

**RECENT DEVELOPMENTS IN SALVAGE LAW**  
Maritime Law Association, Salvage Committee, Spring 2008<sup>1</sup>

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**In re: The City of New York as Owner and Operator of the**  
**M/V ANDREW J. BARBERI, 03 CV 6049, 534 F.Supp. 2d**  
**370 (E.D.N.Y., February 14, 2008).**

On October 15, 2003, the Staten Island Ferry ANDREW J. BARBERI allided with a concrete maintenance pier during “very windy,” but clear and “not extreme” weather. At 373. The DOROTHY J, a tugboat owned and operated by Henry Marine Service, Inc., had been in the area awaiting orders to tow an oil barge in New York Harbor. Henry Marine had a contract with DOT to provide services for towing, which included maneuvering, shifting, pumping, siphoning, and additional services such as firefighting, aiding stranded ferry vessels as an emergency response vessel, and other authorized work as required by the DOT. Personnel aboard the DOROTHY J at the time were a Captain, Mate, Engineer and Deck Hand. The Mate, Robert Seckers, had been in the wheelhouse reading newspapers when he noticed the BARBERI off course and rapidly approaching the slip at which the DOROTHY J was berthed. The BARBERI then allided with the pier.

The BARBERI failed to respond to Seckers’ radio calls. Seckers believed the

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<sup>1</sup> Notes: A special thank you to Rountree, Losee & Baldwin, L.L.P. and its staff for their assistance with this undertaking; on citations: citations to the cases which are the subject of this update are cited as follows: “At [A.M.C. or, if no A.M.C. cite, other reporter page number];” questions or comments should be directed to Jason R. Harris of Rountree, Losee & Baldwin, L.L.P., 2419 Market Street, Post Office Box 1409, Wilmington, North Carolina 28402-1409, telephone no. (910) 763-3404, facsimile no. (910) 763-0320, [jharris@rlblawfirm.com](mailto:jharris@rlblawfirm.com). Please note that this update is not exhaustive, nor is it necessarily limited to the period since the last update authored in the Fall of 2007.

BARBERI was without power and drifting towards the Verrazano Bridge. Seckers maneuvered the DOROTHY J to the BARBERI and eventually attached lines, turned over a first aid kit and attempted to calm passengers and stop them from jumping onto the tugboat or into the water. The BARBERI was then safely pushed back to the passenger slip where emergency personnel were waiting to help. The City then ordered the DOROTHY J to continuously push on the BARBERI to hold her position until Saturday morning, October 18<sup>th</sup>. Of the 65 hours and 35 minutes the DOROTHY J assisted the BARBERI, the City alleged that 65 hours were spent in holding the BARBERI in position. Henry Marine sought a \$6M salvage award, Seckers sought a \$2M salvage award and each filed Motions for Summary Judgment on the issue of whether the services constituted a cognizable marine salvage claim.

The Court analyzed whether there was a peril and concluded in the affirmative as there was at least a reasonable apprehension of injury or destruction if the services were not rendered. The Court analyzed whether services were voluntary in light of the preexisting contract. Although the contract did not specifically include the word “salvage,” the services mentioned “clearly encompasses services that have a salving effect.” At 379. The Court scrutinized the definition of the contractual phrase “aid stranded ferry vessels.” It also looked at and appeared to rely on the manner in which the services were performed – specifically the initial services were rendered *without an order* to such act and while the DOROTHY J was awaiting another job. Therefore, the Court ruled in favor of the DOROTHY J and Seckers in concluding that there was insufficient evidence to create a triable issue of fact as to whether the DOROTHY J was acting under any instructions from the City or ferry office when it first responded to the BARBERI. However, when the DOROTHY J was subsequently *ordered* to hold the

BARBERI in place at the ferry slip, “it was performing work of a kind that it was obligated to do under its contract with the City” and such contractual work was not subject to a salvage award. At 382.

