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Front cover photo of Edinburgh Castle, Edinburgh, Scotland
Back cover photo of Urquhart Castle at Loch Ness
(Monuments of The National Trust of Scotland)

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Lane Powell Spears Lubersky LLP provides a broad spectrum of legal services to its clients. In response to requests from our readers, we are pleased to include non-marine articles which will appear regularly in each new edition of London Market News. This expansion has been implemented primarily at the request of the readers. We are interested in your comments and suggestions for future issues. All articles not otherwise specified are drafted by the Editor.

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Katie Matison
London Market News Editor/Author

Flying Solo: The U.S. Supreme Court's Conclusion That "Inaction" May Constitute an "Accident" Under the Warsaw Convention

AVIATION

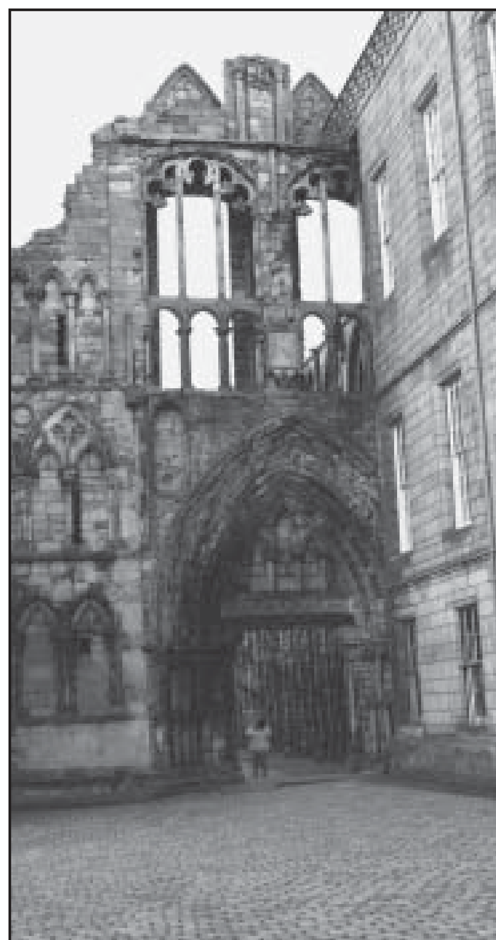
Steve Jensen

The majority opinion in the United States Supreme Court's recent decision in ***Olympic Airways v. Husain, ___ U.S. ___, 124 S. Ct. 1221 (2004),*** is remarkable for a number of reasons. Not the least of these reasons is that it upheld a recovery made by the widow of an airline passenger who died, in part, due to the presence of ambient cigarette smoke inside the cabin. Of greater long-term significance than the ultimate outcome of the case, however, is one of the conclusions that the Court reached along the way. That is, the Court concluded that the term "*accident*," as used in ***Article 17 of the Warsaw Convention***, may encompass instances of "*inaction*" as well as instances of "*action*." With this conclusion, the Court placed itself squarely at odds with decisions previously rendered by English and Australian Courts. Breaking with the general practice of affording due deference to the decisions of the Courts of its sister signatories to the Convention, the United States Supreme Court effectively veered off on its own solo course.

It is difficult to say why the United States Supreme Court chose to depart from the reasoning of the English and Australian courts. However, the facts in ***Olympic Airways*** are compelling, and it is certainly possible that the decision making process of the Court was influenced by a desire to ensure that a recovery was made. In that case, Dr. Abid Hanson and his wife, Rubina Husain, were passengers aboard a flight from Athens to San Francisco. Dr. Hanson, an asthma sufferer, was sensitive to second-hand smoke. However, after boarding, he discovered that his seat was located just three rows in front of the economy-class smoking section.

Consequently, Ms. Husain informed a flight attendant that her husband could not sit in a smoking area, stating, "*You have to move him*." The flight attendant told her to, "*Have a seat*." After all passengers had boarded, but prior to takeoff, Ms. Husain again asked the flight attendant to move Dr. Hanson to a different seat, explaining that he was "*allergic to smoke*." However, the flight attendant replied that she could not reseat Dr. Hanson, as the plane was "*totally full*" and she was "*too busy*" to help.

Shortly after takeoff, Dr. Hanson became surrounded by ambient cigarette smoke from his fellow passengers. Ms. Husain then spoke with the flight attendant a third time, stating "*You have to move my husband from here*." Again, her request was refused. The flight attendant did offer that Dr. Hanson could switch seats with another passenger if he chose to do so, but stated that he would have to find someone who was willing to make the switch on his own. Ms. Husain countered that Dr. Hanson had to move, even if the only available seat was in the cockpit or in business class. Again, the flight attendant refused to offer assistance. Approximately two hours into the flight, after the level of smoking in the cabin had noticeably increased, Dr. Hanson collapsed. A short time later, despite efforts to administer CPR and other medical attention, Dr. Hanson died.



Ms. Husain filed suit against the air carrier, alleging wrongful death. Her right to a recovery pursuant to her lawsuit was governed by the Warsaw Convention, an international treaty. In particular, ***Article 17 of the Convention*** sets forth the circumstances under which a carrier shall be held liable:

> The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

(Emphasis added.) From ***Article 17***, then, it is apparent that there must have been an "accident" in order for a recovery to be made. Just what constitutes an "accident," however, has been the subject of substantial litigation in the various signatory countries.

In 1985, the United States Supreme Court rendered its decision in ***Air France v. Saks, 470 U.S. 392 (1985)***, a case which has proven to be very significant in terms of defining the term "accident" under the Convention. In that case, the Court was confronted with the issue of whether a passenger's *"loss of hearing proximately caused by normal operation of the aircraft's pressurization system"* was an *"accident."* The Court concluded that it was not, as the injury was the passenger's "*own internal reaction*" to the normal pressurization of the aircraft's cabin. Accordingly, the ***Saks*** Court held that an "accident" under ***Article 17*** is "*an unexpected or unusual event or happening that is external to the passenger*."

In ***Olympic Airways***, neither party disputed the ***Saks*** definition of the term "*accident*." However, perhaps predictably, the parties did disagree in their interpretations thereof. The carrier contended that only affirmative acts are "*events or happenings*" under the ***Saks*** definition and that, consequently, the flight attendant's failure to act could not constitute an "*accident*." In other words, the carrier contended that an "accident" requires action, not mere inaction. Ms. Husain — and ultimately the United States Supreme Court — disagreed. The Court decided that there was no distinction between "*action*" and "*inaction*" under ***Article 17***, and concluded that either could form the basis for an "*accident*."

The United States Supreme Court's conclusion that an "*accident*" could result from inaction was destined to raise debate regardless of the surrounding circumstances. However, it is particularly controversial due to the fact that it is squarely at odds with the conclusions of the English and Australian courts that had previously addressed the same issue. In ***Deep Vein Thrombosis and Air Travel Group Litigation, EWCA Civ. 1005 (2003)***, England's Court of Appeals held as follows:

> A critical issue in this appeal is whether a failure to act, or an omission, can constitute an accident for the purposes of Article 17. Often a failure to act results in an accident, or forms part of a series of acts and omissions which together constitute an accident. In such circumstances it may not be easy to distinguish between acts and omissions. I cannot see, however, how inaction itself can ever properly be described as an accident. It is not an event; it is a non-event. Inaction is the antithesis of an accident.

(Emphasis added.) Likewise, in ***Quantas Ltd. v. Povey, VSCA 227 (2003)***, the Supreme Court of Victoria, Australia, agreed:

> The allegations in substance do no more than state a failure to do something, and this cannot be characterized as an event or happening, whatever the concomitant background . . .

(Emphasis added.) Normally, the fact that different courts in different countries had reached different conclusions with regard to a particular legal issue might not seem especially unusual. However, this situation is different as it involves the interpretation of an international treaty common to each of the countries. To date, due deference to prior decisions from other signatory countries to the Warsaw Convention had been relatively standard practice. Indeed, in reaching their decisions, the English and Australian courts gave extensive consideration to foreign decisions, including those of American courts. The relatively flippant manner in which the ***Olympic Airways*** majority dismissed the English and Australian decisions — with a mere footnote — was novel even for the United States Supreme Court. For example, in rendering the ***Saks*** decision, the United States Supreme Court had specifically noted its responsibility to read the treaty in a manner "*con-*

Continued from page 5

sistent with the shared expectations of the contracting parties."

