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I. Admiralty

FOURTH CIRCUIT REVIEW

I. ADMIRALTY

The Fourth Circuit recently considered several important questions of admiralty law. In *I.T.O. Corp. v. Benefits Review Board*[1] and *Norfolk, B. & C. Lines v. Office of Workers' Compensation Programs,*[2] the court interpreted the coverage and benefits provisions of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).[3] The court also considered Jones Act coverage[4] of bridgeworkers in *Whittington v. Sewer Construction Co.,*[5] and the duty of the Coast Guard to mark wrecks under the 1965 amendments to the Wreck Removal Acts[6] in *Lane v. United States.*[7] Finally, in *Oriente Commercial, Inc. v. M/V Floridian,*[8] the Fourth Circuit explored the intricacies of maritime lien priority law and the Ship Mortgage Act.[9]

A. Extended Coverage and Benefits under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act.

The 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act of 1927 (LHWCA)[10] were intended to revitalize the existing compensation scheme for longshoremen.[11] Notable bene-

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[1] 529 F.2d 1080 (4th Cir. 1975), *aff'd in part, rev'd in part on rehearing en banc,* 542 F.2d 903 (4th Cir. 1976).

[2] 539 F.2d 378 (4th Cir. 1976), *cert. denied,* 45 U.S.L.W. 3503 (U.S. Jan. 25, 1977) (No. 76-658).

[3] Act of October 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251, *amending* 33 U.S.C. §§ 901-950 (1970) (codified at 33 U.S.C. §§ 901-950 (Supp. V 1975)).

[4] 46 U.S.C. § 688 (1970).

[5] 541 F.2d 427 (4th Cir. 1976).

[6] 14 U.S.C. § 86 (Supp. V 1975); 33 U.S.C. §§ 409, 414 (1970).

[7] 529 F.2d 175 (4th Cir. 1975).

[8] 529 F.2d 221 (4th Cir. 1975).

[9] 46 U.S.C. §§ 951-954 (1970).

[10] Act of October 27, 1972, Pub. L. No. 92-576, 86 Stat. 1251, *amending* 33 U.S.C. §§ 901-950 (1970) (codified at 33 U.S.C. §§ 901-950 (Supp. V 1975)).

[11] *See* H.R. No. 1441, 92d Cong. 2d Sess. (1972), *reprinted in* [1972] U.S. CODE, CONG. & AD. NEWS 4698 [hereinafter cited as HOUSE REPORT]. *See generally* Doak & Hecker, *Is it a New Ball Game?—The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act,* 11 FORUM 544 (1976); Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments,* 6 J. MARITIME L. & COM. 1 (1974); Note, *Maritime Jurisdiction and Longshoremen's Remedies,* 1973 WASH. U.L.Q. 649.

fit changes included increases in weekly disability compensation,[12] death benefits,[13] student benefits,[14] and the allowance for funeral expenses.[15] Additionally, the 1972 amendments expanded LHWCA coverage previously confined to injuries occurring over navigable waters.[16] The Act presently provides compensation for injuries taking place on adjoining land areas which customarily are used in loading, unloading, repairing, or building a vessel.[17] The amendments also require that an injured employee be engaged in "maritime employment."[18] Thus, the LHWCA now conditions compensation coverage upon satisfaction of both a situs and a status test.

Proper application of the dual situs and status test was the primary issue in *I.T.O. Corp. v. Benefits Review Board*[19] and its companion cases.[20] The Fourth Circuit held that dock workers injured

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[12] 33 U.S.C. §§ 906-908 (Supp. V 1975).

[13] *Id.* § 909.

[14] *Id.* § 902(18).

[15] *Id.* § 909(a).

[16] The 1927 Act provided in part: "Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States. . . ." 33 U.S.C. § 903(a) (1970). The phrase "upon the navigable waters" has been held not to include piers and wharves or other fixtures permanently attached to land. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969); Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969); Labit v. Carey Salt Co., 421 F.2d 1333 (5th Cir. 1970); Nicholson v. Calbeck, 385 F.2d 221 (5th Cir. 1967), *cert. denied*, 389 U.S. 1051 (1968); Houser v. O'Leary, 383 F.2d 730 (9th Cir. 1967), *cert. denied*, 390 U.S. 954 (1968).

[17] The amended statute retains the wording of the original Act, but new language expands the concept of "navigable waters" to include "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel." 33 U.S.C. § 903(a) (Supp. V 1975).

[18] "Maritime employment," as described in the statute, covers longshoremen and harbor workers, including ship repairmen, shipbuilders, and shipbreakers. *Id.* § 902(3). Under the original Act, a broader definition of "employee" included anyone except "a master or member of a crew of any vessel" or persons engaged in loading, unloading, or repairing a vessel under 18 tons. *Id.* § 902(3).

The amendments retained the employer's requirement to have at least one employee engaged in work of a maritime nature, which must be performed partly "upon the navigable waters of the United States." *Id.* § 902(4) (Supp. V 1975). Navigable waters in this context also includes piers, wharves, and adjoining land areas. The employer requirement, however, is no longer material under the amendments since the employee himself is now required to be engaged in maritime employment.

[19] 529 F.2d 1080 (4th Cir. 1975), *aff'd in part, rev'd in part on rehearing en banc*, 542 F.2d 903 (4th Cir. 1976).

[20] The following cases were combined in *I.T.O.* for appeal to the Fourth Circuit: Harris v. Maritime Terminals, Inc., 1 BRBS 301 (1975); Brown v. Maritime Terminals, Inc., 1 BRBS 212 (1974); Adkins v. I.T.O. Corp., 1 BRBS 199 (1974).

while transferring goods from one point on a pier to another pier location, or from a pier to a delivery truck, were not engaged in maritime employment.[21] The court concurred in the Benefits Review Board[22] determination that the injuries occurred over navigable waters as defined in the amendments.[23] However, the Review Board's application of the maritime employment status test was reversed.[24] The Board had held that any job which is an integral part of the overall process of loading or unloading a vessel qualifies the employee as a maritime employee within the meaning of the amendments.[25] The Fourth Circuit instead determined that only those employees engaged in moving cargo from the ship to the first point of storage on the pier, or from the last point of storage on the pier to the ship, could be categorized as maritime employees.[26]

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[21] In Adkins v. I.T.O. Corp., 1 BRBS 199 (1974), the plaintiff was a forklift operator at Dundalk Marine Terminal in Baltimore where he was injured while moving a load of brass tubing from a warehouse to a delivery truck. The tubing had arrived seven days earlier in a container. The storage shed was 685 feet from the water.

The plaintiff in Brown v. Maritime Terminals, Inc., 1 BRBS 212 (1974), was a forklift operator at Norfolk International Terminals in Norfolk, where he suffered carbon monoxide poisoning. Brown was engaged in moving loads from warehouse storage to containers for loading. The warehouse was 805 feet from the water.

In Harris v. Maritime Terminals, Inc., 1 BRBS 301 (1975), the claimant was a "hustler" driver at Norfolk International Terminals. Harris was injured when the brakes failed on the hustler he was operating. His job consisted of moving containers from the storage area to the container marshalling area adjacent to the pier. At the time of the injury, no ship was present at the pier.

[22] The Benefits Review Board was created by the 1972 amendments to sit as an appellate tribunal for claims brought under the LHWCA. 33 U.S.C. § 921(b) (Supp. V 1975). This task of reviewing decisions by administrative law judges, who sit as courts of the first instance, formerly belonged to the federal district courts. Decisions by the Board may be appealed directly to the Court of Appeals in the circuit where the injury occurred. *Id.* § 921(c). For an authoritative article by the chairperson of the Review Board discussing appellate procedure, see Washington, *Benefits Review Board's New Appellate Process Under the Longshoremen's Act,* 11 FORUM 686 (1976).

[23] 529 F.2d at 1083-84.

[24] *Id.* at 1084, 1087-88.

[25] Harris v. Maritime Terminals, Inc., 1 BRBS 301, 304 (1975); Brown v. Maritime Terminals, Inc., 1 BRBS 212, 214 (1974); Adkins v. I.T.O. Corp., 1 BRBS 199, 202 (1974).

[26] 529 F.2d at 1087-88. The court emphasized that the test would apply to some workers who never crossed the line into the sphere of navigable waters, but whose work took place wholly on land. This applies, however, only to those workers engaged in moving the cargo from its immediate point of rest alongside the ship to its initial place of storage. *Id.* at 1088. *See generally* Note, *Admiralty Law/Workmen's Comensation—On the Waterfront: The Fourth Circuit Draws the Line at the Point of Rest in a Narrow Interpretation of the LHWCA Amendments of 1972,* 54 N.C.L. REV. 925 (1976).

The Fourth Circuit's "point of rest" test[27] was derived primarily from the legislative history of the amendments.[28] The House Committee on Education and Labor[29] stated that the LHWCA was amended to provide uniform compensation for long-shoring "employees who would otherwise be covered by this Act for part of their activity."[30] This statement was illustrated by the example of an employee moving cargo from a ship to a storage area on the pier.[31] Under the 1927 Act, that employee would be covered only while aboard the ship or on the gangplank,[32] while the 1972 amendments would cover the longshoreman's activity on the adjoining pier as well.[33] Congress intended that longshoremen's compensation no longer should depend upon the "fortuitous circumstances of whether the injury occurred on land or over water."[34]

The Fourth Circuit interpreted the language of the congressional reports to indicate that LHWCA coverage extends only to the immediate process of loading and unloading a ship. The "point of rest" doctrine consequently was devised by the court as a test for determining LHWCA coverage of an injured longshoreman.[35] The doctrine is based on the presumption that cargo enters maritime commerce at the moment it is picked up from its last "point of rest" and loaded onto the ship. Similarly, cargo ceases to be in maritime commerce

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[27] The majority's analysis was labeled the "point of rest" test by the dissent. 529 F.2d at 1089 (Craven, J., dissenting).

[28] The House Committee on Education and Labor reported that the new situs test was necessitated by the increasing use of modern containerized cargo, resulting in more longshoring work on shore. For this reason, the definition of "navigable waters" was expanded to include piers, wharves, and other adjacent land areas. HOUSE REPORT, *supra* note 11, at 10, 4708. The report explained that coverage was *not* intended to extend to employees merely because they happened to be injured in the adjoining land area. The employees must be engaged in loading, unloading, repairing, or building a vessel to qualify for compensation. The worker who picks up cargo for overland transshipment was given as an example of an employee not covered. Clerical employees also were listed as employees unable to benefit from the Act. HOUSE REPORT, *supra* note 11, at 10,4708.

[29] The House and Senate Reports are virtually identical. *Compare* H.R. REP. No. 1441, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE, CONG. & AD. NEWS 4698 *with* S. REP. No. 1125, 92d Cong., 2d Sess. (1972).

[30] HOUSE REPORT, *supra* note 11, at 10,4708.

[31] *Id.*

[32] *See* Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969); O'Keeffe v. Atlantic Stevedoring Co., 354 F.2d 48 (5th Cir. 1965); O'Loughlin v. Parker, 163 F.2d 1011 (4th Cir. 1947).

[33] *See* note 17 *supra.*

[34] HOUSE REPORT, *supra* note 11, at 10,4708.

[35] 529 F.2d at 1088. *See* text accompanying note 26 *supra.*

when placed at its first point of rest after being removed from the ship.[36]

Judge Craven dissented from the majority's holding, and considered the majority's application of the 1972 amendments too constrictive.[37] He contended that the terms "longshoremen," "maritime employment," and "loading and unloading" have established meanings which obviate the need to look for further legislative guidance.[38] In particular, courts often have been called upon to construe "loading and unloading" in the context of tort actions against ship owners for injuries sustained in the ship's service.[39] Judge Craven argued that, in these cases, courts consistently have interpreted "loading and unloading" to include all employees engaged in the overall process of moving cargo between the waterfront and the ship.[40] Moreover, the dissent noted that the Fourth Circuit itself has followed this approach in similar cases.[41]

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[36] *See* 529 F.2d at 1095 (Craven, J., dissenting).

[37] *Id.* at 1094 (Craven, J., dissenting).

[38] *Id.* at 1097 (Craven, J., dissenting). Specifically, the dissent noted that "maritime employment" is intended to encompass all work done over navigable waters. "On the basis that there can be nothing more maritime than the sea, every employment on the sea or other *navigable water[s]* [*sic*] should be considered as maritime employment." 529 F.2d at 1090 n.2, *quoting* E. JHIRAD, 1A BENEDICT ON ADMIRALTY § 17 (7th ed. 1973, Supp. 1975) (emphasis in original). Judge Craven suggested that in view of the expanded concept of "navigable waters" in the 1972 amendments, *see* note 16 *supra*, the concept of "maritime employment" should be expanded correspondingly. 529 F.2d at 1090 n.2 (Craven, J., dissenting).

