

RECENT DEVELOPMENTS IN SALVAGE LAW
Maritime Law Association, Salvage Committee, Spring 2009¹

In Memory of Michael J. McHale

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Great Lakes Exploration Group, LLC v. Unidentified Wrecked and (For Salvage-Right Purposes), Abandoned Sailing Vessel, 522 F.3d 682, 2008 A.M.C. 1111 (6th Cir., Apr. 22, 2008).

A professional salvor filed a complaint seeking the arrest of what is believed to be THE GRIFFIN, one of the first sailing ships to navigate on the Great Lakes. The State of Michigan intervened claiming title and alleging lack of jurisdiction based on the Abandoned Shipwreck Act (“ASA”), 43 U.S.C. §§ 2101-2106, which gives title to a State (despite not having actual possession) upon a showing that the vessel is both abandoned and embedded in the state’s submerged lands. In order to determine whether the shipwreck was embedded, Michigan sought and the District Court ordered the disclosure of the precise location of the wreck. The salvor refused, fearing Michigan would take possession of the wreck prior to arrest.

On appeal, the Court held that the order for arrest should have been issued (possibly conditioned upon limiting salvage operations) under the rationale that arrest

¹Notes: 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. Please note that this update is not exhaustive, nor is it necessarily limited to the period since the last update authored in the Spring of 2008.

does not affect title so long as the description generally notifies the public and alerts potential owners. However, the Court held that when a State intervenes based on the ASA and embeddedness is at issue, the salvor must pledge to reveal the precise location of the wreck once the court secures federal jurisdiction or upon arrest (possibly under seal).

Weeks Marine, Inc. v. Cargo of Scrap Metal Ladened Aboard Sunken Barge CAPE RACE, 571 F. Supp. 2d 334, 2008 A.M.C. 2602 (D. Conn., Jul. 31, 2008).

The barge CAPE RACE sank with scrap metal cargo in 1984 in Long Island Sound. Weeks Marine, Inc. sought “the necessary authorization from the Coast Guard to obtain the scrap metal.” At 2603. It filed a complaint for salvage or, in the alternative, finds and sought injunctive relief excluding others from participating in the salvage operations. The Court refused to issue *in rem* process because the cargo had yet to be salvaged inasmuch as Weeks had not recovered anything from the wreck (distinguishing *Martha’s Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1988 A.M.C. 1109 (1st Cir. 1987) (allowing *in rem* action to proceed before salvage was actually conducted because Court undisputedly had *in personam* jurisdiction over relevant parties)). The Court also refused to grant injunctive relief—an *in personam* remedy—absent *in personam* jurisdiction; the salvor is entitled, however, to bring an *in personam* action to enjoin a rival.

In re Southern Scrap Material Company, LLC v. ABC Insurance Company, et al., 541 F.3d 584, 2008 A.M.C. 2369 (5th Cir., Aug. 25, 2008) (upholding district court holding [discussed in 2008 Salvage Case Law Update] allowing U.S. to

pursue *in personam* claim for substantial damages under Wreck Act despite filing of limitation action), *cert. denied*, 2009 WL 804229 (Mar. 30, 2009).

Crescent Towing & Salvage Co. v. M/V CHIOS BEAUTY, 2008 WL 3850481, 2008 A.M.C. 2535 (E.D.La., Aug. 14, 2008).

In post-Hurricane Katrina litigation, the Court held that “[t]here is no statutory or jurisprudential foundation for granting [a purported salvor] an award of salvage because its actions prevented [a vessel] from damaging the property of third parties.” At 2555. The Court cited *Allseas Maritime, SA v. M/V MIMOSA*, 812 F.2d 243, 1987 A.M.C. 2525 (5th Cir. 1987) (denying compensation in limitation action to salvor for environmental liability avoided by virtue of salvage).

Williamson v. Recovery Ltd. Partnership cases:

1. **542 F.3d 43, 2008 A.M.C. 2054 (2nd Cir., Aug. 22, 2008)** (holding that employment contracts with workers participating in salvage operations were maritime contracts; Ohio choice of law clause in such contracts merely *supplements* any area of contract law for which federal common law did not provide; attachment order survived as to some defendants), *cert. denied*, *Columbus Exploration LLC v. Williamson*, 129 S.Ct. 945, 2009 WL 56270 (U.S., Jan. 12, 2009); followed by No. 2 below.

2. **2009 WL 243031 (S.D. Ohio, Jan. 29, 2009)** (denying motion to dismiss, alleging lack of subject-matter jurisdiction and noting: “the covenants not to compete, the non-disclosure agreements, and the lease agreement for sonar equipment were each made in exchange for a percentage of the recovery. The Court concludes that the parties entered into these contracts in connection with and in furtherance of a maritime commercial venture and are, therefore, maritime in nature.” At 3.).

3. **2009 WL 649841 (S.D. Ohio, Mar. 11, 2009)** (remanding to state court supplemental claims of salvage investors (alleging breach of contract and breach of fiduciary duties by salvor)).

