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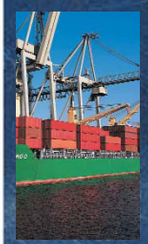

Inside This Issue

SEAMAN STATUS AND VESSEL STATUS UPDATE

Aaron B. Greenbaum*

This article addresses recent developments as to Jones Act seaman status and vessel status determinations. With respect to seaman status there have been several interesting decisions interpreting the "identifiable fleet" requirement. Vessel status remains a hot issue post-*Lozman*,[1] as courts continue to address whether moored structures, marine construction barges, and vessels taken out of navigation qualify as "vessels" under the Supreme Court's test. The cases discussed herein were issued between October 1, 2017 and October 7, 2018.

Several recent decisions have addressed seaman status with respect to shore-based employees who worked upon dock-side vessels. Courts have taken a restrictive view of the "identifiable fleet" requirement under the *Chandris*[2] test in denying seaman status. For example, in *Tilcon N.Y., Inc. v. Volk*, the plaintiff was a barge "maintainer" at a rock quarry processing facility located on the Hudson River.[3] He would inspect rock barges that were always moored, but sometimes were three or four deep, which required the plaintiff to "climb over" the barges to reach the one he needed to inspect.[4] While inspecting a moored barge, the plaintiff slipped

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[1] *United States v. Lozman,* 568 U.S. 115 (2013).

[2] *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

[3] *Tilcon N.Y., Inc. v. Volk,* 874 F.3d 356, 361 (2d Cir 2017).

[4] *Id.*

(Continued on page 166)

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Managing Editor's Introductory Note

We begin this edition with a review of cases addressing the questions of seamen and vessel status by Aaron Greenbaum. Aaron takes us through an analysis of the recent cases addressing seaman status with respect to shore-based employees working on dock-side vessels, and the issue of what constitutes a vessel, as courts continue to address whether moored structures, marine construction barges, and vessels taken out of navigation qualify as "vessels" under the Supreme Court's *Lozman* test.

We then present a review by Pamela Schultz of the United States Court of Appeals for the Third Circuit's *en banc* decision in *Joyce v. Maersk Line Ltd.*, 876 F.3d 502 (3d Cir. 2017) on seamen as "wards of the admiralty court." For long, we have always adopted this as a truism. However, Pamela points out that recent decisions seem to erode this principle, where other competing policies may apply.

In his regular column, Window on Washington, Bryant Gardner provides us with a detailed look at the responses to the Trump Administrations' Request for Information in the Federal Register on May 1, 2018, seeking public input on "how the Federal government may prudently manage regulatory costs imposed on the maritime sector." Many interests responded with specific ideas on how federal regulations on maritime industry could be reduced or eliminated.

Nest, we again visit the interaction between admiralty and bankruptcy jurisdiction and the power of the different courts with respect to *in rem* sales of vessels and the extinguishment of maritime liens. Brian Maloney gives a detailed analysis and discussion of the decision of the United States Court of Appeals for the Ninth Circuit in *Barnes v. Sea Hawaii Rafting, LLC,* 886 F.3d 758 (9th Cir. 2018), distinguishing questions left open by the United States Court of Appeals for the Second Circuit's 2005 ruling in *Universal Oil Ltd. v. Allfirst Bank (In re Millenium Seacarriers, Inc.),* 419 F.3d 83, 2005 AMC 1987 (2d Cir. 2005).

We follow with our Recent Developments case summaries to keep you informed on developments in various aspects of maritime law.

Once again, we encourage our readers to submit photos, artwork, poems, or thought pieces to enhance the enjoyment of reading our publication.

As always, we hope you find this edition interesting and informative, and ask you to consider contributing an article or note for publication to educate, enlighten, and entertain us.

Robert J. Zapf

Barnes v. Sea Hawaii Rafting, LLC: The Ninth Circuit Distinguishes Second Circuit Authority Concerning the Scope of Bankruptcy Jurisdiction to Sell a Vessel Free and Clear of an Existing Maritime Lien

Brian P. Maloney*

On March 28, 2018, in *Barnes v. Sea Hawaii Rafting, LLC*, a panel of the United States Court of Appeals for the Ninth Circuit found that where an Article III admiralty court had prior exclusive jurisdiction arising from an *in rem* arrest proceeding, a bankruptcy petition could not divest the jurisdiction held by the admiralty court.[1] Moreover, the Ninth Circuit questioned whether a bankruptcy court had any power to extinguish maritime liens in ordering the sale of a vessel under Section 363 of the Bankruptcy Code (11 U.S.C.§ 363) on the basis that maritime liens can only be extinguished by a court sitting in admiralty absent the consent of the lienors, distinguishing questions left open by the United States Court of Appeals for the Second Circuit's 2005 ruling in *Universal Oil Ltd. v. Allfirst Bank (In re Millenium Seacarriers, Inc.)*.[2]