[39] 529 F.2d at 1097 (Craven, J., dissenting). The "loading and unloading" question arose in the context of unseaworthiness claims by longshoremen against shipowners. In Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963), the Supreme Court held that admiralty jurisdiction obtains when a shipowner commits a tort while the ship is being loaded or unloaded and the impact is felt ashore at a time and place not remote from the wrongful act. The claimant in that case was injured on shore when he slipped on loose beans that had spilled from defective cargo container bags. Holding that the cargo bags were an appurtenance of the ship, the Court concluded that jurisdiction could be predicated upon the Admiralty Extension Act, 46 U.S.C. § 740 (1970), and that the unseaworthiness doctrine could be invoked because claimant was in the process of loading or unloading the ship. 373 U.S. at 207, 209, 214-15.

[40] *See* Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); Chagois v. Lykes Bros. S.S. Co., 432 F.2d 388 (5th Cir. 1970); Spann v. Lauritzen, 344 F.2d 204 (3rd Cir. 1965); Thompson v. Calmar S.S. Corp., 331 F.2d 657 (3rd Cir. 1964); Olvera v. Michalos, 307 F. Supp. 9 (S.D. Tex. 1968).

[41] *See* Garrett v. Gutzeit, 491 F.2d 228 (4th Cir. 1974), where the claimant was injured by a defective bale of pulp paper while stacking recently unloaded bales in a pierside warehouse. In concluding that the plaintiff could invoke the seaworthiness warranty, the court noted:

> The [district] court apparently concluded that "unloading" ceases when the cargo is no longer in contact with the ship, i.e., when the

The dissent proposed four procedural reasons why the Review Board's decision should be affirmed. First, the remedial nature of the statute requires a liberal interpretation to assure that the congressional purpose of eliminating disparity in benefits is accomplished.[42] Second, the Act creates a presumption that a claimant will fall within the coverage of the Act absent substantial evidence to the contrary.[43] Third, the Supreme Court has held that great deference should be given to consistent construction of a statute by the agency charged with its enforcement.[44] Finally, Judge Craven argued that courts historically have confined themselves to a narrow scope of review of decisions under the LHWCA; accordingly, the Board's rulings should be conclusive unless the decision has no basis in law or fact.[45]

Judge Craven's dissent has received a great deal of attention from other circuits confronting the same issue of LHWCA coverage.[46] The First, Second, Third, and Fifth Circuits have rejected the "point of rest" theory and have established a "total process of loading and unloading" test consonant with the liberal remedial purposes of the 1972 amendments.[47] The circuit courts relied substantially on the

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> bales were deposited on the pier and discharged from the ship's gear. . . . [W]e believe that the case law rejects such a narrow definition of "unloading."
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> . . .In view of the obvious trend to fully develop the humanitarian purposes of the warranty of seaworthiness we find no reason to apply a hypertechnical definition to the terms loading and unloading.

Id. at 234-35.

[42] 529 F.2d at 1091 (Craven, J., dissenting). *See* note 28 *supra. See also* Reed v. The Yaka, 373 U.S. 410, 415 (1963); Voris v. Eikel, 346 U.S. 328, 334 (1953); Pillsbury v. United Eng'r. Co., 342 U.S. 197, 200 (1952).

[43] 529 F.2d at 1091 (Craven, J., dissenting); 33 U.S.C. § 920 (1970) provides in part: "In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—(a) That the claim comes within the provisions of this chapter." *See, e.g.*, African Overseas Constr. Co. v. McMullen, 500 F.2d 1291 (2d Cir. 1974); Friend v. Britton, 220 F.2d 820 (D.C. Cir.), *cert. denied*, 350 U.S. 836 (1955); Hartford Accident and Indem. Co. v. Cardillo, 112 F.2d 11 (D.C. Cir.), *cert. denied*, 310 U.S. 649 (1940).

[44] 529 F.2d at 1091 (Craven, J., dissenting); *see, e.g.*, NLRB v. Boeing, 412 U.S. 67, 75 (1973).

[45] 529 F.2d at 1093-94 (Craven, J., dissenting); *see, e.g.*, O'Loughlin v. Parker, 163 F.2d 1011 (4th Cir. 1947).

[46] *See* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 52 n.20, (2d Cir. 1976); Sea-Land Serv., Inc. v. Office of Workers' Compensation Programs, 540 F.2d 629, 638-39 (3rd Cir. 1976); Stockman v. John T. Clark & Son, 4 BRBS 304, 311 (1st Cir. 1976).

[47] After the Fourth Circuit's decision in *I.T.O.*, the Benefits Review Board rejected that court's narrow interpretation of maritime employment and continued to apply a

expressed legislative intent to provide uniform coverage of longshoremen whether working on vessels or in adjoining land areas.[48] In *Pittston Stevedoring Corp. v. Dellaventura,*[49] the Second Circuit held that the 1972 amendments extend LHWCA benefits to workers who meet the situs requirement and are engaged in stuffing or stripping containers[50] or generally handling cargo between a trans-shipment vehicle and the ship.[51] The case involved a claimant who slipped on ice while checking a container on the pier, and a claimant who was injured while loading cheese on a truck for trans-shipment. All of the arguments raised in Judge Craven's *I.T.O.* dissent were asserted before the Second Circuit in *Pittston.* The court rejected the

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test based on the total process of loading and unloading. In the weeks immediately following the Fourth Circuit's decision, the Board decided three cases with facts similar to those in *I.T.O.:* Perez v. United Terminals, Inc., 3 BRBS 368 (March 30, 1976); Cabera v. Maher Terminals, Inc., 3 BRBS 297 (March 10, 1976); Bradshaw v. J. A. McCarthy, Inc., 3 BRBA 195 (Jan. 26, 1976). In *Bradshaw,* the Board indicated that it was

> well aware of the restrictive interpretation given the status requirement by the Fourth Circuit Court of Appeals. . . . However, we are of the opinion that our interpretation with regard to coverage is more in keeping with the amended statute and the legislative history, and we will continue to follow the line of reasoning developed in previous decisions. . . .

3 BRBS at 198.

See also Toomer v. Machinery Rental, 3 BRBS 220 (ALJ) (Jan. 28, 1976); Fanelli v. Universal Terminal and Stevedoring Corp., 3 BRBS (ALJ) (Jan. 16, 1976).

[48] Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 540 n.21 (5th Cir. 1976); Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 54 (2d Cir. 1976); Sea-Land Serv., Inc. v. Office of Workers' Compensation Programs, 540 F.2d 629, 637 (3rd Cir. 1976); Stockman v. John T. Clark & Son, 4 BRBS 304, 320 (1st Cir. 1976).

[49] 544 F.2d 35 (2d Cir. 1976), *petition for cert. filed sub nom.,* Northeast Maritime Terminal Co. v. Caputo, 45 U.S.L.W. 3256 (U.S. Sept. 27, 1976) (No. 76-444), International Terminal Operating Co. v. Blundo, 45 U.S.L.W. 3256 (U.S. Sept. 28, 1976) (No. 76-454).

[50] Container stuffers and strippers are workers who load goods into, and unload goods from containers.

[51] Upon analyzing congressional committee reports to determine the purpose of the 1972 amendments, the Second Circuit arrived at two conclusions. First, Congress was concerned that modern containerization and LASH-type vessels (LASH vessels transport pre-"stuffed" lighters rather than containers) have required the movement of an increasing number of traditional longshoring jobs ashore. 544 F.2d at 53. Second, Congress intended to provide uniform coverage for persons engaged in loading or unloading functions on piers. *Id.* at 54. The court found that these conclusions indicated congressional intent to extend the Act's coverage to workers stuffing or stripping containers, and to workers handling cargo within adjoining land areas. The court noted that coverage for the latter category of workers might be conditioned upon a showing that the employee has spent a significant portion of his time working aboard vessels. However, the court reserved decision on this point for a later date. *Id.* at 56.

"deference" argument, the "presumption" argument, and the arguments based on definitions of terms, such as "loading and unloading," as defined in other contexts. The court chose to rely on congressional intent and the principle of liberal construction of remedial legislation.[52] Thus, the *Pittston* court permitted LHWCA coverage of claimants who would have been denied recovery under the Fourth Circuit test. The Second Circuit rejected the "point of rest" test as incongruent with the legislative purpose of providing uniform coverage to longshoremen.[53]

Uniformity of coverage likewise was emphasized by the Third Circuit in *Sea-Land Services, Inc. v. Office of Workers' Compensation Programs.*[54] In *Sea-Land,* the Third Circuit held that a truck driver, injured when his truck turned over on a public road, was covered by the LHWCA if he was merely transporting ship's cargo from one point of the sprawling Port Elizabeth to another.[55] The case was remanded for additional findings of fact to determine what type of freight, if any, was on the truck at the time of the accident.[56] Nevertheless, the court rejected the "point of rest" doctrine of *I.T.O.* and championed the dissenting opinion of Judge Craven.[57]

Similarly, in the First Circuit case of *Stockman v. John T. Clark & Son,*[58] the "point of rest" analysis was discarded in favor of the Second Circuit's *Pittston* approach. The First Circuit held that the claimant, injured while stripping a container, was a maritime employee within the meaning of the Act, and therefore entitled to

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[52] *Id.* at 48-51, *see* text accompanying notes 42-45 *supra.*

[53] *Id.* at 52.

[54] 540 F.2d 629 (3rd Cir. 1976).

[55] *Id.* at 639.

[56] *Id.* at 639-40.

[57] The Third Circuit, like the Second, relied substantially on the expressed legislative intent to provide uniform coverage of longshoremen whether working on vessels or in adjoining land areas. The court held that location of an employee injury at some point remote from the pier is immaterial as long as the employee is engaged in moving cargo within the terminal. *Id.* at 639. In rejecting the "point of rest" analysis, the Third Circuit cited the dissent in *I.T.O.* for language encouraging adoption of a total process of loading and unloading test. By this analysis, longshoring is viewed as an uninterrupted process which continues at all times while the cargo is in maritime commerce as distinguished from land commerce. *Id.* Accordingly, the Third Circuit drew the line of coverage at the point where cargo passes between an employer engaged in maritime commerce and an employer engaged in land commerce. At this point, the court reasoned, the functional relationship of the employee's activity to maritime transportation becomes clear. Thus, the parameters for LHWCA coverage should be drawn "where cargo is delivered to a segregated place for delivery to the next mode of transportation." *Id.*

[58] 4 BRBS 304 (1st Cir. 1976).

LHWCA benefits.[59] As in *Pittston*,[60] the arguments made by Judge Craven in his *I.T.O.* dissent were presented before the *Stockman* court. The First Circuit remained unmoved by the "presumption," "deference," and definition of terms arguments,[61] but like the Second Circuit, proceeded to find LHWCA coverage on the basis of legislative intent to provide uniformity of coverage.[62]

The Fifth Circuit also considered congressional intent in *Jacksonville Shipyards, Inc. v. Perdue*.[63] The Fifth Circuit, however, did not emphasize the notion of uniform coverage.[64] Rather, the court relied on other language in the House Report to hold that an injured worker is covered if engaged in or "directly involved" in loading, unloading, repairing, breaking, or building a vessel.[65] The "point of rest" doctrine was rejected in the absence of explicit language creating such a restrictive application of a remedial statute. Instead, the court applied the general rule that remedial statutes should be liberally construed.[66] The Fifth Circuit's liberal application of its "direct

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[59] 4 BRBS at 321-22.

[60] *See* note 51 *supra*.

[61] *See* text accompanying notes 42-45, 51 *supra*.

[62] 4 BRBS at 320; *see* 529 F.2d at 1095, 1097.

[63] 539 F.2d 533 (5th Cir. 1976), *petition for cert. filed sub nom.* P. C. Pfeiffer Co. v. Ford, 45 U.S.L.W. 3364 (U.S. Nov. 8, 1976) (76-641). Five cases were combined on appeal from the Benefits Review Board award of compensation to all of the plaintiffs below. The Fifth Circuit affirmed the awards to three of the plaintiffs: an employee injured while securing to a flatcar a vehicle which had been moved from the ship to a storage area before being taken to the flatcar, P. C. Pfeiffer Co. v. Ford, No. 75-2289, 539 F.2d at 543; an employee injured in a fabrication shop while building a piece of woodwork that was to be installed in a new ship, Halter Marine Fabricators, Inc. v. Nulty, No. 75-2317, *id.* at 543; and an employee, a "cotton header," who was injured while unloading bales of cotton from dray wagons and stacking them in a pierside warehouse, Ayers S.S. Co. v. Bryant, No. 75-4112, *id.* at 544. The court reversed the awards to: a worker injured while going to "punch out" on his employer's time clock at the end of the work day at a location removed from the waterfront, Jacksonville Shipyards, Inc. v. Perdue, No. 75-1659, *id.* at 541; and an employee injured while tearing down a building at an unused marine facility, Jacksonville Shipyards, Inc. v. Skipper, No. 75-2833, *id.* at 542.

[64] *Id.* at 541 n.21.

[65] *Id.* at 539-40. The court considered committee report language concerning examples of employees not covered by the Act:

> Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are *directly involved* in the loading or unloading function are covered by the new amendment.

HOUSE REPORT, note 11 *supra*, at 11,4708 (emphasis added).

[66] In rejecting the "point of rest" approach, the Fifth Circuit relied on the intent

involvement" test obtains results comparable to the "overall process" test as applied by the Benefits Review Board and the other circuits.[67] In both instances coverage is extended to workers handling cargo in intra-terminal movement up to the point of overland trans-shipment.[68] Thus, the *Jacksonville* decision also rejected the *I.T.O.* "point of rest" analysis.