The Court found an entitlement to a single salvage award, but (a) only for the services in the immediate aftermath of the collision, not in keeping the BARBERI stable in the ferry slip, and (b) tilted its hand on the size of the award (at least as to Seckers) as towing a drifting vessel is typically of a low order of merit. Citing *The High Cliff*, 271 F. 202 (2<sup>nd</sup> Cir. 1921). Readers may also be interested in the 2<sup>nd</sup> Circuit’s March 27, 2008 ruling denying limitation to the City for the injuries and damages related to the casualty.

**In Re Captain William Beck, 526 F.Supp. 2d 1291, 2008 A.M.C. 113 (S.D.Fla. December 6, 2007). Court denies petition for salvage license calling into question constitutionality of 46 U.S.C. 80102; potential licensors left in a state of quandary.<sup>2</sup>**

46 U.S.C. 80102(a) (2006) requires that “[t]o be regularly employed in the business of salvaging on the coast of Florida, a vessel and its master each must have a license issued by a judge of the district court of the United States for a judicial district of Florida.” The statutory criteria include an analysis of the seaworthiness of the vessel for saving property and whether the master is trustworthy and innocent of fraud related to the property shipwrecked or saved. 46 U.S.C. 81012(b)(1)(2). USDC Judge William J. Zloch denied a petitioners application under Section 80102 suggesting that the statute was unconstitutional, but concluding that the court lacked jurisdiction to so rule.<sup>3</sup>

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<sup>2</sup> Attorney Michael McHale represented the Petitioner. Mr. McHale will make a presentation to the MLA Salvage Committee at its April 30, 2008 meeting in New York.

<sup>3</sup>The ruling followed briefing by the Petitioner and the Justice Department. The Justice Department took the position that the statute was *unconstitutional*.

The statute is the successor to an 1828 Act originally addressed to “wreckers,” on the coast of the Florida Keys and its “principal purpose was to combat the problem of nefarious characters who would place lanterns near the reefs, obscuring the ships captains’ view of the lighthouses around the Florida Keys, in hopes of drawing merchant ships in to the surrounding reefs. The opportunistic few would then loot the cargo of the shipwrecked vessel.” At 115. After Florida was admitted to the union in 1845, the screening duties were taken up by the federal court judge sitting in the Florida Keys pursuant to an Act in 1847. At the time the Act passed, there was some protest over the power of the beneficiary to issue licenses for wrecking. The statute, which became 46 App. U.S.C. 724, was “largely ignored by mariners who engage in the business of ‘salvaging’ or ‘wrecking’” (at 117) until the re-codification of Title 46 in 2006 when the term salvaging was used instead of the term wreckers. Since 2006, the Courts in the Southern and Middle Districts of Florida have seen increased petitions for such licenses.

The Court first questioned its powers as a purported commissioner due to the word “judge” instead of “court” being used in the statute. It looked at three prior instances of judges serving as commissioners (one in 1792 involving claims to widows of the Revolutionary War<sup>4</sup>, one in the early 1800s involving implementation of the 1819 Treaty with Spain<sup>5</sup>, and in 1989 involving whether a federal judge may serve as a commissioner on the United States Sentencing Commission<sup>6</sup>) and concluded that there was no executive review, no standards to guide a judge’s decisions, no designated income for wearing a second hat, and it was to be presumed that the filings and records regarding such licensure were to be made in the normal course of the district court clerk’s record keeping. Therefore, the actions were unlike those of federal employees

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<sup>4</sup> *Hayburn’s Case*, 2 U.S. (2 Dall.) 408 (1792).

<sup>5</sup> *United States v. Ferreira*, 54 U.S. (13 How.) 47 (1851).

<sup>6</sup> *Mistretta v. United States*, 488 U.S. 361 (1989).

and there was no appointment of the district court judges as officers of the United States. The Court concluded that the petitions were to proceed in the normal course of a federal action and would be held to the same standards as all other matters before the Court. At 123.

Next, the Court examined whether there was an actual case and controversy which clause in Article III, Section 2 of the Constitution, limits the Court's jurisdiction. The Court noted the *ex parte* nature of the petition and that there was no adversarial party to contest the petition.

