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## li. Admiralty

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## II. ADMIRALTY

### *Admiralty Jurisdiction in Asbestos Litigation: The Fourth Circuit Draws the Line*

Article III, section two of the Constitution grants exclusive jurisdiction of admiralty and maritime cases to the federal courts.<sup>1</sup> Traditionally, the locality of a wrong was the single relevant factor in establishing admiralty jurisdiction for tort actions.<sup>2</sup> If an alleged wrong occurred on navigable waters, the plaintiff could bring an admiralty action in federal court.<sup>3</sup> The

1. U.S. CONST. art. III, § 2. Congress enacted § 1333(1) of Title 28 of the United States Code pursuant to article III, section two of the U.S. Constitution. 28 U.S.C. § 1333(1) (1976). Section 1333(1) provides that district courts shall have original jurisdiction, exclusive of the courts of the states, of . . . [a]ny civil case of admiralty or maritime jurisdiction." *Id.* See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 365-70 (1959) (explaining scope of grant of admiralty jurisdiction to federal courts). For a discussion of the constitutional grant of admiralty jurisdiction to the federal courts see Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460 (1925). The purpose of a separate federal admiralty jurisdiction is to promote uniformity in maritime laws. 1 BENEDICT ON ADMIRALTY § 105 at 7-10 (7th ed. 1985). The congressional grant of admiralty jurisdiction to the federal courts, however, does not supercede all state law. See *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373 (1959) (holding that state law must yield to maritime law when necessary to promote uniform laws governing maritime activity). While states must yield to the federal courts' admiralty jurisdiction when the needs of a uniform maritime law so require, the state still has an interest in claims that may outweigh the federal interest of a uniform maritime law. BENEDICT ON ADMIRALTY, *supra*, § 105 at 7-14. See *infra* notes 157-58 and accompanying text (discussion of weighing state against federal interest when determining admiralty jurisdiction of claim). For a general discussion of the judicial grant of admiralty jurisdiction to the federal courts see G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 1-9, at 18-21 (2d ed. 1975); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 COLUM. L. REV. 259 (1950); Chamlee, *An Introduction to Admiralty*, 22 MERCER L. REV. 523, 524 (1971).

2. See *Thomas v. Lane*, 23 F. Cas. 957, 960 (No. 13,902) (C.C.D. Me. 1813). In *Thomas v. Lane*, Justice Story first articulated the locality standard for invoking admiralty jurisdiction in tort actions. *Id.* at 960. *Thomas* held that the claimant could not bring his libel action in admiralty because he failed to allege that the wrong occurred on navigable water. *Id.* Similarly, in *De Lovio v. Boit*, Justice Story determined that a claim's relation to maritime navigation and commerce governed admiralty jurisdiction for contract actions while the locality of the wrong determined admiralty jurisdiction for tort claims. *De Lovio v. Boit*, 7 F. Cas. 418, 444 (No. 3776) (C.C.D. Mass. 1815). For a general discussion of the development and scope of admiralty jurisdiction see GILMORE & BLACK, *supra* note 1 § 1-9—1-19 at 18-52.

3. See *The Plymouth*, 70 U.S. (3 Wall.) 20, 27-29 (1865). In *The Plymouth*, the Supreme Court gave full credence to the locality test for determining whether admiralty jurisdiction was proper. *Id.* at 34. The Court, in addition to citing favorably *Thomas v. Lane*, held that all torts occurring on navigable waters were cognizable in admiralty regardless of whether the tort occurred on board a vessel. *Id.* at 36; see *Thomas v. Lane*, 23 F. Cas. 957, 960 (No. 13,902) (C.C.D. Me. 1813). For a detailed discussion of the historical development of the locality test for invoking admiralty jurisdiction see Comment, *Torts Along the Water's Edge: Admiralty or Land Jurisdiction*, 1968 U. ILL. L.F. 95 (1968). In response to much litigation concerning the scope of the term "navigable waters," the Supreme Court in *The Genessee Chief* determined that navigable waters include inland waters as well as ocean waters. *The Genessee Chief*, 53

Supreme Court, until recently, espoused the locality requirement as the sole factor in determining whether admiralty jurisdiction existed.<sup>4</sup> In *Executive Jet Aviation, Inc. v. City of Cleveland*,<sup>5</sup> however, the Supreme Court determined that the locality of the tort alone is an insufficient criterion for determining admiralty jurisdiction.<sup>6</sup> The *Executive Jet* Court conceded that the tort at issue met the locality test, but held that the alleged wrong must bear a significant relationship to traditional maritime activity before admiralty jurisdiction would lie.<sup>7</sup> While judicial scholars have hailed the *Executive Jet* decision as an overdue solution to the problems presented by the locality test,<sup>8</sup> courts have experienced difficulty in determining whether the scope of admiralty jurisdiction is proper under *Executive Jet*.<sup>9</sup> This difficulty stems

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U.S. (12 How.) 233, 242 (1851). For a general discussion of the evolution of the term "navigable waters" see Guinn, *An Analysis of Navigable Waters in the United States*, 18 BAYLOR L.R. 559 (1966).

4. See *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 205-06 (1971) (plaintiff denied admiralty jurisdiction in suit for injuries sustained while operating fork lift on dock beside navigable waters).

5. 409 U.S. 249 (1972).

6. *Id.* at 268. The plaintiff in *Executive Jet* sought admiralty jurisdiction on the basis of the locality test when his plane ingested seagulls into its engine during takeoff and crashed into the navigable waters of Lake Erie. *Id.* at 250-51. The plaintiff sued the air traffic controller on duty at the airport from which the plane departed, the city of Cleveland as owner and operator of the airport, and the airport manager. *Id.* The plaintiff alleged that the defendants failed to keep the runway free of birds or to warn pilots of the birds' presence. *Id.* at 252. See *infra* notes 56-59 and accompanying text (discussing Supreme Court's reasoning in *Executive Jet*).

7. *Executive Jet*, 409 U.S. at 268. The Supreme Court in *Executive Jet* determined that in light of the history and purpose of admiralty law, federal courts should grant admiralty jurisdiction on the basis of a claim's relationship to traditional maritime activity. *Id.* The *Executive Jet* Court held that because the plaintiffs' action implicated no maritime concerns and only incidentally occurred on navigable waters, the plaintiff could not bring his action in admiralty. *Id.* at 273-74. See *infra* notes 56-59 and accompanying text (discussing Supreme Court's reasoning in *Executive Jet*).

The Supreme Court in *Foremost Ins. Co. v. Richardson* put to rest judicial controversy surrounding the breadth of the *Executive Jet* ruling. See *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 673 (1982), *reh'g denied*, 459 U.S. 899 (1982). In *Foremost*, the Court held that the nexus requirement introduced in *Executive Jet* applies outside of the aviation tort context. *Id.* at 673. The *Foremost* case involved the collision of two pleasure crafts on a river in Louisiana causing the death of one passenger. *Id.* at 669. In a majority opinion the Supreme Court concluded that the nexus requirement not only applies outside of the context of aviation torts, but also applies when determining admiralty jurisdiction for noncommercial torts. *Id.* at 674. The Court reasoned that a boating accident on navigable waters affects maritime commerce regardless of whether the accident involves a pleasure or commercial craft. *Id.* at 675. *But see id.* at 683 (Justice Powell, dissenting). In dissenting, Justice Powell argued that *Executive Jet* did not support the majority decision. *Id.* Powell reasoned that the wreckage of a jet airplane, as in *Executive Jet*, affects maritime commerce in the same way as the wreckage of two pleasure boats, yet the Supreme Court denied admiralty jurisdiction for the plaintiffs' claim in *Executive Jet*. *Id.*; see *Executive Jet*, 409 U.S. at 250-51.

8. See GILMORE & BLACK, *supra* note 1, § 1-10 at 30-31, n.98q. (suggesting that *Executive Jet* moves toward more rational approach to determining admiralty jurisdiction for tort claims).

9. See *Carroll v. Protection Maritime Ins. Co.*, 512 F.2d 4, 10 (1st Cir. 1975) (Aldrich,

from the Supreme Court's failure in *Executive Jet* to set forth specific criteria for determining whether a tort is significantly related to traditional maritime activity.<sup>10</sup> To assist lower courts in determining whether a claimant properly may bring an action in admiralty, the federal circuits have developed varying means of implementing the nexus requirement presented in *Executive Jet*.<sup>11</sup> In *Oman v. Johns-Manville Corporation*,<sup>12</sup> the Fourth Circuit, adopting a four factor analysis of the nexus requirement, concluded that claims for asbestos related injuries do not lie within the admiralty jurisdiction of the federal courts even though the injuries occurred on navigable waters.<sup>13</sup>

In *Oman*, five employees of the Newport News Shipyard<sup>14</sup> brought suit in the United States District Court for the Eastern District of Virginia against Johns-Manville Corporation and nine other asbestos manufacturers and distributors.<sup>15</sup> The plaintiffs sought damages for injuries sustained from exposure to asbestos fibers while installing asbestos insulation on ships.<sup>16</sup>

J., concurring) (confusion exists concerning factors courts must consider in determining nexus relationship).

10. See Comment, *Admiralty Tort Jurisdiction: Floundering on the Sea of Inconsistency*, 27 U. FLA. L.R. 805, 811 (1975) (criticizing *Executive Jet* as lacking guidelines by which courts should determine if claims satisfy nexus requirement). *But cf.* *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 228 (4th Cir. 1985) (finding guidance in *Executive Jet*'s discussion of history and purpose of admiralty law), *cert. denied*, 106 S. Ct. 351 (1985); *infra* notes 27-53 and accompanying text (discussion of *Oman*).

11. See *Oman*, 764 F.2d at 230 (using four factor analysis to determine whether nexus relationship exists); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 783 (11th Cir. 1984) (using four factor analysis to determine whether claim satisfies nexus requirement); *Austin v. Unarco Industries, Inc.*, 705 F.2d 1, 9-11 (1st Cir. 1983) (using seaworthiness doctrine to determine whether shipyard workers properly brought products liability action in admiralty), *cert. denied*, 463 U.S. 1247 (1983); *Keene Corp. v. United States*, 700 F.2d 836, 844 (2d Cir. 1983) (analyzing maritime nature of product to determine whether products liability action satisfied nexus requirement), *cert. denied*, 464 U.S. 864 (1983); *Owens-Ill., Inc. v. United States Dist. Court for the Western Dist. of Wash.*, 698 F.2d 956, 970 (9th Cir. 1983) (using four factor analysis to determine whether admiralty jurisdiction exists and emphasizing traditional concepts of admiralty law); *Kelly v. Smith*, 485 F.2d 520, 525-26 (5th Cir. 1973) (using four factor analysis to determine whether nexus requirement existed), *cert. denied*, 416 U.S. 969 (1973); *infra* notes 32-53 and accompanying text (discussion of *Oman*); *infra* notes 110-12 and accompanying text (discussion of *Harville*); *infra* notes 114-25 and accompanying text (discussion of *Owens-Ill.*); *infra* notes 125-34 and accompanying text (discussion of *Keene*); *infra* notes 140-48 and accompanying text (discussion of *Austin*).