The Fourth Circuit reconsidered its original *I.T.O.* decision upon rehearing en banc.[69] A divided court briefly considered the issue of LHWCA coverage[70] and reversed its earlier decision.[71] A test devised

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to provide uniform coverage for longshoremen in addition to the rule that remedial statutes are to be liberally construed. 539 F.2d at 541 n.21; *see also* Voris v. Eikel, 346 U.S. 328 (1953).

[67] *See* text accompanying notes 47-48 *supra.*

[68] The Fifth Circuit applied its "direct involvement" analysis to plaintiff Ford, *see* text accompanying note 65 *supra,* who was engaged in securing vehicles to flatcars in preparation for their trans-shipment. The vehicles had previously been unloaded from a ship and taken to a storage area, where they had remained for several days before being loaded onto the flatcars. The court held that Ford was directly involved in the process of moving maritime cargo from a ship to land transportation. 539 F.2d at 543.

[69] 542 F.2d 903 (4th Cir. 1976).

[70] Upon rehearing, the Fourth Circuit also considered whether the Director of the Office of Workers' Compensation Programs [OWCP] should be named as a respondent in appeals of Benefits Review Board decisions. In the original *I.T.O.* case, the Benefits Review Board was named as a respondent along with the injured claimant Adkins. The Board moved to be dismissed from the proceedings and further moved that the Director of OWCP be substituted as respondent. 529 F.2d at 1088. The switch would be nominal only, for the Review Board, as an arm of the Department of Labor, 33 U.S.C. § 921 (Supp. V 1975), is represented by the Solicitor of Labor, who also represents the Director of OWCP. *See* Washington, *Benefits Review Board's New Appellate Process Under the Longshoremen's Act,* 11 FORUM 686, 695 (1976). Despite the actual inconsequential effects of replacing the Board by the Director, the Board prefers not to be a party because of the conceptual difficulties resulting. Requiring the Board to appear as a party is analogous to requiring a district court to appear and defend its decisions on appeal. *Id.* at 694, *quoting* McCord v. Benefits Review Bd., 514 F.2d 198, 200 (D.C. Cir. 1975).

The Fourth Circuit granted the Board's motion to be dismissed, but denied the motion to substitute the Director of OWCP as respondent. 529 F.2d at 1084. In dismissing the Board, the court relied on McCord v. Benefits Review Bd., 514 F.2d 198 (D.C. Cir. 1975). The District of Columbia Circuit had held in *McCord* that the statute creating the Board, 33 U.S.C. § 921 (Supp. V 1975), did not compel the Board to be a party in appeals. Moreover, the *McCord* court held that sufficient adversity existed between the employer and employee to insure proper litigation without the Board's participation. 514 F.2d at 200. The Fourth Circuit considered this reasoning equally applicable to the Director of OWCP, and refused to allow his substitution as respondent on this basis. 529 F.2d at 1089.

In the *I.T.O.* rehearing, the Fourth Circuit affirmed its earlier decision that the Director is not a necessary respondent in LHWCA appeals. 542 F.2d at 906. The court pointed out that the Review Board is not like other administrative agencies in that the

by Judge Widener emerged as the basis for reversal without explicit approval by a majority of the court. The test is based on the principle expressed in the original *I.T.O.* decision, but is augmented by a revised "point of rest."[72] The earlier *I.T.O.* holding placed the crucial "point of rest" at the cargo's first storage point after being unloaded from the ship.[73] The new test moves the "point of rest" landward to the cargo's last storage point before trans-shipment overland.[74] This revision expands LHWCA coverage to include container stuffers and strippers,[75] as well as other handlers of cargo in intra-terminal movement.[76] The court, however, implied that only cargo movement which is an essential step in the overall loading or unloading process would

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Act creating the Board does not on its face make the Director a respondent on appeals. *Id.* at 906-07. Moreover, the court determined that the LHWCA is not analogous to other agency-creating statutes because the Act provides for adjudication of claims between two private parties, not between one private party and the government. *Id.* at 907 n.4. Hence, the adversity that exists between a claimant and the Federal Communications Commission, or a claimant and the Federal Power Commission, is not present here. *Id. But see* Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 42 n.5 (2d Cir. 1976).

Having determined that the Director has no statutory right to be a party to a BRB appeal, the court considered alternatively if he had been "adversely affected or aggrieved by a final order of the Board" within the meaning of § 921(c). 542 F.2d at 907. The en banc court decided that the Director did not have the requisite stake in the proceedings to be considered adversely affected or aggrieved. *Id.* at 908. *But see* Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 546 (5th Cir. 1976). Although the Fourth Circuit refused to consider the Director a necessary party, both *I.T.O.* decisions made clear that the Director may intervene in such cases and that the application for intervention ordinarily will be granted. *Id.* at 909.

[71] *Id.* at 905. Upon rehearing en banc, Judges Russell, Winter, and Haynesworth subscribed to the majority opinion in the earlier *I.T.O.* decision, while Judges Craven and Butzner dissented. Judge Widener divided his vote between the two sides. Judge Widener voted with the dissent in regard to plaintiffs Harris and Brown, *see* note 21 *supra,* which resulted in an evenly divided bench. Thus, the earlier Fourth Circuit reversal of the *Harris* and *Brown* holdings by the Benefits Review Board was replaced by an affirmative judgment. However, Judge Widener sided with the majority on the *Adkins* case, which effected its reversal. Consequently, Judge Widener's test was decisive. Unfortunately, the court did not explain the test in detail, and Judge Widener did not write a separate opinion.

[72] 542 F.2d at 905.

[73] 529 F.2d at 1088.

[74] The court explained that under the new test, coverage ends at the last point where the cargo is stored within the terminal before being placed directly into an overland carrier. 542 F.2d at 905. Thus, a worker moving cargo from a storage place in the terminal onto a truck for land shipment is not covered. *Id.* Likewise, a worker engaged in unloading an overland carrier would not be covered. *Id.*

[75] *Id.*

[76] *Id.*

be covered by the Act.[77] Consequently, under the Fourth Circuit en banc decision, the LHWCA covers any injuries which occur during necessary intra-terminal movement of cargo between the ship and the point of storage immediately preceding or following overland transport.[78]

The court's cursory treatment of Judge Widener's test renders analysis of the holding difficult. However, the *I.T.O.* revised standard of coverage appears more comparable to the interpretations of LHWCA coverage by other circuits than the original "point of rest" standard. The Second Circuit in *Pittston* held that all intra-terminal movement of cargo, including stripping or stuffing containers, between the ship and the overland trans-shipment vehicle, is within the Act's coverage.[79] In *Sea-Land,* the Third Circuit held that the boundary of coverage should be placed where the cargo is delivered to a segregated location for transfer to the next mode of transportation.[80] The First Circuit's decision in *Stockman,* based primarily on *Pittston,*[81] specifically determined that container stuffers are covered by the LHWCA even if never required to work aboard a vessel.[82] Finally, the Fifth Circuit held in *Jacksonville* that workers "directly involved" in loading or unloading are eligible for compensation even if injured while loading goods onto an overland shipment vehicle.[83]

All of the courts seem to agree that coverage should extend to employees handling cargo up to the point where the cargo begins its movement in overland commerce. However, the circuits do not agree on the precise point where coverage begins or ceases. The Fourth Circuit draws the line where the cargo is in its last resting place in the terminal. Further movement into the trans-shipment vehicle is not part of maritime commerce and hence does not involve maritime employment.[84] However, the Second Circuit held that any handling

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[77] In discussing the application of the Act to plaintiff Harris, *see* note 21 *supra,* the court stated: "The goods were being moved solely for loading purposes, *not for mere convenience,* and therefore . . . Harris . . . was engaged in the overall process of loading the ship." 542 F.2d at 905 (emphasis added).

[78] *Id.*

[79] 544 F.2d at 56.

[80] 540 F.2d at 639.

[81] 4 BRBS at 321-24.

[82] *Id.* at 324.

[83] 542 F.2d at 905.

[84] Pittston Stevedoring Corp. v. Dellaventura, 544 F.2d 35, 56 (2d Cir. 1976). The Second Circuit stated that a worker engaged in handling cargo in circumstances such as loading goods onto a mode of land transport, comes within the coverage of the amended Act, provided he has spent "a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel." *Id.* However, the court indicated

of cargo, including loading the trans-shipment vehicle, which occurs prior to the actual movement of the vehicle from the terminal, constitutes maritime employment.[85] Similarily, the Fifth Circuit held that an employee injured on a railroad car while loading cargo for transshipment was engaged in maritime employment.[86] The Third Circuit did not consider this specific issue, but the court's language stating that the coverage line should be set "where cargo is delivered to a segregated place for delivery to the next mode of transportation"[87] indicates that the court may agree with the Fourth Circuit's recovery line. The Fourth Circuit's *I.T.O.* decision upon rehearing served to expand the court's earlier restrictive interpretation of LHWCA coverage. This result was a substantial step toward bringing the Fourth Circuit within the growing consensus among the circuits establishing appropriate coverage standards for the 1972 LHWCA amendments.

A different aspect of the 1972 amendments was at issue in *Norfolk, B. & C. Lines v. Office of Workers' Compensation Programs.*[88] The 1972 amendments substantially increased death benefits[89] and liberalized the requirements for eligibility to recover

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that the proviso was not essential to the *Pittston* holding, and reserved decision on the question for another time. *Id.*

[85] Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533, 543 (5th Cir. 1976).

[86] Sea-Land Serv., Inc. v. Office of Workers' Compensation Programs, 540 F.2d 624, 639 (3d Cir. 1976).

[87] 539 F.2d 378 (4th Cir. 1976), *cert. denied,* 45 U.S.L.W. 3503 (U.S. Jan. 25, 1977) (76-658).

[88] 33 U.S.C. § 906(d) (Supp. V 1975). Under the former provisions, a widow could receive weekly compensation at a maximum rate of only 35% of the decedent's average wages, and children were limited to 15% of the average wages. The funeral expense allowance was $400. 33 U.S.C. § 909 (1970). The 1972 amendments increased these benefits to 50% for the widow, 16 2/3% for the children, and a funeral expense allowance of $1000. *Id.* at § 909 (Supp. V 1975). The standard for computing these percentages, the decedent's average weekly wage, was not disturbed by the amendments. However, the maximum weekly amount receivable was changed from the arbitrary $70 ceiling to a floating ceiling based upon the "national average weekly wage." *Id.* This figure is to be determined annually by the Secretary of Labor based upon wage schedules throughout the country. 33 U.S.C. § 906(b)(3) (Supp. V 1975). The maximum benefit to be permitted longshoremen is 200% of this fluctuating figure. *Id.* § 901(b)(1)(d) (Supp. V 1975). *See generally* Doak & Hecker, *Is It a New Ball Game?—The 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act,* 11 FORUM 544 (1976); Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments,* 6 J. MARITIME L. & COM. 1 (1974); Note, *Maritime Jurisdiction and Longshoremen's Remedies,* 1973 WASH. U.L.Q. 649; Note, *Admiralty—Maritime Personal Injury and Death—Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972,* 47 TUL. L. REV. 1151 (1973); HOUSE REPORT, *supra* note 11, at 2-4, 4700-01.

those benefits under the Act.[90] The amendments have facilitated the compensation of survivors of an employee who has become permanently and totally disabled from a work-related injury, even if the employee dies from causes wholly unrelated to his injury.[91] Prior to the amendments, survivors of a permanently and totally disabled employee could recover death benefits only if he died as a result of his work-related injuries.[92] In *Norfolk, B. & C. Lines,* the Fourth Circuit considered the constitutionality of the amended death benefits provisions, and the admiralty jurisdictional propriety of extending benefits upon death "by other causes."

Plaintiffs in *Norfolk, B. & C. Lines* were the survivors of Lee Rouse, a longshoreman injured in the course of his employment. In 1969, Rouse was declared permanently and totally disabled because of the work-related injury. While still disabled, he died in 1974 from non-injury-related causes. His survivors brought suit to collect death benefits as provided by the LHWCA,[93] and received favorable judgments from the administrative law judge and the Benefits Review Board.[94] On appeal, the Fourth Circuit affirmed the Review Board decision.[95]

The Fourth Circuit rejected the defendant's contention that the award of death benefits was an unconstitutional denial of due process and an impairment of contract obligations.[96] Rouse's employer pointed out that the 1972 LHWCA amendments had been applied retrospectively, since Rouse had been injured and declared disabled before enactment of the amendments.[97] However, the Fourth Circuit determined that although retrospective statutes are not favored, such

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[90] Prior to 1972, the LHWCA provided death benefits only in cases in which a work-related injury caused the death. 33 U.S.C. § 909 (1970). However, the statute as amended provides: "If the injury causes death, *or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury,* the compensation shall be known as a death benefit." *Id.* § 909 (Supp. V 1975) (emphasis added).

[91] *Id.*

[92] 33 U.S.C. § 909 (1970), *see* note 90 *supra.*

[93] 539 F.2d at 379.

[94] 2 BRBS 11 (1975), *see* note 22 *supra.*

[95] 539 F.2d at 381.