Cape Flattery Ltd v. Titan Maritime, LLC, 2009 WL 734058 (D. Hawaii, Mar. 19, 2009).

The M/V CAPE FLATTERY ran aground on a submerged reef off Barbers Point, Oahu, Hawaii. Titan Maritime was hired to salvage the vessel. In doing so Titan used heavy tow lines (despite being expressly warned not to use heavy lines) allegedly damaging coral reef. The United States Coast Guard informed Plaintiff (vessel-interests) that it was strictly liable in an amount exceeding \$15 million for the environmental damages. Plaintiff sued Titan for indemnity or contribution on a negligent salvage theory.

The Court examined an arbitration provision in the salvage agreement which stated: “Any dispute arising under this Agreement shall be settled by arbitration in London, England, in accordance with the English Arbitration Act ... English law and practice to apply.” At 4. In confronting the salvor’s motion to compel arbitration—and Plaintiff’s opposition to the same—the Court ruled for the Plaintiff.

The Court determined that the Agreement itself, including the arbitration provision, would be interpreted using U.S. federal law. At 3-4. U.S. law applied because a) the agreement “does not actually contain a choice-of-law provision governing the *interpretation* of the agreement to arbitrate or even the Agreement as a whole. Rather, the Agreement provides only that disputes arising under the Agreement are subject to arbitration, which will occur in England pursuant to English law”; and b) the agreement was “silent regarding what law applies to *determine* whether a dispute is subject to

arbitration.” At 4.

The Court endeavored to interpret the arbitration provision. At 4-6. Despite policy favoring arbitration, the Court held that a provision committing all disputes “arising under” an agreement to arbitrate should be interpreted *narrowly*, and only claims sufficiently related to interpreting and performing the agreement itself are governed by such provision.

The Court found that the contribution and indemnity claims arose out of tort liability—as opposed to any obligation found in the agreement—and thus the dispute did not “arise out of” the salvage agreement. The Court’s rationale was that the action could still be maintained absent the salvage agreement because it was “clearly foreseeable” to Titan that harm would result from the use of submerged tow lines. A determination as to performance under the contract was not a prerequisite to a determination of breach of a duty. At 9. Therefore, the claims were not subject to arbitration in England, nor governed by English law.

McCaddin v. Southeastern Marine, Inc., 567 F. Supp. 2d 373, 2008 A.M.C. 1999 (E.D.N.Y., Jul. 22, 2008).

Henry A. McCaddin’s 42’ pleasure vessel PANDONNA lost power in Long Island Sound. A professional salvor arrived on scene and offered to tow the vessel. The parties disputed whether the salvor told McCaddin the service would be “a salvage” or “a tow”. Despite not wearing his eyeglasses, McCaddin signed a “STANDARD FORM YACHT SALVAGE CONTRACT” containing an arbitration clause. McCaddin filed a Declaratory Judgment action which the salvor sought to dismiss or, in the alternative, stay pending arbitration. McCaddin unsuccessfully contested arbitrability.

The issue presented was whether the contract was void due to fraud in the

execution (an issue for the court) or whether it was merely voidable due to fraudulent inducement (an issue for arbitration). McCaddin alleged he signed a contract for salvage because he was induced by, and relied upon, the fraudulent representation that the contract was for towing. Citing illustrations from Sections 163 and 164 of the Restatement (Second) of Contracts, the Court found the claims presented a “classic allegation of fraudulent inducement” rather than fraud in the execution. At 2007. The case was stayed pending arbitration.

Sullivan v. General Helicopters, Int’l, 564 F. Supp. 2d 496 (D.Md., Jul. 10, 2008).

Stevedores (employed by Ceres Marine Terminal) attempted to unload a helicopter from a vessel at the Port of Baltimore. The attempt was “bungled” (at 498) when the nose wheel broke as the helicopter was hauled by tractor down a loading ramp to the pier. A tow truck from Sullivan’s Garage arrived and used a heavy-duty crane mounted atop the tow truck to lift the unsecured helicopter from the ramp and lower it safely to the pier. The tow truck company sued for a marine salvage award. The defendants moved to dismiss based on lack of subject matter jurisdiction.

The Court applied a “modified version of the *Grubart* test²”, which focused on the activities of the putative salvor and reduced “the ‘connection’ prong of the test to the single question of whether the salvor’s activities bear a substantial relationship to traditional maritime activity.” At 499. The Court found sufficient locality because the helicopter was sitting with a broken wheel on a loading ramp. Further, the service of “unloading of cargo from a vessel” was essentially maritime in character. At 500.

²“A party seeking to invoke admiralty jurisdiction over a tort claim must satisfy both conditions of location and of connection with maritime activity.” *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995).

Therefore, the Court found subject matter jurisdiction in favor of the tow truck salvor. The Court also deemed that the conditions alleged (including high winds) presented a marine peril. As there was no *in rem* action, the helicopter could not be arrested.