In *Barnes*, the plaintiff was injured on the *M/V Tehani* (the "Vessel") when the Vessel exploded. He asserted a maritime lien for seaman's wages as well as the maritime remedy of maintenance and cure against the Vessel *in rem*, and Sea Hawaii Rafting, LLC ("SHR"), the vessel owner, and Kris Henry ("Henry"), SHR's owner and manager, *in personam*.[3] After some 15 months of litigation, both SHR and Henry filed for bankruptcy protection—SHR for dissolution under Chapter 7 and Henry for reorganization under Chapter 13—resulting in the imposition of an automatic stay under Section 362(a) of the Bankruptcy Code (11 U.S.C. § 362(a)) and staying the admiralty proceedings that plaintiff had commenced.[4]

The bankruptcy court partially lifted the stay to allow the district court to adjudicate the merits of any maritime lien claim asserted by Barnes against the Vessel, but kept the stay to bar enforcement of any maritime lien against SHR or Henry. After reopening the case, the district court dismissed the plaintiff's claim against the Vessel for lack of *in rem* jurisdiction due to plaintiff's failure to submit a verified amended complaint, although his original *in rem* complaint had been verified and the claimants had appeared and contested plaintiff's *in rem* claims. While Barnes' appeal was pending, the bankruptcy court also purported to approve the sale of the Vessel free and clear of all liens for $35,000.[5]

On appeal, the Ninth Circuit reversed the district court's order and issued a writ of mandamus to the district court to award the plaintiff maintenance.[6] The Court's jurisdictional analysis was notably definitive, holding that once *in rem* jurisdiction is conferred, a subsequent bankruptcy had no authority to discharge the lien or to divest the admiralty court of jurisdiction:[7]

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1 *Barnes v. Sea Hawaii Rafting, LLC*, 886 F.3d 758 (9th Cir. 2018).

2 *Universal Oil Ltd. v. Allfirst Bank (In re Millenium Seacarriers, Inc.),* 419 F.3d 83, 2005 AMC 1987 (2d Cir. 2005).

3 "Maintenance is a seaman's right . . . to food and lodging if he falls ill or becomes injured while in the service of the ship. Cure is the right to necessary medical services." *See id.* n. 1 (quoting 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 6-28 (5th ed. 2016) (internal quotations omitted).

4 *See Barnes*, 886 F.3d at 764-67.

5 *See id.* at 767-68.

6 *See id.* at 765. The Ninth Circuit was critical of the course of the underlying litigation, as the seafarer had previously been denied any material recovery or maintenance for his injuries for some six years. On remand, the district court heeded the Ninth Circuit's directive to move quickly to rule on Barnes' claims, and following a three-day trial awarded him: (i) maintenance in the amount of $68.00 per day; (ii) cure of $21,697.76; (iii) punitive damages in the amount of $10,000; (iv) attorneys' fees and costs in an amount to be determined; and (v) pre-judgment interest under Hawaii law of 10% per year, for a total judgment (excluding attorneys' fees and costs) of $305,856.64. *See Barnes v. Sea Hawaii Rafting, LLC*, Civ. No. 13-00002 ACK-RLP, 2018 U.S. Dist. LEXIS 152330, *38-39 (D. Haw. Sept. 6, 2018).

7 *Barnes*, 886 F.3d at 765 (emphasis added).

> The district court obtained jurisdiction over the vessel *Tehani* when Barnes filed a verified complaint and the defendants appeared generally and litigated without contesting *in rem* jurisdiction. The district court did not lose *in rem* jurisdiction while the *Tehani* remained in its constructive custody. **And the court's control over the vessel, once obtained, was exclusive.** [The owner's] later-filed bankruptcy petition did not divest the district court of *in rem* jurisdiction. Moreover, the automatic bankruptcy stay did not affect Barnes's maritime lien against the *Tehani*, and the bankruptcy court had no authority to dispose of the lien through the application of bankruptcy law.

This decision squarely addresses issues that were avoided for the most part by the Second Circuit in *Millenium Seacarriers* and also calls into question decisions that assume a bankruptcy court's use of the automatic stay ousts the prior exercise of *in rem* jurisdiction and can enjoin those actions.[8] Instead, "neither the timing of the bankruptcy petition relative to the maritime lien nor the nature of the bankruptcy proceeding – liquidation versus reorganization – factored into [the Ninth Circuit's] decision" and the Court ruled that once *in rem* jurisdiction had vested with the admiralty court, the bankruptcy court could not later obtain such jurisdiction by the filing of a bankruptcy petition.[9]

In addition, the court also noted that "it is an open question whether bankruptcy courts have the 'effective ability to sell a vessel free and clear of maritime liens.'"[10] The court reasoned that maritime liens can only be extinguished through the application of admiralty law because, *inter alia*, bankruptcy's goal of distributing the debtor's assets among various creditors conflicts with maritime law's system of priorities between creditors, noting that "[t]he central bankruptcy scheme of *pro rata* distribution among creditors deprives secured creditors of immediate enforcement and is obviously at odds with the complex maritime system providing for priorities between various creditors and distinguishing between maritime and nonmaritime creditors." (internal quotations omitted).[11]