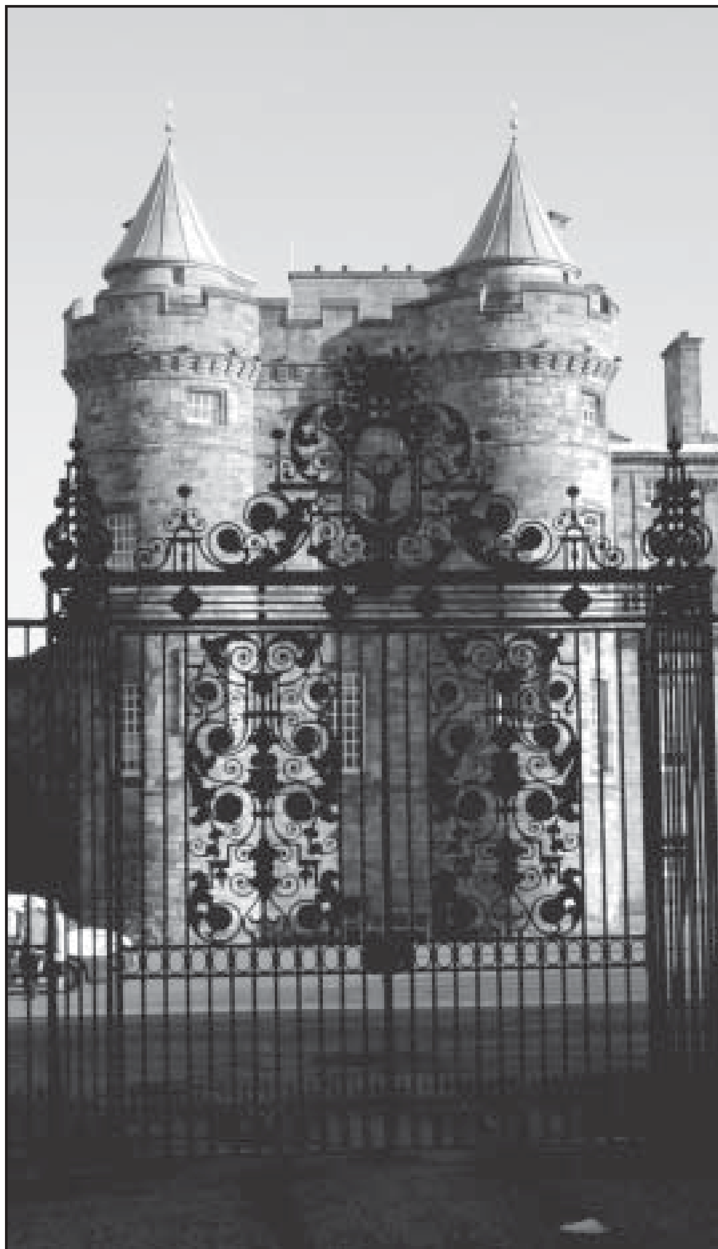
The dissenting opinion in ***Olympic Airways*** noted the majority's cavalier approach to the English and Australian decisions with distinct disapproval:

> When we interpret a treaty, we accord the judgments of our sister signatories "considerable weight." True to that canon, our previous Warsaw Convention opinions have carefully considered foreign case law. Today's decision stands out for its failure to give any serious consideration to how the courts of our treaty partners have resolved the legal issues before us.

AVIATION
(Continued)

Later in its opinion, the dissent continued in this same vein:

> We can, and should, look to decisions of other signatories when we interpret treaty provisions. Foreign constructions are evidence of the original shared understanding of the contracting parties. Moreover, it is reasonable to impute to the parties an intent that their respective courts strive to interpret the treaty consistently . . . Finally, even if we disagree, we surely owe the conclusions reached by appellate courts of other signatories the courtesy of respectful consideration.



It is difficult to say why the ***Olympic Airways*** majority failed to give more than cursory consideration to the English and Australian decisions. The dissent suggests that the majority may have been driven by a desire to ensure compensation due to the existence of especially egregious facts. However, if in fact this was the majority's approach, it was likely short-sighted. As the dissent coolly stated: "*Whether inaction can constitute an accident under the Warsaw Convention is a significant issue on which international consensus is important; whether Husain can recover for her husband's death in this case is not*." Ultimately, whatever the majority's motivation, the end result is the same: the United States Supreme Court has chartered a solo course, placing itself at odds with its sister signatories, and creating a confused and inconsistent body of international case law.

LMN

District Court Holds Diversity of Citizenship Requirements Are Applicable to Each Name and That Alien Jurisdiction Does Not Alter This Requirement

CIVIL PROCEDURE

Brett Anderson

The plaintiff in ***Zidell Marine Corp. v. Beneficial Fire & Casualty Ins. Co., No. 03-5131 RBL (W.D. Wa.),*** filed an action seeking a declaratory judgment and alleging numerous state law actions regarding environmental contamination at the Hylebos Waterway site in Tacoma, Washington. Underwriters filed a motion to dismiss for lack of jurisdiction arguing plaintiff failed to carry its burden that complete diversity exists and that the amount in controversy is satisfied with respect to each Name. Dismissing Underwriters from the action, the district court recently entered two orders holding that complete diversity of citizenship and the amount in controversy must be satisfied as to each Name and that "alien jurisdiction" does not excuse plaintiff from meeting the diversity of citizenship and amount in controversy requirements. ***See December 4, 2003, Order on Motion to Dismiss ("December 4, 2003, Order") and February 19, 2004, Order Granting Motion to Dismiss ("February 19, 2004, Order") in Zidell Marine Corp. v. Beneficial Fire & Casualty Ins. Co.***

Beginning in the 1940s, the plaintiff, Zidell Marine Corporation ("Zidell"), operated ship-dismantling facilities in Oregon and Washington. The Environmental Protection Agency and the Oregon Department of Environmental Quality notified Zidell that it may be liable for environmental contamination arising out of these operations. On March 11, 2003, Zidell filed an action in federal court in Washington regarding alleged contamination at the Hylebos Waterway. Underwriters filed the motion to dismiss.

Underwriters argued that both the diversity of citizenship and amount in controversy requirements must be satisfied with respect to each Name when determining whether diversity jurisdiction exists. ***December 4, 2003, Order at 2 & 7.*** Zidell argued that the citizenship of the active Underwriters of the various syndicates controls and that its claim for $3.2 million coupled with its claims for attorney's fees, natural resource damages, and other statutory damages greatly exceed the jurisdictional standard. ***Id.*** The district court agreed with Underwriters and held that complete diversity and amount in controversy must be independently met for each Name. ***Id. at 5 & 9.***

"Citizens of Different States" (28 U.S.C. § 1332)

The court agreed with Underwriters that diversity jurisdiction depends on the citizenship of each Name. The court noted that the Names are the *"real parties to the controversy"* when the litigation arises out of a policy to which they subscribed. ***December 4, 2003, Order at 5.*** This conclusion is supported by the unequivocal fact that the Names are only severally liable for their fractional share of the risk. ***Id.***

The court noted that the complaint listed *"Certain Underwriters at Lloyd's of London"* without any limitation as to the scope of the term "Underwriters." ***Id.*** The district court, therefore, rejected Zidell's contention that "the individual names are simply not defendants in this case." ***Id. at 6.*** Pointing out that Zidell could not have sued the Society and Corporation of Lloyd's or the syndicates, the court asked *"who do you think you were suing when you purported to commence a lawsuit against Certain Underwriters at Lloyd's of London?"* ***Id.*** *"The only credible answer — indeed, the only remaining answer — is that plaintiff sued some or all the Names; the Names are subject to suit under British law and therefore can be sued in federal court with respect to their contractual undertakings."* ***Id. (internal citations omitted).***

The district court rejected Zidell's reliance on ***Certain Interested Underwriters at Lloyd's, London, England v. Layne, 26 F.3d 39 (6th Cir. 1994). December 4, 2003, Order at 6-7.*** In ***Layne***, the Sixth Circuit concluded that under

ON JUNE 4, 2004, THE COMITE MARITIME INTERNATIONAL DELEGATES ATTENDING THE 38TH CONFERENCE IN VANCOUVER, B.C., VOTED TO AMEND THE GENERAL AVERAGE PROVISIONS OF THE YORK-ANTWERP RULES 1994.