12. 764 F.2d 224 (4th Cir. 1985), *cert. denied*, 106 S. Ct. 351 (1985).

13. *Id.* at 233. See *infra* notes 26-53 and accompanying text (discussion of *Oman*).

14. See *White v. Johns-Manville Corp.*, 662 F.2d 234, 234 (4th Cir. 1981), (*White II*), *cert. denied*, 454 U.S. 1103 (1982), *vacated*, 764 F.2d 224 (1985). The original plaintiffs in *White v. Johns-Manville Corp.* were John W. White, James T. Oman, Fred R. Walker, High V. Reynolds and Willie A. Gibbons. *Id.* The plaintiffs brought separate actions which the district court consolidated for trial. *Oman*, 764 F.2d at 226.

15. *White II*, 662 F.2d at 234. The named defendants in *White II* were Johns-Manville Corporation, Johns-Manville Sales Corporation, Raybestos-Manhattan Corporation, Owens-Corning Fiberglass Corporation, Pittsburg Corning Corporation, The Celotex Corporation, Unarco Industries, Inc., H.K. Porter Company, Southern Asbestos Company and Eagle-Picher Industries, Inc. *Id.*

16. *Id.* at 238. The plaintiffs' work in *Oman* involved installing asbestos insulation on

Under Virginia state law, the plaintiffs faced a two year statute of limitations period which, if applicable, would limit or bar their recovery.<sup>17</sup> In an apparent effort to circumvent the state statute of limitations and apply the equitable doctrine of laches,<sup>18</sup> the plaintiffs sought to bring their claim in admiralty.<sup>19</sup> The district court denied admiralty jurisdiction, reasoning that the plaintiffs' work bore no significant relationship to traditional maritime activity and thus failed to satisfy the nexus requirement of *Executive Jet*.<sup>20</sup>

On appeal to the fourth Circuit, a three judge panel in *White v. Johns-Manville Corporation (White II)*<sup>21</sup> held that the plaintiffs' claim satisfied the nexus test and therefore was cognizable in admiralty.<sup>22</sup> The *White II* court reasoned that the installation of insulation was necessary for a ship to fulfill its

ships both under construction and being repaired. *Id.* About 90 to 95 percent of the plaintiffs' work was done while the ships were docked in navigable waters. *Id.* at 239.

17. *Id.* Section 8.01-243 of the Virginia Code states that actions for personal injuries must be brought within two years of the time the action accrues regardless of the theory of recovery. VA. CODE §8.01-243 (1980 Replacement ed.).

In *Locke v. Johns-Manville Corp.*, the Supreme Court of Virginia held that a cause of action accrued when the injury occurred. See *Locke v. Johns-Manville Corp.*, 221 Va. 959, 959, 275 S.E.2d 900, 905 (1981). The *Locke* court held that the limitations period should commence from the date on which medical evidence could reveal that the plaintiff had been injured. *Id.* in *Large v. Bucyrus-Erie Co.* the United States District Court for the Eastern District of Virginia, relying on *Locke*, found that a plaintiff suffering from respiratory disease due to exposure to silica and asbestos dust was injured at the time when medical evidence could have revealed the injury. See *Large v. Bucyrus-Erie Co.*, 524 F. Supp. 285, 288-89 (E.D. Va. 1981), *aff'd*, 707 F.2d 94 (1983). Thus, the *Large* court held that the statute of limitations period began to run when the medical evidence could have revealed the injury regardless of whether physicians actually performed medical tests. *Id.*

18. See *infra* note 19 (doctrine of laches is available in admiralty).

19. *White II*, 662 F.2d at 239. Laches is an affirmative defense available under admiralty law which bars a claim only when the defendant proves that the plaintiff unnecessarily delayed in filing suit and that the delay prejudiced the defendant. *Costello v. United States*, 365 U.S. 265, 282 (1961); see also M. MORRIS, *THE LAW OF MARITIME PERSONAL INJURIES* § 123 at 225 (3rd ed. 1975) (discussion of equitable doctrine of laches in admiralty law). Admiralty actions excluded from the laches doctrine include salvage suits and petitions for limitations of liability. 43 U.S.C. § 730, 1303(b) (1976). For a discussion of the laches doctrine in asbestos suits see Comment, *Admiralty Jurisdiction: The New Wave in Asbestos Litigation*, 13 U. BALT. L. REV. 145 (1983) [hereinafter cited as *The New Wave in Asbestos Litigation*].

In 1985 the Virginia legislature enacted § 8.01-249 of the Virginia Code which states that actions for asbestos related injuries accrue when a physician first communicates the injury to the claimant. VA. CODE § 8.01-249 (1984 Replacement Vol. & Supp. 1985). Consequently, claimants no longer must seek admiralty jurisdiction for asbestos related claims to avoid Virginia's general two year statute of limitations period for products liability actions. See VA. CODE § 8.01-243. For an overview of the discovery rule which tolls the statute of limitations in latent disease cases until a physician or patient actually discovers the illness, see *The New Wave in Asbestos Litigation*, *supra*, at 154-56.

20. *White II*, 662 F.2d at 238.

21. 622 F.2d 234 (4th Cir. 1981) (*White II*), *cert. denied*, 454 U.S. 1163 (1982), *vacated*, 764 F.2d 224 (4th Cir. 1985).

22. *Id.* at 241. The *White II* court read *Executive Jet* as requiring that a claim satisfy both a nexus test and locality test before the claim could lie in admiralty. *Id.* at 239; *Executive Jet*, 409 U.S. at 268. The plaintiffs' tort in *White II* met the locality test. *White II*, 662 F.2d at 241. Between 90-97 percent of the plaintiffs' exposure to asbestos fibers occurred while the

maritime function and that therefore the plaintiffs' work was essential to the maritime industry.<sup>23</sup> The panel then cited several cases as support for its conclusion that claimants properly may bring products liability actions in admiralty when their claims meet the *Executive Jet* criteria.<sup>24</sup> The *White II* court vacated the district court order and remanded the case with instructions to try the claim under admiralty law and to determine whether the doctrine of laches barred the suit.<sup>25</sup>

The Fourth Circuit, sua sponta, called for an en banc hearing of the case to reconsider the panel's ruling in *White II*.<sup>26</sup> The Fourth Circuit in *Oman* overruled *White II* and concluded that the plaintiffs' work bore no reasonable relationship to traditional maritime activity.<sup>27</sup> The Fourth Circuit, accordingly, held that the plaintiffs' claim for work related injuries could not lie in admiralty.<sup>28</sup> The *Oman* court determined that the panel's decision in *White II* was the result of a misapplication of case law and a misunderstanding of the nexus requirement introduced in *Executive Jet*.<sup>29</sup>

The *Oman* court initially distinguished the various cases that the *White II* court cited to support the invocation of admiralty jurisdiction for products liability claims.<sup>30</sup> The Fourth Circuit observed that these cases involved

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plaintiffs were working on ships which were docked in navigable waters. *Id. See infra* notes 23-24 and accompanying text (discussing *White II* court's reasoning on the nexus relationship).

23. *White II*, 662 F.2d at 239.

24. *Id.* at 239-40. The *White II* court relied on several cases which held that products liability claims were cognizable in admiralty when the products caused damage or injuries which implicated maritime concerns. *Id. See Sperry Rand Corp. v. Radio Corp. of Am.*, 618 F.2d 319, 321-22 (5th Cir. 1980) (admiralty jurisdiction allowed in action against manufacturer of gyropilot steering unit for damages incurred when ship collided with another ship and ran aground due to alleged defects in steering unit); *Jones v. Bender Welding and Mach. Works, Inc.*, 581 F.2d 1331, 1336-37 (9th Cir. 1978) (upholding admiralty jurisdiction in action against manufacturer of marine engine for damages to fishing vessel resulting from allegedly defective design of engine's oil cooler supply lines); *Pan-Alaska Fisheries, Inc. v. Marine Constr. and Design Co.*, 565 F.2d 1129, 1140 (9th Cir. 1977) (finding admiralty jurisdiction in action against manufacturer of marine engine for damages resulting from allegedly defective fuel filter that caused fire aboard ship at sea); *JIG The Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 579 F.2d 171, 174 (5th Cir. 1975) (admiralty jurisdiction allowed in action against ship builder for loss of shrimp boat due to builder's alleged negligent design of boat), *cert. denied*, 414 U.S. 954 (1976).

25. *White II*, 662 F.2d at 241. *Oman v. Johns-Manville Corp.* is a rehearing of *White v. Johns-Manville Corp.* *Id.* at 236. The *Oman* Court renamed the case because John W. White, an original plaintiff in the *White II* case, did not join in the motion for rehearing.

26. *Oman*, 764 F.2d at 226.

27. *Id. See infra* notes 32-53 and accompanying text (discussing rationale behind *Oman* ruling).

28. *Oman*, 764 F.2d at 232.

29. *Id.* at 228. *See infra* notes 30-37 and accompanying text (discussing *Oman* court's criticism of *White II* rationale).

30. *Oman*, 764 F.2d at 229. *See supra* note 24 (cases on which *White II* court relied to support its conclusion that products liability actions are cognizable in admiralty).

products that caused damages to ships.<sup>31</sup> The *Oman* court reasoned that damages to ships have a significant effect on the traditional admiralty concerns of maritime navigation and commerce.<sup>32</sup> The Fourth Circuit maintained, however, that the *Oman* case involved asbestos fibers which caused injuries to land based workers and thus implicated no traditional maritime concerns.<sup>33</sup>

The *Oman* court then determined that the *White II* court had utilized a flawed analysis in concluding that the plaintiffs satisfied the nexus requirement of *Executive Jet*.<sup>34</sup> The Fourth Circuit criticized *White II* for focusing exclusively on the occupation of the plaintiffs to determine whether the plaintiffs' claim met the nexus requirement.<sup>35</sup> The *Oman* court maintained that the holding in *White II* was incorrect because the panel had failed to consider all the factors necessary for a proper analysis of *Executive Jet's* nexus requirement.<sup>36</sup> The Fourth Circuit in *Oman* ruled that when determining whether a plaintiff's claim satisfies the nexus requirement, courts should consider four factors—the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, and the traditional concepts of the role of admiralty law.<sup>37</sup>

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31. *Oman*, 764 F.2d at 229. The *Oman* court emphasized that each case cited in *White II* to support the use of admiralty law in products liability cases involved damage to ships or the shipping industry. *Id.* See *supra* note 24 (cases on which *White II* court relied to support its conclusion that products liabilities actions are cognizable in admiralty). The *Oman* court held that the plaintiffs' claim implicated no such admiralty concerns. *Oman*, 764 F.2d at 229. The *Oman* court noted, however, that claimants could bring a claim in admiralty for damages caused by defective asbestos insulation if the damages implicated maritime concerns. *Id.* The *Oman* court indicated that the court would allow a products liability claim involving asbestos in admiralty if the asbestos caused a fire to spread through a ship. *Id.* For a general discussion of admiralty jurisdiction over products liability claims see Note, *Determination of Admiralty Jurisdiction for Products Liability Actions*, 22 B.C.L. Rev. 1133 (1981).