The court also distinguished the Second Circuit's holding in *Millenium Seacarriers* by noting that the Second Circuit's decision had turned on the lienors' consent to bankruptcy jurisdiction by voluntarily submitting their claims. Thus, the Ninth Circuit suggested that the bankruptcy court lacked jurisdiction to extinguish the plaintiff's maritime lien where that claim was not voluntarily before the court.[12]

Prior to *Barnes*, Second Circuit precedent had established that bankruptcy courts may extinguish existing maritime liens in at least some circumstances, despite lacking admiralty jurisdiction conferred upon district courts by Article III of the United States Constitution.[13] In *Millenium Seacarriers*, the Second Circuit found that the proceeding before the bankruptcy court ranking the priority of maritime lien claims was a "core" proceeding within the bankruptcy court's "comprehensive power" to "hear and determine all cases" under the Bankruptcy Code.[14] The statutory criteria for core proceedings include "determinations of the validity, extent, or priority of liens."[15] Accordingly, the court determined that the admiralty issues at stake in the case—the existence of liens under the Ship Mortgage Act—did not deprive the bankruptcy court of its "core jurisdiction" to adjudicate an estate. Thus, the court construed the Congressional intent underlying the statute as not creating a blanket exception to bankruptcy jurisdiction for all maritime issues.[16]

An important factor in *Millenium Seacarriers* was the fact that the lienors had voluntarily submitted their claims to the bankruptcy court for adjudication through

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[8] *See Atl. Richfield Co. v. Good Hope Refineries, Inc.*, 604 F.2d 865, 869-70 (5th Cir. 1979).

[9] *See Barnes*, 886 F.3d at 774.

[10] *Id.*

[11] *See id.* at 775. The court relied on prior Ninth Circuit precedent for the proposition that automatic bankruptcy stays under Section 362 of the Bankruptcy Code do not apply to maritime liens under admiralty jurisdiction, because the automatic stay provision only references land-based lien interests and "'does not expressly refer to *maritime* liens.'" *Id.* at 773 (quoting *United States v. Chandon*, 889 F.2d 233, 238 (9th Cir. 1989)).

[12] *See id.* at 775-76.

[13] *See Universal Oil Ltd. v. Allfirst Bank (In re Millenium Seacarriers, Inc.),* 419 F.3d 83, 101-02 (2d Cir. 2005); *see also* U.S. Const. art. III, § 2, cl. 1.

[14] *See Millenium Seacarriers*, 419 F.3d at 96-97 (citing 28 U.S.C. §§ 157 (b)(1), 158).

[15] *Id.* at 97 (internal quotations omitted).

[16] *See id.* at 98, 100.

filing notices of objection and litigating their liens through adversary proceedings.[17] Indeed, the Second Circuit was explicit in recognizing that by relying on the lienors' consent to jurisdiction, the Court did not address "whether the bankruptcy court could have expunged the vessels of their liens had it not had jurisdiction over the lienors."[18] The Court found, moreover, that "[t]hose who purchase maritime assets from a debtor's estate under the auspices of a bankruptcy proceeding take a calculated commercial risk that they have not received clean title."[19]

Those risks continue and are perhaps heightened in the wake of the Ninth Circuit's decision in *Barnes*, where the bankruptcy court's vessel sale had no ability to extinguish liens or divest the admiralty court of jurisdiction to adjudicate that issue where an *in rem* action had been filed pre-petition. Prospective purchasers of vessels in distressed asset sales must be mindful of the additional diligence needed to understand the possible lien exposure maritime assets may face, where—after *Barnes*—the application of bankruptcy law may not in all circumstances permit such exposure to be fully extinguished.

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[17] Courts within the Seventh and Tenth Circuits have similarly held that lienors may consent to the bankruptcy court's jurisdiction to adjudicate and extinguish their liens. *See*, *e.g.*, *In re Bachrach Clothing, Inc.*, 480 B.R. 820, 831-32 (Bankr. N.D. Ill. 2012) (finding that the plaintiff had voluntarily consented to adjudication by the bankruptcy court by filing its claim in bankruptcy court and alleging in its complaint that the adversary proceeding constituted a "core" proceeding); *High Performance Real Estate, Inc. v. Riley*, Civil Action No. 13-cv-0663-WJM-MJW, 2013 U.S. Dist. LEXIS 89127, at *8-10 (D. Colo. June 25, 2013) (ruling that defendants voluntarily consented to the bankruptcy court's authority by failing to object to its jurisdiction until seventeen months after the complaint was filed).

[18] *Millenium Seacarriers*, 419 F.3d at 103.

[19] *Id.*