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CIVIL PROCEDURE *(Continued)*

Tennessee agency principles, the active Underwriters were undisclosed principals and liable on the contract. ***Layne, 26 F.3d at 43.*** The Washington district court found ***Layne*** distinguishable because the Names here were not undisclosed principals; rather, they were at most partially disclosed principals. ***See December 4, 2003, Order at 6-7.*** The district court pointed out that each policy informed Zidell that the identities of the Names *"are or will be on file."* ***Id. at 7.*** Accordingly, the Names are not acting as undisclosed principals and, hence, are not liable for the other principal's nonperformance but are only severally liable at most. ***See Id. at 5 & 7.***

"[W]here the Matter in Controversy Exceeds . . . $75,000.00" (*28 U.S.C. § 1332*). Zidell argued that the value of its claims (in total) greatly exceeds the amount in controversy requirement. ***December 4, 2003, Order at 7.*** Underwriters contended that the claim against each Name or, at least, against each Syndicate must exceed the $75,000.00 threshold. ***Id.***

As an initial matter, the district court rejected Zidell's contention that in "no case . . . has a plaintiff been required to establish a separate jurisdictional amount for each individual 'Name.'" ***Id. at 8.*** In doing so, the district court cited no less than seven cases where courts required the amount in controversy to be established as to each Name. ***Id. at 7-8.*** The district court commented on the "appealing symmetry" in using the Names to determine both the diversity of citizenship and the amount in controversy. ***Id. at 8.*** The district court observed, however, that a "more principled basis for focusing on the Names . . . derives from the nature of their liability." ***Id.*** Since the Names are severally liable, each Name essentially has *"a separate contract with the plaintiff to pay for his or her percentage of a covered loss."* ***Id.*** On these facts, the district court held that Zidell must allege the amount in controversy is in excess of the jurisdictional amount against each Name. ***Id.***

Before the district court ruled on the motion, however, it required Underwriters to provide evidence regarding the limits of the policies at issue, the identity of the syndicates and percentage of the risk assumed by each syndicate, and the identity of the Names and the percentage subscribed by each Name. ***December 4, 2003, Order at 11.*** The district court also directed Underwriters to secure information on the citizenship of any domestic, non-diverse Names. ***Id.*** Lastly, the district court ordered Zidell to quantify its claims against Underwriters, including the value of defense obligations and attorney's fees. ***Id. at 11-12.***

The material filed by Underwriters established that Zidell's greatest potential recovery against any one Name still failed to meet the amount in controversy requirement. ***February 19, 2004, Order at 1.*** Zidell conceded that it could not meet the amount in controversy standard for the individual Names. ***Id. at 1-2.*** Nevertheless, recognizing that it was facing imminent dismissal, Zidell injected a new argument into the fray. Relying on 28 U.S.C. § 1332(a)(3), Zidell argued that it did not have to meet the amount in controversy requirement when alien defendants are additional parties in an action between citizens of different states. ***Id. at 2.*** Zidell relied on ***E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 1999 WL 350857 (S.D.N.Y. 1999) ("Squibb II"),*** to support this argument.

[1] On its own accord, the district court rejected the ***Squibb II*** alien jurisdiction analysis for the following five reasons.

i) *Squibb II* lacks precedential value. Discounting Zidell's reliance on ***Squibb II***, the district court noted that one year before ***Squibb II***, the Second Circuit Court of Appeals stated its skepticism "that § 1332 (a)(3) can be read so broadly as to eliminate entirely the amount in controversy requirement on foreign subjects." ***E.R. Squibb & Sons, Inc. v. Accident & Cas. Ins. Co., 160 F.3d 925, 934 (2d Cir. 1998).*** The Washington district court doubted the Second Circuit would affirm the New York district court's position had the issue been addressed on appeal. ***See February 19, 2004, Order at 3-4.***

ii) The case primarily relied on by the *Squibb II* court does not support the argument. The district court recognized that the ***Dresser Indus., Inc. v. Underwriters at Lloyd's of London*** case discussed only whether diversity jurisdiction exists when, in addition to diverse citizens, "aliens appear as both plaintiffs and defendants." ***See 106 F.3d 494, 495 (3rd Cir. 1997).*** Accordingly, the district court remarked that ***Dresser*** lacked precedential force since it did not address the amount in controversy issue. ***See February 19, 2004, Order at 4.***

iii) *Squibb II* is not logically persuasive. In ***Squibb II***, the court stated that nothing in § 1332(a)(3) specifically requires the amount in controversy to apply to alien defendants. ***1999 WL 350857 at *9.*** The Washington district court noted this "cuts both ways." ***February 19, 2004, Order at 4.*** *"[I]t is equally true that the statutory language does not expressly exempt aliens from the amount in controversy requirement."* ***Id.*** The district court also rejected the oft-asserted policy consideration that federal courts should be available to alien defendants to avoid local bias since the alien defendants here (Underwriters) are willing to litigate in state court. ***Id.***

iv) *Squibb II's* interpretation would lead to bizarre results. The district court believed that an exception for alien defendants from the jurisdictional analysis would create a jurisdictional anomaly. ***Id at 4.*** The district court correctly noted that a plaintiff suing two citizens of different states would have to satisfy the amount in controversy for each defendant. ***Id. (citing 28 U.S.C. § 1332(a)(1)).*** Similarly, a plaintiff suing two alien defendants would have to meet the amount in controversy requirement as to each alien defendant. ***Id. (citing 28 U.S.C. § 1332(a)(2)).*** Under the ***Squibb II*** analysis, *"a citizen of a state who sues a citizen of another state in which the amount in controversy between them exceeds that jurisdictional minimum can assert any number of additional claims against any number of aliens without regard to the amount at stake between them."* ***Id.*** *The district court found this result to be "strange."* ***Id. at 4-5.***

v) Legislative history does not exempt alien defendants. The district court believes the legislative history of § 1332(a)(3) reveals the alien jurisdiction provision was intended to clarify that diversity jurisdiction can exist when an alien party and a diverse citizen are on one side of a lawsuit. ***February 19, 2004, Order at 5.*** Recognizing that other courts had previously determined that the presence of alien parties destroyed diversity jurisdiction, the district court remarked that 28 U.S.C. § 1332(a)(3) was enacted to correct this line of reasoning. ***Id.*** Lastly, the district court found nothing in the legislative history exempting alien defendants from the amount in controversy requirement. ***Id.***

The district court concluded, *"only some cases may be brought in federal court."* ***Id. at 5.*** Federal courts, therefore, should strictly construe the congressional grant of diversity jurisdiction. ***Id.*** As such, the district court held that plaintiff is required to satisfy the jurisdictional minimum with respect to both domestic and foreign defendants. ***Id. at 5-6.*** Zidell's failure in this respect warranted dismissal. ***Id. at 6.***

[1] 28 U.S.C. § 1332(a)(3) provides jurisdiction in cases between "citizens of different States and in which citizens or subjects of a foreign state are additional parties."

LMN

CIVIL PROCEDURE
(Continued)

Enforceability of Arbitration Agreements in Nursing Home Admission Contracts in Washington

LONG-TERM HEALTH CARE

Linda Blohm Clapham

I. Introduction

Long-term care litigation is now recognized as one of the fastest-growing areas of health care litigation. In order to potentially reduce liability exposure, nursing home contracts often contain mandatory arbitration clauses. Enforceability of these arbitration clauses has become a contentious issue in the battle between plaintiffs and defendants to the extent that currently two of the leading arbitration services will only "administer consumer health care liability claims if an agreement to arbitrate was entered into by the parties in writing *after* the alleged injury occurred." ***See Important Announcement Related to Health Lawyers' ADR Service*** (***American Health Lawyers Association, www.ahla.org.***); ***see also Consumer Due Process Protocol and Health Care Due Process Protocol (American Arbitration Association, www.adr.org)***. To date, there have been no Washington cases addressing the enforceability of arbitration clauses in nursing home contracts with residents.

This article outlines the state and federal statutory schemes governing alternative dispute resolution in Washington including the Federal Arbitration Act and Medicare and Medicaid. The article further identifies the potential challenges to enforcement of binding arbitration agreements in Washington and, finally, provides suggestions for successful dispute resolution in the nursing home context.

II. Nursing Homes Are the Most Regulated Entity in Health Care

State legislatures have responded to concerns about the quality of long-term care through regulation, rendering nursing homes among the most highly regulated entities in American health care. ***M.B. Kapp, "Quality of Care and Quality of Life in Nursing Facilities: What's Regulation Got to do With it?" McGeorge Law Review 31, No. 3 (2000): 707-731***. Washington is no different. ***See, e.g., RCW 70.124.010*** (Reporting requirements for abuse of patients in nursing homes); ***RCW 74.42 et. seq.*** (Minimum standards for resident care in nursing homes). In addition, to address, in part, the growing population of elderly adults, in 1999, the Washington legislature enacted a comprehensive ***Abuse of Vulnerable Adults*** statute, ***RCW 74.34 et seq.***, effectively creating a new cause of action and intending that the cause of action survive the death of the plaintiff. ***Schumacher v. Williams, 107 Wn. App. 793 28 P.3d 792 (2001), review denied, 145 Wn.2d 1025, 41 P.3d 484. RCW 74.34.200(2),*** contains the following language:

> (2) It is the intent of the legislature, however, that where there is a dispute about the care or treatment of a vulnerable adult, **the parties should use the least formal means available to try to resolve the dispute**. Where feasible, parties are encouraged but not mandated to employ the direct discussion with the health care provider, use of the long-term care ombudsman or other intermediaries, and, when necessary, recourse through licensing or other regulatory authorities. (emphasis added)

While arbitration is not specifically mentioned in the statute, it is certainly a less formal means of resolving disputes. The following statutes directly address arbitration agreements in Washington.

