ADMIRALTY

The Fifth Circuit rendered several decisions during the current survey period that significantly affect admiralty law. This year marks the end of a judicial dynasty in the area of admiralty law with the splitting of the circuit.[1] Because the Fifth Circuit's judicial shoreline will be reduced, the number of admiralty decisions rendered by this circuit will likewise be substantially reduced. The precedent generated from this court, however, will continue to impact the law of admiralty as it reaches upon and beneath the seas.[2] This article will focus on significant decisions rendered during the survey period concerning (1) the Jones Act[3] and general maritime actions, (2) developments in other actions at law, and (3) several unique jurisdictional applications to the law of admiralty.

I. THE JONES ACT AND GENERAL MARITIME ACTIONS

A. *Forum Non Conveniens and Choice of Law*

During the current survey period, the Fifth Circuit clarified the relationship of forum non conveniens and the choice-of-law doctrine.[4] In 1947, the United States Supreme Court established guidelines for application of the forum non conveniens principle in the non-maritime case of *Gulf Oil Corp. v. Gilbert*.[5] Although *Gil-*

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1. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994. The new Fifth Circuit will be composed of Texas, Louisiana, and Mississippi. The Eleventh Circuit will encompass Georgia, Alabama, and Florida. *Id.*

2. One may soon hear the argument of "precedent" (or the lack thereof) resounding from the Eleventh Circuit. No doubt there will be some companion consistency between the Fifth and Eleventh Circuits as the courts search for guidelines established in precedent by the predecessor circuit. *See generally* Reavley, *The Split of the Fifth Circuit: Update and Finis*, 12 TEX. TECH L. REV. 1, 4-5, 11 (1981).

3. 46 U.S.C. § 688 (1976).

4. Fisher v. Agios Nicolaos V, 628 F.2d 308 (5th Cir. Oct. 1980), *rehearing and rehearing en banc denied mem.*, 636 F.2d 1107 (5th Cir. Jan. 1981), *cert. denied*, 50 U.S.L.W. 3245 (U.S. Oct. 6, 1981).

5. 330 U.S. 501 (1947). In *Gilbert* the Court weighed important considerations such as access to sources of proof and costs of obtaining witnesses in deciding that the trial court had properly dismissed the tort action brought in New York by a Virginia resident against a Pennsylvania defendant for an alleged negligent act occurring in Virginia. *Id.* The doctrine of forum non conveniens presupposes at least two forums in which the defendant is amenable to process. *Id.* at 506-07.

bert recognized that a court could resist imposition upon its jurisdiction even when jurisdiction was authorized,[6] that sweeping though rarely used power was restricted in maritime law. An earlier United States Supreme Court case established that jurisdiction in a maritime tort cause should be declined only in the limited instance when it would better serve justice.[7] The Fifth Circuit has consistently followed this line of reasoning.[8]

In *Fisher v. Agios Nicolaos V*,[9] a case decided during this survey period, the Fifth Circuit considered questions of jurisdiction and forum non conveniens as applied to a Greek seaman who was killed on a foreign vessel in an American port. The court initially assumed that it had jurisdiction over the controversy in the absence of evidence that retaining jurisdiction would result in an injustice.[10] Turning to the choice-of-law and forum non conveniens issues in *Fisher*, the Fifth Circuit pointed out that the choice-of-law factors developed in *Lauritzen v. Larsen*[11] are relevant in determining which forum should retain jurisdiction, but that forum non conveniens considerations are not necessarily relevant in determining which body of law should be chosen to resolve a controversy.[12] The court in *Fisher* noted that when American law is determined to be applicable, the American court should retain jurisdiction[13] because the question of which forum should retain jurisdiction essentially depends on and is conclusively determined

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6. *Id.* at 507.

7. The Belgenland, 114 U.S. 355, 367 (1885).

8. *See, e.g.*, Poseidon Schiffahrt, G.M.B.H. v. M/S Netuno, 474 F.2d 203, 204 (5th Cir. 1973).

9. 628 F.2d 308 (5th Cir. Oct. 1980), *rehearing and rehearing en banc denied mem.*, 636 F.2d 1107 (5th Cir. Jan. 1981), *cert. denied*, 50 U.S.L.W. 3245 (U.S. Oct. 6, 1981).