[96] *Id.* at 380. The impairment of contracts argument was based on the contract between the employer and his insurance carrier. A contract made prior to the amendments would be based on a statutory scheme quite different from that created by the amendment. The resulting changes dramatically increase the number of cases in which the insurance company is obligated to pay as well as the amount to be paid in each instance. *See* Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments,* 6 J. MARITIME L. & COM. 1, 29 n.142 (1974).

[97] 539 F.2d at 380.

statutes are not per se unconstitutional.[98] The court relied on *Stephens v. Cherokee Nation*[99] in which the Supreme Court held that "the mere fact that the legislation is retroactive does not necessarily render it void."[100] Thus the bare claim of retroactivity in *Norfolk, B. & C. Lines* was held to be lacking merit, and the court never considered whether the statute on its face is retrospective.[101] The Fourth Circuit also rejected Norfolk's claim that its contract obligations had been impaired. The court explained that this constitutional proscrip-

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[98] *Id.*

[99] 174 U.S. 445 (1899). The statute at issue in *Stephens* provided a right to appeal decisions from the United States Court for the Indian Territory to the Supreme Court. Indian Territory Court decisions previously had been final. After the effective date of the statute, claimants appealed Indian Territory Court decisions which had been handed down prior to the statute's effective date, and which had been final under the former law. The Supreme Court held that the legislation's retroactivity did not render it void. *Id.* at 478. *See also* Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949); Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945).

[100] 174 U.S. at 478. *See* note 99 *supra.*

[101] The retroactivity of the 1972 Amendments however, was considered by the Second Circuit in American Stevedores, Inc. v. Salzano, 538 F.2d 933 (2d Cir. 1976). One of the issues raised in that case was whether the provision in the amendments providing for an increase in compensation due employees permanently and totally disabled before 1972, 33 U.S.C. § 910(h) (Supp. V 1975), was unconstitutional as a retrospective application of law. The Second Circuit determined that the constitutionality of retrospective provisions in workmen's compensation statutes is well established. 538 F.2d at 937. Accordingly, the court found meritless the defendant's claim that the 1972 LHWCA amendments are unconstitutional because of retrospective applicability. 538 F.2d at 937.

The Fifth Circuit confronted the same issue in Landrum v. Air America, Inc., 534 F.2d 67 (5th Cir. 1976). The plaintiff, rather than the defendant, raised the retroactivity question in *Landrum* because the plaintiff's average weekly wage was substantially above the national average weekly wage used as a maximum benefits standard in the amendments. *See* note 89 *supra.* Nevertheless, the court ruled that the amendments were intended to be retrospective and to apply to all pre-amendment injuries. 534 F.2d at 70-71.

In Morris v. Joseph F. Nebel, Co., 4 BRBS 143 (1976), the Benefits Review Board considered whether a death benefits award upon death by other causes was an invalid application of § 909 without express congressional intent. Under factual circumstances similar to those in *Norfolk,* the Board held that an award was a prospective rather than retrospective application of the statute since the conferred benefit is a right which accrued subsequent to the effective date of the amendments. 4 BRBS at 145. The Board held that a claim for death benefits is a cause of action belonging to survivors which arises at the disabled employee's death and is distinct from the injured employee's own prior claim for disability compensation. *Id. Cf.* National Independent Coal Operator's Ass'n v. Brennan, 372 F. Supp. 16 (D.D.C.), *aff'd mem.,* 419 U.S. 955 (1974) (retroactive operation of Federal Coal Mine Health and Safety Act held constitutional).

tion[102] applies only to states,[103] and therefore is no bar to federal action.[104] Similarly, the court held Norfolk's assertion that the amendments impose responsibilities without due process was without merit.[105] The Supreme Court decision in *Fleming v. Rhodes*[106] provided the Fourth Circuit with authority for this position. In *Fleming*, the Supreme Court held that Congress could pass regulatory legislation which might encroach on contractual rights of parties arising prior to the legislation. The Court stated that "[i]mmunity from federal regulation is not gained through forehanded contracts."[107] The Fourth Circuit concluded on this basis that the LHWCA amendments are not "an ordaining by Congress of a responsibility without due process."[108]

Finally,[109] appellant in *Norfolk, B. & C. Lines* challenged the jurisdictional propriety of a suit in admiralty based on claims for benefits upon "death by other causes."[110] Appellant urged that Congress exceeded the constitutional grant of admiralty jurisdiction[111] by extend-

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[102] U.S. CONST. art. I, § 10[1] provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."

[103] 539 F.2d at 381. The rule that the impairment of contract obligation clause applies only to states is well settled. *See* Continental Illinois Nat'l Bank & T. Co. v. Chicago, R.I. & P.R.R., 294 U.S. 648 (1935); Norman v. Baltimore & O. Ry., 294 U.S. 240 (1935); W. B. Worthen Co. v. Thomas, 292 U.S. 426 (1934); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[104] In *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871), the Supreme Court rejected the argument that Congress could not pass legislation which may have the indirect effect of impairing contract obligations. The Court held that no obligation of a contract can interfere with the exercise of legitimate governmental authority, and that contracts must be understood to be subject to the possible exercise of such authority. *Id.* at 549. *See also* Continental Illinois Nat'l Bank & T. Co. v. Chicago, R.I. & P.R.R., 294 U.S. 648 (1935).

[105] 539 F.2d at 381.

[106] 331 U.S. 100 (1947).

[107] *Id.* at 107. *See also* FHA v. The Darlington, Inc., 358 U.S. 84 (1958).

[108] 539 F.2d at 381.

[109] In addition to the constitutional arguments, Norfolk, B. & C. Lines asserted that the LHWCA amendments contain so many inconsistencies and conflicting provisions that application of the amendments is impracticable. *Id.* at 380. The court responded that in spite of possible inconsistencies, the purpose of the amendments is clear: "to enlarge the recompense provided to the survivors of a longshoreman dying after suffering a permanent and total disability." *Id.* The court relied on Lawson v. Suwanee Fruit & S.S. Co., 336 U.S. 198 (1949). In that case, the Supreme Court interpreted the unamended LHWCA and stated that statutory definitions of words should not be applied where incongruity results and the major purpose of the statute is thwarted. *Id.* at 201.

[110] 33 U.S.C. § 909 (Supp. V 1975); *see* note 90 *supra.*

[111] Article Three of the Constitution contains the general grant of admiralty jurisdiction to the federal courts: "The Judicial Power Shall Extend . . . to all Cases of

ing LHWCA death benefits to deaths unrelated to maritime employment.[112] The Fourth Circuit, however, decided that the Act's basic purpose of providing compensation to injured longshoremen and their families is maritime in nature,[113] and that the amended benefits provision at issue was designed to promote the LHWCA's purpose.[114] The court suggested that the permanent and total disablement of an employee while engaged in longshoring activities was a sufficiently strong maritime nexus to remain effective until his death.[115] In addition, the court pointed out that the Act's purpose to aid the families of injured longshoremen is furthered by the procedural assistance afforded by the amendments.[116] Since LHWCA benefits are now available to survivors of permanently and totally disabled longshore-

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Admiralty and Maritime Jurisdiction." U.S. CONST. art. III, § 2[1]. Article Three has been held to confer three grants of maritime adjudicative power. Congress is empowered to give lower federal courts maritime jurisdiction; federal courts impliedly are empowered to apply substantive law inherent in admiralty and maritime jurisdiction; and Congress impliedly is empowered to supplement or revise substantive maritime law. Romero v. International Terminal Operating Co., 358 U.S. 354, 360 (1959).

Appellant in *Norfolk, B. & C. Lines* apparently argued that the words "admiralty" and "maritime" as used in the Constitution were not intended to encompass occurrences unrelated to navigable waters or maritime activity. Specifically, appellant contended that through broadening admiralty jurisdiction to include actions for death benefits where the death was unrelated to maritime activity, Congress has given federal courts jurisdiction without any constitutional basis. Rouse v. Norfolk, B. & C. Lines, 2 BRBS 11, 16 (1975). *See* Victory Carriers, Inc. v. Law, 404 U.S. 202, 212 (1971); *Cf.* Healy v. Ratta, 292 U.S. 263, 270 (1934) (powers reserved to the States under the Constitution to adjudicate controversies in their courts may be restricted only by congressional action in conformity with the judiciary sections of the Constitution). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 1-9 (2d ed. 1975); 7A MOORE'S FEDERAL PRACTICE § .200[2] (2d ed. 1976).

[112] Admiralty tort jurisdiction now depends on establishing a significant relationship between a tort and a traditional maritime activity. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 268 (1972). The tort must have occurred over navigable waters and must be significantly related to traditional maritime navigation and commerce. *Id. See also* Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972); Gowdy v. United States, 412 F.2d 525 (6th Cir. 1969); Smith v. Guerrant, 290 F. Supp. 111 (S.D. Tex. 1968); McGuire v. New York, 192 F. Supp. 866 (S.D.N.Y. 1961). *See generally* Birdwell & Whitten, *Admiralty Jurisdiction: The Outlook for the Doctrine of* Executive Jet, 1974 DUKE L.J. 757; Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard,* 34 WASH. & LEE L. REV. 121 (1977); Note, *Admiralty Jurisdiction: Executive Jet in Historical Perspective,* 34 OHIO ST. L.J. 355 (1973).

[113] The Fourth Circuit indicated that the purpose of § 909 is "to assure indemnification of survivors of the inshore maritime worker who had become utterly disabled in his work for the rest of his life." 539 F.2d at 380.

[114] *Id.*

[115] *Id.; see* note 112 *supra.*

[116] *Id.* at 381.

men who die from non-injury-related causes, survivors no longer must prove that the disabling injury was the proximate cause of death.[117]

No other circuit has considered the jurisdictional issue of whether a claim for benefits upon death by other causes is appropriate to admiralty courts. However, the Benefits Review Board has considered this question several times[118] and consistently has held that a sufficient maritime nexus exists to assure the constitutionality of the provision. In *Norfolk, B. & B. Lines,*[119] the Review Board upheld the validity of the death benefits provisions on the basis of the Supreme Court decision in *Detroit Trust Co. v. The Thomas Barlum.*[120] In that case, the Supreme Court held that Congress may constitutionally create new causes of action in admiralty provided a "maritime" relationship exists, as "maritime" is defined by current usage.[121] Applying this reasoning to *Norfolk, B. & C. Lines,* the Review Board found that Congress had not exceeded its power in providing death benefits to survivors of a former maritime employee.[122]

The Fourth Circuit's decision in *Norfolk, B. & C. Lines* provides an important step toward establishing the constitutionality of the 1972 LHWCA amendments. The Fourth Circuit not only held that the amendments' retrospective nature does not render them void,[123] but also upheld the "death by other causes" provision. In so doing, the court held that the provision was sufficiently maritime-related to fall within the general constitutional grant of admiralty jurisdiction. This decision provides the Review Board with judicial precedent for the constitutionality of the "death by other causes" provision, which promotes the liberal remedy intended by Congress.[124]

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[117] *Id. Compare* 33 U.S.C. § 909 (Supp. V 1975), *with* 5 U.S.C. § 8102 (1970) (the compensation statute covering government employees, which allows recovery of death benefits only upon a showing that death was caused by an injury sustained in the course of employment.)

[118] Witthuhn v. Todd Shipyards Corp., 3 BRBS 146 (1976); Morris v. Joseph F. Nebel Co., 4 BRBS 143 (1976); Pesce v. Guardino & Sons, 4 BRBS 36 (1976).

[119] 2 BRBS 11 (1975).

[120] 293 U.S. 21 (1934).

[121] *The Thomas Barlum* involved the constitutionality of the Ship Mortgage Act, 46 U.S.C. § 953 (1970). The Court held that the framers of the Constitution did not intend that the concept of maritime law would remain unalterable. Rather, Congress has the power to alter the extent of maritime law as changing conditions require. 293 U.S. at 42. *See also* Panama Ry. v. Johnson, 264 U.S. 375 (1924).

[122] 2 BRBS 11, 16 (1975).

[123] In holding that the amendment's retrospective nature did not render it void, the Fourth Circuit concurred with the Second and Fifth Circuits. *See* note 101 *supra.*

[124] *See generally* HOUSE REPORT, *supra* note 11.

B. Bridgeworkers as "Seamen" under the Jones Act.

The Jones Act[1] is designed to provide compensation for seamen who are injured in the course of their employment.[2] Since the Act's coverage extends only to seamen,[3] much litigation has focused upon the definition of "seaman" as used in the Act.[4] In determining who is a seaman, courts have looked to traditional considerations of a claimant's status as a member of a vessel's crew,[5] the nature of his duties, and his relationship to the vessel and its navigation.[6] The Act clearly applies to conventional shipboard seamen, but courts have

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[1] 46 U.S.C. § 688 (1970). The sections of the Merchant Marine Act of 1920 still in force are found at 46 U.S.C. §§ 861-89, except for the most famous section of the Act, § 688. Actually the entire Merchant Marine Act is named the Jones Act for Senator Wesley L. Jones of Washington.

[2] Cox v. Roth, 348 U.S. 207 (1955); The Arizona v. Anelich, 298 U.S. 110 (1936); Warner v. Goltra, 293 U.S. 155 (1934).