The Court next examined whether the power to regulate salvaging on the coast of Florida is a power properly vested in the Judiciary per the Vesting Clause in Article III, Section 1 of the Constitution. The Court concluded that licensure "is a solitary executive action akin to administrative proceeding [and] removes it from any permissible infringement upon the separation of powers that may have otherwise been tolerated by the Judiciary in the past." At 129-130.

The Court noted the petitioner was prevented from engaging in his chosen trade while his competitors had licenses. It then called on Congress for the "speedy repeal of this constitutionally infirm statute." At 130.

**R.M.S. TITANIC, Inc. v. Wrecked and Abandoned Vessel  
Believed to be the R.M.S. TITANIC, 2007 A.M.C. 2575  
(E.D.Va., October 15, 2007). RMST still not an owner.**

On October 1, 2007, the Court held another hearing to set parameters and deadlines for RMST to pursue its salvage award and to receive an update from the United States on the status of legislation to implement an international agreement to give greater protection to the TITANIC.

RMST or its affiliate had publicized an agreement between it and Liverpool & London Ltd. (which previously asserted and filed a claim of ownership through subrogation to the TITANIC and her artifacts) under which it acquired all rights, title and interests to Liverpool & London's subrogation rights for certain objects removed from the wreck. The Court found the publication and claim of ownership "blatantly misleading to the public and the investors in RMST." At 2576. The Court's bases were its prior dismissal with prejudice of Liverpool and London's claims (it had no rights to give), as well as multiple rulings that RMST was not the owner pursuant to the law of finds, but was instead the salvor.

The Court ordered RMST to file a motion for a salvage award (including its costs from inception through December 31, 2006) within 60 days and to post the Order on the website previously depicting the News Release concerning the purported acquisition from Liverpool and London. The Court further directed the United States to review RMST's continuing actions as salvor and the periodic status reports, as well as any salvage award motion filed by RMST, in order to protect the TITANIC and ensure compliance with the Court's orders.

**Southwest Florida Maritime, Inc. v. Albert Wareikis, 2007 A.M.C. 2358 (Arbitration, New York, September 24, 2007). Pump out by professional salvor deemed voluntary despite Sea Tow contract; \$24,000.00 award accounts for prevention of potential pollution.**

On October 26, 2006, Albert Wareikis' 2006 33' Rampage Express sport fishing vessel AMY began taking on water at the Port Sanibel Marina due to a broken brass screw at the bottom of the sea strainer. No captain or crew were aboard at the time.

The marina notified Sea Tow Fort Myers which deployed two gasoline pumps and hoses and dewatered the vessel. An hour later, Wareikis, a four year member of Sea Tow, arrived on scene and signed a MARSALV Agreement containing a “no cure, no pay” provision. The vessel was towed to another location and hauled out. Wareikis paid Sea Tow’s \$900.00 invoice for towing services. Sea Tow also claimed entitlement to a salvage award.

An issue before the SMA arbitrator was whether Sea Tow’s services were performed voluntarily or pursuant to a contractual duty. The Sea Tow 2006 Member Guide indicates that salvage operations including “taking on water” are excluded from membership benefits. At 2362. The arbitrator found no contractual duty to perform the services rendered. There may have been an issue of fact about whether the AMY sat on the bay bottom, in which case the arbitrator suggested that a marine peril may no longer exist if there is little or no risk of sustaining further damage and absent aggravating circumstances. However, the arbitrator concluded that the vessel was then in peril, noting the hull designed with numerous penetrations that would have been exposed to the sea, rendering her particularly susceptible to flooding.

Sea Tow sought \$45,000.00, being 9% of the vessel’s purported salved value, plus an equitable uplift, interest, attorneys’ fees and costs. The arbitrator, recognizing a potential environmental threat, awarded \$24,000.00, plus interest, and \$2,500.00 towards attorneys fees.

