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II. Admiralty

Fourth Circuit's failure to cite *Overton Park* in either *Associated Builders* or *Sinai Hospital* probably signals that the court has found *Overton Park* too obscure to implement consistently and effectively. The Fourth Circuit instead will probably employ a more pragmatic analysis such as that advanced in *Associated Builders* and *Sinai Hospital*.

Associated Builders and *Sinai Hospital* afford general lessons for the practicing attorney. The Fourth Circuit may consider case law, legislative history or the three-pronged test adopted in *Sinai Hospital* to decide if a particular administrative action is committed to agency discretion under section 701(a)(2)[143] of the APA.[144] Additionally, the Fourth Circuit's earlier dalliance with *Overton Park* indicates a receptiveness to other ways of resolving the issue of whether an action is committed to agency discretion.[145] Furthermore, the attorney should be prepared to show whether *Leedom v. Kyne*[146] is applicable to the administrative action at issue since in both *Associated Builders* and *Sinai Hospital* the court commented that should an administrator's action contravene an express statutory directive, a court will apply the *Leedom* doctrine and review the action.[147]

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II. ADMIRALTY

Jones Act Claims of Foreign Seamen

Section 688 of the Merchant Marine Act of 1920,[1] commonly known as the Jones Act, allows substantial recoveries to seamen injured in the course of employment.[2] Since recovery under the Jones Act frequently

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tion were discretionary. Rather, the court examined whether the action in fact were "committed" to agency discretion or merely "involved" agency discretion. 489 F.2d at 498. The Fourth Circuit concluded that the action merely "involved" discretion and therefore was reviewable. *Id.* at 498-99.

[143] 5 U.S.C. § 701(a)(2) (1976).

[144] *See* text accompanying notes 43-50, 97-100 *supra*.

[145] *See* text accompanying notes 135-42 *supra*.

[146] 358 U.S. 184 (1958).

[147] *See* 621 F.2d at 1269; 610 F.2d at 1227.

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[1] 46 U.S.C. §§ 13, 597, 599, 688, 802, 803, 808, 812, 813, 861, 864-869, 871, 872, 875-877, 880-885, 887-889, 911, 921-927, 941, 951-954, 961, 971-975, 981-984 (1976); *see* note 2 *infra*. *See generally*, G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY § 6-20 at 325-28 (2d ed. 1975) [hereinafter cited as GILMORE & BLACK].

[2] 46 U.S.C. § 688 (1976). Traditional maritime law limited a seaman to claims for unseaworthiness and maintenance and cure. *See* The Osceola, 189 U.S. 158, 175 (1903); 2 M. NORRIS, THE LAW OF SEAMEN § 657 (3rd ed. 1976) [hereinafter cited as NORRIS]. This limitation of a seaman's claims against his employer has existed since the early Middle Ages. 189

exceeds compensation under foreign law, foreign seamen often attempt to sue under the Jones Act.[3] United States courts severely limit the applicability of the Jones Act in cases involving foreign seamen injured while on board foreign flag vessels.[4] This limitation promotes international comity by affirming the sovereignty of the foreign flag nation.[5] Nevertheless, if substantial contacts exist between the Jones Act claim and the United States, United States courts will assert jurisdiction over the claim.[6] In *Morewitz v. Andros Compania*

U.S. at 169-175; NORRIS, *supra*, §§ 538-541 & 657. The Jones Act departs from tradition by allowing an injured seaman a right of action against his employer for negligence. *See* 46 U.S.C. § 688 (1976); NORRIS, *supra*, § 659. *See, e.g.*, Moore v. The O/S Fram, 226 F. Supp. 816, 818 (S.D. Tex.), *aff'd per curiam sub nom.* Whilhelm Seafoods, Inc. v. Moore, 328 F. 2d 868 (5th Cir. 1964) (negligent failure to provide proper lifesaving equipment); McDonough v. Buckeye S.S. Co., 103 F. Supp. 473, 475-78 (N.D. Ohio), *aff'd. per curiam*, 200 F. 2d 588 (6th Cir.), *cert denied*, 345 U.S. 926 (1952) (shipowner negligent in failing to exercise reasonable care to prevent intoxicated seaman from drowning).