[3] The statute provides: "Any seaman who shall suffer personal injury in the course of his employment may . . . maintain an action for damages." 46 U.S.C. § 688 (1970). *See generally* Desper v. Starved Rock Ferry Co., 342 U.S. 187 (1952); Mietla v. Warner Co., 387 F. Supp. 937 (E.D. Pa. 1975); *see also* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY §§ 6-20 to 6-21 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

[4] *E.g.*, United Pilots Ass'n v. Halecki, 358 U.S. 613 (1959); Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957); Lewis v. Roland E. Trego & Sons, 501 F.2d 372 (4th Cir. 1974); Noack v. American S.S. Co., 491 F.2d 937 (6th Cir. 1974); Garcia v. The Queen, Ltd., 487 F.2d 625 (5th Cir. 1973); Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966).

[5] The traditional "seaman" requirements of crew member status and a relationship to navigation were expressed by the Supreme Court in Swanson v. Marra Bros., 328 U.S. 1, 4 (1946). The terms "seaman" and "member of the crew" have become synonymous because of the use of one term in the Jones Act and the other in the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-50 (Supp. V 1975), to describe the same type of employee. *See* Brown v. ITT Rayonier, Inc., 497 F.2d 234, 236 (5th Cir. 1974); Mietla v. Warner Co., 387 F. Supp. 937 (E.D. Pa. 1975).

[6] Courts have held that the vessel should be in navigation, that the employee should be aboard primarily to aid in navigation, and that a somewhat permanent connection should exist between the employee and the vessel. Noack v. American S.S. Co., 491 F.2d 937, 938-39 (6th Cir. 1974); Garcia v. The Queen, Ltd., 487 F.2d 625, 628 n.6 (5th Cir. 1973); Nelson v. Green Line Steamers, Inc., 255 F.2d 31 (6th Cir. 1958), *cert. denied*, 358 U.S. 867 (1959); Bellomy v. Union Concrete Pipe Co., 297 F. Supp. 261, 264 (S.D. W.Va. 1969), *aff'd per curiam*, 420 F.2d 1382 (4th Cir.), *cert. denied*, 400 U.S. 904 (1970); Hill v. Diamond, 203 F. Supp. 877 (E.D. Va.), *aff'd*, 311 F.2d 789 (4th Cir. 1962).

The term "navigation" has been construed broadly, both with regard to a vessel in navigation, Senko v. LaCrosse Dredging Corp., 352 U.S. 370 (1957); Rogers v. United States, 452 F.2d 1149 (5th Cir. 1971); and as to the employee's duties, Lewis v. Roland E. Trego and Sons, 501 F.2d 372 (4th Cir. 1974); Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir. 1953); Early v. American Dredging Co., 101 F. Supp. 393 (E.D. Pa. 1951).

encountered difficulty when applying the Act to barge workers or construction workers who occasionally work on board barges.[7]

In *Whittington v. Sewer Construction Co.*,[8] a bridgeworker injured while engaged in bridge demolition, brought suit under the Jones Act to recover compensation for his injuries.[9] The Fourth Circuit held that the bridgeworker did not possess seaman status, finding that Whittington had no permanent connection to a vessel and did not aid in navigation of a vessel.[10] The court also determined that the tort causing his injury occurred upon a bridge, and that bridges, as extensions of land, are not within admiralty jurisdiction.[11]

Whittington was a laborer on a bridge demolition crew when injured in the course of his employment.[12] Seeking recovery in admiralty, Whittington relied primarily on the peculiar facts surrounding his injury to support the existence of admiralty jurisdiction.[13] The injury occurred when Whittington was being lowered by a winch on the bridge to a barge which served as a receptacle for dismantled scrap. As plaintiff began his descent to the barge, the cable on which he was riding caught on a projecting beam in the bridge, causing him to fall to the barge below.[14] On the day prior to his injury, Whittington briefly had worked on this barge detaching materials lowered from the cable hook. Whittington argued, on the basis of this relationship to the barge, that he was an "able-bodied seaman," and thus entitled to recover in admiralty.[15]

The Fourth Circuit initially examined three possible grounds for

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[7] *E.g.*, Cox v. Otis Engineering Corp., 474 F.2d 613 (5th Cir. 1973); Burns v. Anchor-Wate Co., 469 F.2d 730 (5th Cir. 1972); Spearing v. Manhattan Oil Transp. Corp., 375 F. Supp. 764 (S.D.N.Y. 1974); Hartzfelds v. Travelers Ins. Co., 369 F. Supp. 955 (W.D. La. 1974).

[8] 541 F.2d 427 (4th Cir. 1976).

[9] In addition to Jones Act compensation, Whittington sought "maintenance and cure" under general admiralty law. 541 F.2d at 430. "Maintenance and cure" is the seaman's ancient right to be supported and cared for by his ship when injured in her service, irrespective of fault, GILMORE & BLACK, *supra* note 3, at § 1-10; *see also* The Osceola, 189 U.S. 158 (1903). A suit brought for maintenance and cure requires the same showing of seaman status as in a suit under the Jones Act. Swanson v. Marra Bros., 328 U.S. 1 (1946).

[10] 541 F.2d at 436.

[11] *Id.* at 433. *See* text accompanying note 21 *infra*.

[12] 541 F.2d at 431.

[13] *Id.* at 429.

[14] *Id.* at 431.

[15] *Id.* at 430. Plaintiff's deposition, which was the only evidence before the district court when it dismissed the case, indicated that plaintiff had worked on the barge for as much as "half of a day." Plaintiff claimed to be an "able bodied seaman" employed to perform the work of a deckhand. *Id.* at 430-31.

the exercise of admiralty jurisdiction over torts:[16] general admiralty law, the Admiralty Extension Act,[17] and the Jones Act.[18] Under general admiralty law, tort claims can be brought only if the injury occurred upon navigable waters and was significantly related to traditional maritime activity.[19] The Fourth Circuit held that Whittington's claim could not be brought on this theory since the winch which had caused the injury was located on the bridge.[20] Bridges traditionally are considered extensions of land[21] and not as vessels or objects upon navigable waters. As a result, the winch must be considered a shore-based instrument which caused a tort on the land extension,[22] and thus, does not satisfy the jurisdictional locality criterion necessary to bring a tort claim within general admiralty law.[23]

The second jurisdictional possibility, the Admiralty Extension Act,[24] requires that the injury be caused by a vessel or an appurtenance of a vessel in navigable waters. Again, the court rejected the statute's applicability because the locus of the accident was the

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[16] The court did not consider the admiralty tort causes of action clearly inapplicable to Whittington such as the Suits in Admiralty Act, 46 U.S.C. §§ 741-52 (1970), the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-15 (1970), and the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901-50 (Supp. V 1975).

[17] 46 U.S.C. § 640 (1970).

[18] 46 U.S.C. § 688 (1970).

[19] Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972).

[20] 541 F.2d at 432.

[21] Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969); Evans v. Louisiana Dep't of Hwys., 430 F.2d 1280 (5th Cir. 1970). *Cf.* Kozikowski v. Delaware River Port Auth., 397 F. Supp. 1115 (D.N.J. 1975), and Oregon Transfer Co. v. Tyee Constr. Co, 188 F. Supp. 647 (D. Ore. 1960) (a bridge is part of the highway to which it is connected).

[22] The locus of the accident centers at the point where the tort occurs, not where it is consummated. See, for example, May v. Lease Serv., Inc., 365 F. Supp. 1202 (E.D. La.), *aff'd per curiam*, 487 F.2d 915 (5th Cir. 1973), where the plaintiff was injured when he fell from a fixed platform in the Gulf of Mexico onto the deck of ship. Plaintiff was working a winch affixed to the platform to off-load some equipment from the ship when the accident occurred. The court held that the locus of the accident for determining jurisdiction was where the fall started, not where it eventually stopped. 365 F. Supp. at 1204.

[23] 541 F.2d at 433. Since the plaintiff did not establish the locality requirement, the Fourth Circuit did not have to consider whether the employment and injury of a bridgeworker is sufficiently related to traditional maritime activities as to fall within admiralty jurisdiction.

[24] The Admiralty Extension Act, 46 U.S.C. § 740 (1970), provides a remedy to those injured on shore by an appurtenance of a vessel. However, a maritime nexus is still required or recovery is barred. *See* Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973); Oppen v. Aetna Ins. Co., 485 F.2d 252 (9th Cir. 1973); Peytavin v. Government Employees Ins. Co., 453 F.2d 1121 (5th Cir. 1972).

shore-based winch[25] rather than the barge. Thus, the injury was wholly unrelated to a vessel on navigable waters.[26]

Finally, the Fourth Circuit considered the jurisdictional requirements of the Jones Act. A claimant under the Jones Act must be a seaman injured in the course of his employment.[27] Recovery under that Act, however, does not require that the injury occur over navigable waters.[28] Nevertheless, the Fourth Circuit held that Whittington failed to satisfy the Jones Act test because he could not reasonably be categorized as a seaman.[29] The court relied on the Supreme Court holding in *Senko v. LaCrosse Dredging Corp.*[30] that a "seaman" must be a crew member in the permanent employ of a vessel.[31] Moreover, the Supreme Court has held that a claimant must be on board the vessel primarily to aid in navigation.[32] The Fourth Circuit found that Whittington had not satisfied either of these essential requirements; that he was neither in the permanent employ of the vessel nor on board primarily to aid in navigation.[33] Furthermore, the court held that the bare allegation that he was injured while performing a task

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[25] *See* note 22 *supra*, note 26 *infra*.

[26] 541 F.2d at 433. A shore-based winch is considered an extension of land and not a part of the vessel it services. McCullum v. United Int'l Corp., 493 F.2d 501 (9th Cir. 1974); Snydor v. Villain & Fassio et Cia. Int'l Di Genova Societa Reunite Di Naviagaione, S.P.A., 459 F.2d 365 (4th Cir. 1972).

[27] *See* text accompanying notes 2 & 3 *supra*.

[28] The Supreme Court in Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 373 (1957), stated: "The fact that petitioner's injury occurred on land is not material. Admiralty jurisdiction and the coverage of the Jones Act depends only on a finding that the injured was 'an employee of the vessel, engaged in the course of his employment' at the time of his injury," *quoting* Swanson v. Marra Bros., 328 U.S. 1, 4 (1946). *See also* O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943); Garrett v. Gutzeit O/Y, 491 F.2d 228 (4th Cir. 1974); Delancey v. Motichek Towing Serv., Inc., 427 F.2d 897 (5th Cir. 1970).

[29] 541 F.2d at 433.

[30] 352 U.S. 370 (1957).

[31] *Id.* at 372. In *Senko*, the plaintiff was a handyman on a dredge. His duties involved transporting and storing supplies, and general maintenance of the dredge, which was anchored to shore for the entire duration of his employment. A coal stove explosion in a shed on land caused his injuries. The Supreme Court found him to be a member of the crew not only because most of his work was done on the dredge, but also because plaintiff would have had to perform navigational duties had the dredge been moved. *Id.* at 374.

[32] South Chicago Coal & Dock Co. v. Basett, 309 U.S. 251, 260 (1940). The plaintiff in *Bassett* was suing under the LHWCA, which excludes seamen from its coverage. Thus, in holding that the plaintiff, had no navigational duties, and therefore was not a seaman, the court facilitated his recovery of compensation. *See also* note 6 *supra*.

[33] 541 F.2d at 434.

traditionally done by seamen was not a basis for invoking admiralty jurisdiction.[34]

Judge Widener dissented, asserting that Whittington's status as a seaman is a question of fact which goes to the merits as well as to jurisdiction; and that the claim should not be dismissed for lack of jurisdiction solely on the basis of plaintiff's deposition. Judge Widener contended that Whittington's allegations that he was performing work on a vessel were sufficient to invoke admiralty jurisdiction and to warrant further factual inquiry.[35] The dissent relied primarily upon two Supreme Court cases, *Grimes v. Raymond Concrete Pile Co.*[36] and *Butler v. Whiteman,*[37] which were factually similar to *Whittington.* Grimes was a pile driver employed in the construction of an off-shore radar platform.[38] His claim to seaman status rested upon six hours of work on a barge on the day of his injury. The injury occurred as he was being transferred from a tug to the platform. The First Circuit in *Grimes* affirmed[39] the lower court's directed verdict for the defendant, and Grimes appealed. The Supreme Court held

[34] *Id.* The court relied on Victory Carriers, Inc. v. Law, 404 U.S. 202 (1971), in which the Supreme Court held that admiralty jurisdiction cannot be invoked merely because a worker is injured while performing a task traditionally done by seamen. Law was a longshoreman injured while engaged in such a task, and sought to recover under the unseaworthiness doctrine without a further basis for admiralty jurisdiction. The Court determined that absent a basis for establishing admiralty jurisdiction, the unseaworthiness doctrine is unavailable and the injured worker's involvement in typical seaman's work is immaterial. *Id.* at 210-11. The unseaworthiness doctrine does not provide a basis for jurisdiction, but merely a remedy for those who have already fulfilled the navigable waters and maritime nexus test, or come within the Admiralty Extension Act. Gutierrez v. Waterman S.S. Corp., 373 U.S. 206 (1963); United Pilots Ass'n v. Halecki, 358 U.S. 613 (1958); Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); *see* note 24 *supra,* text accompanying note 19 *supra.*

The Fourth Circuit apparently was misled by appellant's brief in regard to the unseaworthiness claim. The court refers to the brief where unseaworthiness is mentioned, 541 F.2d at 430, and proceeds to devote a portion of the opinion to a discussion of why Whittington is not eligible to avail himself of this doctrine. *Id.* at 433-34. However, Judge Widener pointed out in dissent that the complaint only sought recovery under the Jones Act, 46 U.S.C. § 688, and under general admiralty law for maintenance and cure. 541 F.2d at 437-38 (Widener, J., dissenting). Whittington did not allege unseaworthiness in the complaint and the issue was not before the court.