32. *Oman*, 764 F.2d at 229.

33. *Id.*

34. *Id.* at 230.

35. *Id.* at 228-29. See *supra* notes 23-24 and accompanying text (*White II* focuses exclusively on analysis of plaintiffs' function to determine whether admiralty jurisdiction exists); *White II*, 662 F.2d at 239-40.

36. *Oman*, 764 F.2d at 229. See *infra* notes 37-49 and accompanying text (general discussion of four factor analysis in *Oman*).

37. *Oman*, 764 F.2d at 230. The four factor analysis adopted in *Oman* originated in *Kelly v. Smith*. See *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), *cert. denied*, 416 U.S. 969 (1973). In *Kelly* the plaintiffs sued the caretaker of a private hunting island. *Id.* at 552. The defendant caretaker caught the plaintiffs poaching and shot them as they escaped the island by boat. *Id.* at 521-22. The *Kelly* court held that courts must look to the facts and circumstances of each case to determine whether a claim meets the nexus test of *Executive Jet*. *Id.* at 525; *Executive Jet*, 409 U.S. at 261. The *Kelly* court examined the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, and the traditional concepts of the role of admiralty law. *Kelly*, 485 F.2d at 525. The Fifth Circuit in *Kelly* held that the plaintiffs claim was cognizable in admiralty for the reasons that the party most seriously injured was the pilot of a boat who was responsible for the navigation of the

The *Oman* court began its four factor analysis by examining the functions and roles of the parties involved in the action.<sup>38</sup> The Fourth Circuit conceded that the role of the defendant in supplying insulation to the plaintiffs favored the court's exercising admiralty jurisdiction because the defendants specifically designed, marketed, and advertised the asbestos insulation for maritime use.<sup>39</sup> The *Oman* court ultimately maintained, however, that of the four factors under consideration, the role of the defendants was the only factor that favored admiralty jurisdiction.<sup>40</sup> The *Oman* court then determined that while the plaintiffs' work was important to maritime commerce, it was not maritime activity.<sup>41</sup> The court reasoned that only work traditionally done by sailors was related significantly to maritime activity.<sup>42</sup> Because installing insulation is the work of landsmen and not sailors, the *Oman* court found that the role of the plaintiffs militated against invoking admiralty jurisdiction.<sup>43</sup>

The *Oman* court next considered the causation and type of injury involved in the plaintiffs' claim.<sup>44</sup> The court reasoned that injuries resulting from exposure to asbestos fibers were more closely related to negligence in the construction industry than to negligence involving traditional maritime activities.<sup>45</sup> Observing that asbestos related injuries are not peculiar to maritime service, the *Oman* court determined that the type and causation of the plaintiffs' injuries counseled against trying the claim in admiralty.<sup>46</sup> The court then examined the instrumentalities involved in the tort.<sup>47</sup> The *Oman* court maintained that the relationship between ships and the plaintiffs' work was merely incidental since the plaintiffs would have a similar claim had they incurred those same injuries while installing asbestos insulation in

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vessel on the river; that the vehicle involved was a boat, whose function was transportation on the river; and that traditional concepts of admiralty law include laws governing the safe navigation of waterways. *Id.* at 526. For a general discussion of the impact of *Kelly v. Smith* on admiralty tort jurisdiction see *Recent Developments, Admiralty Tort Jurisdiction—Tort Claims Not Within Admiralty Jurisdiction Unless Requisite Maritime Nexus Exists*, 27 VAND. L. REV. 343, 351-52 (1974) [hereinafter cited as *Recent Developments*].

38. *Oman*, 764 F.2d at 230.

39. *Id.*

40. *Id.* See *infra* notes 44-52 and accompanying text (discussion of last three factors in *Oman* analysis).

41. *Oman*, 764 F.2d at 230.

42. *Id.* at 230-31. The *Oman* court determined that work is not traditionally maritime if the only maritime attribute of the activity is that workers perform the activity on board a ship. *Id.*

43. *Id.* at 230. The *Oman* court noted that sailors occasionally may make repairs to ships similar to those made by the plaintiffs. *Id.* The *Oman* court emphasized, however, that sailors make repairs only in emergency situations and that landsmen normally make repairs involving asbestos insulation. *Id.*

44. *Id.* at 231.

45. *Id.*

46. *Id.*

47. *Id.* The *Oman* court concluded that ships, asbestos insulation, and the tools necessary for installing the insulation were the vehicles and instrumentalities involved in the action. *Id.*



buildings.<sup>48</sup> The Fourth Circuit determined that while designed for maritime use, asbestos has no peculiar maritime character and that exposure to asbestos fibers is unrelated to maritime activity.<sup>49</sup>

The *Oman* court viewed the fourth factor, traditional concepts of the role of admiralty, as the most important consideration in analyzing the nexus requirement.<sup>50</sup> Quoting *Executive Jet*, the Fourth Circuit determined that admiralty law evolved to manage specific problems related to maritime navigation, the seaworthiness of ships, maritime liens, general average, limitations of liabilities, and claims for salvage.<sup>51</sup> The *Oman* court concluded that the plaintiffs' claim involved none of the maritime interests listed in *Executive Jet* and therefore implicated no maritime concerns.<sup>52</sup> On the basis of its four factor analysis, the *Oman* court held that the plaintiffs' claim did not satisfy the nexus requirement and that the plaintiffs therefore could not invoke the admiralty jurisdiction of the federal courts.<sup>53</sup>

In determining that installing insulation on ships is not significantly related to traditional maritime activity, the *Oman* court's holding furthers the purpose of the *Executive Jet* nexus requirement by limiting admiralty jurisdiction to claims that fall within the scope of activity traditionally governed by maritime law.<sup>54</sup> Before *Executive Jet*, a tort action that occurred on navigable waters was cognizable in admiralty even though the tort was unrelated to maritime navigation and commerce.<sup>55</sup> In *Executive Jet*, however, the Supreme Court limited the scope of admiralty jurisdiction to tort claims that are significantly related to maritime activity.<sup>56</sup> The plaintiff in *Executive*

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48. *Id.*

49. *Id.* The *Oman* court determined that asbestos insulation has no uniquely maritime character even though manufacturers designed, manufactured, and advertised the insulation for maritime use. *Id.*

50. *Id.* at 231.

51. *Id.* at 227-28; *Executive Jet*, 409 U.S. at 270. See generally GILMORE & BLACK, *supra* note 1 § 7-7—7-13, at 500-15 (discussion of maritime navigation); § 3-27, at 150-55 (discussion of seaworthiness of ships); § 9-1—9-95, at 586-817 (discussion of maritime liens); § 5-1—5-16, at 244-71 (discussion of general average); § 10-1—10-48, at 818-957 (discussion of limitations of liabilities); § 8-1—8-15, at 532-88 (discussion of claims for salvage).

52. *Oman*, 764 F.2d at 231. The plaintiffs in *Oman* failed to allege that their work was the type traditionally done by sailors. See *supra* note 42 and accompanying text (claims arising from work traditionally done by sailors are cognizable in admiralty).

53. *Oman*, 764 F.2d at 232. The *Oman* court noted that courts cannot use admiralty jurisdiction for the sole purpose of bypassing state law. *Id.* The *Oman* court refused to interfere with the application of Virginia's statute of limitations. *Id.* The Fourth Circuit in *Oman* intimates that to allow the plaintiffs' claim in admiralty simply to bypass state law would undermine the independence of the state's government. *Id.*

54. See *infra* notes 58-59 and accompanying text (maintaining that Supreme Court sought to limit admiralty jurisdiction with nexus requirement of *Executive Jet*); *Executive Jet*, 409 U.S. at 268. See also *infra* notes 60-64 and accompanying text (*Oman* limits admiralty jurisdiction by using nexus requirement); *Oman*, 764 F.2d at 232.

55. See *supra* notes 2-3 and accompanying text (discussion of locality of tort as only factor in determining whether admiralty jurisdiction exists).

56. *Executive Jet*, 409 U.S. at 250. For a general discussion of the Supreme Court's

*Jet* sought admiralty jurisdiction on the basis of the locality test when his plane ingested seagulls into its engine during takeoff and crashed into the navigable waters of Lake Erie.<sup>57</sup> The Supreme Court in *Executive Jet* determined that allowing a claim in admiralty based on the claim's relationship to traditional maritime activity, as opposed to the locality of the occurrence, was more sensible and consonant with the history and purpose of admiralty law.<sup>58</sup> Thus, the Supreme Court developed the nexus test to exclude from federal admiralty courts those tort claims in which the wrong only incidentally occurred on navigable waters.<sup>59</sup> The plaintiffs' claim in *Oman* is typical of the type of claims that the Supreme Court sought to exclude from admiralty jurisdiction via the nexus requirement of *Executive Jet*.<sup>60</sup> Injuries resulting from exposure to asbestos fibers are not uniquely maritime.<sup>61</sup> In *Oman*, the maritime location of the plaintiffs' injuries presents

reasoning in *Executive Jet* see H. BAER, ADMIRALTY LAW OF THE SUPREME COURT §§ 25-1 to 25-3 at 671 (3d ed. 1979).

57. *Executive Jet*, 409 U.S. at 250.

58. *Id.* at 273. In *Executive Jet*, the plaintiff's plane crashed into Lake Erie about a fifth of a mile from shore. *Id.* at 250. The Supreme Court reasoned that allowing a claim to lie in admiralty simply because the tort occurred a few hundred yards from land made little sense. *Id.* at 266.

59. *Id.* at 261. In *Executive Jet*, the Supreme Court sought to remedy the inconsistencies of the strict locality test for determining admiralty jurisdiction by requiring a nexus relationship between the alleged wrong and maritime activity. *Id.* at 255. For instance, the Supreme Court in *T. Smith & Son Inc. v. Taylor* found admiralty jurisdiction lacking in a case brought by a longshoreman who was injured when a loading sling knocked him off a dock and into navigable waters. See *T. Smith & Son Inc. v. Taylor*, 276 U.S. 179, 181-82 (1928). In *Minnie v. Port Huron Terminal Co.*, however, the court upheld admiralty jurisdiction when a ship's hoist knocked a longshoreman off the deck of a ship in navigable waters and onto a dock. See *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 649 (1937).