10. *Id.* at 314.

11. 345 U.S. 571 (1953). In concluding that the choice of applying American law was improper and that Danish law should apply, the Court, in *Lauritzen*, considered (1) the place of the wrongful act (Cuba), (2) the law of the flag (Denmark), (3) the domicile of the injured (Denmark), (4) the allegiance of the defendant shipowners (Denmark), (5) the place of contract (New York), (6) the inaccessibility of a foreign forum, and (7) the law of the forum. *Id.* at 583-92.

12. 628 F.2d at 314-15. In *Fisher* (1) the place of the act was Beaumont, Texas, (2) the *Agios Nicolaos V* was a Greek flag-flying vessel, (3) the decedent was a citizen of Greece, (4) the shipowners were Liberian and Panamanian corporations owned entirely by three citizens of Greece, and (5) the decedent was hired in Greece. *Id.* at 311. The court was left with weighing the accessibility of a foreign forum and the law of the forum issues together with the other *Lauritzen* factors in resolving the choice-of-law question.

13. *Id.* at 315.

by the outcome of the choice-of-law issue.[14] As one commentator suggests, if American law is to govern, the court has no forum non conveniens issue, but if American law is not applicable, the doctrine of forum non conveniens should be considered and the appropriateness of the forum determined.[15] *Romero v. International Terminal Operating Co.*[16] and *Hellenic Lines, Ltd. v. Rhoditis*[17] are two other United States Supreme Court cases involving foreign seamen in which the Court applied the *Lauritzen* factors in resolving the choice-of-law question. The Court in *Romero* held that the seven factors set out in *Lauritzen* were not limited to deciding which law should govern Jones Act claims, but were also applicable in deciding whether or not American general maritime law should govern.[18] In *Rhoditis,* moreover, the Court found that the seven factors of *Lauritzen* were not exhaustive and added that "the shipowner's base of operations is another factor of importance"[19] in determining applicability of the Jones Act in favor of the foreign seaman. The Court in *Rhoditis* utilized a "contacts" analysis and found that the continuing contacts that the owner had with the United States outweighed the other *Lauritzen* factors and required that American law be applied.[20] Applying the *Lauritzen-Romero-Rhoditis* trilogy,[21] the Fifth Circuit in *Fisher* held that United States law applied to this foreign seaman's accident in a United States port because the vessel had a substantial base of operations in the United States and its owners derived substantial revenue from United States trade.[22] The Fifth Circuit leaned heavily on the fact that the vessel's entire service was for the American grain trade,[23] and observing the *Rhoditis* and *Lauritzen* factors, the court decided that American law was more appropriate than that

14. *Id.*

15. Comment, *A New Look at* Lauritzen v. Larsen, *Choice of Law and Forum Non Conveniens,* 38 LA. L. REV. 957, 958 (1978).

16. 358 U.S. 354 (1959).

17. 398 U.S. 306 (1970).

18. 358 U.S. at 384.

19. 398 U.S. at 309.

20. *Id.* at 310. "The flag, the nationality of the seaman, the fact that his employment contract was Greek, and that he might be compensated there are in the totality of the circumstances . . . minor weights . . . ." *Id.*

21. 628 F.2d at 316.

22. *Id.* at 317.

23. *Id.* at 317 n.16.

of Greece.[24]

On petition for rehearing en banc, the dissenting judge voiced his concern over the legal implications raised by the decision.[25] As the dissent pointed out, the court's attempt to provide a liberal choice-of-law road map seemingly opened the courts of the Fifth Circuit to foreign seamen and their heirs.[26] The Fifth Circuit has previously shown, however, that mere contacts in the United States will not confer jurisdiction in an admiralty action. In Jones Act suits[27] the Fifth Circuit continues to apply the seven *Lauritzen*[28] factors along with the "base of operations" gloss of *Rhoditis*[29] in deciding whether jurisdiction extends to an essentially foreign controversy.

In another case decided during the current survey period, *Nunez-Lozano v. Rederi,*[30] the Fifth Circuit declined jurisdiction after determining that the majority of "important" contacts was associated with foreign jurisdictions.[31] With the addition of the *Fisher* and *Rederi* decisions to the admiralty law of the Fifth Circuit, foreign seamen may now maintain Jones Act suits if the court can be satisfied that the contacts with America are numerous and impor-

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24. *Id.* at 317-18.