A. ***Washington Arbitration Act. RCW 7.04 et. seq.*** There is a strong public policy in Washington state favoring arbitration of disputes. ***Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 454, 45 P.3d 594 (2002)***. "[A]rbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation." ***Munzy v. Walla Walla College, 80 Wn. App. 92, 95, 45 P.3d 594 (1995)***. As a result, Washington courts broadly construe and apply arbitration agreements. ***Id.*** *"If the trial court finds that 'no substantial issue exists as to the existence or validity of the agreement to arbitrate . . .' it will order the parties to arbitrate in accordance with the agreement."* ***Mendez, 111 Wn. App. at 455.***

Continued on next page

B. *__Federal Arbitration Act. 9 U.S.C.A. § 1 et seq.__* The FAA mandates enforcement of arbitration agreements covered by the Act.

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . **shall** be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). The FAA is enforceable in both state and federal courts and will apply to any agreement *"evidencing interstate commerce."* ***Walters v. A.A.A. Waterproofing, Inc., 120 Wn. App. 354, 85 P.3d 389, 391 (2004)***. Does a nursing home contract between a resident and a provider constitute a transaction involving commerce? The statute itself does not define "involving commerce." To answer the question, the following must be determined: (1) is there a sufficient nexus between the personal services agreement of the resident and provider to constitute a contract "involving commerce," and (2) is there a specific nexus between (interstate) commerce and the care provided to the residents. Again, no Washington cases have addressed whether nursing home contracts constitute transactions involving commerce. However, the following factors are relevant to the question: is the nursing home a division of a multi-state corporation; does it hire employees from out of state; does the nursing home purchase the majority of its goods, supplies and equipment from out of state; does it receive payments from the federally funded programs of Medicaid and Medicare? Even if a nursing home contract does not "involve commerce," it would not matter in Washington since Washington has enacted its own Arbitration Act, ***RCW 7.04 et seq.***, and the FAA only preempts those state laws that prohibit arbitration or the waiver of rights in arbitration clauses.

C. __Arbitration and the Centers for Medicare and Medicaid ("CMS").__ In January 2003, CMS issued a memorandum setting forth CMS' position on the validity of binding arbitration agreements between nursing homes and prospective or current residents:

- "Under **Medicare**, whether to have a binding arbitration agreement is an issue between the resident and the nursing home."
- "Under **Medicaid**, we will defer to state law as to whether or not such binding arbitration agreements are permitted subject to the concerns we have where Federal regulations may be implicated."
- "Under both programs, however, there may be consequences for the facility where facilities attempt to enforce these agreements in a way that violates Federal requirements."

The memorandum then provides the following guidance to state survey and certification agencies:

- A facility may not discharge a resident or retaliate against a resident who does not sign or comply with a binding arbitration agreement; this violates federal rules governing discharge and transfer, and may subject the facility to enforcement action.
- Retaliation against a resident for failure to sign or comply with an arbitration agreement is considered "failure to comply with the obligation to furnish an abuse free environment . . . or other requirements bearing on the facility's obligation to provide quality care to all residents."
- A current resident may not be required to sign a new admission agreement containing an arbitration clause.
- Medicare and Medicaid are not bound by the arbitration agreement.
- CMS will defer to state **Medicaid** agencies to determine the legality of binding arbitration for Medicaid residents.

LONG-TERM HEALTH CARE
(Continued)

III.
Challenges to the Enforcement of Binding Arbitration Agreements

Challenges to arbitration agreements are determined based on state law. There is no federal law or federal jurisdiction to determine if the agreement will be enforced. ***See Peak Medical Oklahoma No. 5, Inc. v. Collins, 237 F. Supp. 2d 1287, 1290 (N.D. Okla. 2002).*** Issues as to the enforceability of arbitration agreements in Washington are similar to those that have arisen in the long-term care contract context in other jurisdictions.

- **__Who may sign on behalf of the resident and who is bound.__** Not only must the provider sign the agreement, the resident or the resident's legally authorized representative must sign. In the nursing home context, questions could arise concerning whether the resident was mentally

Continued from page 11

LONG-TERM HEALTH CARE ***(Continued)***

competent upon signing and/or whether the representative had the legal capacity or authority to sign on behalf of the resident.

- **Consideration.** The laws governing contracts applies in analyzing the enforceability of arbitration clauses. ***Luna v. Household Finance Corp. III, 236 F. Supp. 2d 1166 (W.D. Wash. 2002)*** (General contract defenses, such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements.) The arbitration clause must be analyzed separate and apart from the underlying nursing home contract to determine its validity. Given this, there must be separate consideration for the arbitration clause. This raises an issue with **Medicaid**; namely, that the Medicaid statute prohibits providers from asking Medicaid recipients for any compensation over and above what Medicaid pays for services provided under Medicaid. For example, a nursing home can charge a resident for the services of a beautician, or for taking the resident to the bank, but cannot charge the resident for the pillow or sheets or towels or meals or any care mandated under Medicaid. Nor can the provider charge the resident's family for the difference between private pay and the Medicaid rate. The claim is that the consideration for entering into an arbitration agreement constitutes additional consideration over and above Medicaid. The counter argument is that consideration in the context of an arbitration agreement is not limited to money. However, there is nothing in the Medicaid statue that suggests arbitration is prohibited or that a resident may not waive the right to be heard in court. Given Washington's penchant for favoring arbitration of disputes, consideration could be found where there is mutual agreement to arbitrate. ***See Howell v. NHC Healthcare-Fort Sanders, Inc., 109 S.W.3d 731, 733 (Tenn. 2003)*** (Plaintiffs alleged that the arbitration agreement violated Medicare/Medicaid law by requiring consideration in addition to the standard rate paid by federal or state law. The court found this claim "not without appeal" but did not rule on it.); ***Gainesville Health Care Center, Inc. d/b/a HIS at Gainesville v. Weston, 857 So. 2d 278, 288 (Fla. 1st DCA 2003)*** (The court specifically rejected the Medicaid consideration argument stating, "We have found no authority from any jurisdiction which holds that an arbitration provision constitutes 'consideration' in this sense; nor do we believe that the federal regulation was intended to apply to such a situation.)"

- **Contracts of adhesion.** A contract of adhesion is one that is offered to the resident on a *"take it or leave it"* basis and one that has little chance for negotiation or revision. Such contracts are not favored in the law. However, the mere fact that the parties did not negotiate the inclusion of an arbitration provision will not necessarily defeat its enforcement. In the insurance context, such provisions are most often not separately negotiated and are upheld as valid.

- **Unconscionable contracts.** Even though there is a strong public policy in Washington state favoring arbitration of disputes; arbitration agreements that are unconscionable are not enforceable. ***Heaphy v. State Farm Mut. Auto. Ins. Co., 117 Wn. App. 438, 72 P.3d 220 (2003).*** A contract must be both procedurally conscionable (an individualized assessment of the circumstances under which the contract was entered into) and substantively conscionable (whether the terms of the agreement are unduly oppressive, unreasonable, and/or unfair), but both elements do not have to be present in the same degree. For example:

  - Is the arbitration agreement hidden in the contract;
  - Has the resident had the opportunity to question the terms or the purpose of the arbitration agreement;
  - Does the arbitration procedure give an unfair advantage to the provider, i.e., where the provider picks the arbitrator;
  - Are both sides similarly required to arbitrate (mutuality);
  - Is the resident clearly informed that s/he is giving up the right to a jury trial;
  - Are there hidden or buried terms in the arbitration agreement;
  - Is the arbitration agreement irrevocable, or can the resident revoke the decision to arbitrate;
  - Does the agreement change the provider's duty to use reasonable care in treating residents or limit the provider's liability for breach of that duty rather than simply shifting the forum for resolution of disputes.

IV.
Successful Dispute Resolution in the Nursing Home Context

The Abuse of Vulnerable Adults statute in Washington sheds some light on the attitude of Washington toward alternative dispute resolution in the nursing home context. ***RCW 74.34.200(2)*** makes it clear that the legislature intends that informal means be utilized to resolve disputes between residents and providers.

The nature of the services provided by nursing homes is intimate; namely, providing housing, services and medical care for the elderly and/or infirm. While disputes may be inevitable in this context, the essential inquiry is how to help providers avoid disputes in the first instance. Addressing the conflict, responding in a timely and professional manner, is as important as *"solving"* it. By so doing, liability exposure can be reduced. Studies suggest that medical malpractice lawsuits tend to be brought against medical providers that are distant, unresponsive and unfriendly. Responding to concerns, objections, disputes and complaints earlier rather than later, quickly rather than dilatorily, empathetically rather than defensively, can reduce the likelihood of a minor complaint escalating out of control. Finally, creating an internal dispute resolution program as part of the admission agreement can be effective. Examples include:

- Family Council;
- Resident Council;
- Regular, periodic open meetings with senior staff and residents and/or their families to manage the families' expectations regarding the state of the residents' health and progress;
- In-service training for residents and their families on substantive issues;
- Anonymous complaint/hotline/suggestion box;
- Ombudsman.