[3] *See* 46 U.S.C. § 688 (1976); The Fletero v. Arias, 206 F.2d 267, 273 (4th Cir. 1953). Foreign seaman Arias brought claims against his employer under the Jones Act and general maritime law. 206 F.2d at 269. Without addressing the issue whether it possessed jurisdiction over the Jones Act claim, the court awarded Arias $20,000 even though the maximum value of his claim would not have exceeded $400 if brought under the law of his own country. *Id.* at 273. Some foreign seamen prefer to sue under the Jones Act because their native countries have no-fault compensation systems which guarantee compensation, but do not match the possible amount of a Jones Act award. *See* Lauritzen v. Larsen, 345 U.S. 571, 575-76 (1953). A further factor that has lead foreign seamen to sue under the Jones Act is that any possible recovery will be paid in dollars, a relatively high-value currency on the world exchange. *See* Currie, *The Silver Oar and All That: A Study of the Romero Case*, 27 U. CHI. L. REV. 1, 67 (1959); Recent Developments, *Admiralty—Choice of Law—Jones Act Held Applicable in Action Against Resident Alien Shipowner*, 16 VIL. L. REV. 148, 157-58 n. 65 (1970).

[4] *See, e.g.*, Koupetoris v. Konkar Intrepid Corp., 535 F.2d 1392, 1396-97 (2d Cir. 1976) (no jurisdiction over Greek seaman's claim against Liberian flag vessel owned by Greek corporation for injuries incurred off coast of United States); Merren v. A/S Borgestad, 519 F.2d 82, 83 (5th Cir. 1975) (no jurisdiction over Honduran seaman's Jones Act claim against Norwegian flag vessel for death occurring off coast of Japan); Yohanes v. Ayers S.S. Co., 451 F.2d 349, 350 (5th Cir.) *cert. denied*, 406 U.S. 919 (1971) (no jurisdiction over Greek seaman's Jones Act claim against Greek flag vessel for injuries incurred while in United States port).

[5] *See* Lauritzen v. Larsen, 345 U.S. 571, 584-86 (1953). Customary international law limits jurisdiction over a vessel to the nation under whose flag the vessel sails. *Id.; see* H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 619-20 (3rd ed. 1979); J. BRIERLY, THE LAW OF NATIONS 307 (6th ed. 1963); I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 424-25 (3rd ed. 1979). The "law of the flag" doctrine benefits international relations by affirming the sovereignty of the flag nation and providing a practical means of identifying the nationality of a vessel. 345 U.S. at 584-85; Kyriakos v. Goulandris, 151 F.2d 132, 139 (2d Cir. 1945) (Hand, J., dissenting); C. J. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA §§ 306-310 (6th ed. 1967). Applying the Jones Act freely to the claims of foreign seamen would conflict with the legal and compensation systems of other nations, since the Jones Act provides for more extensive relief than do the laws of many nations. 345 U.S. at 575-76; *see* note 3 *supra*.

[6] Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, 308-10 (1969), *rehearing denied*, 400 U.S. 856 (1970); Lauritzen v. Larsen, 345 U.S. 571, 582-93 (1953); *see* GILMORE & BLACK, *supra* note 1, § 6-63 at 471-72; NORRIS, *supra* note 2, § 683. The *Lauritzen* court discussed

Maritima, S.A.,[7] the Fourth Circuit reaffirmed the importance of the substantial contacts test by denying a foreign seaman's attempt to win "bootstrap" jurisdiction for a Jones Act claim that lacked substantial contacts with the United States.

The *Morewitz* suit arose from the death of Fotios Kannes, a Greek seaman. Kannes died at sea near the Phillipine Islands while working aboard a Liberian flag vessel owned entirely by foreign citizens and residents.[8] Kannes' heirs, who were also foreign citizens and residents, brought a claim for damages based on negligence under the Jones Act against the vessel and its owners.[9] The district judge dismissed the claim for lack of United States jurisdiction.[10]

The Fourth Circuit affirmed the district judge's determination that the Jones Act claim lacked an adequate nexus with United States jurisdiction.[11] The Fourth Circuit also rejected jurisdiction over an incidental wage claim which Morewitz had linked to the Jones Act claim.[12] The Fourth Circuit held that Morewitz had not brought the wage claim in good faith and, therefore, dismissed the claim and avoided the bootstrap problem.[13] By rejecting jurisdiction over the wage claim, the Fourth Circuit avoided granting bootstrap jurisdiction over the Jones Act claim.