25. Fisher v. Agios Nicolaos V, 636 F.2d 1107 (5th Cir. Jan. 1981) (Brown, J., dissenting), *denying rehearing and rehearing en banc mem.* 628 F.2d 308 (5th Cir. Oct. 1980).

26. *Id.* at 1108 (Brown, J., dissenting).

27. 46 U.S.C. § 688 (1976). The Jones Act provides:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

Id.

28. Lauritzen v. Larsen, 345 U.S. 571 (1953).

29. Hellenic Lines, Ltd. v. Rhoditis, 398 U.S. 306 (1970).

30. 634 F.2d 135 (5th Cir. Dec. 1980).

31. *Id.* at 137. In *Rederi* (1) the place of the wrong was Liberia, (2) the law of the flag was Norway, (3) the domicile of the injured seaman at the time of the accident was Honduras, (4) the allegiance of the shipowner was Norway, and (5) the place of contract was the United States. The other two *Lauritzen* factors, the accessibility of a foreign forum and the law of the forum, were inapplicable to this case. The shipowner's base of operations was Norway. *Id.*

tant enough to resolve the choice-of-law question in favor of American law.

B. *Seaman Status—The Waves Keep Coming*

The Jones Act grants any seaman who suffers a personal injury in the course of his employment the right to recover damages for such injury if it is caused by the negligence of the seaman's employer.[32] Because the Statute fails to define the term "seaman," the Fifth Circuit is regularly confronted with the issue of whether an injured person is a seaman within the purview of the Act. The Fifth Circuit, in defining "seaman," utilizes the concept of "member of a crew,"[33] the definition generally recognized and applied under the Act. "The essential and decisive elements of the definition of a 'member of a crew' are that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation."[34] Because of the increased level of offshore petroleum activity in this circuit, the court has been required to resolve numerous riddles concerning the status of various types of petroleum-related workers.[35] The Fifth Circuit generally regards the question of status as a mixed one of law and fact to be decided on a case-by-case basis.[36]

In *Ardoin v. J. Ray McDermott & Co.*,[37] the Fifth Circuit utilized the two-element test established in *Offshore Co. v. Robison*[38]

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32. 46 U.S.C. § 688 (1976).

33. McKie v. Diamond Marine Co., 204 F.2d 132, 135-36 (5th Cir. 1953).

34. *Id.* at 136.

35. Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. Mar. 1981).

36. Ardoin Co. v. J. Ray McDermott & Co., 641 F.2d 277, 280 (5th Cir. Mar. 1981).

37. 641 F.2d 277 (5th Cir. Mar. 1981).

38. 266 F.2d 769, 779 (5th Cir. 1959). In *Robison* the plaintiff was a roughneck working on a drilling rig mounted on a mobile drilling platform. While the rig was in operation, the jack-up legs were lowered, and they rested firmly on the ocean floor. When drilling operations ceased, the legs were retracted, and the platform became a floating barge that was then towed to a new drilling location. The rig was in operation, and while running casing into the drilled hole, the plaintiff was injured. The court in *Robison* found a sufficient evidentiary basis for the Jones Act case to go to the jury for determining the seaman issue. The jury found that the rig was a vessel and that Robison was a member of the crew of the vessel. *Id.* at 771-73. But most importantly, the court listed two reasons for such an evidentiary basis. According to the court, the case may go to the jury:

> (1) If there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and

to determine seaman status and found that a reasonable inference existed that the injured structural welder's connection with his employer's fleet of derrick barges was sufficiently permanent to qualify him as a seaman.[39] In *Ardoin* the plaintiff was a structural welder on an offshore construction job and was injured while dismantling an offshore drilling platform.[40] The plaintiff sought recovery under the Jones Act, but the district court found as a matter of law that he was not a seaman and entered summary judgment against him.[41] On appeal, the Fifth Circuit reversed, finding that both of the *Robison* criteria were satisfied—the evidence supported "a reasonable inference that Ardoin's connection with McDermott's fleet of derrick barges was sufficiently 'permanent' to make him a seaman within the meaning of the Jones Act,"[42] and it could be reasonably shown that the welder performed work that contributed to the mission of the derrick barge.[43]