**Sea Tow Portland/Vancouver v. HIGH STEAKS, 2007 WL 2994502, 2007 A.M.C. 2705 (D.Or. October 12, 2007).**  
**Vessel in peril even though in “safe zone” away from fire,**

**\$3,000.00 award for two hours labor.**

On January 25, 2006, a fire broke out at the Columbia River Yacht Club on Hayden Island in Portland, Oregon. The 65', 2005 Marquis M/Y HIGH STEAKS was moored in a boathouse located close to the fire. She was worth \$2M+. A Port of Portland rescue vessel moved the vessel out of the boathouse and a Portland Fire Bureau firefighter was positioned on the bow of the vessel. A Sea Tow vessel showed up and was instructed by the Port to tow the vessel. Sea Tow's efforts began when the vessel was in the "safe" or "cold" zone away from the fire. At 2708. It towed the HIGH STEAKS to a safe location.

The Court concluded that at the time Sea Tow began its tow, the HIGH STEAKS remained in peril as she was not under her own power and the fire was still raging and embers were still flying through the air creating uncertainty as to possible additional explosions or spread of the fire.

The salvor sought \$236,000.00 based on 10% of the yacht value, plus a 1% uplift due to its status as a professional salvor. The owner argued for a \$600.00 award based on Sea Tow's maximum per hour charge of \$300.00, multiplied by two hours. The Court found a minimal degree of danger from which the property was rescued and allowed a \$3,000.00 award. Sea Tow sought pre-judgment interest at 10.5%. However, the Court ordered pre-judgment interest in accordance with applicable local rules and 28 U.S.C. 1961 and determined the applicable rate to be 4.5%.

**Cape Ann Towing v. M/Y UNIVERSAL LADY, 07-13237,**  
**2008 WL 647095 (11<sup>th</sup> Cir. March 11, 2008) (unpublished).**  
**No marine peril after eye of hurricane.**

Cape Ann Towing sought a salvage award of \$487,500.00 for recovering and

towing the M/Y UNIVERSAL LADY during strong wind conditions. The District Court concluded there was no peril and gave a *quantum meruit* award of \$2,706.37. Cape Ann Towing appealed, among other things, the finding of no peril. The 11<sup>th</sup> Circuit affirmed the District Court decision.

The Court examined the weather conditions noting that the center of a hurricane had already passed, the adverse conditions had begun to dissipate and would continue to do so, the vessel was afloat, secured by rope, and, although she was next to several broken concrete pilings, she was without any apparent damage that would have put her at risk of sinking. She was not aground, on fire, leaking, nor at the mercy of the sea.

**Powell v. United States, 2007 WL 2292693, 2007 A.M.C. 2226 (D. Or. August 6, 2007). Coast Guard not liable for boater’s entanglement in drogue during rescue.**

On July 20, 2003, Mitchell P. Powell was sailing alone aboard the S/V SWAY in rough seas about 20 miles northwest of Brookings, Oregon. The engine failed so Powell contacted the Coast Guard which dispatched a 47’ motorized lifeboat that arrived on scene about two hours later. Seas were six to ten feet, winds 20 knots, with limited visibility due to fog, and the SWAY’s mast was tipping from one side of the vessel to the other, nearly hitting the water on each side.

Due to the weather and Powell’s representations, the Coast Guard did not deploy a second vessel or helicopter, nor transfer personnel between vessels. Instead, Coast Guard deckhands threw Powell a drogue<sup>7</sup> and instructed him how and when to deploy it. However, Powell prematurely deployed the drogue. His left leg became entangled by a loop of drogue line and he was pinned to the stern rail as the Coast Guard vessel began

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<sup>7</sup> “Something like a parachute ... prevents the towed vessel from ‘surfing’ down wave faces and potentially corkscrewing and/or capsizing.” At 2228.

the two hour voyage to shore. About 30 minutes later, Coast Guard personnel realized Powell's dilemma and slackened the line allowing Powell to free himself. Powell suffered a strangulation injury of his left leg and compartment syndrome requiring several surgical procedures.

The Court found that the discretionary function exception did not apply to the instant facts and concluded that the Coast Guard was not negligent as its actions and decisions were within the reasonable standard of care.

**Southern Scrap Material Co., LLC, 2007 WL 1234995,**  
**2007 A.M.C. 2612 (E.D.La. April 26, 2007). *In personam***  
**liability under Wreck Act, regardless of fault.**

During Hurricane Katrina, a 228' x 157' dry dock displacing 3,868 tons broke free from its moorings on the Industrial Canal and partially sank near the Florida Avenue Bridge. The government declared the (not-so dry) dry dock a hazard to navigation, procured its removal and sent its owner an \$8M bill. The owner filed a Limitation Action. Relying on Section 409 of the Wreck Act, the government sought to exclude its claim from the Limitation proceeding.