In some cases, the absurdity of applying the strict locality test caused courts to abandon the test for certain claims. See *Peytavin v. Gov't Employees Ins. Co.*, 453 F.2d 1121, 1127 (5th Cir. 1972) (denying admiralty jurisdiction in action for injuries resulting from collision of two automobiles on ferry crossing navigable waters); *Chapman v. City of Grosse Pointe Farms*, 385 F.2d 962, 966 (6th Cir. 1967) (refusing to grant admiralty jurisdiction in action for injuries incurred from diving off shore and into shallow, but navigable waters); *McGuire v. City of New York*, 192 F. Supp. 866, 871-72 (S.D.N.Y. 1961) (refusing to grant admiralty jurisdiction in action for injuries plaintiff incurred while swimming in navigable waters). For criticism of the locality test see 7 A. J. MOORE, FEDERAL PRACTICE, ADMIRALTY ¶¶ 325[3]-[5] (2d ed. 1972); Note, *The Other Half of Executive Jet: The New Rationality in Admiralty Jurisdiction*, 57 TEX. L. REV. 977, 986-89 (1979) [hereinafter cited as *The Other Half of Executive Jet*]; Black, *supra* note 1, at 264. See *infra* notes 62-64 and accompanying text (maintaining that because tort in *Oman* only incidentally occurred on navigable waters, nexus requirement of *Executive Jet* properly excludes tort claim from admiralty jurisdiction).

60. See *supra* note 59 and accompanying text (*Executive Jet*'s nexus test properly excludes from admiralty jurisdiction claims that only incidentally occur on navigable water); *Executive Jet*, 409 U.S. at 257-58. See also *infra* note 62-63 and accompanying text (plaintiffs' injuries in *Oman* only incidentally occurred on navigable waters); *Oman*, 764 F.2d at 231.

61. See *Oman*, 764 F.2d at 231 (asbestos related injuries are unrelated to maritime activity); *Harville v. Johns-Manville Corp.*, 731 F.2d 775, 785 (11th Cir. 1984) (asbestosis is nonmaritime disease); *Owens-Ill. Inc. v. United States Dist. Court for the Western Dist. of*

no additional admiralty concerns.<sup>62</sup> Indeed, the only distinction between the plaintiffs' injuries in *Oman* and those afflicting workers with asbestos related diseases in the construction industry is the location of the worker's exposure to asbestos fibers.<sup>63</sup> Therefore, because the plaintiffs' injuries only incidentally occurred on navigable waters, the *Oman* court properly employed the nexus test to exclude the claim from the court's admiralty jurisdiction.<sup>64</sup>

The analysis of the Fourth Circuit panel in *White II*, on the other hand, undermines the purpose of the nexus requirement.<sup>65</sup> The panel in *White II* determined that the plaintiffs' claim met the nexus requirement because the plaintiffs' work was necessary to fulfill the ship's maritime function, and because the insulation installed by the plaintiffs became an integral part of the ship.<sup>66</sup> Under *White II*, claims arising from any work necessary for a ship to fulfill its maritime function are related to traditional maritime activity.<sup>67</sup> Many products manufactured on land eventually become appurtenances of ships and are necessary to fulfill a ship's maritime function. The *White II* rationale implies that claims arising from the manufacturing of maritime products on land satisfy the nexus requirement of *Executive Jet*.<sup>68</sup>

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Wash., 698 F.2d 967, 971 (9th Cir. 1983) (asbestos-related diseases and asbestos bear little maritime connection).

62. *Oman*, 764 F.2d at 231. Under certain fact patterns, claims for asbestos related injuries are cognizable in admiralty. For instance, if a sailor incurred injuries through exposure to asbestos fibers while making emergency repairs on a ship, he could bring a claim for his injuries in admiralty. See *supra* text accompanying note 42 (claims arising from work traditionally done by sailors are cognizable at admiralty); see also *infra* notes 142-43 and accompanying text (concerns of admiralty law include protection of sailors).

63. See *Oman*, 764 F.2d at 231. The *Oman* court determined that the plaintiffs' injuries were identical to those afflicting thousands of land based workers. *Id.*; (quoting *Harville v. Johns-Manville Corp.*, 731 F.2d 775, 785 (11th Cir. 1984)). In *Keene Corp. v. United States*, however, the Second Circuit recognized a distinction between asbestos related claims brought by shipyard workers and similar claims brought by land based workers. See *Keene Corp. v. United States*, 700 F.2d 836, 844 (2d Cir. 1983), *cert. denied*, 464 U.S. 846 (1983). The *Keene* court noted that admiralty jurisdiction may lie in a products liability action involving asbestos if the manufacturer designed, advertised, and marketed the asbestos product for maritime use. *Id.* See *infra* notes 126-34 and accompanying text (discussion of *Keene* rationale). But cf. *supra* notes 58-59 and accompanying text (single factor analysis of product or instrumentality causing injury is inconsistent with policy of *Executive Jet*); *Executive Jet*, 409 U.S. at 261.

64. *Oman*, 764 F.2d at 231-32. See *supra* note 59 and accompanying text (Supreme Court advocates use of nexus requirement to exclude from admiralty jurisdiction claims for wrongs fortuitously occurring on navigable waters).

65. See *White II*, 662 F.2d at 239 (*White II* panel applied single factor analysis to invoke admiralty jurisdiction); *infra* notes 66-71 and accompanying text (*White II* undermines *Executive Jet* by allowing locality of tort to determine whether admiralty jurisdiction exists); *Executive Jet*, 409 U.S. at 261.

66. *White II*, 662 F.2d at 239.

67. See *id.* (holding that plaintiffs' claim satisfied nexus test because plaintiffs' work was necessary for ship to sail); *infra* note 68 and accompanying text (any work necessary for ship to sail is related significantly to maritime activity under rationale of *White II*).

68. See *White II*, 662 F.2d at 239. The *White II* court ruled that the plaintiffs' claim satisfied the nexus test because the work from which the claim arose was necessary for the ship to fulfill its maritime role. *Id.* Extending this reasoning, any work, on land or sea, necessary

*White II* distinguished these claims from the plaintiffs' claim on the basis that the plaintiffs' claim involved a tort which occurred on navigable waters.<sup>69</sup> Thus, under *White II*, the determining factor for invoking admiralty jurisdiction is the locality of the tort.<sup>70</sup> The *White II* holding, therefore, defeats the purpose of *Executive Jet* by allowing the locality of the tort to determine admiralty jurisdiction.<sup>71</sup>

The Fourth Circuit in *Oman* recognized that admiralty law is not suited to governing claims that only incidentally are related to maritime activity.<sup>72</sup> The *Oman* court, while agreeing with *White II* that the plaintiffs' claim was related to maritime navigation and commerce, ruled that more than a mere relationship to maritime activity was necessary to satisfy the nexus requirement.<sup>73</sup> Quoting *Executive Jet's* extensive discussion of the history and purpose of admiralty law, the *Oman* court concluded that a claim satisfies the nexus requirement only when the claim arises out of an activity traditionally governed by admiralty law.<sup>74</sup> The *Oman* court's interpretation of the nexus test properly limits the scope of admiralty law.<sup>75</sup>

The *Oman* court cited *Executive Jet's* discussion of the history and purpose of admiralty law as a guideline for determining claims that satisfy the nexus test.<sup>76</sup> The Fourth Circuit, however, did not examine the traditional concepts of admiralty law alone to determine whether the plaintiffs' claim met the nexus requirement.<sup>77</sup> Instead, the *Oman* court adopted a formula

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for a ship to sail is related to maritime activity, and claims arising from such work satisfy the nexus test. See *id.* Thus, *White II* defeats the policy of *Executive Jet* by broadening admiralty jurisdiction to include claims that do not implicate maritime concerns. See *Executive Jet*, 409 U.S. at 273 (purpose of nexus test is to exclude actions not related significantly to maritime activity).

69. See *White II*, 662 F.2d at 239. The *White II* court held that a claim must satisfy both the nexus test and the locality test before the plaintiff could bring his action in admiralty. *Id.* Thus, the distinguishing factor between the plaintiffs' claim in *White II* and other claims arising out of work necessary for a ship to sail is the locality of the tort giving rise to the claim. *Id.*

70. *White II*, 662 F.2d at 239. See *supra* notes 68-69 and accompanying text (under *White II* holding, locality of tort determines admiralty jurisdiction).

71. *White II*, 662 F.2d at 239. See *supra* note 59 and accompanying text (Supreme Court introduced nexus requirement in *Executive Jet* to eliminate use of strict locality test in determining admiralty jurisdiction).

72. See *Oman*, 764 F.2d at 231-32 (claimants should not bring actions in admiralty that do not require expertise of admiralty court).

73. *Id.* at 230. The *Oman* court acknowledged that the plaintiffs' work was important to maritime commerce, but held that mere importance to maritime commerce does not bring an activity within the scope of admiralty law. *Id.* See GILMORE & BLACK, *supra* note 1, § 170 at 29 (maintaining that while concerns of shipping industry may reach back to ranch on which cattle were bred, admiralty jurisdiction should not).

74. *Id.* at 227-28 (citing *Executive Jet*, 409 U.S. at 269-70).

75. See *Oman*, 764 F.2d at 231 (using nexus test to eliminate from admiralty jurisdiction claims which are not related significantly to maritime activity); *supra* notes 58-59 and accompanying text (admiralty jurisdiction is limited to actions traditionally governed by maritime law).

76. *Oman*, 764 F.2d at 228.

77. See *id.* at 230. The *Oman* court adopted a four factor analysis to determine whether

that three other federal circuits use.<sup>78</sup> Under the *Oman* analysis, the traditional concepts of the role of admiralty law is just one of four factors that the court considers in determining whether to allow a claim in admiralty.<sup>79</sup> The *Oman* court's four factor analysis, however, attenuates the Supreme Court's emphasis on the traditional concepts of the role of admiralty law, the final factor of the *Oman* court's four factor analysis.<sup>80</sup>

Each of the first three of the four factors in the *Oman* court's analysis—the functions and roles of the parties, the causation and type of injury, and the types of vehicles and instrumentalities involved—either support or oppose the characterization of a claim as an activity traditionally governed by admiralty law.<sup>81</sup> Thus, when considering whether a claim falls within admiralty jurisdiction, courts qualitatively may assess these first three factors in determining whether a claim is an activity governed by the traditional concepts of the role of admiralty law, the fourth and final factor.<sup>82</sup> Consequently, courts should give higher significance to the final factor, which is established upon reference to the first three factors.<sup>83</sup> This drawback to the *Oman* four factor analysis may be academic since most claims that are cognizable in admiralty under the first three factors will also be cognizable in admiralty under the last factor.<sup>84</sup> Furthermore, an examination of the *Oman* court's individual treatment of each factor supports the conclusion that the four factor analysis effectively accomplishes the purpose of *Executive Jet's* nexus requirement.<sup>85</sup> The Fourth Circuit in *Oman* did not examine each factor mechanically in an isolated setting, but rather viewed the factors collectively to determine whether the claim was of a maritime nature.<sup>86</sup>

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an action properly was in admiralty. *Id.* The traditional concepts of the role of admiralty law is one of the four factors in the *Oman* analysis. *Id.* at 231.