The Fifth Circuit continues to liberally apply the *Robison* test in determining whether a complainant is a seaman under the Jones Act. The "permanency" prong of the test, although never literally applied,[44] has become but a judicial gloss that enables the court to consider the equities in imposing liability. However, although the court may be willing to resolve the factual question of status as a "seaman" in the injured's favor, the question has been resolved inconsistently.[45] The injured worker seeking to invoke application of the Jones Act may be disappointed in the jury's determination of seaman status; the Fifth Circuit, however, generally provides a more favorable review for the claimant upon appeal.

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(2) If the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

Id. at 779.

39. 641 F.2d at 281.

40. *Id.* at 279.

41. *Id.* at 278.

42. *Id.* at 281. The defendant's argument that the offshore welders were assigned to projects and not to the derrick barges was not accepted.

43. *Id.* at 282. The court recognized that the principal function of the derrick barge was to construct or dismantle offshore platforms. *Id.* at 282-83.

44. *Id.* at 281.

45. *Id.* at 281-82. *Compare Ardoin*, 641 F.2d at 281-82, *and* Davis v. Hill Eng'r, Inc., 549 F.2d 314, 326-28 (5th Cir. 1977), *with* Kirk v. Land & Marine Applicators, Inc., 555 F.2d 481, 483 (5th Cir. 1977) (per curiam).

C. *A New Right—Spousal Recovery for Loss of Society of a Surviving Seaman*

Perhaps the most significant decision handed down by the Fifth Circuit during the current survey period is *Cruz v. Hendy International Co.*[46] Prior to *Cruz,* the Fifth Circuit refused to allow a claim for loss of consortium by the wife of a surviving seaman who suffered debilitating injury during the course of his employment.[47] Likewise, the Fifth Circuit originally affirmed the dismissal of Mrs. Cruz's claim for loss of society.[48] However, while Cruz's petition for rehearing en banc was pending before the Fifth Circuit, the United States Supreme Court decided *American Export Lines, Inc. v. Alvez,*[49] which gave the Cruz claim new life. In *Alvez* the Court held that general maritime law allowed the wife of a harbor worker nonfatally injured aboard a vessel in state territorial waters to maintain an action for damages for loss of her husband's society.[50] The Fifth Circuit, loaded with high caliber authority from *Alvez,* seized the opportunity afforded by *Cruz* to recognize a spouse's claim for loss of society under general maritime law when the seaman's nonfatal injuries are attributable to the unseaworthiness of a vessel.[51] The rationale in *Cruz* required minimal judicial innovation in light of the United States Supreme Court's decision in *Alvez.*[52]

Although the right of recovery established in *Cruz* is a welcomed addition to the Fifth Circuit and the field of admiralty law, the holding could technically lead to conflicting results for plaintiffs who bring actions under the general maritime law and those who plead solely through the statutory vehicle of the Jones Act.[53] The Fifth Circuit faces a substantive crossroads in the area of recovery for damages and must form good judicial decisions that comply with the difficult framework established by the United States Supreme Court's decisions. For example, in *Cruz*[54] the Fifth

46. 638 F.2d 719 (5th Cir. Feb. 1981).
47. Christofferson v. Halliburton Co., 534 F.2d 1147 (5th Cir. 1976).
48. Cruz v. Hendy Int'l Co., 606 F.2d 319 (5th Cir. 1979) (mem.).
49. 446 U.S. 274 (1980).
50. *Id.* at 276.
51. 638 F.2d at 727.
52. American Export Lines, Inc. v. Alvez, 446 U.S. 274 (1980).
53. 638 F.2d at 725. The same damages are not recoverable in a negligence claim under the Jones Act.
54. Cruz v. Hendy Int'l Co., 638 F.2d 719 (5th Cir. Feb. 1981).

