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Authors

Joseph C. Baiocco
Partner
Stamford/White Plains
203.388.2403
joseph.baiocco@wilsonelser.com

Brian Del Gatto
Regional Managing Partner
Stamford/Hartford/Phoenix
203.388.2400
brian.delgatto@wilsonelser.com

B. Otis Felder
Of Counsel
Los Angeles
213.330.8844
otis.felder@wilsonelser.com

Tiffany Y. Gruenberg
Associate
Los Angeles
213.330.8953
tiffany.gruenberg@wilsonelser.com

Andrew J. Heck
Associate
New Jersey
973.735.6112
andrew.heck@wilsonelser.com

Christopher W. McClanahan
Of Counsel
New Jersey
973.735.5992
christopher.mcclanahan@wilsonelser.com

For more information about Wilson Elser's Transportation practice, visit our website.

U.S. Supreme Court Rules in Favor of Independent Contractors/Owner Operators

On January 15, 2019, the United States Supreme Court issued a blockbuster holding, ruling in favor of independent contractors who work in transportation.

FACTS

In *New Prime Inc. v. Oliveira*, the Court was faced with an issue involving a dispute between the trucking company New Prime Inc. and one of its drivers, Dominic Oliveira. The parties' contract labeled Oliveira as an independent contractor rather than an employee, and it instructed that any dispute arising out of the parties' relationship should be resolved by an arbitrator − even disputes over the scope of the arbitrator's authority.

Oliveira filed a class action lawsuit on behalf of himself and thousands of other contractors. He alleged that New Prime misclassified him as a contractor to underpay him in violation of a federal labor law. In response to Oliveira's complaint, New Prime asserted that under the Federal Arbitration Act (FAA) the court must compel arbitration according to the terms found in the parties' agreements. The District Court for the District of Massachusetts and Court of Appeals for the First Circuit agreed with Mr. Oliveira.

SUPREME COURT DECISION

On appeal, the U.S. Supreme Court examined two issues:

- Whether the application of the exemption in § 1 of the FAA is an issue for courts or an arbitrator to decide, even if parties have agreed that issues of "arbitrability" are to be decided by an arbitrator
- Whether the "contracts of employment" language in § 1 of the FAA applies only to agreements involving employees or extends to transportation workers classified as independent contractors.

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On the first issue, the Court affirmed the First Circuit's ruling, reasoning that, "while a court's authority under the [FAA] to compel arbitration may be considerable … it is not unconditional." One condition is established in § 1, which provides that nothing in the FAA shall apply to "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." It held that a court should decide for itself whether § 1's "contract of employment" exclusion applies before ordering arbitration. The Court reasoned this is the procedure even when parties' agreement delegates to an arbitrator to decide whether the parties' dispute is subject to arbitration because a "delegation clause" is "merely a specialized type of arbitration agreement" and can be enforced "only if the contract in which the clause appears does not trigger § 1's 'contract of employment' exception."

On the second issue, the Court interpreted the "contracts of employment" to refer broadly to any agreement to perform work and is not limited to employee-employer relationships. The Court relied on the ordinary meaning of "contract of employment" understood when Congress enacted the FAA in 1925. At the time of enactment of the statute, "employment" was more or less a synonym for "work," and as a result, "most people then would have understood § 1 to exclude not only agreements between employers and employees but also agreements that require independent contractors to perform work." There was no dispute that Oliveira, as an owner-operator for New Prime, qualified as a "worker engaged in … interstate commerce." Therefore, the Court rejected New Prime's claim for arbitration and held that "contracts of employment" cover even independent contractors.

IMPLICATIONS

The Court's decision has broad implications for an industry that relies on the independent contractor/owner operator model. While this ruling is limited to § 1 of the FAA, it serves as a reminder that arbitration agreements must be prepared thoroughly and thoughtfully in order to be used effectively. Further, this holding comes after past decisions in which a divided U.S. Supreme Court has compelled employees to arbitrate claims rather than litigate them. It seems likely that the Court will hear more cases challenging agreements to arbitrate within the transportation industry.

Although this decision delivered a victory to litigants who prefer to have a day in court, it does not completely rule out arbitration as a method of alternative dispute resolution. Since the Court's decision resolved only questions of federal law, state arbitration statutes provide an alternative avenue for implementing an enforceable arbitration program. Additionally, forum selection and class waivers can be added into contractor agreements to minimize the potential of class action suits. Until courts determine the enforceability of these agreements under state law, it seems probable that jurisdictions will vary significantly.