The Court also concluded that the marine terminal defendant was a bailee of the helicopter and thus a proper party, since it had a “direct pecuniary interest in ensuring that the helicopter was not lost or damaged.” At 502.

Peterson v. Allen, 2009 WL 666781 (W.D. Wash., Mar. 10, 2009).

Plaintiff owned the 58’ M/V LOFOTEN SPIRIT which grounded on rocks and began taking on water in the Swinomish Channel near La Conner, Washington while others were aboard, but Plaintiff was not. A commercial salvor responded and presented the personnel aboard with a no cure, no pay salvage agreement containing a clause allowing a twenty percent award of the net salvaged value. After inconsistent indications from personnel aboard the vessel about signing the agreement and an apparent opportunity for the personnel to discuss the agreement with the (absent) owner, the agreement was executed. However, the salvor explained that a twenty percent award was a cap or ceiling and the actual cost would be negotiated after the salvage was complete. The parties failed to negotiate following the salvage operation.

The Court set aside the contract and, after applying the *Blackwall* factors, awarded (surprise!?) twenty percent of the fair market value (explicitly refusing to base the award on the insured value), less costs for repairing the vessel.

Azille v. United States, 2008 WL 4911205, 2008 A.M.C. 2820 (V.I., Nov. 13, 2008).

While en route to St. Thomas from St. Croix, a large catch of fish shifted aboard the 26’ A LIGHT IN THE DARK, causing the boat to take on water and eventually

capsize. The Coast Guard's ensuing (unsuccessful) search covered approximately 192 square miles over 18 hours. The plaintiffs were found in the water by a private sailing vessel.

Plaintiffs sued, claiming the Coast Guard's search effort was negligent. The Court allowed the U.S.'s motion to dismiss plaintiffs' claim based on lack of subject matter jurisdiction. The Suits in Admiralty Act ("SIAA") waives sovereign immunity in some instances, but contains an implied discretionary function exception to such waiver. 46 U.S.C. § 30903. The Court found the conduct at issue to be "not the specific decision to send a helicopter to area A-1, but the more general decision to search for plaintiffs and the judgments made regarding how to conduct the search." At 2823. Citing excerpts from the U.S. National Search and Rescue Supplement and the Coast Guard Addendum thereto, the Court concluded that the decision was discretionary and fell within the types of decisions the discretionary function exception is designed to protect.

Towboat One, Inc. v. M/V WATERDOG, 2008 WL 2609505, 2008 A.M.C. 1730 (S.D. Fla., June 24, 2008).

Readers may remember the case of *In Re Captain William Beck*, 526 F. Supp. 2d 1291, 2008 A.M.C. 113 (S.D. Fla., Dec. 6, 2007) reported in the Spring 2008 Recent Developments in Salvage Law (holding that Court lacked jurisdiction to issue licensure under 46 U.S.C. § 80102(a) (2006); it provided: "To 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." Due in part to lack of case in controversy, the Court did not, however, rule the statute unconstitutional). Attendees of the MLA Salvage Committee meeting in the Spring of 2008 will remember the presentation about *Beck* by Michael John McHale,

counsel for Petitioner Beck. Here is its progeny:

The Court (this time) concluded it had jurisdiction in the instant litigation arising out of the de-watering by an un-licensed commercial salvor of the M/V WATERDOG off the Coast of Florida. The vessel owners affirmatively defended the claim, in part, based on the salvor lacking the license required by the suspect statute. The salvor contended the statute was unconstitutional. The issue was ripe for decision and the Court took the next logical step by striking down the statute for the reasons espoused in *Beck*, thereby essentially ruling on that issue in favor of the salvor, who enjoyed the benefit of representation by Mr. McHale. Antiquity collectors may begin their bids for an original signed salvage license issued by a federal judge prior to *Beck* and *Waterdog*. Meanwhile, salvors and members of the MLA (particularly including this author) will mourn the loss of Mr. McHale.

Diaz v. Diaz, 2009 WL 272870 (W.D.Va., Feb. 3, 2009).

Plaintiff, a *pro se* federal inmate, brought a civil action against himself “pursuant to F.R.Civ.P. 9(h), ‘specifically Rule C Special Provision to enforce a Maritime lien granted for salvage Service’”, concerning the “Distressed U.S. Vessel Jerry Resto Diaz charged under indictment 96-00075” and seeking enforcement of a lien he claimed he had in “all property and/or collateral held under the name of the U.S. Vessel Jerry Resto Diaz.” The Court explained: “In sum, it appears from his submissions that Diaz is arguing that he has a possessory interest in himself, and asks the court to release him from BOP custody and deliver him to himself.” Creative though it was (and despite attaching to the complaint a host of documents including a “bill of lading order,” a State of Florida UCC Financing Statement Form and interrogatories) the Court dismissed the action as frivolous.