Circuit decided that its holding was not limited to territorial waters, but was also applicable to the high seas.[55] Unlike the line of cases dealing with spousal recovery for wrongful death,[56] the Fifth Circuit did not classify the recovery of loss of consortium according to where the injury occurred. The court did affirm that a spouse may recover for loss of society via a nonfatal accident claim under general maritime law,[57] but recovery by the surviving spouse of a seaman killed in a line-of-duty accident will be denied if the claim is presented solely under the Jones Act.[58] Thus, the levels of recovery are not structured equitably under the different methods through which a claim may be procured. There is some solace for an aggrieved seaman or his spouse in that a crew member is entitled to a seaworthy vessel and the maritime court is available to all those exposed to the sea's hazards.[59] The harsh difference in treatment of claimants under general maritime law and those under the Jones Act may only technically exist; a claimant does have the ability to bring parallel actions. As a result, the Jones Act provides the vehicle for invoking a jury trial, and the general maritime law provides a claim for the loss of society, a claim not contemplated by Congress in drafting the Jones Act.[60]

II. Other Actions at Law

There were two cases decided during the survey period that warrant cursory review in this area of admiralty law, an area laden with statutory causes of action. In *McCormick v. United States*,[61] the plaintiff claimed that he was injured because of the government's negligence in placing an obstruction with which he collided in a bay.[62] The district court dismissed the maritime claim that was brought against the government under the Federal Tort Claims Act (FTCA),[63] determining that the suit could be properly maintained only under the Suits in Admiralty Act (SAA).[64] On ap-

55. *Id.* at 725.
56. *See Fifth Circuit Survey—Admiralty*, 12 Tex. Tech L. Rev. 61, 61-66 (1981).
57. 638 F.2d at 725.
58. *Id.*
59. *Id.*
60. *See id.*
61. 645 F.2d 299 (5th Cir. May 1981).
62. *Id.* at 300.
63. 28 U.S.C. §§ 1346(b), 2671-2680 (1976).
64. 46 U.S.C. §§ 1-12, 742-752 (1976).

peal, the Fifth Circuit was confronted with the question of whether the suit was exclusively confined to the realm of the SAA or whether the maritime tort claim could be maintained under the FTCA.[65] Holding that the FTCA was a viable mechanism through which to bring a maritime tort claim,[66] the court in *McCormick* found "no purpose to expand the scope of the SAA at the expense of the FTCA, when both . . . were clearly within the exclusive jurisdiction of the district courts."[67] The court also intimated that there should be no problem in reviving the FTCA in the area of maritime torts as long as there is no conflict under the SAA.[68] The application of the FTCA was justified under the court's reasoning that the plaintiff should, for purposes of determining relief, be more properly considered as an ordinary citizen injured by a government-tortfeasor rather than as a member of the shipping industry for which the SAA was specifically enacted.[69]

While dispensing with a case, the Fifth Circuit seldom undertakes to educate the bar about the law on some peripheral matter. However, such a rarity occurred in *Noritake Co. v. M/V Hellenic Champion*,[70] in which the Fifth Circuit elaborated on a point of appeal concerning prejudgment interest. This action was brought by Noritake to recover for damaged porcelainware under the Carriage of Goods by Sea Act.[71] The Fifth Circuit first considered and sustained the district court's finding for defendant Hellenic based on the defense of act of God and then considered the issue of prejudgment interest.[72] The court reiterated the general rule that prejudgment interest should be awarded in admiralty cases to compensate an aggrieved party for the use of funds to which he was rightfully entitled[73] and that the trial court has discretion to deny

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65. 645 F.2d at 300. The significance of this issue to the parties was that if the SAA were held to be the exclusive method under the claim, its two year statute of limitations, 46 U.S.C. § 745 (1976), would bar plaintiff's action. Whereas under the FTCA procedures and applicable statute of limitation provision, 28 U.S.C. § 2401(b) (1976), there is a tolling of the two year limitation during administrative review of the claim with a six month period for filing after completion of a review.

66. 645 F.2d at 309.

67. *Id.*

68. *Id.*

69. *Id.*

70. 627 F.2d 724 (5th Cir. Oct. 1980).

71. 46 U.S.C. §§ 1300-1315 (1976).

72. 627 F.2d at 728.

73. *Id.*

prejudgment interest only when there are peculiar circumstances that would make it inequitable to impose on the losing party such an obligation.[74] The court stated that when prejudgment interest has not been awarded and when neither peculiar circumstances nor inferences of such circumstances exist, then the prevailing party should be awarded prejudgment interest.[75] Although the reasoning and guidelines presented in *Noritake Co.* are clear and straightforward, application of the rule under varying fact situations may be difficult.