Attempts to win bootstrap jurisdiction for Jones Act claims arise from the existence of a judicially created rule of maritime law followed almost exclusively by the Fourth Circuit.[14] In Fourth Circuit admiralty

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seven factors useful in determining whether sufficient contacts exist between a foreign seaman's Jones Act claim and United States jurisdiction. *See* 345 U.S. at 583-593. The *Lauritzen* factors were (1) the place of the wrongful act; (2) the law of the flag of the vessel; (3) the allegience or domicile of the injured seaman; (4) the allegience of the shipowner; (5) the place of contract (i.e., where the seaman signed the articles for his voyage); (6) the inaccessibility of a foreign forum; (7) the law of the foreign forum. *Id.* The *Rhoditis* court added an eighth factor, the base of operations of the shipowner. 398 U.S. at 308-10.

[7] 614 F.2d 379 (4th Cir. 1980).

[8] *Id.* at 380.

[9] *Id.* at 380-81.

[10] *Id.*

[11] *Id.* at 381 & 384.

[12] *Id.* at 380-81. Morewitz claimed that seaman Kannes had received a wage advance while the vessel was in New Orleans, and stated that the amount of the advance had been withheld from final payment of Kannes' wages to his heirs. *Id.* at 381. Morewitz also claimed that overtime pay due Kannes had been withheld from the final wage settlement with the heirs. *Id.* Morewitz brought the wage claims under 46 U.S.C. §§ 596, 597 & 599 (1976). Sections 596 and 597 require the prompt payment of a seaman's wages at the conclusion of the voyage for which he has shipped. *Id.*, §§ 596, 597. Section 599 prohibits deduction of an advance in wages from final payment at the termination of the voyage. *Id.*, § 599(a). Deduction of wage advances made to foreign seamen shipping on foreign flag vessels is illegal under United States law if the advance is made and if the voyage terminates in a United States port. Fitzgerald v. Liberian S/T Chryssi P. Goulandris, 582 F.2d 312, 313-14 (4th Cir. 1978); Heros v. Cockinos, 177 F.2d 570, 571-72 (4th Cir. 1949).

[13] 608 F.2d at 383; *see* text accompanying notes 27-32 *infra*.

[14] *See* Grevas v. M/V Olympic Pegasus, 557 F.2d 65, 67-68 (4th Cir.), *cert. denied*, 434

law the assertion of jurisdiction over one of several related claims requires retention of all related claims, including those claims over which the court would not otherwise assert jurisdiction.[15] This rule aids judicial economy by settling related disputes in one suit and preventing fragmented litigation.[16] The rule, however, creates the opportunity for a plaintiff to link a substantial Jones Act claim to a minor wage claim solely to gain bootstrap jurisdiction for the Jones Act claim. Granting such jurisdiction would nullify the substantial contacts test. To mitigate the bootstrapping possibility, the Fourth Circuit will refuse to assert jurisdiction over a wage claim not brought in good faith.[17]

The Fourth Circuit applies the substantial contacts test to determine whether to grant jurisdiction over the Jones Act claims of foreign seamen.[18] The test is an objective inquiry into whether a nexus sufficient to permit United States jurisdiction exists between the United States and the foreign seaman's claim. Accordingly, factors such as the law of the flag of the vessel,[19] the place of the wrongful act,[20] the allegiance or

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U.S. 969 (1977); Dutta v. Clan Grahan, 528 F.2d 1258, 1260 (4th Cir. 1975); Elefteriou v. Tanker Archontissa, 443 F.2d 185, 188-89 (4th Cir. 1971); Gkiafis v. Steamship Yiosonas, 387 F.2d 460, 465-66 (4th Cir. 1967) (Boreman, J., dissenting); Malanos v. Marsuerte Compania Naviera, S.A., 259 F. Supp. 646, 648 (E.D. Va. 1966); Giatilis v. The Darnie, 171 F. Supp. 751, 753-54 (D. Md. 1959).

