BY PAUL S. EDELMAN AND JAMES E. MERCANTE

Does a Maritime Contract Afford Admiralty Jurisdiction?

The U.S. Court of Appeals for the Second Circuit has decided several important admiralty cases this year. Three significant decisions discussed herein involve jurisdiction and maritime status.

What makes a contract maritime? Does a maritime contract afford admiralty jurisdiction?

The Second Circuit decided a leading admiralty jurisdiction case in June 2005 and answered these questions. It is the first decision to analyze the recent U.S. Supreme Court admiralty case of *Norfolk S. Ry. Co. v. James N. Kirby Pty. Ltd.*, in the context of jurisdiction over contracts.[1]

Paul S. Edelman

James E. Mercante

Injury Aboard Vessel

The case involved an injury to Milton Rivera, a tank cleaner working in New York Harbor. Climbing out of the tank of an oil barge, he either lost grip of the stepladder or was overwhelmed by fumes. Mr. Rivera tumbled backwards down into the tank hitting the steel deck below. He commenced a personal injury lawsuit in state court against his employer, the barge owner, the barge and the local company that hired him for the job, Clean Water of New York, Inc.

Clean Water placed its insurance carrier on notice of the lawsuit, asking the insurer to defend and satisfy any judgment against Clean Water. The insurer's successor in interest, Folksamerica Reinsurance Co., believed that there was no coverage under the policy or that conditions precedent to coverage and warranties were breached. Invoking admiralty jurisdiction, Folksamerica filed a declaratory judgment action in federal court seeking a ruling that it had no obligation to defend or indemnify Clean Water under the insurance contract.

The insurer promptly moved for summary judgment. Clean Water came back swinging, not only cross-moving for summary judgment but arguing that the policy was not a maritime contract and therefore the case had no business in federal court. The policy contained a Comprehensive General Liability (CGL) section coupled with a Ship Repairer's Legal Liability (SRLL) section.

The admiralty question had implications beyond simply conferring federal jurisdiction because Folksamerica had urged the court to employ the federal maritime doctrine of uberrimae fide, or utmost good faith. This doctrine provides that "the parties to a marine insurance contract are held to the highest degree of good faith, whereby the party seeking insurance is required to disclose, inter alia, all circumstances known to it which materially affect the risk."[2] For example, Folksamerica maintained that because Clean Water failed to disclose that it performed tank cleaning on others' vessels, the policy should be declared void.

Contract Not 'Salty'

Clean Water's two chief objections to construing the CGL policy as marine insurance involved the "form" of the policy and its "coverage" terms. First, Clean Water argued that unlike the three traditional marine insurance policies—hull, cargo and protection indemnity (P&I)—a CGL policy is a shore-side insurance form covering nothing but shore-side risks. Clean Water's second objection was based on the coverage terms. It claimed that the function of admiralty jurisdiction is to ensure uniformity of laws as they apply to the carriage of cargo and passengers upon navigable waters and since the CGL policy covers none of those risks, it cannot be a policy of marine insurance.

The district court agreed with Clean Water and dismissed the complaint.[3] The court found that a CGL policy is basically a shore-side insurance form with such nonmaritime elements as advertising risks, medical malpractice risks and liability for liquor-related injuries, and it excluded coverage for damages arising from such things as snowmobile use, the unloading of aircraft, certain automobile use and Workers' Compensation liability. The district court determined that it was a standard CGL policy of the type used by many businesses to cover a variety of losses which may arise in day-to-day general operations.

Contrasting CGL insurance with the above-mentioned traditional forms of marine insurance,[4] the district court concluded that the CGL form "simply lacks the genuinely salty flavor necessary to constitute a maritime contract."[5]

Folksamerica timely appealed to the Second Circuit and argued that the three traditional forms of marine insurance do not cover the waterfront. The primary issue on appeal was whether a CGL policy is a maritime contract giving rise to admiralty jurisdiction.

Threshold Inquiry

The Second Circuit issued a reasoned 30-page opinion entitled *Folksamerica Reinsurance Co. v. Clean Water of New York Inc.*, holding that the CGL policy was indeed a maritime contract and that the federal court must retain jurisdiction.[6]

The appeals panel of Chief Judge John Mercer Walker Jr. and Circuit Judges Rosemary Pooler and Richard Wesley, first conducted a "threshold inquiry" into the subject matter of the underlying dispute.[7] This inquiry showed that the parties' dispute concerned an insurance claim based on an injury sustained by a ship oil-tank cleaner aboard an oceangoing vessel in navigable waters. The court noted that the business of ship maintenance has long been recognized as maritime in nature. Thus, an insurance claim arising out of an onboard injury is directly related to maritime commerce and thereby implicates the concerns underlying admiralty and maritime jurisdiction.

The panel referred to the recent instruction of the

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Paul S. Edelman *is of counsel at Kriendler & Kriendler. Mr. Edelman's firm represented the Morganti family in the maritime status case.* **James E. Mercante,** *is an admiralty partner at Rubin, Fiorella & Friedman and represented Folksamerica Reinsurance Co. in the admiralty jurisdiction case.*

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U.S. Supreme Court that courts must look at a contract's "'nature and character'" to see "whether it has reference to maritime service or maritime transactions."[8] Here, the Folksamerica policy was not called "marine" but the court noted that the form of or label given to an insurance policy will not always identify the nature of the risks the insurer assumes.[9]

Custom-Built Policy

The Second Circuit then carefully analyzed the terms of the insurance contract and concluded that both sections were primarily or principally concerned with maritime objectives, although there were some incidental nonmaritime elements. The court found that there is nothing intrinsically "shore-side" about a CGL policy. Indeed, issuance of CGL—like policies to maritime businesses seems to be a growing trend.[10] The Second Circuit determined that disputes arising from CGL policies issued to shore-side marine entities such as ship-repairers, tank cleaning companies, and so on, are entitled to the benefits of admiralty jurisdiction. Moreover, the Ship Repairer's Legal Liability Section, which provides coverage for vessels lost or damaged while undergoing repairs by the insured was found to be "decidedly marine."[11]

The policy as a whole was found to be a custom-built maritime contract intended to fill the gaps that hull, cargo and P&I policies leave in maritime-industry coverage. As a result, the district court decision was vacated and the case remanded.