III. Miscellaneous Jurisdictional Matters

A. *Sunken Treasure and the* Atocha

On September 4, 1622, the *Nuestra Senora de Atocha* set sail from Havana laden with bullion,[76] but was lost at sea during a hurricane.[77] In 1971, the *Atocha* was discovered by the Treasure Salvors group.[78] The *Atocha* and its treasures have been the subject of two Fifth Circuit decisions rendered during the current survey period, some three and one-half centuries after the ship sank.[79] As in most admiralty cases involving sunken or abandoned treasure, the case of the *Atocha* poses some complex jurisdictional questions regarding salvage operations. In the first case decided by the Fifth Circuit involving the *Atocha,* referred to as *Treasure Salvors I,*[80] the United States Government entered the in rem proceeding in admiralty and challenged Treasure Salvors' assertion of possession and title to the sunken remains. The United States claimed that the district court lacked in rem jurisdiction over that portion of

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74. *Id.* The court continued to embrace the presumption that an award of prejudgment interest implies that the trial court either found no peculiar circumstances existed or found peculiar circumstances existed, but declined to exercise its discretion. *Id.* at 729.

75. *Id.* at 730. The court may, after determining that prejudgment interest should be awarded, modify the trial court's judgment and award the appropriate amount or remand to the district court with directions to recalculate and award the proper interest. *Id.*

76. In 1978, the cargo was valued at $250 million. State of Fla. v. Treasure Salvors, Inc., 621 F.2d 1340, 1342 n.3 (5th Cir. July 1980), *cert. granted,* 49 U.S.L.W. 3863 (U.S. May 19, 1981) (No. 80-1348).

77. *Id.* at 1342.

78. *Id.* at 1343.

79. Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. Mar. 1981); State of Fla. v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. July 1980), *cert. granted,* 49 U.S.L.W. 3863 (U.S. May 19, 1981) (No. 80-1348).

80. Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 569 F.2d 330 (5th Cir. 1978).

the wreckage that was not located within the district and claimed title to the sunken remains pursuant to provisions of the Antiquities Act[81] and the Abandoned Property Act.[82] Generally, in rem jurisdiction in admiralty requires that the res be present in the district when suit is filed.[83] The Fifth Circuit in *Treasure Salvors I* held, however, that absence of the res from the territorial jurisdiction of the court was not fatal since the parties elected to waive the requirement.[84] Even this exception was not needed in *Treasure Salvors I,* however, because the United States' claim under federal statutes enabled the Fifth Circuit to base jurisdiction on 28 U.S.C. § 1331.[85] The Fifth Circuit affirmed the district court's finding that Treasure Salvors had title to the wreckage.[86]

During this survey period, the jurisdictional controversy of the

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81. 16 U.S.C. § 431 (1976). This section provides:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected. When such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is authorized to accept the relinquishment of such tracts in behalf of the Government of the United States.

Id.

82. 40 U.S.C. § 310 (1976). This section provides:

> The Administrator of General Services is authorized to make such contracts and provisions as he may deem for the interest of the Government, for the preservation, sale, or collection of any property, or the proceeds thereof, which may have been wrecked, abandoned, or become derelict, being within the jurisdiction of the United States, and which ought to come to the United States, and in such contracts to allow such compensation to any person giving information thereof, or who shall actually preserve, collect, surrender, or pay over the same, as the Administrator of General Services may deem just and reasonable. No costs or claim shall, however, become chargeable to the United States in so obtaining, preserving, collecting, receiving, or making available property, debts, dues, or interests, which shall not be paid from such moneys as shall be realized and received from the property so collected, under each specific agreement.

Id.

83. Platoro Ltd. v. Unidentified Remains of a Vessel, 508 F.2d 1113, 1115 (5th Cir. 1975).

84. 569 F.2d at 335.

85. *Id.* (citing 28 U.S.C. § 1331 (1976) (federal question)).

86. 569 F.2d at 343.