The Court reaffirmed the holding in *Wyandotte Trans. Co. v. United States*<sup>8</sup>, and added weight to dicta in *In re the Matter of Barnacle Marine Management, Inc.*<sup>9</sup>, by holding that Section 409 includes an *in personam* remedy in favor of the government.

The next issue the Court faced was whether the Wreck Act as recently amended<sup>10</sup> imposes a strict liability obligation rather than a fault-based obligation under Section 409. The Court interpreted the amendment by relying in part on *Barnacle Marine* once

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<sup>8</sup> 389 U.S. 191 (1967).

<sup>9</sup> 233 F.3d 865 (5<sup>th</sup> Cir. 2000) (where Section 408 was at issue and distinctions were drawn between it and 409).

<sup>10</sup> Congress changed the text from "or to voluntarily or carelessly sink" to "or to sink."

again which indicated that “Congress changed 409’s standard for liability from negligence to strict liability.” At 2616, citing *Barnacle Marine* at 868, n.6.

The Court went on to hold that the Limitation Act does not apply to the government’s civil suits for wreck removal expenses. At 2616, citing *University of Texas Medical Branch at Galveston v. United States*, 557 F.2d 438 (5<sup>th</sup> Cir. 1977).

The Court permitted the dry dock’s owner to persist in its claim that the negligence of the Army Corps of Engineers was responsible for the storm surge causing the dry dock to sink. However, the government was permitted to pursue its *in personam* action against the owner of the dry dock.

**United States v. Haun, 494 F.3d 1006, 2007 A.M.C. 2326 (11<sup>th</sup> Cir., August 6, 2007). Faked disappearance resulting in distress call by others to USCG is a crime, without a need to show specific intent.**

Steven Wayne Haun and four acquaintances went for a “late night/early morning excursion” on a boat in the bay off of Panama City, Florida. At 2327. During darkness, Haun asked a passenger to tow him on a raft behind 140’ of tow line at 25 mph. Of course, the passengers complied. Once underway, the passengers realized that they could not see Haun due to darkness and the length of the line. After some time, they finally feared Haun might not be on the raft, so they stopped the boat. Haun was not on the raft and his life vest was found floating in the water. Haun’s acquaintances called the Coast Guard who, with the help of local authorities, spent about 12 hours searching for Haun. They also notified Haun’s father who “was very much at ease and did not seem upset.” At 2327.

Sometime later, an Indiana State Police officer found Haun in a sleeper berth of

an 18-wheeler in an excavation lot in Indianapolis. Haun admitted to devising the following scheme *to evade a state court trial date*: he left a jet ski on an island earlier in the day; about the time he was to be towed, he let go of the raft, took off his life jacket, swam to the jet ski, and rode back to the marina to leave town.

Haun was charged with violating 14 U.S.C. 88(c), which makes it a felony to knowingly and willfully communicate a false distress message to the Coast Guard or cause the Coast Guard to attempt to save lives and property when no help is needed. Haun argued that the statute required a showing of specific intent. The Court disagreed.

The decision appears to be based on two rationales. First, the House Committee Report<sup>11</sup> discussing the bill “indicates that Congress wanted to penalize not only those who directly communicate a false distress message to the Coast Guard or direct someone to send a false distress message, but also those who indirectly, by their actions, cause the Coast Guard to attempt to save lives and property when no help is needed.” At 2330. Second, “buoyed by our common sense, which we do not throw overboard, we conclude that the purpose of the statute is to penalize those who cause the Coast Guard to become involved when no help is needed, regardless of whether the individual who precipitated the drama in the open seas knew with certainty that the Coast Guard would needlessly answer the distress call.” At 2331.

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<sup>11</sup> Liability for False Distress Calls, HR Rep. No. 101-684 (1990) (later codified into 14 U.S.C. 88(c)).