78. *Oman*, 764 F.2d at 230. See *Woessner v. Johns-Manville Sales Corp.*, 767 F.2d 634, 641 (5th Cir. 1985) (using four factor analysis to determine whether admiralty jurisdiction exists); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 783 (11th Cir. 1985) (same); *Owens-Ill. Inc. v. United States Dist. Court for the Western Dist. of Wash.*, 698 F.2d 967, 970 (9th Cir. 1983) (same).

79. *Oman*, 764 F.2d at 231.

80. See *supra* note 74 and accompanying text (citing *Executive Jet's* discussion of history and purpose of admiralty law as primary guidelines for determining whether admiralty jurisdiction lies for tort claims); *Executive Jet*, 409 U.S. at 253-63; *infra* notes 81-82 and accompanying text (maintaining that courts should give higher significance to final factor of *Oman* four factor analysis).

81. See *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 643 (5th Cir. 1985) (using four factor analysis to determine whether claim falls within traditional concepts of role of admiralty law); *infra* notes 104-09 and accompanying text (discussion of *Woessner*).

82. *Woessner*, 757 F.2d at 643.

83. See *supra* note 76 and accompanying text (history and purpose of admiralty law are proper guidelines for determining whether claims satisfy nexus test).

84. See *Woessner*, 757 F.2d at 643 (extending special significance to traditional concepts of role of admiralty law in borderline situations).

85. See *supra* notes 81-82 and accompanying text (courts should examine first three factors of *Oman* analysis to determine whether claims are within the traditional concepts of role of admiralty law).

86. *Oman*, 764 F.2d at 229.

86. *Id.*

In addition to properly utilizing the nexus test, *Oman* furthers the purpose behind the test.<sup>87</sup> The Supreme Court in *Executive Jet* described admiralty jurisdiction as a question of federalism.<sup>88</sup> The *Executive Jet* Court introduced the nexus requirement to prevent federal courts from usurping state law by expanding admiralty jurisdiction beyond its proper bounds.<sup>89</sup> The federal interest in admiralty law is a uniformity of law governing maritime activity.<sup>90</sup> Weighing the interest in uniform laws to govern admiralty against the interest of the state in self-government, the Supreme Court in *Executive Jet* concluded that in order to achieve a proper balance between state and federal interests, state courts should have jurisdiction over claims that only incidentally are related to maritime concerns.<sup>91</sup> The *Oman* court similarly concluded that the federal interest in uniform laws governing admiralty claims militated against allowing the plaintiffs to bring their case under admiralty law.<sup>92</sup> The Fourth Circuit reasoned that since each federal circuit that had considered the issue had rejected admiralty jurisdiction for asbestos related claims by shipyard workers, the *White II* decision deviated from the uniform conclusion reached in other circuits.<sup>93</sup>

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87. See *infra* notes 88-93 and accompanying text (*Oman* furthers federal interest in uniformity of maritime law); *Oman*, 764 F.2d at 232.

88. *Executive Jet*, 409 U.S. at 272-73. See Note, *The Other Half of Executive Jet*, *supra* note 59, at 982 (whether to apply federal admiralty law or state law is essentially question of federalism).

89. *Executive Jet*, 409 U.S. at 272-73.

90. See GILMORE & BLACK, *supra* note 1, § 1-17 at 48 (state law cannot interfere with uniform operation of maritime law).

91. See *Executive Jet*, 409 U.S. at 272-73. The Supreme Court in *Executive Jet* found that the claim before the court was connected only incidentally with navigable waters. *Id.* at 273. See *supra* notes 56-58 and accompanying text (discussion of *Executive Jet* facts). The Court determined, after noting the rightful independence of state governments, that the plaintiff could have his claim heard under state tort law without implicating maritime concerns. *Id.*

92. *Oman*, 764 F.2d at 232. The *Oman* court found that the plaintiff's claim was similar to many claims brought under state tort law. *Id.* The court determined that the federal interest in uniform maritime laws governing was not great enough to supplant state tort law with federal admiralty law. *Id.*

93. *Id.* See *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 649 (5th Cir. 1985) (denying admiralty jurisdiction for asbestos related claims brought by shipyard workers); *Harville v. Johns-Manville Prods. Corp.*, 731 F.2d 775, 787 (11th Cir. 1984) (same); *Austin v. Unarco Indus., Inc.*, 705 F.2d 1, 18 (1st Cir. 1983) (same), *cert. denied*, 463 U.S. 1247 (1983); *Keene Corp. v. United States*, 700 F.2d 836, 844-45 (2d Cir. 1983) (same), *cert. denied*, 464 U.S. 864 (1983); *Owens-Ill. Inc. v. United States Dist. Court for the Western Dist. of Wash.*, 698 F.2d 956, 972 (9th Cir. 1983) (same). See *infra* notes 104-09 and accompanying text (discussion of *Woessner*); *infra* notes 125-34 and accompanying text (discussion of *Keene*); *infra* notes 114-24 and accompanying text (discussion of *Owens-Ill.*).

The *Oman* court reasoned that because all federal circuits that have considered whether asbestos related claims brought by shipyard workers are cognizable in admiralty have denied federal jurisdiction to the parties bringing the claims, the *Oman* decision furthered the federal interest in uniform laws governing admiralty by overruling *White II*. *Oman*, 764 F.2d at 232. On the facts of *Oman*, however, two circuits may have granted jurisdiction in admiralty to the plaintiffs. See *infra* notes 125-34 and accompanying text (discussion of *Keene* analysis); *infra*

The *Oman* holding supports *Executive Jet's* purpose not only by considering the federal interests involved, but also by recognizing the state's interest in governing the claim.<sup>94</sup> In *Executive Jet*, the Supreme Court advised that federal courts proceed with caution when determining jurisdiction over claims that raise issues involving the independence of state governments.<sup>95</sup> The *Oman* court refused to apply admiralty jurisdiction to bypass Virginia's statute of limitations that would bar an arguably meritorious claim.<sup>96</sup> Furthermore, the Fourth Circuit in *Oman* noted that Virginia state courts were hearing asbestos related claims involving the construction industry.<sup>97</sup> Because claims brought by construction workers for asbestos induced injuries differ from the plaintiffs' claim in *Oman* only in the location of the alleged exposure to asbestos,<sup>98</sup> the *Oman* court held that Virginia's interest in uniform laws governing asbestos related claims outweighed any federal admiralty concern in the action.<sup>99</sup> Following the Supreme Court's advice, the Fourth Circuit in *Oman* denied admiralty jurisdiction after a cautious four factor analysis of the claim.<sup>100</sup>

Five other federal circuits have considered whether shipyard workers can sue asbestos manufacturers under admiralty jurisdiction.<sup>101</sup> The Fifth, Ninth,

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notes 114-24 and accompanying text (discussion of *Owens-III.* analysis). The Second Circuit in *Keene Corp. v. United States* denied the plaintiffs' admiralty jurisdiction because the plaintiffs failed to allege that the asbestos product causing the injury was designed and advertised for maritime use. *Keene Corp. v. United States*, 700 F.2d 836, 844 (2d Cir. 1983), *cert. denied*, 464 U.S. 846 (1983). In contrast, the *Oman* plaintiffs alleged that the product causing their injuries was designed and advertised for maritime use. *Oman*, 764 F.2d at 230. Therefore, if faced with the facts of *Oman*, the Second Circuit, following *Keene*, may permit similar plaintiffs to bring asbestos actions in admiralty. See *infra* notes 126-34 and accompanying text (discussion of *Keene*).

The outcome of *Owens-III. Inc. v. United States Dist. Court for the Western Dist. of Wash.* also may have been different had the Ninth Circuit faced the *Oman* facts. The *Owens-III.* court determined that the plaintiffs' claim was not cognizable at admiralty because the plaintiffs incurred injuries while constructing ships as opposed to repairing ships. *Owens-III.*, 698 F.2d at 972. The *Oman* plaintiffs incurred injuries while both constructing and repairing ships. *Oman*, 764 F.2d at 230. Thus, on the *Oman* facts, the *Owens-III.* court may have granted admiralty jurisdiction for the plaintiffs' claim. See *infra* notes 114-24 and accompanying text (discussion of *Owens-III.*).

94. *Oman*, 764 F.2d at 232. The *Oman* court noted that the plaintiffs' claim was the type traditionally committed to resolution under state law. *Id.*

95. *Executive Jet*, 409 U.S. at 272-73 (quoting *Healy v. Ratta*, 292 U.S. 263, 270 (1934)).

96. *Oman*, 764 F.2d at 232. See *supra* notes 17-19 and accompanying text (plaintiffs' claim in *White II* barred under state law statute of limitations but allowed under federal law laches doctrine); *White II*, 662 F.2d at 239-41.

97. *Oman*, 764 F.2d at 232.

98. See *supra* notes 61-64 and accompanying text (maintaining that plaintiffs' claim in *Oman* differed from claims brought by land based construction workers only in location of exposure to asbestos fibers); *Oman*, 764 F.2d at 232.

99. *Oman*, 764 F.2d at 232.

100. See *supra* notes 38-54 and accompanying text (Oman adopted Fifth Circuit's four factor analysis to determine if nexus relationship existed); *Oman*, 764 F.2d at 229.