[15] *See* Dutta v. Clan Grahan, 528 F.2d 1258, 1260 (4th Cir. 1975); Bekris v. Greek M/V Aristoteles, 437 F.2d 219, 220 (4th Cir. 1971); Heros v. Cockinos, 177 F.2d 570, 572 (4th Cir. 1949).

[16] 614 F.2d at 381 n.3.

[17] *See* Elefteriou v. Tanker Archontissa, 443 F.2d 185, 188 (4th Cir. 1971); Bekris v. M/V Aristoteles, 437 F.2d 219, 220 (4th Cir. 1971); Malanos v. Marsuerte Compania Naviera, S.A., 259 F. Supp. 646, 648 (E.D. Va. 1966); *see, e.g.*, Dutta v. Clan Grahan, 528 F.2d 1258, 1260 (4th Cir. 1975) (jurisdiction asserted over admittedly "weak" wage claim where lack of good faith not demonstrated); Bekris v. Greek M/V Aristoteles, 437 F.2d 219, 220 (4th Cir. 1971) (no good faith where plaintiff failed to contest defendant's detailed account ledger showing payments made).

[18] *See* Fitzgerald v. Liberian S/T Chryssi P. Goulandris, 582 F.2d 312, 315 (4th Cir. 1978); Southern Cross S.S. Co. v. Firipis, 285 F.2d 651, 653 (4th Cir.), *cert. denied*, 365 U.S. 869 (1960). The Fourth Circuit's application of the substantial contacts test follows well-established case law. At one time, the lower federal courts had difficulty in resolving whether to grant jurisdiction over the Jones Act claims of foreign seamen. *See generally* Morrison, *The Foreign Seaman and the Jones Act*, 8 MIAMI L.Q. 16 (1953). Supreme Court guidance settled the issue in 1953, however, by establishing the substantial contacts test. *See* Lauritzen v. Larsen, 345 U.S. 571, 582-93 (1953); note 6 *supra*.

[19] Lauritzen v. Larsen, 345 U.S. 571, 584-86 (1953). The *Lauritzen* court stated that the law of the flag is the most important factor in substantial contacts analysis. *Id.*; *see* Hansen v. A.S.D.S.S.V. Endborg, 155 F. Supp. 387, 389 (S.D.N.Y. 1957) (law of the flag applies unless unusual countervailing circumstances exist); Nakken v. Fearnley & Eger, 137 F. Supp. 288, 289 (S.D.N.Y. 1955) (law of the flag given greater significance than the place of the wrongful act).

[20] Lauritzen v. Larsen, 345 U.S. 571, 583-84 (1953); *see, e.g.*, Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 441-42 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1959) (fact that wrongful act occurred in United States territorial waters "significant"); Voyiatzis v. Na-

domicile of the parties to the suit,[21] and whether the United States constitutes a convenient forum for the suit[22] are important considerations in substantial contacts analysis.

Application of the substantial contacts test to the Morewitz facts compelled the Fourth Circuit to reject jurisdiction over the Jones Act claim. Seaman Kannes died on a foreign flag vessel owned entirely by foreign citizens.[23] The place of the wrongful act was the high seas, near the Phillipine Islands.[24] All of the parties to the suit, as well as the witnesses, were foreign citizens and residents.[25] Pursuing the suit in the United States would have required the deposition or production of numerous foreign citizens and the translation of various foreign documents. Clearly, the United States constituted an inconvenient forum for the action.[26] Almost no contacts whatsoever, and certainly no substantial contacts, linked Morewitz' Jones Act claim to the United States. Adherence to the substantial contacts test required the dismissal of direct jurisdiction over the claim.

Dismissing the wage claim on good faith grounds avoided the bootstrap problem, but proved more complicated than the application of the substantial contacts test to the Jones Act claim. Good faith is a vague concept,[27] and the good faith test involves an analysis of the motivation and credibility of parties and witnesses. The Fourth Circuit consequently allows its district courts great discretion in the resolution of a good faith issue.[28] The appellate court will not overturn a trial court's determination of the existence of good faith unless the lower court's decision is clearly erroneous.[29] The Fourth Circuit upheld the

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tional Shipping & Trading Corp., 199 F. Supp. 920, 923-24 (S.D.N.Y. 1961) (fact that wrongful act occurred in United States port important).