For additional information, contact:

Joseph C. Baiocco
Partner (Stamford | White Plains)
203.388.2403
joseph.baiocco@wilsonelser.com

Brian Del Gatto
Regional Managing Partner
Stamford | Hartford | Phoenix
203.388.2400
brian.delgatto@wilsonelser.com

Duck Boat Owners Avoid Seeking Limitation, Ducking Potential Exposure to Punitive Damages

"Sisson [the vessel owner] has also argued throughout this litigation that the [Limitation Act] provides an independent basis for federal jurisdiction. Respondents contend that the Act does not create jurisdiction, but instead may be invoked only in cases otherwise within the maritime jurisdiction of [28 U.S.C.] § 1333(1). We need not decide which party is correct, for even were we to agree that the [Limitation Act] does not independently provide a basis for this action, § 1333(1) is sufficient to confer jurisdiction." Sisson v. Ruby, 497 U.S. 358, 359 n.1 (1990).

Whether to seek to apply general maritime law to an incident is not always obvious and the consequences can be even less apparent. For example, when confirming arrangements for a hearing in the King County Superior Court in Seattle, Washington, on an unrelated tour bus case, I learned a verdict was about to be read in a nearby courtroom after a months-long trial had ended in February. The case, brought on behalf of Phuong Dinh and 42 other victims of a crash that killed five and injured more than 60 people, arose from a 2015 collision by a "Ride the Ducks" vehicle into a tour bus on the Aurora Bridge in Seattle. Many of the cases had settled. For those that had not, I watched as the jurors awarded $123 million to the plaintiffs, some receiving as much as $25 million, splitting liability between the duck boat owner and the company that had refurbished the WWII era vehicles for use for public tours. As a maritime lawyer, I wondered if the owners had considered filing a Limitation Action, and if they had, what led to their decision not to do so.

THE LIMITATION ACT

Many jurisdictions, including the United States, have long granted vessel owners the ability to bring an action to limit liability to the value of the vessel after a marine casualty, provided the owner can prove it lacked knowledge of the problem beforehand. In some cases, the value of the vessel would be little, such as in the action filed following the sinking of the *RMS Titanic*. More recently, the value could be substantially more, although much less than potential liability for the loss and punitive damages, as in the case following the *Deepwater Horizon* oil spill where limitation was sought but the court ultimately found certain acts of the crew were within the owners' knowledge so as to decline limitation. Even so, the limitation action in that case provided the procedural advantages of *concursus*, bringing together all claims in a single forum while staying all other proceedings.

The U.S. version of the Limitation of Liability Act (Act) is found at Title 46 of the United States Code, starting at Section 30501. Enacted in 1851, the same year *Moby Dick* was published, the Act was intended to promote the American merchant marine and investment in shipping.

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Since then, the Act's scope has adjusted to cover all kinds of vessels and circumstances.

WHAT IS A VESSEL?

A preliminary question when seeking to apply the Act is what constitutes a "vessel." Section 3 of Title 1 of the U.S. Code defines it this way: "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or *capable of being used*, as a means of transportation on water." Accordingly, limitation has been invoked to apply to jet skis and watercraft smaller than may typically be expected. In fact, currently before the United States Court of Appeals for the Ninth Circuit is a case on whether a paddleboard meets the definition.

The U.S. Supreme Court's most recent case relevant to defining a vessel attempts to create a more practical approach in articulating a "reasonable observer" test in "borderline cases where 'capacity' to transport over water is in doubt." *Lozman v. Riviera Beach*, 568 U.S. 115, 129 (2013). The basic difference as to when a watercraft is or is not a vessel is determined by whether it was regularly but not primarily used (and designed in part to be used) for persons to go over water, while others are not designed (to any practical degree) to serve a transportation function and did not do so.

FEDERAL COURT JURISDICTION

"*The owner of a vessel may bring a civil action in a district court of the United States for limitation of liability under this chapter*...." 46 U.S.C. § 30511.

Relative to this issue, a federal court may hear a limitation case. Section 30511 provides that a vessel owner may bring a civil action for limitation in a U.S. district court. Generally invoking a federal court's admiralty tort jurisdiction is often satisfied in limitation proceedings where an incident involving a vessel would potentially adversely impact maritime commerce and have a substantial relationship to traditional maritime activity. However, in some cases it may be difficult to satisfy the test for such admiralty jurisdiction in order to file in federal court; for example, where the incident does not occur on navigable waters.

In this circumstance, the Supreme Court's "most recent" decision on the issue from 1911 supports that the Act, as now stated in § 30511, provides an independent basis for federal jurisdiction without having to meet the test for maritime torts, including being on a navigable body of water. See *Richardson v. Harman*, 22 U.S. 96 (1911). However, subsequent cases, including in the Ninth Circuit Court of Appeals in *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771, 773 (9th Cir. 1995) (collecting cases), hold this may no longer be generally accepted even though the Supreme Court has not overruled *Richardson*.

As for the duck boat cases in Seattle, if the owners had filed for limitation they would have had to demonstrate that the "vehicle" was a "vessel" in that it was capable of being used for water transportation. As the crash occurred over water on a bridge, the owners also would have had to argue that the Act provided an independent basis for federal jurisdiction, as the case may not have

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qualified as an admiralty tort, or found another vehicle for jurisdiction into federal court, such as diversity jurisdiction.