101. See *supra* note 93 (circuits that have considered whether shipyard workers can bring asbestos related claims in admiralty have denied admiralty jurisdiction).

and Eleventh Circuits apply the four factor analysis used in *Oman* to determine whether claims for asbestos related injuries meet the nexus requirement of *Executive Jet*.<sup>102</sup> Among these circuits, the Fifth and Eleventh Circuits apply the four factor test in a manner that is similar to *Oman's* application, but is more consistent with *Executive Jet*.<sup>103</sup> In *Woessner v. Johns-Manville Sales Corporation*,<sup>104</sup> for example, the Fifth Circuit ruled that the final factor of traditional concepts of the role of admiralty law was dispositive in borderline cases.<sup>105</sup> The *Woessner* court determined that the plaintiffs' asbestos related claim, similar to the plaintiffs' claim in *Oman*, was a borderline case because some factors supported admiralty jurisdiction and other factors opposed trying the claim under maritime law.<sup>106</sup> The *Woessner* court therefore chose to weigh the federal interests in providing uniform maritime laws against the interest of state governments in handling actions that claimants traditionally bring under state law.<sup>107</sup> The *Woessner* court concluded that the traditional concerns of admiralty law did not implicate an interest in a uniform resolution of claims brought by shipyard workers who only coincidentally were injured on ships.<sup>108</sup> The Fifth Circuit reasoned that the plaintiffs should bring their claims under the same law that governs actions brought by workers with similar injuries incurred on land.<sup>109</sup>

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102. See *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 642-43 (5th Cir. 1985) (applying four factor analysis to determine whether admiralty jurisdiction lies); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 783 (11th Cir. 1984) (same); *Owens-Ill., Inc. v. United States Dist. Court for the Western Dist. of Wash.*, 598 F.2d 967, 970 (9th Cir. 1983) (same).

103. See *infra* notes 104-109 and accompanying text (*Woessner* court emphasizes guidelines presented in *Executive Jet* for determining whether admiralty jurisdiction exists). The Supreme Court in *Executive Jet* emphasized the importance of the history and purpose of admiralty law in determining whether admiralty jurisdiction exists. See *supra* note 76 and accompanying text (history and purpose of admiralty law are only guidelines presented in *Executive Jet* by which courts must determine whether claim is cognizable at admiralty); *Executive Jet*, 409 U.S. at 253-67. The *Woessner* court recognized the history and purpose of admiralty law as dispositive in borderline cases. *Woessner*, 757 F.2d at 643. In contrast, the *Oman* court, while acknowledging the importance of the traditional concepts of the role of admiralty law, failed to hold that this factor controls in borderline cases. See *supra* notes 78-83 and accompanying text (maintaining that traditional concepts of role of admiralty law is more important than other factors in *Oman's* four factor analysis).

104. *Woessner*, 757 F.2d 634 (5th Cir. 1985).

105. *Id.* at 643. In *Woessner*, land based shipyard workers sought admiralty jurisdiction for claims against asbestos manufacturers based on injuries sustained from exposure to asbestos fibers. *Id.* at 637.

106. *Id.* at 643. While the *Woessner* court found that claims for injuries involving ships normally could fall within the admiralty jurisdiction of the federal courts, the court noted that the functions and roles of the parties, the type and causation of the injuries, and the offending asbestos insulation were not uniquely maritime and thus opposed trying the plaintiffs' claim in admiralty. *Id.* at 643-48.

107. *Id.* at 643.

108. *Id.* at 648. The *Woessner* court determined that the traditional concerns of admiralty do not include an interest in the uniform resolution of claims by land based workers exposed to asbestos fibers while working on ships. *Id.*

109. *Id.* at 649. The *Woessner* court reasoned that the plaintiffs should not have access to



Similarly, the Eleventh Circuit in *Harville v. Johns-Manville Products Corporation*<sup>110</sup> noted that the issues in claims brought by shipyard workers for injuries resulting from exposure to asbestos fibers involve questions of tort law that state courts normally resolve.<sup>111</sup> Placing special emphasis on the extent to which the plaintiffs' claim implicated the traditional purposes of admiralty jurisdiction, the Eleventh Circuit in *Harville* ruled that state courts could hear the plaintiffs' suit and apply state tort law to resolve the controversy without implicating maritime concerns.<sup>112</sup> By emphasizing the concepts of the role of admiralty law, both the Fifth Circuit in *Woessner* and the Eleventh Circuit in *Harville* applied an analysis of the nexus requirement that is consistent with the policies espoused in *Executive Jet*.<sup>113</sup>

Unlike other federal circuits, the Ninth Circuit in *Owens-Illinois Inc. v. United States District Court for the Western District of Washington*<sup>114</sup> relied on decisions resolving contract disputes in applying the four factor analysis used in *Oman* to determine whether claims by shipyard workers for asbestos related injuries are cognizable in admiralty.<sup>115</sup> The plaintiffs in *Owens-Illinois* brought suit against asbestos manufacturers for injuries incurred from exposure to asbestos fibers while working at shipyards during World War II.<sup>116</sup> The plaintiffs were engaged exclusively in the construction of ships.<sup>117</sup> Relying on cases which address the issue whether a contract dispute lies within admiralty jurisdiction, the Ninth Circuit in *Owens-Illinois* noted that courts consider a contract for the repair of a ship as maritime while a contract for the construction of a ship is not.<sup>118</sup> The *Owens-Illinois* court held that

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special laws unavailable to similarly situated claimants whose injuries occurred on land. *Id.* The court held that although the plaintiffs' injuries occurred on navigable waters, the maritime location of the tort was insufficient to invoke the admiralty jurisdiction of the federal courts. *Id.*

110. 731 F.2d 775 (11th Cir. 1984).

111. *Id.* at 786.

112. *Id.*

113. See *supra* notes 81-83 and accompanying text (maintaining that courts should give greater deference to final factor of *Executive Jet's* four factor analysis).

114. 698 F.2d 967 (9th Cir. 1983).

115. *Id.* at 971. While the *Owens-III.* court mentioned the four factors of the *Oman* analysis, the Ninth Circuit based its decision on cases resolving contract disputes. *Id.*; *Oman*, 764 F.2d at 230.

116. *Owens-III.*, 698 F.2d at 969.

117. *Id.* at 970. Courts may distinguish the *Owens-III.* decision from the *Oman* decision because the plaintiffs' work in *Owens-III.* did not include the repair of ships while the plaintiffs' work in *Oman* did. See *supra* note 93 (under *Oman* facts, Ninth Circuit might grant admiralty jurisdiction for plaintiffs' claim); *Oman*, 764 F.2d at 226-27.

118. *Owens-III.*, 698 F.2d at 970-71. The *Owens-III.* court cited *North Pac. Steamship Co. v. Hall Bro. Marine Ry. & Shipping Co.* to support its conclusion that tort claims arising out of the repair of ships are cognizable in admiralty while tort claims arising out of the construction of ships are nonmaritime. *Id.* *North Pac. Steamship Co. v. Hall Bro. Marine Ry. & Shipping Co.* 249 U.S. 119, 125 (1919). The Supreme Court in *Hall Bro.* held that contract claims for the repair of ships are cognizable in admiralty regardless of whether the vessel is on navigable water, in dry dock, or hauled up on land. *Hall Bro.*, 249 U.S. at 125. The *Owens-III.* court, however, required that the plaintiffs' tort occur on navigable waters as well as satisfy the nexus

because the plaintiffs suffered injuries only while constructing ships, their claims for damages did not satisfy *Executive Jet's* nexus requirement.<sup>119</sup> While the *Owens-Illinois* court briefly examined the functions and roles of the parties, the vehicles and instrumentalities involved in the action, and the type and causation of the injuries, the court based its decision on an analysis of the type of contract involved which fell within the court's consideration of the traditional concepts of the role of admiralty law.<sup>120</sup> Prior to *Executive Jet*, the *Owens-Illinois* court would have been misguided in relying on contract cases to conclude that the plaintiffs' claim was not cognizable in admiralty because the only relevant consideration would have been the locality of the occurrence.<sup>121</sup> However, with the advent of *Executive Jet*, which requires that the alleged tort satisfy the nexus test as well as the locality test, courts properly may consider cases in determining whether the tort claim has a maritime nexus.<sup>122</sup> In *Owens-Illinois*, the Ninth Circuit reasoned that since courts traditionally have not viewed contracts for the construction of ships as being maritime in nature, the plaintiffs' tort claim arising out of injuries incurred while constructing a ship was not maritime in nature and did not satisfy the nexus test.<sup>123</sup> Thus, the Ninth Circuit in *Owens-Illinois* properly relied on contract cases in ruling that the plaintiffs' claim was not cognizable in admiralty.<sup>124</sup>

In *Keene Corporation v. United States*<sup>125</sup> the Second Circuit chose not to apply the four factor analysis in determining whether the plaintiffs' claim was cognizable in admiralty.<sup>126</sup> The plaintiffs in *Keene*, relying on *White II*, argued that because the asbestos insulation became a part of the ship, installing the insulation was related significantly to maritime activity, and that claims arising from this work satisfied the nexus requirement.<sup>127</sup> The *Keene* court found that the plaintiffs' reasoning undermined *Executive Jet* by making the locality of the tort decisive in determining whether to grant admiralty

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test before the plaintiff properly could bring his action in admiralty. *Owens-III.*, 698 F.2d at 969. *But cf. infra* notes 156-60 and accompanying text (courts should not require that torts meet the locality test before allowing claim in admiralty); GILMORE & BLACK, *supra* note 1, § 1-10 at 30 (Supreme Court's distinction between contract for repair and contract for construction of ship is erroneous).

119. *Owens-III.*, 698 F.2d at 971.

120. *Id.* at 970-71.

121. *See* *The Plymouth*, 70 U.S. (3 Wall.) 20, 27-29 (1865) (locality of occurrence is only factor in determining whether admiralty jurisdiction exists for tort claims).

122. *See Executive Jet*, 409 U.S. at 268 (Supreme Court requires that tort claims satisfy nexus test before courts allow claims in admiralty); *The Plymouth*, 70 U.S. at 27-29 (contract actions are cognizable in admiralty if claim is related to traditional maritime activity).

123. *Owens-III.*, 698 F.2d at 971.

124. *See supra* notes 6-7 and accompanying text (Supreme Court in *Executive Jet* espouses nexus relationship as proper test for invoking admiralty jurisdiction).

125. 700 F.2d 836 (2d Cir. 1983), *cert. denied*, 464 U.S. 864 (1983).

126. *Id.* at 844.

127. *Id.*

jurisdiction.<sup>128</sup> The *Keene* court denied admiralty jurisdiction on the grounds that the plaintiffs failed to show that the manufacturer of the asbestos insulation, which caused the plaintiffs' injuries, designed or advertised the insulation for maritime use.<sup>129</sup> The Second Circuit specifically rejected the argument that an action for injuries resulting from non-maritime products may lie in admiralty.<sup>130</sup> The *Keene* court, like the panel in *White II*, focused on a single factor to determine whether the claim was related significantly to traditional maritime activity.<sup>131</sup> The Second Circuit's mechanical analysis is at odds with the policy of *Executive Jet*.<sup>132</sup> Nonmaritime products often cause injuries or damage that implicate traditional maritime concerns.<sup>133</sup> Thus, in an effort to limit admiralty jurisdiction to claims related to traditional maritime activity, the Second Circuit has developed a nexus analysis that excludes actions traditionally within the scope of admiralty law.<sup>134</sup>

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128. *Id.* See *supra* notes 69-73 and accompanying text (under *White II* analysis locality of tort determines admiralty jurisdiction); *White II*, 662 F.2d at 239-40.