[21] Laurtizen v. Larsen, 345 U.S. 571, 586-88 (1953); *see, e.g.*, Southern Cross S.S. Co. v. Firipis, 285 F.2d 651, 654-55 (4th Cir. 1960) (emphasizing importance of 20% ownership of vessel by United States citizen); Bartholomew v. Universe Tankships, Inc., 263 F.2d 437, 441-42 (2d Cir.), *cert. denied*, 359 U.S. 1000 (1958) (complete ownership of Liberian flag vessel by United States citizens determinative in allowing assertion of United States jurisdiction).

[22] *See, e.g.*, Gkiafis v. Steamship Yiosonas, 387 F.2d 460, 464 (4th Cir. 1967) (United States jurisdiction proper where witnesses and evidence in United States); Xerakis v. Greek Line, Inc., 382 F. Supp. 774, 776-77 (E.D. Pa. 1974) (United States jurisdiction improper where all witnesses are foreign citizens who do not speak English).

[23] 608 F.2d at 380.

[24] *Id.*

[25] *Brief for Appellee* at 6, Morewitz v. Andros Compania Maritima, S.A., 608 F.2d 379 (4th Cir. 1980).

[26] *See* note 22 *supra.*

[27] *Gilmore & Black, supra* note 1, at 479.

[28] *See* text accompanying note 29 *infra.*

[29] *See* Grevas v. M/V Olympic Pegasus, 557 F.2d 65, 67-68 (4th Cir.), *cert. denied*, 434 U.S. 969 (1977); Gkiafis v. Steamship Yiosonas, 387 F.2d 460, 464-65 (4th Cir. 1967). Trial courts are given extensive discretion in all admiralty cases. *See* Crumady v. The Joachim Hendrick Fisser, 358 U.S. 423, 427-28 (1959); McAllister v. United States, 348 U.S. 19, 20 (1954).

district court's decision that Morewitz had not brought his wage claim in good faith.[30] Kannes' heirs had accepted a wage settlement and executed a release as to all further wage claims, and the release barred suit absolutely.[31] Noting that good faith is absent if a claim cannot possibly succeed, the Fourth Circuit dismissed the wage claim.[32] Morewitz thus failed to win bootstrap jurisdiction for the Jones Act claim.

The effectiveness of the good faith test for preventing attempts to secure bootstrap jurisdiction for otherwise jurisdictionally deficient Jones Act claims varies from case to case. Since the existence or lack of good faith is a factual issue,[33] the clarity of the good faith analysis increases or diminishes with the facts of a given case.[34] In *Morewitz*, the execution of the wage release by Kannes' heirs permitted resolution of the good faith issue. Absent existence of the wage release, the good faith issue could have been resolved only by assessing Morewitz' motivation in bringing the claim. An inquiry into the intentions of a party and his attorney is a difficult and troublesome process. Given the problems inherent in the application of the good faith test, modification of the test or substitution of another test is desirable.

Elimination of the Fourth Circuit's joinder of related claims rule would discourage the linking of wage claims to Jones Act claims and obviate the need for the good faith test. The joinder rule provides the benefit, however, of reducing fragmented litigation to a single judicial unit, thereby clearing dockets and easing judicial workloads.[35] The Fourth Circuit's joinder rule, therefore, serves a valid purpose. Rejecting the rule would burden rather than aid the courts by causing a greater volume of litigation. Nevertheless, a slight modification of the rule would aid in the prevention of the bootstrap problem.

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[30] 614 F.2d at 381-83.

[31] *Id.*

[32] *Id.* at 382 n.4. The *Compton* court's objective approach narrowed the reach of a previous Fourth Circuit decision allowing jurisdiction over a "weak" wage claim where a lack of good faith had not been conclusively demonstrated. *See* Dutta v. Clan Grahan, 528 F.2d 1258, 1260 (4th Cir. 1975). The *Dutta* test would allow a finding of good faith in almost all cases, since it imposes upon the defendant the burden of proving a particular state of mind on the part of the plaintiff. *Id.*; *see* note 34 *infra* (discussing *Dutta* test).