Thus, while arbitration agreements likely will be viewed favorably in Washington, it is important for providers to understand that they must do their part in addressing conflicts to avoid reaching the stage that requires arbitration.

Ninth Circuit Holds That the Hague Convention Allows Service of Process on an English Defendant Through Regular Mail to a Post Office Box

HAGUE CONVENTION

Brad Ambarian

In March, a panel of the United States Court of Appeals for the Ninth Circuit held that service of process by an American plaintiff on an English defendant through regular mail to a post office box was valid under the ***Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents ("Hague Convention") 20 U.S.T. 361, 658 U.N.T.S. 163.*** In ***Brockmeyer v. Marquis Publications, Inc., 361 F.3d 1222 (9th Cir. 2004)***, plaintiff Ronald B. Brockmeyer, a publisher and distributor of adult entertainment and novelties, filed a trademark infringement action against several defendants, including Marquis Publications, a corporation organized and existing under the laws of England. Brockmeyer mailed a copy of the summons and complaint to Marquis by regular mail to a post office box address listed in an edition of a magazine published by Marquis. The magazine itself was at issue in the trademark claim. Brockmeyer eventually obtained from the United States District Court a default judgment against Marquis for $424,000. Marquis moved to set aside the default judgment on the ground that service was improper under the Hague Convention because service was made by regular mail to a post office box instead of Marquis' registered corporate address. The United States District Court denied the motion to set aside the default judgment on the grounds that the Hague Convention permits service of process by mail. ***Id.* at 1225**. On appeal, the Ninth Circuit affirmed the District Court, and the default judgment, in a three-part analysis:

First, the Ninth Circuit held that service of process by mail was permitted under the Hague Convention. Fed. R. Civ. P. 4, which governs service of process in federal courts, provides in part that service on an individual in a foreign country may be made "by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents." ***Fed. R. Civ. P. 4(f)(1)***. As both the United States and United Kingdom are signatories to the Hague Convention, the service of process by an American plaintiff on an English defendant in England is governed by the Hague Convention. ***Brockmeyer, 361 F.3d at 1225 (citing Volkswagenwerk Aktiengesellshaft v. Schlunk*, 486 U.S. 694, 705 (1988))**. The Ninth Circuit then looked to ***Article 10(a)*** of the Hague Convention, which states that ***"provided the state of destination does not object, the present Convention shall not interfere with — (a) the freedom to send judicial documents, by postal channels, directly to persons abroad." Brockmeyer, 361 F.3d at 1225***. The Ninth Circuit noted a split in the federal courts as to whether the word *"send"* in ***Article 10(a)*** also meant *"service"* of process. ***Id. at 1226.*** The Ninth Circuit noted that the first line of cases followed ***Ackermann v. Levine, 788 F.2d 830 (2nd Cir. 1986)***, in holding that "send" in Article 10 meant "service." ***Brockmeyer, 361 F.3d at 1226.*** For cases holding to the contrary, the

Ninth Circuit cited ***Bankston v. Toyota Motor Corp., 889 F.2d 172 (8th Cir. 1989)***, and ***Nuovo Pignone v. Storman Asia M/V, 310 F.3d 374 (5th Cir. 2002)***. ***Id.*** Cases within the Ninth Circuit itself were also split. The Ninth Circuit cited ***R. Griggs Group Ltd. v. Filanto Spa, 920 F. Supp. 1100 (D. Nev. 1996)***, ***Meyers v. ASICS Corp., 711 F. Supp. 1001 (C.D. Cal. 1989)***, and ***Newport Components v. NEC Home Electronics, 671 F. Supp. 1525 (C.D. Cal. 1987)***, as holding that *"send"* in Article 10 meant *"service,"* and ***Anbe v. Kikuchi, 141 F.R.D. 498 (D.C. Hawaii 1992)***, and ***Mateo v. M/S. Kiso, 805 F. Supp. 792 (N.D. Cal. 1992)***, as holding to the contrary. ***Id.*** The holding in ***Brockmeyer*** thus abrogated the holdings in ***Anbe*** and ***Mateo***. However, the Ninth Circuit adopted the line of cases following ***Ackermann v. Levine, 788 F.2d 830 (2d Cir. 1986)***, and held that *"send"* was a synonym for *"service."* ***Id.*** The main ground for the court's holding was its opinion that the very purpose of the Hague Convention was to provide the means for service abroad. ***Id.*** The Ninth Circuit then found that neither the United States nor the United Kingdom objected to ***Article 10(a)***, and held: "Consequently, under the terms of the Hague Convention, service by mail is permitted within the United Kingdom." ***Id. at 1227.***

Second, in the most fact-specific portion of the case, the Ninth Circuit held that service of process by mail to Marquis' post office box, instead of its registered corporate address, was valid. Id. Here, the Ninth Circuit examined English ***Civil Procedure Rule 6.5(6)***, which states that a document can be served on a corporation at its principal office, or *"at any place of business of the company within the jurisdiction which has a real connection with the claim."* ***Id.*** The panel noted that ***Civil Procedure Rule 6.5*** also states that the importance of service is to bring the pending action to the attention of the company. ***Id.*** After analyzing the facts of the case, the Ninth Circuit held that the post office box address was a *"place of business ... which has a real connection to the claim,"* because (1) Marquis held out to the public the post office box address by printing that address in its own magazine, and (2) the magazine itself went to the heart of Brockmeyer's trademark claim. ***Id.*** Therefore, service on Marquis' post office box address was valid under English law. ***Id.*** The court rejected a claim by Marquis that service on a post office box is not proper by noting that Marquis pointed to no English authority prohibiting it. ***Id.***

Third, the Ninth Circuit held that the Hague Convention allowed service by regular mail. Id. at 1228. In doing so, the court rejected Marquis' argument that only registered or certified mail was proper so as to ensure actual receipt of process. The court noted that the Hague Convention made no reference to registered or certified mail, that English law allowed service by regular mail, and that the Hague Convention was intended to not interfere with a member country's own methods for service. ***Id.*** The court also found that a showing of *"actual receipt"* of process was not required under the Hague Convention, and that mailing process to Marquis' post office box by regular mail was "a sufficient guarantee that Marquis had actual and timely notice." ***Id.*** Finally, the Ninth Circuit rejected an argument by the dissent that service through international mail may only be effected through ***Fed. R. Civ. P. 4(f)(2)(C)(ii)***, which requires registered mail, or through ***Fed. R. Civ. P. 4(f)(3)***, which authorizes the district court to allow other methods of service. ***See Id. at 1236-39 (Fletcher, CJ, dissenting).*** The majority of the Ninth Circuit panel instead relied on ***Fed. R. Civ. P. 4(f)(2)(A)***, which provides that service in a foreign country may be made as follows:

> if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
>
> (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction . . . .

Id. at 1228 n.3.

The court stated that ***Fed. R. Civ. P. 4(f)(2)(A)*** *"thus acts as a conduit for permitting service by means of the service laws of the country were served."* ***Id.*** The Ninth Circuit then held that, because English law allows the use of regular mail to serve process, it should not make a difference whether service in this case was mailed from the United States instead of England: ***"what is vital to our analysis is that service by mail is allowed in Britain, and [Fed. R. Civ. P.] 4(f)(2)(A) effectively incorporates British service rules for service of process from the United States to England." Id.***

LMN

HAGUE CONVENTION
(Continued)

U.S. Supreme Court Holds That Petitioners' Cause of Action Arises Under An Act of Congress Enacted After December 1, 1990, and Is Therefore Governed by 28 U.S.C. § 1658(A)'s Four-Year Statute of Limitations, as Petitioners' Claim Against Respondent Was Made Possible by a Post-1990 Amendment

STATUTE OF LIMITATIONS

Kathleen Nelson

In ***Jones, et al. v. R.R. Donnelley & Sons Co., 124 S. Ct. 1836 (2004)***, the United States Supreme Court held that Petitioners' causes of action are governed by ***28 U.S.C. § 1658(a)***, a four-year statute of limitations for causes of action "*arising under an Act of Congress enacted after [December 1, 1990]*." At issue is ***42 U.S.C. § 1981***, as amended by the ***Civil Rights Act of 1991***, a statute that contains no statute of limitations. Prior to enactment of the four-year statute of limitations, the Court held that federal courts should apply the most appropriate state statute of limitations to claims arising under ***42 U.S.C. § 1981***.