129. *Keene*, 700 F.2d at 844.

130. *Id.*

131. See *id.* Although the court in *Keene* purportedly relied on the four factor analysis introduced in *Kelly v. Smith* to determine whether the requisite nexus existed, the *Keene* court chose to analyze only two of the four factors presented in the *Kelly* analysis. *Id.* See *Kelly*, 485 F.2d 520, 524-26 (5th Cir. 1973) (introducing four factor analysis for determining nexus requirement); *supra* note 37 (discussion of *Kelly*). The *Keene* court determined that because the asbestos insulation causing the plaintiffs' injuries had no maritime quality, the instrumentalities did not favor admiralty jurisdiction for the claim. *Keene*, 700 F.2d at 844. The *Keene* court found that the role of the government, a party in the action, was unrelated to maritime activity. *Id.* The *Keene* court apparently analyzed both the roles of the parties and the instrumentalities and vehicles involved in the claim. *Id.* The *Keene* court's two factor analysis, however, is misleading. If the plaintiff in *Keene* had alleged that manufacturers designed and advertised the asbestos insulation for maritime use, then not only would that allegation change the nature of the instrumentality involved in the claim, but the allegation also would change the nature of one of the parties. The government's role then would be a provider of maritime asbestos and would therefore implicate maritime concerns. See *Oman*, 764 F.2d at 230 (reasoning that role of defendants in supplying maritime asbestos favored trying claim in admiralty).

132. *Keene*, 700 F.2d at 843-44; see *Executive Jet*, 409 U.S. at 261 (adopting nexus test because nexus test is more consistent with purpose of admiralty law than mechanical application of locality test); see also Comment, *In Search of A New Test for Admiralty Jurisdiction: The Aftermath of Executive Jet*, 7 VAND. J.T.L. 459, 467 (1974).

133. See *Austin v. Unarco Indus. Inc.*, 705 F.2d 1, 9 (1st Cir. 1983), *cert. denied*, 463 U.S. 1267 (1983). In *Austin v. Unarco Indus. Inc.*, the First Circuit refused to accept the *Keene* rule that a products liability claim is cognizable in admiralty only when the product or instrumentality is of a maritime nature. *Id.* The *Austin* court reasoned that nonmaritime products or instrumentalities often cause damage or injury that implicate maritime concerns. *Id.* The *Austin* court cited *Sperry Rand Corp. v. Radio Corp. of Am.* as an example of a case involving a nonmaritime instrumentality that caused damage which implicated maritime concerns. *Id.* (citing *Sperry Rand*, 618 F.2d 319, 321-22 (5th Cir. 1980)). In *Sperry Rand*, a nonmaritime component of a steering unit caused a ship to run aground and collide with another ship. See *Sperry Rand*, 618 F.2d at 319-20.

134. See *Austin*, 705 F.2d at 10 (reliance on maritime nature of product to invoke admiralty jurisdiction undermines federal interest of uniform laws governing maritime activity).

Under the *Oman* court's four factor analysis, plaintiffs may bring products liability claims in admiralty regardless of whether the manufacturer designed the product for maritime use.<sup>135</sup> Following the four factor analysis of *Oman*, if a court concludes that the instrumentalities involved in the action are unrelated to traditional maritime activity, the court still may allow the action to proceed in admiralty if the roles of the parties and the type and cause of the injury suggest that maritime law should govern the claim.<sup>136</sup> The advantage of using the four factor analysis for determining whether claims meet the nexus requirement is that the four factor analysis compels courts to consider several factors in granting admiralty jurisdiction as opposed to relying on a single factor.<sup>137</sup> By analyzing and weighing each of the four factors in its analysis, the *Oman* court avoided the mechanical jurisdictional test exemplified by *Keene* and *White II*<sup>138</sup> and criticized by *Executive Jet*.<sup>139</sup>

One other federal circuit has considered whether shipyard workers can sue asbestos manufacturers under admiralty jurisdiction. In *Austin v. Unarco Industries Inc.*,<sup>140</sup> the First Circuit, using an analysis consistent with the Supreme Court's reasoning in *Executive Jet*, determined that survivors of shipyard workers could not bring actions in admiralty for asbestos related injuries incurred by their decedents.<sup>141</sup> The *Austin* court reasoned that the case and safety of seamen is implicit in the traditional concerns of admiralty law discussed in *Executive Jet*.<sup>142</sup> The First Circuit determined that the

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135. See *Oman*, 764 F.2d at 229-30. In *Oman*, the Fourth Circuit stated that claimants could bring products liability actions in admiralty involving nonmaritime products or instrumentalities. *Id.*

136. See *id.* at 229. The *Oman* court noted that the plaintiffs' claim in *Sperry Rand* implicated traditional maritime concerns. *Id.*; *Sperry Rand*, 518 F.2d at 319-20. Even though the instrumentality causing the damage in *Sperry Rand* was unrelated to maritime activity, the *Sperry Rand* court properly allowed the claim in admiralty because the damage that the instrumentality caused implicated maritime concerns. See *Sperry Rand*, 518 F.2d at 319-20 (damage incurred when faulty steering unit caused ship to collide with another ship and run aground); *supra* note 86 and accompanying text (*Oman* court analyzed four factors collectively in finding jurisdiction); *Oman*, 764 F.2d at 232.

137. See *Woessner*, 757 F.2d at 641-43. The *Woessner* court not only criticized *Keene* and *White II* for allowing a single factor to determine jurisdiction, but also praised the *Kelly* four factor analysis as consistent with the thrust of *Executive Jet*. *Id.* at 641, 643.

138. See *Oman*, 764 F.2d at 230-31 (*Oman* court analyzed four factors collectively to determine whether nexus requirement was met); *supra* note 137 (*Woessner* court criticized *White II* and *Keene* single factor analysis as mechanical and inconsistent with policy of *Executive Jet*); *Woessner*, 757 F.2d at 641-43.

139. See *Executive Jet*, 409 U.S. at 261 (criticizing mechanical application of locality test for determining jurisdiction).

140. 705 F.2d 1 (1st Cir. 1983), *cert. dismissed*, 463 U.S. 1247 (1983).

141. *Austin*, 705 F.2d at 18. See *infra* notes 142-44 and accompanying text. (*Austin* analysis is consistent with policy of *Executive Jet*); *Executive Jet*, 409 U.S. at 253-78.

142. *Austin*, 705 F.2d at 11. In determining whether admiralty law protected the plaintiffs, the *Austin* court first determined admiralty law protects sailors or persons doing the work of sailors via the seaworthiness doctrine. *Id.* The doctrine of seaworthiness contemplates that a

concerns of maritime law extend to the safety of anyone engaged in work traditionally done by seamen.<sup>143</sup> The *Austin* court determined that the only real issue in the case was whether the decedents' work was the type traditionally done by sailors.<sup>144</sup> The First Circuit held that since the ships on which the decedents were working were under construction and thus incapable of fulfilling their maritime functions, and since the decedents' work involved specialized tools and skills beyond the scope of a seaman's duty, admiralty law did not govern the hazards of working with asbestos insulation.<sup>145</sup>

The single drawback in the *Austin* court's analysis is its continued adherence to the requirement that a claim must satisfy the locality test before allowing the action to proceed in admiralty.<sup>146</sup> While basing its analysis on the traditional admiralty concern of protecting seamen, the First Circuit failed to recognize that because the protection accorded sailors applies regardless of whether a sailor is on land or on navigable water, the locality test does not apply.<sup>147</sup> With the exception of this drawback, the First Circuit has provided an objective, consistent means of applying the nexus requirement to products liability claims for personal injury while adhering to the policies underlying the nexus test outlined in *Executive Jet*.<sup>148</sup>

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vessel is fit for its intended service. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 550 (1960). The seaworthiness doctrine provides a remedy for sailors injured as a result of a defective condition on a ship. *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 90 (1946).

143. *Austin*, 705 F.2d at 12. The *Austin* court reasoned that if courts did not extend the doctrine of seaworthiness to protect persons serving the same function as sailors, then vessel owners would subcontract the duties of sailors to nonsailors in order to avoid the cost of protecting the workers. *Id. See Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 96 (1946) (extending seaworthiness doctrine to harbor workers who are injured while doing work of sailors). For an extended discussion of the doctrine of seaworthiness see GILMORE & BLACK, *supra* note 1, § 3-27 at 150-155; George, *Ship's Liability to Longshoremen Based on Unseaworthiness: Sieracki Through Usner*, 32 LA. L. REV. 19, 23-25 (1971).

144. *Austin*, 705 F.2d at 11.

145. *Id.* at 14.

146. *Id.* at 8-9. The *Austin* court referred to the locality of the tort as a "prong" of the *Executive Jet* test. *Id.* at 9; *Executive Jet*, 409 U.S. at 268. Because the ships on which the plaintiff in *Austin* was injured were situated on a navigable river when the injury occurred, the *Austin* court concluded that the claim met the locality prong of the *Executive Jet* test. *Austin*, 705 F.2d at 9.

147. *See id.* at 11. While the *Austin* court applied both the locality and nexus tests in determining whether to exercise admiralty jurisdiction, the court also acknowledged that the doctrine of seaworthiness protects sailors while on land as well as while at sea. *Id. See also Gutierrez v. Waterman S.S. Corp.*, 373 U.S. 206, 214-15 (1963) (extending protection afforded by seaworthiness doctrine to seamen while on land).

148. *See Austin*, 705 F.2d at 11. Courts applying the *Austin* analysis must consider the single issue whether the work from which the plaintiffs' claim arose is that traditionally done by seamen. *Id.* The *Austin* analysis works well for actions by injured land based workers, but does not apply to all tort claims because many of these claims involve damage to ships as opposed to injuries to persons. *See Sperry Rand Corp. v. Radio Corp. of Am.*, 618 F.2d 319, 320-21-(5th Cir. 1980) (tort action involving damage to ship at sea); *JIG the Third Corp. v. Puritan Marine Ins. Underwriters Corp.*, 579 F.2d 171, 173 (5th Cir. 1975) (tort action for damage for loss of ship at sea), *cert. denied*, 414 U.S. 954 (1976).