UNINTENDED CONSEQUENCES

While limitation may have given them the opportunity to have the cases tried to the federal court without a jury, the owners may have thought that doing so would constitute a significant disadvantage by exposing them to punitive damages, which have been recognized under general maritime law in some cases. For example, a recent federal case in Seattle allowed punitive damages by an injured passenger to go to a jury; other courts have not permitted punitive damages to be awarded in maritime cases even under general maritime law where such awards are not available in state court. Washington generally does not permit punitive damage awards under state law, and none were awarded in the duck boat case. Rather than take the chance, staying in state court immunized the owners from any punitive damage award.

SEEK EXPERIENCED ADVICE

As in many cases involving potential maritime issues, this area of law has been recognized by courts and attorneys alike not to be “waters for the inexperienced.” Making an informed decision not only involves knowing all the facts but also requires evaluating the potential consequences of decisions made early on in a case that could be determinative on the outcome. While limitation offers an opportunity to limit liability, filing an action that applies general maritime law in federal court could create greater exposure. Evaluating the risks of both takes experience and know-how.

For more information on this or other maritime issues, click **HERE** to contact one of our Admiralty & Marine attorneys.

For additional information, contact:

B. Otis Felder
Of Counsel (Los Angeles)
213.330.8844
otis.felder@wilsonelser.com

Safety Concerns Prompt New FAA Regulations for Drones

Due to heightened safety concerns, the Federal Aviation Administration (FAA) has mandated that drone owners display their FAA-issued registration number on an outside surface of the aircraft to ensure ease of identification. Prior to this regulation, which went into effect on February 23, 2019, the owner was required to place identification in the battery compartment of the drone, which meant opening the drone and searching for the battery compartment to locate the registration number.

The new FAA mandate is due to increased fear of drones injuring members of the public and safety personnel, and the potential for drones to conceal explosive devices. In these circumstances, it becomes urgent to find the owner quickly in an effort to mitigate further harm to the public.

The small, unmanned aerial vehicles (sUAVs) have been a source of litigation and conflict. The government and various law enforcement agencies have attempted to implement measures to increase safety and awareness of the public when they choose to operate drones in public airspace. With the rapid evolution of technology, it has proved difficult to keep the laws concerning drone use current in real time because it is impossible to predict all of the potential mishaps or dangers that these new technological devices pose in the modern world.

The new requirements are an increased safety measure and a follow up to the 2015 regulation that required drone users to register their drones to easily identify individual drone owners, increase safety and reduce risk of harm to the public. The purpose behind this new FAA requirement is to aid all law enforcement in addressing public safety concerns that stem from a heightened concern that drones could be used for terrorist or criminal activities.

These new requirements also will assist with the ongoing potential for personal injury litigation. Drones, like any other technology, have the potential to malfunction or to be used improperly, therefore it is important to locate violators quickly. The more efficient the processes of locating the owner and operator of the drone, the greater the increase in the ability to mitigate harm or prevent harm from occurring in the first place.

For additional information, contact:

Tiffany Y. Gruenberg
Associate (Los Angeles)
213.330.8953
tiffany.gruenberg@wilsonelser.com

NJ Supreme Court Signals Potential Sea Change on Scope of Damages in Auto Accident Cases

New Jersey's "No-Fault" automobile insurance scheme has been the subject of repeated reforms over the past 40 years. On March 26, 2019, the New Jersey Supreme Court rejected the validity of an entire category of damages in motor vehicle accident suits, with the potential implications reaching far beyond.

BACKGROUND

Since New Jersey's "No-Fault" automobile insurance scheme was first enacted in the early 1970s, New Jersey's Legislature and courts have continuously modified the mechanics of that system to ensure efficacy of its end goals − to strike an appropriate balance between providing accident victims prompt compensation for accident-related losses and reducing insurance costs to the motoring public at large.

A key feature of New Jersey's No-Fault system is a statutory requirement that automobile insurers provide Personal Injury Protection (PIP) benefits, *i.e.*, first-party benefits covering injured motorists' medical expenses regardless of fault. To further the goal of cost containment, the No-Fault system provides that evidence of the amounts of medical expense benefits collectible or paid under a standard automobile insurance policy is inadmissible at a trial in those situations when an injured motorist seeks recovery for bodily injuries. The No-Fault system further provides that motorists are precluded from suing for non-economic losses, *i.e.*, pain and suffering damages, in most cases unless the motorist either sustained a qualifying injury or elected to pay an increased premium in exchange for exemption from that limited-tort injury threshold, known colloquially as the "verbal threshold."