Petitioners are three classes of African-American workers who filed a class-action lawsuit against R.R. Donnelley & Sons Company's Chicago manufacturing division for violations of their rights under ***42 U.S.C. § 1981***, as amended by the 1991 Act (the "*Act*"). The Act provides that all persons in every state shall have the same rights as white citizens to make and enforce contracts. The Act was amended in 1991 to include rights protected under the termination of contracts and enjoyment of all benefits, privileges, terms and conditions of the contractual relationship. The three classes of plaintiffs alleged that they were subject to a racially hostile work environment, given an inferior employee status, and wrongfully terminated or denied a transfer in connection with the closing of the Chicago plant. The United States District Court for the Northern District of Illinois found that the causes of action fell under the 1991 amendment, and thus were subject to the four-year statute of limitations prescribed in ***28 U.S.C. § 1658***. The Seventh Circuit Court of Appeals reversed, holding that ***§ 1658*** only applies to a newly created cause of action, and not one dependent upon a prior statutory enactment refined by an amendment.

The U.S. Supreme Court, in a unanimous opinion by Justice Stevens, reversed the Seventh Circuit, holding that an act ***"arises under an Act of Congress"*** enacted after December 1, 1990, and is therefore subject to ***§ 1658***'s four-year statute of limitations, if the plaintiff's claim against the defendant was made possible because of a post-1990 enactment. The Supreme Court reasoned that, although the 1991 Act qualifies as an ***"Act of Congress enacted"*** after 1990, the meaning of the term ***"arising under"*** is unclear. Petitioners argued that the Court should look at how Congress has used the term ***"arising under"*** in federal legislation. The Court reasoned that it has interpreted several statutes to mean that a claim arises under federal law if federal law provides the necessary element of the plaintiff's claim for relief. The Court has construed the term more broadly in other statutes, and plainly acknowledged that there are two interpretations of ***"arising under."*** One view supports Petitioners' argument that their causes of action arose under the 1991 Act, which created a statutory right that did not previously exist. The other view supports Respondent's claim that Petitioners' cause of action arose under the original version of ***§ 1981***, which contains the operative language setting forth the elements of Petitioners' claims. In order to reconcile the two views, the Court looked beyond the bare text of ***§ 1658*** to the context in which it was enacted and the purposes it was designed to accomplish.

The Court recognized that Congress' failure to enact a uniform statute of limitations applicable to federal causes of action had, over the years, resulted in vast amounts of litigation. Prior to the enactment of ***§ 1658***, the ***"settled practice was to adopt a local time limitation as federal law if it [was] not inconsistent with federal law or policy to do so." Wilson v. Garcia, 471 U.S. 261, 266-67 (1985)***. The practice of "*borrowing*" state statutes of limitations created further litigation and splits of authority. The Court further recognized that, even

when courts were able to identify the appropriate state statute, such borrowing resulted in unpredictability for both plaintiffs and defendants. For example, if a plaintiff alleged a federal claim in one state, she may find herself barred by the local statute of limitations, while a plaintiff raising precisely the same claim in another state may be permitted to proceed.

These problems led the courts to call upon Congress to eliminate the confusion. The Court noted that the history that led to the enactment of the uniform statute of limitations in § ***1658*** strongly supports an interpretation that would aid in reconciling the confusion that caused so much unnecessary work for federal judges. The Court reasoned that, if it were to utilize the Court of Appeals' view, § ***1658*** would apply only to a small fraction of the post-1990 enactments. The Court recognized that Congress routinely creates new rights of action by amending existing statutes to alter statutory definitions or add new definitions. These additions result in the amendment of a statute. "***What matters is the substantive effective enactment — the creation of new rights of action and corresponding liabilities — not the formatting which it appears in the Code.***" ***Jones, supra.***

The Court further held that interpreting § ***1658*** to apply whenever a post-1990 enactment creates a new right to maintain a cause of action is consistent with the plain meaning of the term "***arise,***" meaning "***to come into being,***" "***originate,***" or "***spring up.***" Conversely, the Court noted that case law does not support an interpretation urged by the Seventh Circuit, in which "***arising under***" means "***based solely upon.***"

STATUTE OF LIMITATIONS
(Continued)

The Court therefore concluded that a cause of action arises under an Act of Congress enacted after December 1, 1990, if a plaintiff's claim against the defendant was made possible by a post-1990 enactment. If this is the case, the cause of action is governed by § ***1658***'s four-year statute of limitations. This interpretation best serves Congress' interest in alleviating uncertainty inherent in the practice of borrowing state statutes of limitations, while at the same time protecting litigants' interests. In the instant action, Petitioners' hostile work environment, wrongful termination, and failure to transfer claims arose under the 1991 Act, as their causes of action were made possible by the 1991 Act. The decision of the Seventh Circuit was reversed, and the case was remanded for further proceedings consistent with this opinion.

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Ninth Circuit Reviews Environmental Impact of Mass Transit

CLEAN AIR ACT

Gabriel Baker

In ***Bayview Hunters Point Community Advocates v. Metropolitan Transportation Commission, ___ F.3d ___, 2004 WL 728247 (9th Cir. 2004),*** the Ninth Circuit held that a plan designed by a California government agency to increase mass transit ridership with the goal of reducing air pollution in compliance with the ***Clean Air Act, 42 U.S.C. § 7410***, did not constitute an enforceable obligation mandating that the agency increase ridership to the target levels stated in the plan.

Metropolitan Transportation Commission (MTC) adopted the plan (known as "*TCM2*") at issue in this case as part of the State Implementation Plan (SIP) required by the Clean Air Act and enforced by the Environmental Protection Agency (EPA). Bayview Hunters Point Community Advocates and others (Bayview) filed suit against MTC for achieving an increase in mass transit ridership of twelve and a half per cent rather than the fifteen per cent goal stated in the plan. The federal district court entered an injunction requiring MTC to increase ridership by an additional two and a half per cent, and MTC appealed directly to the Ninth Circuit.

The Ninth Circuit reasoned that the plain language of the plan indicated that the fifteen per cent figure stated a target or goal. The fifteen per cent figure was not a promise to obtain the target increase, despite an EPA opinion letter stating that, in the EPA's opinion, the fifteen per cent figure was a binding promise. The court noted that interpreting the term as an obligation would be erroneous because doing so would bind MTC to factors beyond their control and create internal inconsistencies within the plan.

In a dissenting opinion, Judge Thomas argued that the plan was submitted to the EPA in an "*enforceable form*," and consequently became an enforceable federal regulation upon EPA approval. LMN

Ninth Circuit Interprets Discretionary Function Exception to Federal Tort Claims Act

DISCRETIONARY FUNCTION EXCEPTION

Gabriel Baker

In ***Olson v. U.S., 362 F.3d 1236 (9th Cir. 2004)***, the Ninth Circuit reversed a district court's dismissal of claims against the Mine Safety and Health Administration (MSHA) arising from MSHA's failure to properly evaluate complaints regarding the safety of a mine.

Two mineworkers were permanently disabled when a nine-ton slab of earth fell from the ceiling of the mine were they were working. Plaintiffs claimed that their injuries were caused by MSHA's failure to evaluate six written and oral complaints regarding safety hazards at the mine, and MSHA's failure to inspect the mine thoroughly and in its entirety.

The government moved to dismiss and the district court granted their motions on the grounds that the government was shielded from tort liability by sovereign immunity pursuant to the discretionary-function exception to the Federal Tort Claims Act (FTCA). Although the FTCA waives sovereign immunity for specified torts of federal employees, the FTCA does contain an exception to this waiver when the government is performing a "*discretionary function.*" The discretionary function exception does not apply where a "***federal statute, regulation, or policy specifically prescribe[s] a course of action for an employee to follow . . . .***" The Ninth Circuit ruled that the discretionary function exception to the sovereign immunity waiver was inapplicable because the MSHA General Inspection Procedures Handbook requires that "***all complaints of alleged hazards...must be evaluated.***" The court reasoned that the handbook prescribed a specific course of action that MSHA employees were bound to follow in response to complaints of alleged hazards, and that plaintiffs' claims that MSHA did not follow the proper evaluation procedure were consequently not barred by sovereign immunity.

LMN

The New Washington Condominium Act — Limits on Damages but Broad Warranty Requirements

CONSTRUCTION

Andrew Rigel

After three-years of political wrangling and numerous years of costly litigation about condominium defects, reforms to ***Washington's Condominium Act, RCW 64.34 et seq.***, have finally passed. On March 5, 2004, following extensive debates and ensuing revisions, the bill, 2 ESSB 5536, passed the House 94-0. However, the Senate then refused to concur in the House amendments. The bill was returned to the House where floor amendments were adopted and the House again passed the bill by a vote of 97-0. After resolving the amendment issues, the Senate passed the bill on March 11, 2004, which was the last day of the legislative session. Governor Locke then signed the bill on March 29, 2003, and the new law became effective on June 10, 2004.