[35] 541 F.2d at 437 (Widener, J., dissenting).

[36] 356 U.S. 252 (1958), *rev'g,* 245 F.2d 437 (1st Cir. 1957).

[37] 356 U.S. 271 (1958); cited in the dissent of Judge Widener as Butler v. Bridgeman *[sic],* 541 F.2d at 440.

[38] 243 F.2d at 564. Fixed off-shore platforms such as the one in *Grimes,* like bridges, are treated as extensions of land. *See* Rodrigue v. Aetna Cas. & Sur. Co., 395 U.S. 352 (1969); Ocean Drilling & Exploration Co. v. Berry Bros. Oilfield Serv. Inc., 377 F.2d 511 (5th Cir.),*cert. denied,* 389 U.S. 849 (1967).

[39] 245 F.2d 437, 440 (1st Cir. 1957).

that these facts provided a sufficient evidentiary basis to require jury determination of the seaman status question.[40]

Similarly in *Butler,* the Supreme Court reversed the Fifth Circuit's dismissal of a Jones Act claim.[41] Butler, a harbor worker who performed odd jobs about the wharf, drowned in the course of his employment. His survivors sought Jones Act compensation, claiming that Butler was a seaman on the basis of his relationship to a tug whose boilers he had been cleaning. This tug, withdrawn from service for over a year, was inoperable and had neither captain nor crew. Nevertheless, the Supreme Court reversed the dismissal of the claim, citing *Grimes* and *Senko* for support in requiring jury determination of the seaman question.[42]

The implicit rule of *Grimes* and *Butler* is that any worker whose duties require the slightest contact with a vessel on navigable waters is entitled to a jury determination of his seaman status, and that a determination in his favor cannot be set aside.[43] The *Whittington* decision clearly conflicts with this rule. Nevertheless, the contrary holding in *Whittington* finds support in several recent Fourth and Fifth Circuit decisions. In *Dugas v. Pelican Construction Co.,*[44] the Fifth Circuit reversed a district court finding that a worker assigned to a barge for one day was a seaman. Likewise in *Cox v. Otis Engineering Corp.,*[45] the Fifth Circuit dismissed a Jones Act claim, holding that a worker whose duties required him to be on a barge for two days was not a seaman.[46]

The Fourth Circuit previously considered whether a construction worker could qualify as a seaman in *Lewis v. Roland E. Trego &*

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[40] 356 U.S. at 253.

[41] 243 F.2d 563, 564 (5th Cir. 1956).

[42] 356 U.S. at 271.

[43] *See* GILMORE & BLACK, *supra* note 3, § 6-21 at 333.

[44] 481 F.d 772 (5th Cir.), *cert. denied,* 414 U.S. 1094 (1973). Claimant, a roustabout employed for one day on a drilling barge, was injured when knocked down by a drilling pipe. The Fifth Circuit reversed the district court determination that claimant was a seaman, and the appellate court held that he did not have a sufficiently permanent connection to the barge. *Id.* at 777-78.

[45] 474 F.2d 613 (5th Cir. 1973). Cox was working as a wireline operator aboard a drilling barge when injured. He was supposed to be aboard the barge for two days, but was injured during the first day. The district court dismissed the Jones Act claim and the Fifth Circuit affirmed, holding that Cox's relation to the barge was not sufficiently permanent to support his claim to seaman status. 474 F.2d at 613.

[46] *See also* Labit v. Carey Salt Co., 421 F.2d 1333 (5th Cir. 1970), where claimant was a loader who worked on a conveyor pier. The extent of his contact with a vessel was that "he occasionally moved a barge a few feet to position it for loading. This falls woefully short of permanent assignment to a vessel or the performance of a substantial part of his work on the vessel." *Id.* at 1335.

Sons.[47] The plaintiff in *Lewis* was a marine construction laborer injured aboard a barge while engaged in building a boathouse. The Fourth Circuit held that the district court properly dismissed the claim on the basis of evidence that Lewis had no seaman's papers, was not assigned to a particular vessel, rarely accompanied the barge when it was moved, slept ashore, and performed 90% of his work on land.[48] If these criteria are applied to the *Whittington* facts, the district court appropriately dismissed the claim.[49]

The Fourth and Fifth Circuits are not applying the principle established by the Supreme Court in *Grimes,* which requires a jury determination of the seaman question where a claimant has the slightest contact with a vessel on navigable waters.[50] While this departure from *Grimes* seems limited largely to the Fourth and Fifth Circuits,[51] the deviation within each of these circuits is far from absolute.[52] The two most recent cases in the Fourth Circuit, *Lewis* and *Whittington,* may indicate a trend in the circuit away from unquestioning application of *Grimes.* However, until the Fourth Circuit issues a clear statement of the law, "the plaintiff's fate, in cases of this sort, seems to depend on the luck of the judicial draw."[53]

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[47] 501 F.2d 372 (4th Cir. 1974).

[48] *Id.* at 373.

[49] *See* 541 F.2d at 431.

[50] *See* text accompanying note 43 *supra.*

[51] *See* Harney v. William M. Moore Bldg. Corp., 359 F.2d 649 (2d Cir. 1966) (claimant held to be seaman); Stafford v. Perini Corp., 475 F.2d 507 (1st Cir. 1973) (seaman question held to be matter for jury determination). *But see* Powers v. Bethlehem Steel Corp., 477 F.2d 643 (1st Cir. 1973).

[52] *See* Biggs v. Norfolk Dredging Co., 360 F.2d 360 (4th Cir. 1966), where a plaintiff was employed in constructing the Chesapeake Bay Bridge Tunnel and injured when debarking from the company boat which had ferried him out to the work site. The Fourth Circuit reversed the dismissal of the Jones Act claim, and remanded to have the lower court determine if claimant was a seaman. *Id.* at 364-65.

In Barrios v. Louisiana Constr. Materials Co., 465 F.2d 1157 (5th Cir. 1972), the Fifth Circuit affirmed a jury verdict allowing plaintiff to recover as a seaman. The plaintiff was employed by a dredging outfit but a substantial part of his work was on land. The Fifth Circuit stated that since *Senko* and *Grimes*

> it has been clear that it is a rare case indeed in which a court may conclude as a matter of law that an injured individual is not a seaman within the meaning of the Jones Act. . . . [E]ven where the underlying facts are largely undisputed, the determination of whether an individual is a seaman will ordinarily be left to the jury.

Id. at 1162.

[53] GILMORE & BLACK, *supra* note 3, § 6-12 at 334.

C. The Wreck Removal Acts and the Coast Guard's Duty To Mark.

The Wreck Removal Acts[1] provide that the responsibility for removing and marking wrecks or obstructions in navigable waters is divided between the Army Corps of Engineers and the Coast Guard.[2] Prior to 1965, the Coast Guard was assigned a discretionary duty to mark wrecks in cases where the owners had failed to mark them suitably.[3] This duty remained in effect only until abandonment of the wreck had been established.[4] Upon abandonment, the duty shifted to the Corps of Engineers either to maintain suitable marking or to remove the wreck.[5] The Secretary of the Army could choose to mark

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[1] 14 U.S.C. § 86 (Supp. V 1975); 33 U.S.C. §§ 409, 414 (1970). *See generally* Annot., 19 A.L.R. FED. 297 (1974). Subsequent to the 1965 amendments, 14 U.S.C. § 86 was again amended. In 1974 the words "any navigable waters" were replaced by "the navigable waters or waters above the continental shelf." The additional language is immaterial to this case however, which focuses on the 1965 amendments.

[2] 14 U.S.C. § 86 (1970) provides that the Coast Guard through the Secretary of Transportation may mark sunken vessels in navigable waters as long as the needs of maritime navigation require. 33 U.S.C. § 414 (1970) provides that the Secretary of the Army may remove abandoned wrecks which endanger navigation in navigable waters.

[3] The pre-amendment statute provided in pertinent part: "The Coast Guard may mark for the protection of navigation any sunken vessel or other similar obstruction existing on any navigable waters of the United States, whenever the owner thereof has, in the judgment of the Coast Guard, failed suitably to mark the same." 14 U.S.C. § 86 (1956) (amended 1965).

The standard for "suitable marking" by the owner is established in 33 U.S.C. § 409 (1970), which provides that when a craft is sunk in a navigable channel, the owner must mark the wreck immediately with a buoy or beacon by day, and a lighted lantern at night. *See generally* Schroeder, *The Wreck Act: Owner's Duty to Mark—Moving Toward Strict Liability*, 42 INS. COUNSEL J. 561 (1975).

[4] Abandonment can be established by sending notice of intention to abandon to the Army Corps of Engineers, 33 C.F.R. § 64.15-1 (1976). Also, abandonment can be established by failing to commence immediate removal of the wreck and to prosecute such removal diligently. 33 U.S.C. § 409 (1970). If the wreck has not been removed within 30 days, abandonment is presumed. Jones Towing, Inc. v. United States, 277 F. Supp. 839, 848 (E.D. La. 1967); Wheeldon v. United States, 184 F. Supp. 81, 83 (N.D. Cal. 1960); People's Coal Co. v. Second Pool Coal Co., 181 F. 609, 612 (W.D. Pa. 1910), *aff'd*, 188 F. 892 (3d Cir. 1911); *see* Thames Towboat Co. v. Fields, 287 F. 155, 156, (S.D.N.Y. 1922). *But see* The Snug Harbor, 40 F.2d 27 (4th Cir. 1930).

[5] The pertinent provisions of the two statutes establishing the Army's duty were: "As soon as the abandonment of any such obstruction has been so established, the Secretary of the Army shall keep the same so marked [as previously done by the Coast Guard] pending removal thereof. . . ." 14 U.S.C. § 86 (1956) (amended 1965).

> Whenever the . . . navigable waters of the United States shall be obstructed or endangered by any sunken vessel . . ., and such obstruction has existed for a longer period than thirty days, or whenever the abandonment of such obstruction can be legally established in a

or remove the vessel, but these were the exclusive alternatives.[6] Thus, a mandatory duty was imposed upon him to perform one operation or the other.[7]

In 1965, Congress amended the Wreck Acts to extend the Coast Guard's responsibility for marking obstructions until the time of the wreck's removal, regardless of when abandonment is established.[8] The Army accordingly was relieved of the duty to mark abandoned wrecks, and now bears only the responsibility for removing wrecks.[9] The purpose of the amendment was to delineate the respective responsibilities of the Coast Guard and Army, and to eliminate the confusion caused by assigning a duty to mark wrecks to both government agencies.[10] This shift in responsibilities, however, was not accompanied by a clear indication of whether the Coast Guard's new

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> less space of time, the sunken vessel . . . shall be subject to be . . . removed . . . by the Secretary of the Army at his discretion. . . .

33 U.S.C. § 414 (1970).

[6] Buffalo Bayou Transp. Co. v. United States, 375 F.2d 675, 677 (5th Cir. 1967); Jones Towing, Inc. v. United States, 277 F. Supp. 839, 848 (E.D. La. 1967).

[7] The Fourth Circuit stated in an earlier case: "As we read the Wreck Acts, the duty of the United States to mark or remove the wreck is mandatory." Somerset Seafood Co. v. United States, 193 F.2d 631, 635 (4th Cir. 1951). *Accord,* Jones Towing, Inc. v. United States, 277 F. Supp. 839, 848 (E.D. La. 1967); Wheeldon v. United States, 184 F. Supp. 81, 84 (N.D. Cal. 1960); Cornell Steamboat Co. v. United States, 138 F. Supp. 16, 18 (S.D.N.Y. 1956), *modified,* 247 F.2d 275 (2d Cir. 1957).

[8] Act of Sept. 17, 1965, Pub. L. No. 89-191, 79 Stat. 822 (codified at 14 U.S.C. § 86 (Supp. V 1975)).

[9] The amended statute provides in pertinent part: "The Secretary may mark for the protection of navigation any sunken vessel . . . on the navigable waters . . . of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require." 14 U.S.C. § 86 (Supp. V 1975). The shift in delegation of duty was accomplished by deleting the language which assigned the post-abandonment duty to the Army Corps of Engineers. *See* notes 3 & 5 *supra.*

[10] The Senate Report explained the purpose of the bill:

> The purpose of H.R. 725 is to clarify the responsibility, as among Government agencies, for marking obstructions in navigable waters.
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> . . . This bill as recommended by the Secretary of the Treasury, provides that the primary obligation for marking all obstructions to navigation rests with the Coast Guard. This should completely eliminate the present lack of clarity.
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> . . . .
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> Specifically, the Secretary of the Treasury is authorized to mark wrecks and other obstructions which, in his judgment, constitute obstructions to navigation.