Atocha and its sunken treasure surfaced again in *Treasure Salvors II*[87] and *Treasure Salvors III*.[88] In 1971 when the *Atocha* was discovered, both parties to the *Treasure Salvors II* suit entered into a salvage agreement thinking the wreckage was located on land owned by Florida. The agreement permitted Treasure Salvors to conduct its salvaging operation on state property in return for payment of twenty-five percent of the finds to the state. Upon determination that Florida did not own the land[89] and final adjudication in *Treasure Salvors I*, the district court in the Southern District of Florida issued a warrant for arrest in rem, authorizing recovery of the artifacts held by Florida in the territorial Northern District for return to Treasure Salvors.[90] This led to further legal maneuvers in which the controverted show cause order was issued.[91] The issue in *Treasure Salvors II* was whether the Southern District of Florida had control over a sufficient amount of the res to issue ancillary process in the Northern District of Florida.[92] Finding that the district court had properly founded the case in admiralty jurisdiction, the Fifth Circuit examined the procedural rule under admiralty[93] to determine if ancillary process could be maintained. The Fifth Circuit found that the district court had control over a sufficient amount of the res and that ancillary process could be issued outside the district.[94] The court reasoned that the rule contem-

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87. State of Fla. v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. July 1980), *cert. granted*, 101 S. Ct. 2312 (1981) (No. 80-1348).

88. Treasure Salvors, Inc. v. Unidentified Wrecked & Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. Mar. 1981).

89. United States v. Florida, 420 U.S. 531 (1975).

90. 621 F.2d at 1344.

91. *Id.* The order to show cause placed the burden on Florida to show why it should not be required to deliver the artifacts to Treasure Salvors. The order to show cause is known as ancillary process. *Id.* at 1344 n.14.

92. *Id.* at 1346.

93. FED. R. CIV. P. ADM., SUPP. C(5):

> (5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

Id.

94. 621 F.2d at 1347-48. These are the two qualifying prerequisites to justify the show

plated that the court would control a major portion of the res before ancillary process was used[95] and was satisfied that the Southern District met that requisite. Although it is questionable that the district court had the *Atocha* within its control, the Fifth Circuit focused on the recovered res and found that the Southern District maintained a significant portion of the res, thereby satisfying the first part of the test for issuance of ancillary process.[96] In regard to the other element of the test, the Fifth Circuit readily found that the district court could issue ancillary process outside its district but within state boundaries.[97] The court utilized Federal Rule of Civil Procedure 4(f)[98] to justify the reach of ancillary process because it found no Supplemental Admiralty Rule applicable.[99] With the jurisdictional issue resolved, the Fifth Circuit found that Florida had no interest and therefore the contract between the litigants was voidable for failure of consideration and mutual mistake.[100]

In *Treasure Salvors III* the Fifth Circuit readily resolved any jurisdictional problem by focusing on the type of suit being prosecuted.[101] The Fifth Circuit found that the court had in personam jurisdiction over the parties since the controversy existed between two groups of competing salvors to recover treasures from the

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cause order. *Id.* at 1347.

95. *Id.* at 1347.

96. *Id.*

97. *Id.* at 1347-48.

98. FED. R. CIV. P. 4(f) provides:

> (f) Territorial Limits of Effective Service. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 14, or as additional parties to a pending action or a counter-claim or cross-claim therein pursuant to Rule 19, may be served in the manner stated in paragraphs (1)-(6) of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

Id.

99. FED. R. CIV. P. ADM., SUPP. A. In the absence of a Supplemental Admiralty Rule to the contrary, the general Rules of Civil Procedure govern. *Id.*

100. 621 F.2d at 1349-50.

101. 640 F.2d at 566.

Atocha.[102] Treasure Salvors claimed all remains of the *Atocha* and the exclusive right to conduct salvage operations. During salvage operations, new finds connected with the *Atocha* had resulted in Treasure Salvors amending its description of the wreck site to correspond with the expanded search area.[103] An appeal to the Fifth Circuit followed after competing salvors were enjoined from conducting salvage operations within 2500 yards of the description line of the wreck site as filed by Treasure Salvors.[104] On appeal, there was little dispute that in personam jurisdiction existed, and the court established federal district court subject-matter jurisdiction under admiralty[105] by noting that salvage operations were unquestionably within its admiralty jurisdiction.[106]