As is to be expected, the new Condominium Act attempts to balance owners' rights against imposing too heavy a burden on developers and construction professionals. The following is a brief summary of the most significant changes that are likely to play a role in the outcome of condominium defect disputes in the near future:

- ***Section 5*** **:** Section 5 contains two new provisions. First, subsection (7) provides that in order to prove a breach of any of the obligations arising under the Act, "*the plaintiff must show that the alleged breach* ***has adversely affected or will adversely affect the performance*** *of that portion of the unit or common elements alleged to be in breach*." This provision is in response to cases in which defective construction that did not impair the performance or integrity of condominium were nonetheless held to be a breach, and damages were recoverable by the owner.
- ***Second, subsection (8)*** defines the scope of damages recoverable under the Act in attempt to reign in the amount of damages recoverable by plaintiffs. "*Damages awarded for a breach of an obligation arising under this section are the cost of repairs. However, if it is established that the cost of such repairs is clearly disproportionate to the loss in market value caused by the breach, then damages shall be limited to the loss in market value.*"
- ***Section 6*** **:** Section 6 contains new language regarding exclusion or modification of implied warranties. Implied warranties for residential units can only be disclaimed in the narrow circumstances where: (1) the declarant or dealer knows or has reason to know that the specific defect or failure exists at the time of disclosure; (2) the disclaimer specifically describes the defect or failure; and (3) the disclaimer includes a statement as to the effect of the defect or failure. Additionally, the waiver must be conspicuous and separately signed by the purchaser.
- ***Section 7*** **:** Section 7 precludes contractual modification of the statute of limitations either orally or in writing. The statute of limitations for a claim under the Act is four years after the cause of action accrues.
- ***Section 8*** **:** This entirely new section establishes a committee to study various issues affecting condominium defect litigation, including: (1) the required use of independent third-party inspections as a way to reduce the problem of water penetration in residential condominiums; and (2) the use of arbitration or other forms of alternative dispute resolution to facilitate early and effective resolution of defective construction disputes. The committee is required to deliver a report of its findings and any proposed legislation to the judiciary committees of the Senate and House no later than December 31, 2004.
- ***Article 2*** **:** Developers and construction professionals can protect themselves from liability to unit owners or an association if: (1) every unit is the subject of a qualified warranty; and (2) the association has been issued a qualified warranty with respect to the common elements. A qualified warranty is an insurance policy for repair of physical damage issued by a qualified Washington insurer.
- ***Article 4*****:** Article 4 specifies the substantial qualified warranty obligations that are new to the Act. Article 4 also contains provisions providing for a living expense allowance should an owner need to live elsewhere during repairs. The following table summarizes the qualified warranty requirements:
- ***Articles 6 and 7*****:** Article 6 details the specific items that may be excluded from a qualified warranty. Examples include: landscaping, commercial use areas, roads and curbs, surface drainage (except as required by the building code), quantity and quality of water supply. Similarly, Article 7 details specific defects that may be excluded such as wear and tear, negligent and improper mainte-

Continued from page 19

CONSTRUCTION

nance, alterations to the unit, and various other issues.

new article discusses the procedural aspects of the mediation such as timing and selection of a mediator.

Section	Coverage	Time
Section 401	Materials and Labor Warranty	12 months for other than common elements; 15 months for common elements; and 24 months for materials or labor regarding specific trades such as electrical, plumbing, heating, ventilation, a/c, and for various elements such as exterior cladding, windows, and doors, or any defect that renders the unit unfit to live in.
Section 402	Building Envelope Warranty	Minimum coverage for the building envelope is five years including a defect that permits unintended water penetration so that it causes material damage.
Section 403	Structural Defects Warranty	Minimum coverage for structural defects (e.g., load bearing parts of the condo) is 10 years.

- ***Article 8***: The monetary amount of a qualified warranty can be limited. For a unit, the limit cannot be less than the original purchase price or $1,000. For common element, the limit cannot be less than the total original price for all components of the building or $150,000 times the number of units.
- ***Article 11***: This article delineates the mandatory notice requirements for expiration of warranties. As soon as reasonably possible after the beginning date for the qualified warranty, it is required that an owner and association be provided with a schedule of the expiration dates for coverages under the qualified warranty as applicable to the unit and the common elements, respectively. The expiration date schedule for a unit must set out all the required dates on an adhesive label that is a minimum size of four inches by four inches and is suitable for affixing by the owner in a conspicuous location in the unit.
- ***Article 14***: Article 14 specifies how a qualified warranty claim must be handled including timely investigation and repairs.
- ***Article 15***: Article 15 permits a party to demand mediation. "*If a dispute between a qualified insurer and a claimant arising under a qualified warranty cannot be resolved by informal negotiation within a reasonable time, the claimant or qualified insurer may require that the dispute be referred to mediation by delivering written notice to the other to mediate.*" The remainder of this new article discusses the procedural aspects of the mediation such as timing and selection of a mediator.
- ***Article 16***: This new article provides that a qualified warranty may include mandatory binding arbitration of all disputes arising out of or in connection with a qualified warranty. The provision may provide that all claims for a single condominium be heard by the same arbitrator, but shall not permit the joinder or consolidation of any other person or entity.
- ***Article 17***: In any judicial proceeding or arbitration brought to enforce the terms of a qualified warranty, the court or arbitrator may award reasonable attorneys' fees to the substantially prevailing party. In no event may such fees exceed the reasonable hourly value of the attorney's work.

In summary, the new Condominium Act makes some dramatic changes that are certainly going to impact construction professionals and owners, and the lawyers that represent them. It remains to be seen whether the changes will be positive or negative and it will be interesting to observe whether the Act can encourage more condominium development in the future. It also remains to be seen whether these changes will encourage insurers to re-enter the Washington construction market.

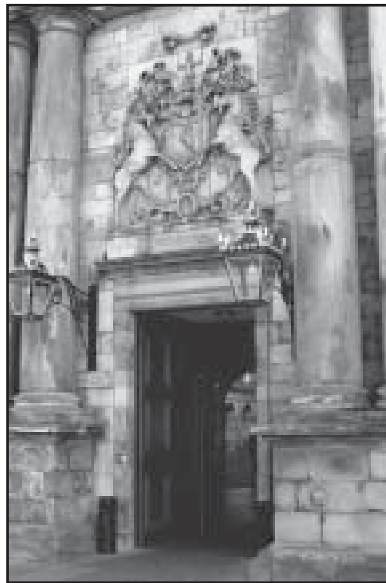
LMN

Seventh Circuit Holds Indefinitely Moored Vessel Was Not In Navigation

VESSEL IN NAVIGATION

In April, a panel of the Seventh Circuit held that a riverboat casino that had been indefinitely moored to a dock was not a vessel in navigation within the context of the Jones Act. Despite the fact that the vessel was capable of cruising at any time after a mere twenty minutes of preparation, the court in ***Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, ___ F.3d ___, 2004 WL 758414 (7th Cir. (Ill.),** concluded that the moored riverboat casino did not possess a transportation function and therefore was not a vessel in navigation. Accordingly, the court found that the employees aboard the vessel were not Jones Act seamen within the ambit of ***46 U.S.C. § 688***.

In 1995, defendant Players Island Casino ("*Players*") commenced operation of a riverboat casino, the PLAYERS II, on the Ohio River pursuant to an Illinois state law provision restricting the business of gaming casinos only on licensed self-propelled excursion boats cruising navigable waterways. Once the statute was relaxed in 1999 to embrace gaming operations on permanently moored barges, the owners of the PLAYERS II terminated all further voyages and excursions down the river and indefinitely docked the vessel. The PLAYERS II had been docked and was connected to land-based utilities including electricity, telephone, water and sewer for approximately one year prior to the plaintiffs' complaint. During this period, the PLAYERS II was documented by the United States Coast Guard as *inspected* passenger vessel, was equipped with firefighting and safety equipment, and employed a full time captain and crew. The PLAYERS II was moved only once each year between 1999 and the fall of 2001 for the duration of a 45-minute propulsion test requiring movement of the vessel into the Ohio River for a distance of approximately 100 feet before returning to the dock. In September 2001, the vessel was sold by defendants to a third party and sailed to Texas.



Forty-six individuals filed negligence claims arising under ***46 U.S.C. App. § 688(a)*** for alleged damages as a result of chemical exposure while aboard the PLAYERS II during the time it was indefinitely moored in late July 2000. The defendants sought to defend these claims on the grounds that the PLAYERS II was not a vessel in navigation at the time of the plaintiffs' alleged injuries. Accordingly, the United States District Court certified the question for interlocutory review pursuant to ***28 U.S.C. § 1292(b)*** to the Seventh Circuit to determine (i) whether PLAYERS II was a vessel in navigation covered by the Jones Act, and (ii) whether all workers on board were Jones Act seamen. ***Id.* at 3**.