S. REP. No. 688, 89th Cong., 1st Sess. 1 (1965); *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 3140.

duty to mark wrecks after abandonment is discretionary or mandatory.[11]

The Fourth Circuit considered the nature of the Coast Guard's duty in *Lane v. United States.*[12] The plaintiff in *Lane* was towing a waterskier behind his cabin cruiser when he ran upon an unmarked sunken barge. The resulting damage to the cabin cruiser caused it to sink minutes later.[13] Lane brought suit under the Suits in Admiralty Act[14] to recover against the United States for its negligent failure to mark the wreck.[15] The district court held the United States liable for breach of its mandatory duty to mark or remove abandoned wrecks, and found no contributory negligence on the part of Lane.[16] On appeal, the Fourth Circuit considered whether the United States has a mandatory or discretionary duty to mark abandoned wrecks, and whether Lane was contributorily negligent through his failure to consult charts on which the wreck was marked.[17] The court affirmed the district court's finding that Lane was not contributorily negligent, but reversed on the liability issue, holding that the amendments imposed only a discretionary duty on the Coast Guard to mark wrecks after abandonment.[18]

The Fourth Circuit compared the language of the Wreck Acts before and after the 1965 amendments. The court observed that the

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[11] *See* note 10 *supra.* The congressional report did not directly address the question of the type of authority vested in the Coast Guard. However, when the Secretary of the Treasury submitted the bill to the Senate, an enclosed communique addressed to the President of the Senate included the following description of the bill: "The bill would vest sole responsibility for wreck marking in the Coast Guard. It would give the Secretary of the Treasury *discretionary authority* to mark wrecks or other similar obstructions for so long as in his judgment the needs of maritime navigation may require." S. REP. No. 688, 89th Cong., 1st Sess. at 2 (1965); *reprinted in* [1965] U.S. CODE CONG. & AD. NEWS 3140, 3141. (emphasis added).

[12] 529 F.2d 175 (4th Cir. 1975).

[13] Lane was towing a skier in the Intracoastal Waterway when he ran his boat upon a submerged wreck. The wreck had been in the waterway about five years, during which time eight to ten boats had run upon it. After the last collision was reported, both government agencies denied responsibility for failing to mark the wreck, and each placed the blame upon the other. 529 F.2d at 177.

[14] 46 U.S.C. § 741 *et seq.* (1970).

[15] The Suits in Admiralty Act provides that admiralty suits may be maintained against the United States if such action could have been maintained against a private person. *Id.* at § 742. In effect, the Act is a qualified waiver of sovereign immunity. Roberts v. United States. 498 F.2d 520, 525 (9th Cir.), *cert. denied,* 419 U.S. 1070 (1974); De Bardeleben Marine Corp. v. United States, 451 F.2d 140, 145 (5th Cir. 1971).

[16] 529 F.2d at 176, 180.

[17] *Id.* at 177-78, 180; Brief for Appellant at 2, 529 F.2d 175 (4th Cir. 1975).

[18] 529 F.2d at 180.

statutes prior to amendment were interpreted to give the Coast Guard a discretionary duty to mark sunken vessels until their abandonment, while the Corps of Engineers had a mandatory duty to mark or remove after abandonment.[19] The 1965 amendments altered 14 U.S.C. § 86 by deleting the language which imposed the mandatory duty on the Army to mark abandoned wrecks.[20] Thus, the court determined that the nature of the Coast Guard's responsibility remained unchanged by the amendments, while the extent of its responsibility was increased.[21] The discretionary duty of the Coast Guard now extends to marking wrecks after abandonment has been established.[22]

The Fourth Circuit suggested that Congress probably did not intend to change the mandatory nature of the statute with respect to marking abandoned wrecks. However, the court determined that the amended language has established a discretionary duty to mark after abandonment.[23] Nevertheless, the court stated that the Coast Guard must exercise its responsibility in a reasonable manner without ignoring real dangers to navigation.[24] Therefore, the case was remanded to the district court to determine whether the failure to mark the wreck was an abuse of the discretionary authority vested in the Coast Guard.[25]

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[19] *Id.* at 178; *see* note 7 *supra.*

[20] 529 F.2d at 178. The remainder of § 86 was not altered substantially, the greatest change being the substitution of the word "Secretary" for "Coast Guard." *Compare* note 3 *with* note 9 *supra.* The Coast Guard has since been moved from the Department of Treasury to the Department of Transportation; thus, the Secretary referred to is now the Secretary of Transportation. Act of Oct. 15, 1966, Pub. L. No. 89-670, § 6(b), 80 Stat. 931 (codified at 49 U.S.C. § 1655(b) (1970)).

[21] 529 F.2d at 178.

[22] *Id.; see* note 4 *supra.*

[23] 529 F.2d at 178; *see* note 10 *supra.*

[24] The *Lane* case is the first time a court has interpreted the Coast Guard's extended discretionary duty under § 86. However, an analogous discretionary duty of the Coast Guard which has been interpreted by courts exists under 14 U.S.C. § 81 (1970). Section 81 provides that the Coast Guard may establish, maintain, and operate aids to air or maritime navigation "[i]n order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft. *Id.* In interpreting the discretionary duty imposed by § 81, courts have never addressed the question of what limitations are placed upon the exercise of discretion. Rather, the courts have held that once the discretion is exercised in favor of putting out navigational aids such as buoys and markers, due care must be exercised to maintain the aid properly. Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955); Afran Transp. Co. v. United States, 309 F. Supp. 650, 654 (S.D.N.Y. 1969), *aff'd,* 435 F.2d 213 (2d Cir. 1970), *cert. denied,* 404 U.S. 872 (1971); Pioneer S.S. Co. v. United States, 176 F. Supp. 140, 148 (E.D. Wis. 1959); *but see* Kline v. United States, 113 F. Supp. 298, 301 (S.D. Tex. 1953).

[25] 529 F.2d at 180.

The United States contended that Lane was contributorily negligent for failing to consult a navigation chart.[26] Evidence indicated that the wreck was marked on a current chart of the waters in question.[27] The court rejected the United States' argument that Lane's proper consultation of a chart could have prevented the accident on the basis of its decision in *United States v. Travis.*[28] The Fourth Circuit there held that experienced small boat navigators who are familiar with the waters are not bound to notice published information.[29] Upon evidence that Lane was familiar with the waters, the district court had found that he was not contributorily negligent, and the Fourth Circuit declined to hold this finding clearly erroneous as a matter of law.[30]

The United States did not challenge the propriety of allowing Lane's claim to be brought in admiralty. However, current confusion over the sufficiency of a maritime nexus in pleasure boat tort cases,[31] prompted the Fourth Circuit to justify admiralty jurisdiction in this instance.[32] The court relied on *Richards v. Blake Builders Supply, Inc.*[33] to support the proposition that pleasure craft are included

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[26] *Id.*

[27] The accuracy of the symbol's location purporting to signify the wreck was disputed in the trial. *Id.* at 180 n.9.

[28] 165 F.2d 546 (4th Cir. 1947).

[29] *Id.* at 548.

[30] 529 F.2d at 180.

[31] *See generally* Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard,* 34 WASH. & LEE L. REV. 121 (1977); Comment, *Admiralty Jurisdiction Over Pleasure Craft Torts,* 36 MD. L. REV. 212 (1976); Comment, *Admiralty Jurisdiction: Pleasure Craft and Maritime Nexus,* 12 CAL. W. L. REV. 535 (1976). The Supreme Court decision in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972), restricted the scope of admiralty jurisdiction over torts having no maritime connection. Previously, a strict locality test had been used to determine the existence of admiralty jurisdiction in tort actions. *See* 7A MOORE'S FEDERAL PRACTICE ¶ 325 (2d ed. 1976). The issue was raised in *Executive Jet* because that case involved tort actions arising from an airplane crash in navigable waters. In holding that admiralty jurisdiction did not attach to the case because traditional maritime activity was not involved, the Court cited cases involving swimmers and waterskiers as examples of situations with a maritime locality, but without a maritime nexus. 409 U.S. at 255, 256 n.5. Although *Executive Jet* specifically concerned an aviation tort, that decision and the maritime nexus test has been applied to maritime torts generally. *See, e.g.,* Onley v. South Carolina Elec. & Gas Co., 488 F.2d 758 (4th Cir. 1973); Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974).

[32] 529 F.2d at 180.

[33] 528 F.2d 745 (4th Cir. 1975); for an analysis of this case and the questions which it raises, see Note, *Pleasure Boat Torts in Admiralty Jurisdiction: Satisfying the Maritime Nexus Standard,* 34 WASH. & LEE L. REV. 121 (1977).

within admiralty jurisdiction. *Richards* combined two cases for appeal. In one, a passenger sued the pleasure boat operator for injuries received when the boat blew up; in the second case, the claimant sued the pleasure boat operator for injuries received when the boat swerved into a river bank at high speed.[34] The court held that plaintiffs in pleasure boat cases may invoke admiralty jurisdiction since a sufficient relationship exists with traditional maritime activities.[35]

The Fourth Circuit then distinguished *Lane* from its earlier decision in *Crosson v. Vance.*[36] In *Crosson,* the court denied admiralty jurisdiction to a claim brought by a waterskier for lack of some relationship of waterskiing to traditional maritime activity.[37] In *Lane* however, the waterskier's presence was only incidental to the substantive claim involved. The court noted that collisions between vessels in navigation and submerged hulks traditionally have been a concern of admiralty.[38] The court inferred that pleasure boat claims based on the Wreck Acts are within admiralty, while claims by waterskiers would not satisfy the jurisdictional maritime nexus test.[39] Thus, the court limited its holding to pleasure boaters whose causes of action arise out of traditional maritime concerns.

The Fourth Circuit is the first court of appeals to hold that the United States no longer has a mandatory duty to mark abandoned wrecks. The holding effectively eliminates United States liability for failure to mark unless an abuse of discretion can be shown.[40] Some legislators may, as the *Lane* court indicated, be surprised to find that they relieved the government of its mandatory duty to mark wrecks.[41] Nevertheless, the propriety of the decision is not likely to be questioned since the Fourth Circuit relied on the exact language of the statute to reach its result.[42]

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[34] 528 F.2d at 746.

[35] *Id.* at 749. The Fourth Circuit had reservations in finding jurisdiction in *Richards* in light of *Executive Jet,* but felt compelled to do since pleasure boats traditionally have been within admiralty jurisdiction. *Id.*

[36] 484 F.2d 840 (4th Cir. 1973).

[37] In *Crosson,* the plaintiff waterskier sued for personal injuries. 484 F.2d at 480. This situation is distinguishable from a case like *Lane* where the presence or absence of the skier has no effect on the claim involved.

[38] 529 F.2d at 180.

[39] *But see* Kaiser v. Traveler's Ins. Co., 359 F. Supp. 90 (E.D. La. 1973), *aff'd,* 487 F.2d 1300 (5th Cir. 1974); King v. Testerman, 214 F. Supp. 335 (E.D. Tenn. 1963); where waterskiers were permitted to bring suits in admiralty.

[40] *See* note 24 *supra.*

[41] 529 F.2d at 178.

[42] *See* text accompanying notes 19-25 *supra.* The Fourth Circuit's decision accords with the expression of intent in the communique from the Secretary of the Treasury, *see* note 11 *supra.*

D. Maritime Lien Priority and the Ship Mortgage Act.

Admiralty law traditionally has provided certain creditors of an insolvent ship owner remedial protection through maritime liens on the ship itself.[1] Whether a debt is of a nature to cause a maritime lien to attach is determined by examining general maritime law.,[2] the Federal Maritime Lien Act,[3] and state lien laws enforceable in admiralty.[4] In addition to these broad sources, the Ship Mortgage Act[5] provides a statutory right to mortgage liens.

Once established, a maritime lien must be ranked relative to the liens of other claimants against the vessel. However, rules of lien priority are settled only in general principle,[6] and are subject to varia-

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[1] FED. R. CIV. P., Supplemental Rule C; Superseded Admiralty Rules of 1920 (as amended), Rules 13-18. *See* 7A MOORE'S FEDERAL PRACTICE ¶ C.02 (2d ed. 1976) [hereinafter cited as MOORE].

[2] The bulk of maritime lien claims come under the broad heading of general maritime law, which includes salvage, The Steamboat Mayflower v. The "Sabine," 101 U.S. 384 (1880), general average, Ralli v. Troop, 157 U.S. 386 (1895), tort and non-executory contract claims, 7A MOORE, *supra* note 1, at ¶ C.04.

[3] 46 U.S.C. §§ 971-75 (1970). The Federal Maritime Lien Act provides liens for that class of creditors furnishing supplies, repairs, towage, dry dock use, or other necessaries. *Id.* § 971.