Early salvage operations involved assistance to distressed ships, which led the courts to recognize maritime liens on behalf of salvors for services rendered. This judicial operation provided incentive for salvors, and the courts have generally continued to look favorably upon the salvor in granting him certain rights. One such grant was the right to exclude others from the salvage operations as long as the salvor was pursuing his task. The Fifth Circuit in *Treasure Salvors III* recognized that jurisdiction of the law of maritime salvage extended to the salvor's claim for relief from interference in the context of treasure trove, even though the artifacts were not within the territorial jurisdiction of the court.[107]

The *Atocha,* resurrected by litigation and powered by the winds of the Fifth Circuit, has sailed the jurisdictional seas and mapped out a course for future salvors to follow. Although there remains uncertainty about in rem jurisdiction in nonterritorial waters, the courts will look closely to establish sufficient nexus to satisfy jurisdictional requirements in order to arrive at fair solutions. For those willing to undergo both financial and mortal risks in search of lost treasure and artifacts, the policy promoted is that the treasure will be their bounty for finds on the high seas.

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102. *Id.* at 567-68. The controversy also involved subject matter within the district court's jurisdiction. *Id.*

103. *Id.* at 563-64.

104. *Id.* at 563.

105. 28 U.S.C. § 1333 (1976).

106. 640 F.2d at 566-67.

107. *Id.* at 567.

B. *The Question of Substantial Maritime Relationship*

To invoke admiralty jurisdiction in a tort case, there has to be a significant relationship between the tort on navigable waters and traditional maritime activity.[108] During the current survey period, the Fifth Circuit in *Richardson v. Foremost Insurance Co.*[109] determined that admiralty jurisdiction encompassed the tort area of boat collision where two boats collided on navigable waters.[110] In *Richardson* two pleasure boats collided while operating on a river. The issue raised on appeal to the Fifth Circuit was the applicability of admiralty law in this fact situation. There was no question that the river was considered a navigable waterway; the only issue before the court was whether the two pleasure boats and their operation fell within the meaning of traditional maritime activity. Commentators[111] and at least one other circuit[112] have restricted the scope of admiralty claims to commercial-type activity on navigable waters. However, in *Richardson* the Fifth Circuit recognized the need for certainty and uniformity in admiralty law and held that two boats are engaged in traditional maritime activity when a collision between them occurs on navigable waters.[113] It is now clear that there is no commercial-noncommercial dichotomy in this area of the maritime law and that the use, purpose, size, and activity of the boats that collide are irrelevant in satisfying the requisite that they were engaged in traditional maritime activity.[114] The only questions remaining in this type of fact situation are whether such collsions are between "boats" and whether the occurrences are on navigable waters.

IV. Conclusion

The current survey period will not only be remembered for the decisions which were rendered, but also as the final survey during which the Fifth Circuit encompassed six states and substantively

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108. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972); Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973).

109. 641 F.2d 314 (5th Cir. Apr. 1981).

110. *Id.* at 316.

111. G. Gilmore & C. Black, The Law of Admiralty (2d ed. 1975).

112. Crosson v. Vance, 484 F.2d 840 (4th Cir. 1973).

113. 641 F.2d at 316. *Accord,* St. Hilaire Moye v. Henderson, 496 F.2d 973 (8th Cir. 1974).

114. 641 F.2d at 316.

played a dynamic part in forming the law of admiralty. It should be emphasized that the purpose of this Article was to analyze the most notable decisions rendered by the Fifth Circuit during the survey period. The omission of cases from the survey is not reflective of their substantive value. The Fifth Circuit dealt with several significant issues in the law of admiralty during the current survey period. A review of those issues reveals that the court will look liberally upon a seaman to find sufficient contacts with this country so that the benefits of American law may be invoked. The Fifth Circuit continues to answer the question of whether an injured claimant's status is that of a Jones Act seaman, and because of the many offshore petroleum activities, the court has evidenced an open-minded interpretation of status to be decided on a case-by-case basis. Perhaps the most significant decision of this survey period was the establishment of a spouse's right to recover for the loss of society of a surviving seaman under general maritime law. The court also tackled many unique jurisdictional questions in connection with admiralty law and dealt with difficult cases involving sunken treasures and pleasure boats on navigable waters.

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