The appellate court examined the criteria for seaman status articulated by the United States Supreme Court in the seminal cases of ***Chandris, Inc. v. Latsis, 515 U.S. 347, 368 (1995)***; and ***McDermott Int'l, Inc. v. Wilander*, *498 U.S. 337, 354-55 (1991)***. The panel determined that although the PLAYERS II was unquestionably a vessel, it held that the dispositive issue was whether the vessel was a *"vessel in navigation"* within the context of the authorities interpreting the Jones Act. The court resolved that the PLAYERS II did not have a transportation function. *"Today we hold that an indefinitely moored dockside casino with no transportation function is not a vessel 'in navigation'."* Citing ***Martin v. Boyd Gaming Corp.*, *252 F. Supp. 2d 321, 323 (E.D. La. 2003)***. *"In this case the undisputed facts doom the plaintiff's claims. PLAYERS II was an indefinitely moored dockside casino at the time of the alleged injuries and was never moved except to be tested. As a matter of law, we conclude that it was not 'in navigation' for purposes of the Jones Act, and thus that these plaintiffs were not within the class protected by that statute."* ***___ F.3d ___, 2004 WL 758414, 35 (7th Cir. (Ill.))***.

LMN

Fourth Circuit Holds That Restowage Operation in an Intermediate Port Did Not Constitute a Discharge From the Vessel

COGSA

In April, a panel of the United States Court of Appeals for the Fourth Circuit affirmed a district court decision that cargo which was damaged during discharge from a vessel at an intermediate port for purposes of restowage did not constitute a *discharge* within the context of the ***Carriage of Goods By Sea Act ("COGSA"), 46 App. U.S.C. § 1304(5)***. The Fourth Circuit, in ***Schramm Incorporated, Atlantic Mutual Insurance Company v. Shipco Transport Incorporated and M/V CASV GUAYA, ___ F.3d ___, 2004 WL 79444 (4th Cir. (S.C.)),*** held that because the cargo had not been discharged, COGSA was still applicable to the shipment, permitting the defendant Shipco, the non-vessel operating common carrier, to limit liability consistent with the package limitation provision contained in COGSA.

The appellant, Schramm Inc., executed a contract with Shipco, a non-vessel operating common carrier ("*NVOCC*") for the shipment of a mobile drilling rig from Baltimore to the Port of Arica, Chile. Shipco issued a clean bill of lading to Schramm designating the latter as the *"shipper"* and Shipco as the *"carrier."* Because Shipco was an NVOCC pursuant to ***46 U.S.C. App. § 1702(17)(B),*** Shipco was a *shipper* in its relationship with any ocean common carrier. The Shipco bill of lading limited Shipco's liability to "*$500 per package wherever COGSA was applicable unless a higher declared had been noted by the parties*." Schramm elected not to declare a higher value for the cargo and instead obtained cargo insurance from Atlantic Mutual Insurance Company. On October 21, 1999, the mobile drilling rig was placed on a flat rack container and was loaded onto the vessel M/V CASV GUAYA in Baltimore. On October 22, 1999, the master of the vessel retained Stevedoring Services of America ("*SSA*") to temporarily offload the rig for restowage on a lower deck of the vessel to assure its protection during the remainder of the voyage. During the offload, the rig slipped onto the concrete dock, sustained damage and was declared a total loss. Subsequently Atlantic paid the cargo claim and filed a subrogation action against Shipco. The district court granted Shipco's ***Rule 59(e)*** motion concluding that COGSA was applicable during the restowage of cargo at the intermediate ports regardless of the fact that the restowage and damage occurred on land. The court also found that the Clause Paramount extended the application of COGSA during the period prior to loading and after discharge of the cargo.

The Fourth Circuit examined the interplay between COGSA, which generally applies from tackle to tackle and the ***Harter Act, 46 U.S.C. §§ 190-196,*** which applies prior to the time the cargo is loaded onto the vessel until after discharge from the ship. The shipper, Schramm and Atlantic, argued strenuously that Harter, which does not contain a package limitation, was applicable at the time that the rig was damaged. The court's analysis was twofold. First, the court determined that the "*discharge of goods from a vessel thus marks the transition of coverage from COGSA to the Harter Act unless the parties have agreed to extend COGSA and the Harter Act then applies until delivery is made*." **___ F.3d ___, 2004 WL 79444, 5 (4th Cir. (S.C.)).** The court interpreted the term of "*discharge*" pursuant to **46 U.S. § 1303(6)** as that point that the goods have reached their final port of destination citing ***SPM Corp. v. M/V MING MOON, 965 F.2d 1297, 1300 (3d Cir. 1992); Philip Morris v. Am Shipping Co., 748 F.2d 563, 566-67 (11th Cir. 1984)***. The court held that a sufficient nexus existed between the activity causing the damage to the rig and the carriage of goods by sea. *"In sum, we hold that the term 'discharge' under COGSA 'means the removal of the goods at their final port of destination and hence COGSA also covers the temporary unloading of goods at an intermediate port citing* ***MING MOON, 965 F.2d at 1300." Id. at 6.***

The panel also examined the effect of the Clause Paramount that extended the application of COGSA to that point before and after loading of the vessel and displaced the ***Harter Act*** during this period. Accordingly, the court determined that COGSA and its package limitation limiting the liability of the carrier to the $500 per package limitation was applicable. The panel further found that there was no evidence indicating that the shipper Schramm was unaware of its opportunity to declare a higher value and pay additional freight. Accordingly, the panel affirmed the decision of the district court applying COGSA's package limitation. **LMN**

Fifth Circuit Examines Validity of Preferred Ship Mortgage

MARITIME LIENS

In late April, a panel of the Fifth Circuit Court of Appeals affirmed a district court holding that a preferred ship mortgage, which was filed on a documented vessel both prior to sea trials and the completion of construction, constituted a valid maritime lien. In ***United States v. Trident Crusader et al., ___ F.3d ___, 2004 WL 784481 (5th Cir. (La.)),*** the Fifth Circuit held that the mortgagee possessed a preferred maritime lien with priority over a lien for necessaries on the vessel, despite the fact that the mortgage was filed prior to the sea trials and before the vessel was complete, affirming the district court.

The M/V TRIDENT CRUSADER was documented as a United States flag vessel in July 1990. On the same day that the vessel was documented, a first preferred ship mortgage covering the entirety of the vessel was filed with the National Vessel Documentation Center. The mortgage secured a guarantee from the Maritime Administration of the United States Department of Transportation ("*MARAD*") pursuant to ***Title XI*** of the ***Merchant Marine Act, 1936***, as amended. ***46 U.S.C. App. §§ 1271***. Although the vessel was documented and the mortgage was filed on July 27, the TRIDENT CRUSADER did not complete its sea trials until August 18, 1999. Subsequently, MARAD instituted a foreclosure action and the vessel was sold to MARAD as a credit bid against MARAD's mortgage secured by the referenced vessel mortgage. Appellant DET NORSKE VERITAS ("*DNV*") intervened contending that its lien for necessaries took precedence over the mortgage, claiming that the mortgage was invalid. The district court held that the mortgage had been properly recorded despite the fact that the sea trials had not been conducted and accordingly as a preferred mortgage filed pursuant to ***46 U.S.C. App. § 31321*** had priority over a subsequent lien for necessaries. The Fifth Circuit affirmed the district court decision.

The panel of the Fifth Circuit determined that pursuant to ***46 U.S.C. § 31301,*** that a vessel could be mortgaged before its construction was completed. ***___ F.3d ___, 2004 WL 784481, 2 (5th Cir. (La.))***. The panel reviewed the lower court's analysis that the MARAD mortgage constituted a preferred mortgage as defined in ***46 U.S.C. App. § 31322,*** because it covered a vessel for which an application for documentation had been filed. ***"We hold that the court correctly determined whether the mortgage was a preferred mortgage by considering when the mortgage was filed under Chapter 313 and when the vessel was 'documented' as provided in Chapter 121, rather than whether the CRUSADER was a vessel under the definitions DNV offers." Id.***

The panel next determined that the mortgage constituted a preferred maritime lien. The court found that the MARAD mortgage fulfilled the requirements contained in ***46 U.S.C. App. § 31322(a)*** and was entitled to preferred status. Given the fact that the preferred vessel mortgage was filed prior to the inception of DNV's maritime lien for necessaries, the court held that the MARAD mortgage had priority over DNV's lien. Moreover, the court affirmed the district court's decision that there was no evidence of bad faith, fraud, or other inequitable conduct on the part of MARAD that would have vitiated the effectiveness of the mortgage.

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