Had the district court's published opinion remained in place, it would have essentially restricted admiralty jurisdiction over insurance contracts to hull, cargo and P&I policies. The Second Circuit's analysis can be applied to any insurance policy issued to a marine entity to determine if the contract is "genuinely salty" and thus worthy of admiralty jurisdiction.

Maritime Status

In *Lockheed Martin Corp. v. Morganti*, the Second Circuit decided a case involving maritime status.

Rocco Morganti was employed by Lockheed Martin as a test engineer. Thirty to 40 percent of his time was spent on a barge in Lake Cayuga, N.Y., testing acoustic equipment. A shuttle boat was used to get to and from the barge.

Due to defects on the shuttle boat, Mr. Morganti fell into the lake and drowned. The issue before the courts was one of status. Did he come within the reach of the Longshore and Harbor Workers' Compensation Act? An administrative law judge held that he was not covered by the act, but this was reversed by the Benefits Review Board and the decision affording coverage was affirmed by the Second Circuit.[12] Circuit courts have jurisdiction to review Benefits Review Board decisions.

There seems no doubt that Lake Cayuga, which connects with the Erie Canal, is federal navigable waters, though an issue was raised as to whether there must be substantial commercial maritime activity and boat traffic in such a lake to trigger the act's coverage. There also seemed little doubt that the decedent was not just "transiently and fortuitously" on navigable waters since so much of his time was spent on the barge. The administrative law judge, however, determined that the barge was a fixed platform (i.e., not a "vessel") to deny Longshore Act coverage. He also found that decedent's job was data processing, which is one of the exclusions under the act.

The court said that the Comprehensive General Liability policies of shore-side marine entities such as ship-repairers, are entitled to the benefits of admiralty jurisdiction.

The Second Circuit's decision traces the history of the Longshore Act, which provides coverage for maritime employment. While commercial maritime activity in Mr. Morganti's employment was spotty, it could be available at any time and the waters were indeed navigable. The barge was found to be a floating vessel, not a fixed platform resting on the lake bottom like an oil rig. The distinction involved citations to numerous cases. Therefore, there was sufficient maritime activity for Longshore Act coverage.

Lastly, Mr. Morganti's job was held not to be data processing which the court found to be simply entering data in a computer. Rather, Mr. Morganti's job was to analyze the data and thus he had the requisite professional status.

Although further appeals are likely imminent, the Second Court's opinion appears correct. Under pre-1972 law, it was clear that an accident on "navigable waters" provided coverage under the act for noncrew members. A further point to be made, but not discussed, is that a person covered by the Longshore Act has a third-party claim against his employer when the employer is a vessel owner and negligence of the vessel owner (as opposed to a fellow worker's negligence) is a cause of the accident.[13] Thus, in this instance, the employee is not bound only by a compensation recovery, but may recover full damages.

The court decided another case involving maritime status in *Uzdavines v. Weeks Marine Inc.* The employee served a few months as an oiler on a bucket dredge and a deck hand on a tugboat, though his usual employment was a welder and shipyard worker. After these activities, he retired and subsequently died of cancer due to asbestosis. The Second Circuit held that his widow was not entitled to benefits under the Longshore Act. Since he was performing traditional maritime work and had a substantial connection to a vessel, he was found to be a crew member not covered by the Longshore Act.[14]

1. 543 US ___, 125 SCt 385 (2004).
2. *Atl. Mut. Ins. Co. v. Balfour MacLaine Int'l Ltd. (In re Balfour MacLaine Int'l Ltd.)*, 85 F3d 68, 80 (2d Cir. 1996).
3. *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 281 FSupp2d 530 (EDNY 2003).
4. *Folksamerica*, 281 FSupp at 533 citing T.J. Schoenbaum, ADMIRALTY AND MARITIME LAW §18-1 (WEST 1987) (identifying the "three principal different categories of marine insurance policies").
5. Id at 533; Benedict on Admiralty §182, at 11-7 (7th ed. 1985) (to have maritime character, "there must be present a direct and proximate judicial link between the contract and the operation of the ship, its navigation or its management afloat").
6. 413 F3d 307 2005, United States App. LEXIS 13041 (2d Cir. 2005); New York Law Journal "Decision of Interest," June 30, 2005.
7. *Atl. Mut. Ins. Co. v. Balfour MacLaine Int'l Ltd.*, 85 F3d 68, 74-75 (2d Cir. 1996).
8. *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F2d 293, 301 (2d Cir. 1987) (quoting *CTI-Container Leasing Corp. v. Oceanic Operations Corp.*, 682 F2d 377, 379 (2d Cir. 1982)).
9. 413 F3d 307, 2005 United States App. LEXIS 13041 (2d Cir. 2005).
10. Id at 316.
11. Id at 323.
12. 412 F3d 307 (2d Cir. 2005).
13. *Stewart v. Dutra Const. Co.*, 125 SCt 1118 (2005).
14. *Uzdavines v. Weeks Marine Inc.*, ___ F3d ___, 2005 WL 1819590 (2d Cir. 2005).