[4] State statutes creating liens largely were pre-empted by § 975 of the Federal Maritime Lien Act, 46 U.S.C. § 975 (1970), which provides that state statutes overlapping the coverage of the federal Act shall be superseded by the Act. However, a few state statutes still create lien rights where the federal statute does not; *see generally* Grow v. Steel Gas Screw Lorraine K, 310 F.2d 547 (6th Cir. 1962), *aff'g,* 185 F. Supp. 803 (E.D. Mich. 1960), where Michigan law allowed a lien for an unpaid insurance premium.

[5] 46 U.S.C. § 953 (1970).

[6] Two basic doctrines control lien priority: the inverse priority rule, and the class priority rule. 7A MOORE, *supra* note 1, at ¶ C.02; G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY, § 9-85 [hereinafter cited as GILMORE & BLACK]. The inverse priority rule has long been a part of maritime law. The St. Jago de Cuba, 22 U.S. (9 Wheat.) 409 (1824). Under this doctrine, the most recent liens receive first priority, while the earliest liens are relegated to a subordinate position. *Id.* at 414. The doctrine is supported by two different theories: (1) that each lienor acquires a *jus in re* at the time his lien attaches and becomes a co-proprietor of sorts in the res, thus subjecting his claim to the next similar lien which attaches, The William Leishear, 21 F.2d 862, 863 (D. Md. 1927); and (2) that the last beneficial service is the one that continues the viability of the ship as long as possible and therefore should be accorded preference. *Id.* Also, beneficial additions subsequent to earlier liens theoretically add to the value of the ship, which, in turn, should bring a higher price at the final sale. Thus, earlier lienors are not deprived of the interest they had in the ship before the beneficial addition. *Id.;* The Glen Island, 194 F. 744 (S.D.N.Y. 1912).

The class priority rule arranges liens according to the type of debt involved. The theory behind the doctrine is that some liens have an inherent merit or comparative righteousness which entitles them to preference. Connor, *Maritime Lien Priorities:*

tions according to locality.[7] Currently, the common denominator is the Ship Mortgage Act, which provides that preferred ship mortgages have priority over all other liens except preferred maritime liens.[8] The Act defines preferred maritime liens as those arising prior to recording and endorsement of a mortgage, and liens for wages of a stevedore or crew, general average, salvage, and damages arising out of tort.[9]

Application of the Ship Mortgage Act was the problem confronting the Fourth Circuit in *Oriente Commercial, Inc. v. M/V Floridian.*[10] Oriente was one of several *in rem* claimants[11] against the defendant merchant vessel, which had been arrested and sold by court order in May of 1973.[12] A judgment in default had been entered in favor of Oriente on its claim that a shipment of meat was negligently damaged in transit.[13] Black and Decker, Inc., the other appellant in this action, also had received a default judgment on its claim of negligent failure to deliver part of a shipment of machinery.[14] In

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Cross-Currents of Theory, 54 MICH. L. REV. 777, 791 (1956). Roughly, the order of priority is as follows: (1) expenses of justice, (2) seamen's wages, (3) salvage and general average, (4) torts, (5) preferred mortgages, (6) repairs and supplies, (7) cargo damage, (8) state-created liens. Varian, *Rank and Priority of Maritime Liens*, 47 TUL. L. REV. 751, 753 (1973); 7A MOORE, *supra* note 1, at ¶ C.02.

In combining the two basic priority doctrines, the majority of courts have held that rank is dominant and that the inverse rule applies only within each class. The Samuel Little, 221 F. 308 (2d Cir. 1915); Todd Shipyards Corp. v. The City of Athens, 83 F. Supp. 67 (D. Md. 1949); The City of Tawas, 3 F. 170 (E.D. Mich. 1880). However, some courts consider the inverse rule more important. The Odysseus III, 77 F. Supp. 297 (S.D. Fla. 1948); *In re* New England Transp. Co., 220 F. 203 (D. Conn. 1914). *See generally* Varian, *Rank and Priority of Maritime Liens*, 47 TUL. L. REV. 751 (1973); Comment, *Developments in the Law of Maritime Liens*, 45 TUL. L. REV 574 (1971); Note, *Priorities of Maritime Liens*, 69 HARV. L. REV. 525 (1956).

[7] District courts often have their own local rules which control some facet of lien priority. *See, e.g.*, United Virginia Bank/Citizens and Marine v. Oil Screw Sea Queen, 343 F. Supp. 1020 (E.D. Va. 1972).

[8] All ship mortgages endorsed and recorded in accordance with the Ship Mortgage Act are "preferred" and thus superior to all other liens except preferred maritime liens and the expenses of justice. 46 U.S.C. §§ 922, 953 (1970).

[9] 46 U.S.C. § 953 (1970).

[10] 529 F.2d 221 (4th Cir. 1975), *rev'g sub nom.* Pierside Terminal Operators, Inc. v. M/V Floridian, 374 F. Supp. 27 (E.D. Va. 1974).

[11] Other *in rem* claimants in the action included Don Julio Corp. and Mike Cruz Machine Shop, Inc., both claiming various amounts for repair work done to the vessel. Pierside Terminal Operators, Inc. v. M/V Floridian, 374 F. Supp. 27, 29 (E.D. Va. 1974). The district court found their claims were inferior to the mortgage claims and they did not appeal. *Id.* at 30.

[12] 529 F.2d at 221. For the procedure to enforce maritime liens, see generally 7A MOORE, *supra* note 1, at ¶ C.03.

[13] 529 F.2d at 222.

[14] *Id.*

addition to these claims, the United States held two preferred ship mortgages on the vessel, on which the outstanding debt far exceeded the proceeds from the ship's sale.[15]

Since the mortgage claims would exhaust the funds available, the appellants sought to achieve priority over the preferred mortgages by qualifying for preferred maritime lienholder status.[16] To this end, appellants brought their claims for cargo damage on the basis of tort, which creates a preferred maritime lien, rather than on the basis of contract, which is subordinate to preferred mortgages.[17] The district court refused to allow the plaintiffs to bring their claims in tort, and plaintiffs appealed. The sole issue before the Fourth Circuit was whether claims for loss or damage of cargo can be brought as tort actions rather than breach of contract actions, thereby qualifying them as "preferred maritime liens" with priority over preferred mortgages.[18]

The district court held that the purpose and policy considerations[19] of the Ship Mortgage Act require that cargo claims be subordinated to valid mortgage claims.[20] Moreover, the court pointed out, without regard to the Ship Mortgage Act, that allowing cargo claims to acquire preferred maritime lien status would give them priority over claims for repairs, supplies, and other necessaries which traditionally are the preferred claims.[21] The court rejected claimants' ar-

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[15] *Id.*

[16] 374 F. Supp. at 29.

[17] *See* note 6 *supra;* text accompanying note 9 *supra.*

[18] Brief for Appellants at 1, 529 F.2d 221 (4th Cir. 1975).

[19] The policy of giving high priority to ship mortgages is designed to encourage investment of capital in ship mortgages, and to promote public confidence in such mortgages. Collier Advertising Serv., Inc. v. Hudson River Day Line, 14 F. Supp. 335 (S.D.N.Y. 1936), *aff'd,* 93 F.2d 457 (2d Cir. 1937); Detroit Trust Co. v. The Thomas Barlum, 293 U.S. 21 (1934). A further explanation supporting the district court's position can be found in the report of the committee hearings on the bill. The report states that the reason for preferring tort and salvage liens is that these are risks that can be insured against by the mortgagor at the request of the mortgagee. Thus, these claims would not deplete the security of the mortgagee. Contract claims, on the other hand, usually are not insured against and consequently should be relegated to a position inferior to that of the mortgagee. The objective is to put the mortgagee in a position where he could have almost 100% security. *Hearings on H.R. 9419 Before the House Comm. on the Merchant Marine and Fisheries,* 66th Cong., 2d Sess., pt. 5 at 21 (1920).

[20] 374 F. Supp. at 31, 32.

[21] *Id.; see* note 6 *supra.* The court also noted that repair or supply claimants rarely will be able to bring a claim in tort, like the cargo claimant, because of the navigable waters situs requirement in admiralty tort actions. 374 F. Supp. at 32.

gument[22] for permitting cargo damage claims in tort, and based its decision on language in *The St. Paul.*[23] The lower federal court in *St. Paul* divided cargo claims into two categories: pre-paid freight, and other cargo claims.[24] The pre-paid freight claims were put in parity with claims for repairs and supplies, thereby giving them priority over other cargo claims.[25] The *St. Paul* court reasoned that the policy behind lien priority rules is to give priority to the creditors who confer the greatest benefit on the ship in terms of service rendered; those creditors should receive a high priority claim for keeping the ship in service to the advantage of all creditors.[26] Pre-paid freight, like repairs or supplies, extends a benefit (cash) to the ship which prolongs the operable life of the ship.[27] Mere cargo damage creditors cannot claim to have conferred any such beneficial service.[28] In *Oriente,* the appellants' authority for their priority status claim included cases involving only pre-paid freight claims.[29] The district court in *Oriente,* however, relied on the *St. Paul* theory that a higher equity inheres in pre-paid freight claims that distinguishes them from cargo damage claims.[30]

The Fourth Circuit reversed the district court's decision and held that cargo damage claims may be brought as tort actions.[31] The appeals court criticized the lower court for failing to give sufficient weight to case authority contrary to its position.[32] Specifically, the

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[22] Claimants relied on The Henry W. Breyer, 17 F.2d 423 (D. Md. 1927); Morrisey v. S.S. A. & J. Faith, 252 F. Supp. 54 (N.D. Ohio 1965). Claimants also cited to dictum from The John G. Stevens, 170 U.S. 113 (1898), a case which is dissimilar factually in that it involved a claim for negligent towage.

[23] 277 F. 99 (S.D.N.Y. 1921).

[24] *Id.* at 109-10.

[25] *Id.*

[26] *Id.; see generally* 7A MOORE, *supra* note 1, at ¶ C.06; Connor, *Maritime Lien Priorities: Cross-Currents of Theory,* 54 MICH. L. REV. 777, 810 (1956).

[27] 277 F. at 109, 110.

[28] *Id.*

[29] However, in one of the cases cited by appellants, The Henry W. Breyer, 17 F.2d 423 (D. Md. 1927), a cargo damage claim was involved as well as several pre-paid freight claims. The district court distinguished this claim as a special case inapplicable to *Oriente* because that claim arose prior to the recording of the mortgage. 374 F. Supp. at 31 n.3. *See* note 9 *supra.* The appellants asserted, however, that the district court had erred in this matter, and that the claim in *Breyer* in fact arose subsequent to the mortgage, as did the claim in *Oriente.* The claimants thus contended that the cases are indistinguishable. Brief for Appellants at 13 n.3, 529 F.2d 221 (4th Cir. 1975).

[30] 374 F. Supp. at 31.

[31] 529 F.2d at 223.

[32] *Id.* at 222.

Fourth Circuit pointed to dictum in *The John G. Stevens*[33] where the Supreme Court stated that shippers could maintain an action in tort against a carrier "for neglect to carry and deliver in safety."[34] In addition, the court quoted extensively from *The Henry W. Breyer,*[35] in which a district court allowed cargo claims to be brought in tort. The *Breyer* court treated the ship owner as a common carrier, holding that "the owner of the goods damaged by the dereliction of a common carrier has the option to bring action either in contract or in tort."[36] Consequently, the cargo claims in *Breyer* were given priority over the preferred mortgage.[37] Similarly, the Fourth Circuit relied on *Morrisey v. S.S.A. & J. Faith,*[38] in which the district court held that cargo claims may be brought in tort if the loss results from the carrier's failure to exercise due diligence.[39] The *Morrisey* court derived its standard for due diligence from the Carriage of Goods by Sea Act,[40] which defines the rights, duties, and liabilities of maritime carriers.[41]

The Fourth Circuit rejected the district court's use of *The St. Paul* as support for the position that cargo damage claims should not receive priority over preferred mortgages. Instead, the appellate court asserted that *St. Paul* could be distinguished on its facts.[42] The distinguishing fact recited by the court—that the tort claims in *St. Paul* were not allowed because they arose from a fire while the ship was in court custody[43]—was immaterial however, to that portion of the holding relied upon by the district court. Rather, the critical part of the *St. Paul* holding was that pre-paid freight claims were given priority over cargo damage claims, and were equated with repair and supply liens.[44] Although these claims were all on the basis of contract, the *St. Paul* court's reasoning with regard to the pre-paid freight and

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[33] 170 U.S. 113 (1898). *See* note 22 *supra.*

[34] *Id.* at 124.

[35] 17 F.2d 423 (D. Md. 1927). *See* note 29 *supra.*

[36] *Id.* at 429.

[37] *Id.*

[38] 252 F. Supp. 54 (N.D. Ohio 1965).

[39] *Id.*

[40] 46 U.S.C. §§ 1300-15 (1970).

[41] *Id.* at § 1303. The Act provides that a carrier must exercise due diligence to provide a seaworthy vessel.

[42] 529 F.2d at 223.

[43] All of the claims in *The St. Paul* were for cargo damage as a result of a fire aboard the ship while the ship was in court custody. The tort claims were denied because the evidence did not warrant a finding of negligence, as well as the fact that a lien cannot arise while the ship is in the custody of a Marshall. 277 F. at 109. Contract liens were allowed because they arose at the time of the contract. *Id.* at 106.

[44] *Id.* at 109-10.