maritime commerce to U.S. vessels did not start in 1920.

Restricting U.S. domestic maritime commerce to U.S. citizens has been the law of the land since 1789. The third act of the Republic (before Congress established any department of the U.S. Government) imposed a tariff on all domestic cargo movements, with foreign ships paying a tariff eight times greater than the U.S. ship tariff. In 1817, Congress changed the law more or less to the way it is today—and was prior to the Merchant Marine Act, 1920—

restricting U.S. trade to U.S. ships. The Jones Act has changed over time since 1817, but the main principle of reserving U.S. domestic maritime commerce to U.S. citizens has remained consistent.

The Jones Act is not a unique restriction.

The U.S. restricts all of its domestic trade—whether by air, rail, truck or otherwise—to U.S. citizens (or permanent residents or qualified visa holders), who must comply with U.S. safety, environmental, labor, tax, and other laws. Waiving the Jones Act is like waiving all those laws, and is the equivalent of letting Mexican trucks owned and operated by Mexican citizens be used to take aid to Houston from Dallas without having to comply with U.S. speed limits, U.S. weight limits, U.S. work hour restrictions, not paying U.S. taxes, etc.

The Jones Act waiver law was intended to be used for national security only.

The 1950 law that permits waiver of the Jones Act is a Cold War creation. The Jones Act cannot be waived except where it is in the "interest of national defense." The law was never intended to be used for natural disasters. And, until 2005, it was not used for natural disasters. President Bush created the first precedent of waiving the Jones Act to alleviate a regional fuel shortage after Hurricane Katrina, with a short "period of time waiver." Similar waivers were granted after hurricanes Rita, Sandy, and Irma. The recent hurricane Maria waiver is the first time a short period of time waiver has been expanded to cover all merchandise, not just fuel. The U.S. Maritime Administration reports that substantially all of the fuel delivered to Florida during the period of time of the Irma waiver was delivered by qualified U.S.-flag vessels.

There has been no finding at all that the existing Jones Act carriers have insufficient capacity to serve Puerto Rico.

Jones Act waivers are generally limited by law only to circumstances where there is inadequate Jones Act tonnage (cargo carrying capacity) available. That is a determination that the Maritime Administration, part of the U.S. Department of Transportation, must make by law. If anything, over the last few years this requirement has been made tighter by law, *i.e.*, the national policy decision was to the effect that waivers should be limited expressly to situations where the Jones Act fleet is inadequate. However, the waiver law also permits waivers without a tonnage inadequacy finding when requested by the Department of Defense. Both the Irma and Maria waivers were done under that part of the law—meaning that the MARAD determination process was avoided in both cases and there is no recent finding at all that the U.S. fleet is inadequate for the relief effort.

Jones Act criticism under anxious political circumstances has proven wrong in the past.

Following the 2010 *Deepwater Horizon* incident, President Obama was criticized by a number of analysts and commentators for not waiving the Jones Act to assist in the spill response "like Bush did after the hurricanes." President Obama did not succumb to the pressure, and the criticism was unjustified then, as it appears to be now. There was plenty of capacity to handle the spill with Jones Act vessels, and the real cause of the uproar appeared to be from disappointed foreign ship owners who tried to charter their vessels for the response and were not needed.

The Jones Act does not prevent foreign vessels from serving Puerto Rico.

The Jones Act restricts U.S. domestic maritime commerce to qualified U.S.-flag vessels. Cargo movements from the Lower 48 states to Puerto Rico are covered by the law. The Jones Act does not apply to U.S. foreign commerce. Every cargo coming to Puerto Rico—like every cargo coming to the rest of the United States—from a foreign country can be carried in a foreign vessel because that is international, not interstate, commerce. The U.S. Maritime Administration has reported that about half of Puerto Rico's trade comes from places other than the United States.

The Jones Act trade is not static.

U.S.-based ship owners have spent billions of dollars in reliance on a legal structure that has been in place since 1789 to provide modern vessel capacity, terminal capacity, etc. for U.S. domestic maritime trade. For example, the first dual fuel (diesel and LNG) capable container vessels built in the world were built in the United States recently for the U.S.-Puerto Rico trade.

Winston & Strawn attorneys have extensive experience regarding the application of the Jones Act and regularly provide advocacy on behalf of maritime clients before various federal agencies, including the U.S. Coast Guard, Customs and Border Protection, the U.S. Maritime Administration, and the U.S. Congress. Learn more about our top-ranked Maritime & Admiralty Practice here.

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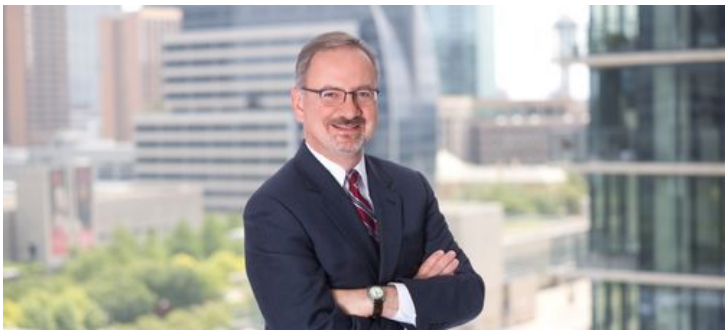

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