The federal circuits that have heard the issue of admiralty jurisdiction over torts have read *Executive Jet* as demanding both a locality and a nexus test for determining admiralty jurisdiction.<sup>149</sup> Justice Stewart's criticism of the locality test in *Executive Jet*, however, intimates that the locality of the tort should not be dispositive in determining whether admiralty jurisdiction exists.<sup>150</sup> Apparently, the federal courts reason that narrowing the scope of admiralty jurisdiction is the only purpose behind the nexus requirement.<sup>151</sup> The language of *Executive Jet* suggests, however, that the Court not only sought to exclude claims not properly within admiralty jurisdiction, but also sought to include actions that claimants properly may bring under admiralty law but which courts excluded by strictly applying the locality test.<sup>152</sup> Under

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149. See *Oman v. Johns-Manville Corp.*, 764 F.2d 224, 227 (4th Cir. 1985) (requiring that tort must occur on navigable water for admiralty jurisdiction to lie), *cert. denied*, 106 S. Ct. 351; *Woessner v. Johns-Manville Sales Corp.*, 757 F.2d 634, 638 (5th Cir. 1985) (same); *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 778 (11th Cir. 1984) (same); *Austin v. Unarco Indus. Inc.*, 705 F.2d 1, 8-9 (1st Cir. 1983) (same), *cert. dismissed*, 463 U.S. 1247 (1983); *Keene Corp. v. United States*, 700 F.2d 836, 843 (2d Cir. 1983) (same), *cert. denied*, 464 U.S. 864; *Owens-Ill., Inc. v. United States Dist. Court for the Western Dist. of Wash.*, 698 F.2d 967, 968-69 (9th Cir. 1983) (same).

150. See *Executive Jet*, 409 U.S. at 251 (determining that nexus test is more sensible for determining admiralty jurisdiction than locality test because nexus test requires torts to have relationship to maritime activity); see also *Recent Developments*, *supra* note 37, at 353 (criticisms of locality test).

151. See *infra* note 154 and accompanying text (locality plus nexus test allows no more claims in admiralty than strict locality test).

152. See *Executive Jet*, 409 U.S. at 259. In *Executive Jet*, Justice Stewart criticized the locality test by citing numerous judicially and congressionally created exceptions to the test. *Id.* These exceptions are characterized by torts that are related significantly to maritime activity but lack the requirement of a maritime locality. *Id.* See *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 41-42 (1943) (granting admiralty jurisdiction for claim brought by sailor injured while on shore performing his duty); *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 214-15 (1963) (granting admiralty jurisdiction for claim brought by sailor injured on land by ship defects); 46 U.S.C. § 740 (1948) (Extension of Admiralty Jurisdiction Act extending admiralty jurisdiction to claims for damage or injury caused by ships regardless of whether damage or injury occurred on land or at sea); see also *supra* note 59 (courts make exceptions to locality requirement under certain circumstances). For a general discussion of legislative extensions of admiralty jurisdiction see Comment, *Admiralty Jurisdiction: Executive Jet in Historical Perspective*, 34 OHIO ST. L.R. 355 (1973) [hereinafter cited as *Executive Jet in Historical Perspective*]. For a discussion of the Supreme Court's criticism of the locality test as both underinclusive and overinclusive see *The Other Half of Executive Jet*, *supra* note 59 at 981-84.

The Supreme Court in *Executive Jet* criticized a strict application of a locality test as "mechanical" and inconsistent with the purposes of maritime law. *Executive Jet*, 409 U.S. at 261. The Fourth Circuit, however, has continued to apply the locality test in a mechanical fashion to determine whether a claim is cognizable at admiralty. See *Hessinger v. Tideland Electric Membership Corp.*, No. 85-1673 (4th Cir. Jan. 8, 1986). In *Hessinger v. Tideland Electric Membership Corp.*, the Fourth Circuit dedicated six paragraphs to the issue of whether a Hobie Cat sailboat was in the water or on land when its mast struck a power line and killed three recreational sailors. *Id.*, slip op. at 5-8. Although the defendants in *Hessinger* argued that navigable water began at the water's edge, the Fourth Circuit concluded that navigable water included shoreline up to the "mean high water mark," or the point of the sea's farthest advance

the federal circuits' interpretation of *Executive Jet*, a tort must occur on navigable waters as well as satisfy the nexus test before the federal courts will hear the claim under their admiralty jurisdiction.<sup>153</sup> Therefore, the effect of the federal circuits' interpretation of *Executive Jet* is that courts hear no more claims in admiralty than they would otherwise hear absent the nexus requirement.<sup>154</sup> If courts are to resolve the problems of both underinclusiveness and overinclusiveness, the locality test should not be dispositive in determining whether admiralty jurisdiction exists.<sup>155</sup>

In determining whether a claim is significantly related to traditional maritime activities, courts would serve the policy of *Executive Jet* better by simply viewing the location of the tort as a factor for consideration rather than a requirement.<sup>156</sup> Once a court concludes that a claim is related significantly to traditional maritime activity, the court should weigh the federal interest in maintaining a uniform body of law governing the activity

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during high tide. *Id.*, slip op. at 9-10. The *Hessinger* court concluded that, because the decedent had not pulled their boat beyond the mean high water mark when the boat's mast struck the power line, the accident occurred on navigable waters. *Id.*, slip op. at 10-11. Apparently, if the sailors had pulled their sailboat a few feet farther up the shoreline, beyond the mean high water mark, and then stuck the power line, their action would not be cognizable at admiralty. *See id.* The Supreme Court in *Executive Jet*, however, intimated that allowing a claim in admiralty based on whether an accident occurred a few feet on one side of a line constituting navigable water "makes little sense." *Executive Jet*, 409 U.S. at 266. After concluding that the accident occurred on navigable water, the *Hessinger* court determined that the claim was significantly related to maritime activity and therefore satisfied the nexus requirement of *Executive Jet*. *Hessinger*, No. 85-1673, slip op. at 12-14. The Fourth Circuit's inquiry into the location of the accident in *Hessinger* is unnecessary because the federal courts should allow any claim significantly related to maritime activity in admiralty regardless of the location of the tort that gave rise to the claim. *See supra* text accompanying notes 150-55 (locality of tort should not be determinative in granting admiralty jurisdiction for claim arising from tort).

153. *See supra* note 149 (claims must satisfy locality and nexus tests for admiralty jurisdiction in all circuits that have tried issue presented in *Oman*).

154. *See supra* note 149 and accompanying text (federal circuits require that tort satisfy locality test before tort claim is cognizable in admiralty). In requiring that claims satisfy both the nexus test and the locality test to lie in admiralty, the federal circuits simply are combining a reasonable test and an unreasonable test. *See supra* note 59 (Supreme Court in *Executive Jet* held nexus test more sensible than locality test because nexus test requires that tort claims have significant relationship to maritime activity before courts can try claims under maritime law); *Executive Jet*, 409 U.S. at 261. Combining the nexus test with the locality test does not solve the underinclusiveness problem inherent in the locality test. *See supra* note 152 (Supreme Court in *Executive Jet* criticizes underinclusiveness of locality test); *Executive Jet*, 409 U.S. at 253-60.

155. *See supra* text accompanying notes 152-55 (concluding that eliminating locality test entirely will solve problem of both overinclusiveness and underinclusiveness).

156. *See Kelly v. Smith*, 485 F.2d 520, 527 (5th Cir. 1973) (Morgan, J., dissenting), cert. denied, 416 U.S. 969 (1973). The dissent in *Kelly* intimates that the location of the tort may eventually become simply a factor for consideration in determining whether a claim is cognizable in admiralty. *Id.* at 527 n.1; *see also supra* notes 150-52 and accompanying text (courts must eliminate locality test as requirement for admiralty jurisdiction to solve problem of underinclusiveness). For a discussion of a proposal to make the locality of the tort a factor to consider in determining jurisdiction *see Executive Jet in Historical Perspective*, *supra* note 137, at 369.

against competing interests of the state in adjudicating the claim.<sup>157</sup> If the state interest outweighs the federal interest, the federal court should exercise restraint.<sup>158</sup> Following the analysis outlined above, courts properly should conclude that claims brought by land based workers against land based manufacturers for injuries implicating no maritime concerns are not related significantly to traditional maritime activity.<sup>159</sup> Furthermore, because the injuries in question in *Oman* differ from those afflicting land based workers only in location of occurrence, the interest of the state in maintaining a consistent standard by which to judge these claims outweighs any federal interest in uniformity of maritime law.<sup>160</sup>

The *Oman* decision holds that shipyard workers must bring their claims for asbestos induced injuries under state law despite the possibility that the state statute of limitations may bar such claims.<sup>161</sup> While this result seems harsh, *Oman* simply places shipyard workers in the same situation as other plaintiffs who incurred asbestos induced injuries on land.<sup>162</sup>

The *Oman* four part analysis for determining the requisite nexus in potential admiralty claims is less certain than the *White II* single factor analysis because the former requires courts to examine four factors collectively while the latter requires courts to examine a single factor.<sup>163</sup> The Supreme Court in *Executive Jet*, however, sought to eliminate the single factor, mechanical analysis by espousing the nexus requirement.<sup>164</sup> The *Oman* analysis, however, is not entirely subjective. The Fourth Circuit's four factor analysis provides specific areas of emphasis for attorneys arguing that a plaintiff properly may bring an action in admiralty.<sup>165</sup> In light of the *Oman*

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157. See *Kelly v. Smith*, 485 F.2d at 527 (Morgan, J., dissenting). The dissent in *Kelly* criticized the majority decision for depriving the state of its control over the action. *Kelly*, 485 F.2d at 527 n.1. The dissent argued that even if an analysis of the *Kelly* factors favored admiralty jurisdiction, the state's interest in trying the claim outweighed any federal interest in the action. *Id.* See also *supra* note 37 (discussion of *Kelly* facts).

158. See *supra* note 157 and accompanying text (*Kelly* dissent argues that courts should not allow claim in admiralty if state's interest in controlling claim outweighs federal interest in uniform laws governing maritime activity).

159. *Oman*, 764 F.2d at 230-32.

160. See *supra* notes 157-58 and accompanying text (courts should consider state interest in granting admiralty jurisdiction); *supra* note 92 and accompanying text (*Oman* furthers federal interest in uniform admiralty law by bringing Fourth Circuit in line with other circuits).

161. *Oman*, 764 F.2d at 230-32.

162. See *id.* (finding plaintiffs' claim in *Oman* identical to asbestos suits brought under state law). For a general discussion of the effect of Virginia's statute of limitations on asbestos litigation see *The New Wave in Asbestos Litigation*, *supra* note 19 at 152-54.

163. See *Oman*, 764 F.2d at 230 (applying four factor analysis to determine whether nexus requirement of *Executive Jet* was met); *Executive Jet*, 409 U.S. at 268; *White II*, 662 F.2d at 234 (applying single factor analysis to determine whether claim met nexus requirement of *Executive Jet*); *Executive Jet*, 409 U.S. at 268.

164. See *supra* note 59 (Supreme Court in *Executive Jet* criticized mechanical application of locality test).

165. See *supra* note 37 and accompanying text (*Oman* adopted analysis for determining requisite nexus that includes four separate factors); *Oman*, 764 F.2d at 230.