[33] 614 F.2d at 381-82; *see* LeBlanc, Allain, & Mestayer, *Introduction: A Seaman's Personal Injury Action—Some Practical Points*, 4 MAR. LAW 17, 43 (1979).

[34] *Compare* Grevas v. M/V Olympic Pegasus, 557 F.2d 65, 67-68 (4th Cir.), *cert. denied*, 434 U.S. 969 (1977), *with* Dutta v. Clan Grahan, 528 F.2d 1258, 1260 (4th Cir. 1975). In *Dutta*, the plaintiffs alleged the existence of valid wage claims. 528 F.2d at 1260. The Court accepted the validity of the claims when the defendant failed to prove that the plaintiffs had brought the claims in bad faith. *Id.* In *Grevas*, however, the court had an objective ground for holding that the wage claim at issue was brought in bad faith. 557 F.2d at 67-68. The plaintiff's asserted wage claim was so large that he would have had to work twenty-three hours a day for each day he was aboard ship to earn the amount he claimed was owned him. *Id.*

[35] *See* note 16 *supra*.

Absent special circumstances, the application of the joinder rule is mandatory.[36] Allowing discretionary rather than mandatory joinder, however, would preserve the joinder rule while discouraging attempts to gain bootstrap jurisdiction.[37] The issue whether the wage claim has been brought in good faith would be one element in the exercise of discretionary joinder, but would not be determinative. Thus, in cases where the facts create difficulty in analyzing good faith, the court would be free to examine other, more objective factors.[38] Soundly exercised, this flexibility would aid the courts on both the trial and appellate level.

Alternatively, bootstrapping of claims could be avoided through the application of the substantial contacts test to wage claims brought by foreign seamen. Applying the substantial contacts test to such claims would allow the courts to examine the claims in an objective manner and thereby avoid the difficulties stemming from the subjective nature of the good faith test. Moreover, the use of the same jurisdictional test for the related claims would aid judicial efficiency because the facts and analysis would usually be identical for both claims.

In *Morewitz*, the Fourth Circuit ultimately evaded the attempt to win bootstrap jurisdiction for an otherwise jurisdictionally deficient Jones Act claim. Under the facts of the *Morewitz* case, application of the good faith test proved straightforward. Future cases, presenting more difficult fact patterns, may require a more objective approach than the good faith test allows. Consequently, the implementation of discretionary joinder or the application of the substantial contacts test to wage claims could help alleviate the bootstrap problem.[39] Nevertheless, the Fourth Circuit in *Morewitz v. Andros Compania Maritima, S.A.*, correctly applied the existing substantial contacts and good faith tests to

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[36] Dutta v. Clan Grahan, 528 F.2d 1258, 1260 (4th Cir. 1975).

[37] At least one court has followed the discretionary joinder approach. *See* Giatilis v. The Darnie, 171 F. Supp. 751, 753-54 (D. Md. 1959) (joinder of wage claim merely one factor of many in determining jurisdiction over Jones Act claim); note 38 *infra*.

[38] *See* 171 F. Supp. at 753-54. Greek seaman Giatilis brought suit against a Liberian vessel owned by Greek citizens and residents. *Id.* at 752. Giatilis sought recovery for injuries allegedly sustained within United States territorial waters. *Id.* Giatilis subsequently amended his claim by adding a claim for unpaid wages under 46 U.S.C. §§ 596, 597. *Id.*; *see* note 12 *supra*. The district court accepted jurisdiction over the wage claims but rejected jurisdiction over the personal injury claims because the personal injury claims lacked substantial contact with the United States. *Id.* at 753-54. Moreover, Greece constituted a more convenient forum for the personal injury claims than did the United States, since all of the witnesses to Giatilis' accident were Greek citizens. *Id.*

[39] The application of substantial contacts analysis for the *Morewitz* claim would have simplified the Fourth Circuit's analysis of the claim. The wrongful withholding of wages occurred in Greece. 614 F.2d at 381. The parties to the wrongful act were Greek nationals. *Id.* Nothing indicated that Greece constituted an inconvenient or inaccessible forum. Clearly, the wage claim possessed insufficient contacts with the United States to allow the assertion of United States jurisdiction over the claim.