The most recent large-scale legislative modification of the No-Fault system, 1998's Automobile Insurance Cost Reduction Act (AICRA), was enacted in an attempt to ensure access to automobile insurance coverage for lower-income motorists while continuing to apply downward pressure to the overall cost of automobile insurance. Up until 1998, $250,000 was the standard PIP coverage limit. One significant feature of AICRA was the ability of motorists to voluntarily select PIP benefit levels as low as $15,000, below the statutory standard coverage of $250,000, in exchange for reduced premiums.

Since AICRA was enacted, there has been wide-ranging debate and conflicting lower-court opinions as to whether medical expenses incurred by accident victims in excess of the motorists' voluntarily reduced PIP coverage but less than the statutory standard $250,000 coverage should be admissible at trial.

Haines v. Taft and Little v. Nishimura

In a consolidated appeal, on March 26, 2019, New Jersey's Supreme Court addressed one aspect of this debate for the first time. Both plaintiffs were involved in motor vehicle accidents, but were unable to substantiate qualifying injuries to overcome the verbal threshold. Additionally, both plaintiffs elected reduced PIP benefits of $15,000, and incurred medical expenses in excess of those PIP limits, but less than $250,000. Both plaintiffs proceeded to trial to attempt to recover those medical expenses in excess of their PIP limits without claims for pain and suffering damages.

The defense in both trials successfully moved to bar the medical expense damages. The trial courts essentially held that permitting those claims was contrary to the intent of the statute and that it would be inequitable to permit the plaintiff to overcome the voluntary choice to

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obtain a reduced premium in exchange for reduced PIP coverage. The Appellate Division reversed, finding that the plain language of the statute permitted those claims to proceed and that the Legislature's intent was not frustrated by permitting those claims because there was no double-recovery by the plaintiffs.

The Supreme Court, after finding that the plain language of the statute permitted more than one reasonable interpretation, and after conducting a detailed review of the legislative history, reinstated the trial courts' determination that the plaintiffs' suits could not proceed.

The Court held that permitting suits for only medical expense damages between the $15,000 reduced PIP limits and the statutory standard $250,000 was contrary to the intent of the Legislature in that it injects a fault-based determination into the No-Fault system, necessarily increasing court congestion and overall costs of insurance. Moreover, the Court rejected the notion that the Legislature intended the absurd result of permitting an increased recovery for insureds who voluntarily elect reduced insurance coverage.

The Court conspicuously limited its decision to cases involving suits for medical expense damages only, and explicitly invited the Legislature to revisit the issue should they disagree with the Court's determination.

WHAT COMES NEXT?

On its face, this decision invalidates claims for medical expense damages proceeding without accompanying claims for bodily injuries if those claims are for less than $250,000. More interesting is the potential impact of the Court's decision on those claims for medical expense damages, less than $250,000, *with* accompanying claims for bodily injury. Although the Court limited its decision to the facts before it, it appears that the overarching analysis of the Court arguably should apply with equal force to claims involving bodily injury. If the Court's decision is so extended, the scope of recoverable damages in suits involving motor vehicle accidents would be dramatically reduced. We can expect a flurry of motion practice on this issue to ensue,

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to be followed by further Appellate and/or Supreme Court analysis of the potential extension of this decision to those cases involving bodily injury.

The Legislature has yet to take the Court up on its suggestion to directly address the outcome of this decision. Bills have been introduced to remove the option of reduced PIP coverage to (1) compel carriers to provide more specific information in buyers' guides relating to actual costs of electing lower PIP benefits, and (2) increase minimum levels of reduced PIP to $25,000 from $15,000.

We can expect further legislative activity, particularly if the Court's decision is extended to claims involving bodily injury.

For additional information, contact:

Andrew J. Heck
Associate (New Jersey)
973.735.6112
andrew.heck@wilsonelser.com

Christopher W. McClanahan
Of Counsel (New Jersey)
973.735.5992
christopher.mcclanahan@wilsonelser.com

Brian Del Gatto and Stuart Miller, co-chairs of Wilson Elser's national Transportation, Cargo & Logistics practice, can assist you with any and all legal or regulatory matters relative to the transportation industry. The practice offers extensive claims handling and litigation management experience together with major trial sophistication. Our nationwide 24/7 response program helps ensure that team members are engaged during the first critical hours following a catastrophe.

Brian Del Gatto
Regional Managing Partner
Stamford, Hartford and Phoenix
brian.delgatto@wilsonelser.com

Stuart Miller
Partner
White Plains
stuart.miller@wilsonelser.com

The Wilson Elser Transportation Newsletter Editorial Committee

Deputy Practice Chair:
Joseph Baiocco | Partner
Stamford/White Plains
joseph.baiocco@wilsonelser.com

Daniel Tranen | Partner
Edwardsville, Illinois
daniel.tranen@wilsonelser.com

Beata Shapiro | Partner
Boston
beata.shapiro@wilsonelser.com