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In the Wake of Devries: Revisiting the Extension of Maritime Jurisdiction Over Asbestos Claims

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IN *Air & Liquid Systems Corp. v. Devries*,[1] the Supreme Court of the United States recently addressed the application under maritime law of the so-called "bare metal" or "replacement parts" defense to claims of mesothelioma against product manufacturers who did not manufacture or supply the asbestos-containing products to which the claimants alleged exposure, but whose products incorporated such components years after sale.[2] For the last several years, it has been these equipment manufacturers who have largely sought application of maritime law to advance this defense.

Under the bare metal (also called the "replacement parts") defense, manufacturers of equipment such as valves and pumps argued that they could not be held liable for replacement components – in that case, gaskets and packing – later incorporated into their equipment that the company did not sell or place in the stream of commerce. Thus, under the defendants' argument there, an asbestos claimant alleging exposure to such components would be required to prove (decades after sale) that the components at issue were original to the equipment. In addition to the bare metals defense, there are a number of other arguments in certain maritime cases available to defendants to limit recovery for certain categories of tort damages.[3]

At the same time, it has not always been defendants who seek the application of maritime law. There are in fact cases in which asbestos claimants have brought their suits by reference to maritime law.[4]

But before maritime *law* can be applied, the party seeking its application first bears the burden of proving the existence of maritime *jurisdiction* over the claim.[5] With the Court's (albeit murky) decision in *Devries*, this article revisits the legal underpinnings to the exercise of maritime jurisdiction in asbestos cases and the emerging trend among a handful of courts holding that maritime jurisdiction properly extends over asbestos product liability litigation. A strong argument can be made that the eight federal appellate court decisions to consider the issue, all of which held 30 years ago that maritime jurisdiction does not extend to asbestos-containing products whose uses are not uniquely and traditionally maritime in nature, remain good law.

I. *Executive Jet Aviation v. City of Cleveland*

For more than 150 years, the test for the exercise of jurisdiction over maritime torts depended solely upon the location of the wrong; if the wrong occurred on navigable waters, the action was held to be within maritime jurisdiction. If the wrong occurred on land, it was held not to fall within maritime jurisdiction.[6] In the summer of 1968, an airplane took off from an airport in Cleveland, struck a flock of seagulls, and crashed into Lake Erie. Suit was filed against the individual airfield employee who cleared the plane for takeoff and against the airport's operators, for failing to keep the runway clear of the birds. The damage complained of was limited to the property loss of the aircraft.

After granting certiorari on the issue of whether the aviation accident properly sounded in maritime jurisdiction, the Supreme Court answered the question in the negative in *Executive Jet Aviation v. City of Cleveland*.[7] In

doing so, the Court's unanimous decision by Justice Stewart recounted how the traditional test focusing on location "was established and grew up in an era when it was difficult to conceive of a tortious occurrence on navigable waters other than in connection with waterborne vessels."[8] But the Court in *Executive Jet* observed for the first time that simply satisfying the locality test was insufficient to establish maritime jurisdiction. Instead, the Court announced an additional prong of the jurisdictional test to accompany the location test, one that was "consistent with the history and purpose of admiralty."

This second prong – sometimes referred to as the nexus test – requires the wrong to "bear a significant relationship to traditional maritime activity." Such traditional activities, the Court explained, involved "navigation or commerce on navigable waters." In assessing whether a "significant relationship" existed between these activities and the wrong, the *Executive Jet* decision emphasized that the law of admiralty:

has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. *That law deals with navigational rules -- rules that govern the manner and direction those vessels may rightly move upon the waters.* When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability, and all other questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. *It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, and claims for salvage.*[9]

Against this backdrop, and sensitive to the "conceptual expertise of the law to be applied" in maritime cases, the Court reasoned that a plane coming down was attributable to a cause unrelated to the sea, whether because of defective design or manufacture of the airframe or engine. These were "factual and conceptual inquiries unfamiliar to the law of admiralty." Moreover, the Court made clear that the inquiry should include examination of whether the case related to any tort growing out of "navigation." If the action alleged only an ordinary tort, no different in substance because the injury occurred in shallow waters along the shore than if the injury had occurred on the sandy beach above the water line – where the accident was "only fortuitously and incidentally connected to navigable waters" and "bears no relationship to traditional maritime activity" – the question of liability was one which could "easily be determined by the locality" and not a maritime court.

Undergirding the Court's reasoning in support of requiring a maritime nexus between the tort and maritime jurisdiction were overarching federalism concerns. Just one term earlier, in *Victory Carriers, Inc. v. Law*,[10] the Court had discussed the need to "proceed with caution" in determining whether to expand maritime jurisdiction. In so holding, the Court – in a passage quoted by the Court in *Executive Jet* – articulated the federalism issues at stake, stating that the power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts "may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. … Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which a federal statute has defined."[11]

II. *Foremost Insurance Co. v. Richardson*

A decade later, the Court returned to the issue of maritime jurisdiction and the requirement of a maritime nexus in *Foremost Insurance Co. v. Richardson*.[12] In that case, two pleasure crafts collided on a river in Louisiana, resulting in a man's death. His widow, who was also a passenger of one of the vessels, sued the other for negligent operation and included as a party the defendant's insurance company. The Court affirmed extension of maritime jurisdiction. The decision was close, 5-4, despite the fact that the case involved a collision between vessels on navigable waters.

Justice Marshall's majority opinion focused on what it said admiralty law had "traditionally been concerned with," which it said were *"navigational rules – rules that govern the manner and direction those vessels may rightly move upon the waters."*[13] With that in mind, the majority held that "the smooth flow of maritime commerce is promoted when all vessel *operators* are subject to the same duties and liabilities."

The source of the division centered on the fact that the vessels in question were not engaged in "commercial" activity. Justice Powell's four-member dissent began by noting that, as evidenced by *Executive Jet*, admiralty jurisdiction does not extend to every accident on navigable waters and that if maritime courts were to exist at all, they "should exist because *the business of river, lake, and ocean shipping* calls for supervision by a tribunal enjoying a particular expertness in regards to the more complicated concerns of that business."[14]

The dissent reasoned that the traditional connection (or nexus) to maritime law concerns was absent where pleasure boats were concerned and that no reason existed for extending maritime jurisdiction to all boating activities. As emphasized in *Executive Jet*, the dissent found federalism concerns to be the "dominating issue" in the case, finding that the federal government had little or no genuine interest in the resolution of a "garden variety tort case." Instead, the dissent reasoned that the law in this area would develop faster and more rationally if the creative capacities of the state courts and legislatures were free to operate in this sphere.

III. The Unanimous Federal Circuit Court Decisions of the 1980s

It was against this backdrop that the principles espoused in *Executive Jet* and *Foremost Insurance* met the first wave of asbestos claims in federal courts. Over the course of the 1980s, eight federal appellate courts addressed the issue of whether ship-related asbestos product liability claims fell within the reach of maritime jurisdiction. In most of those instances, it was the plaintiff who advocated for the application of maritime law. In each of those cases, the same product was involved: asbestos-containing pipe insulation.[15] All eight courts – the First, Second, Third, Fourth, Fifth, Sixth, Ninth, and Eleventh Circuits, totaling more than 25 federal appellate

judges – concluded that maritime jurisdiction was not properly exercised over product liability claims for asbestos-related disease. [16] Most of these decisions – involving a variety of claims by shipyard workers, members of a ship's company, or third-party claims for contribution – focused on the second prong of *Executive Jet*'s connection test and concluded that asbestos claims were not significantly related to traditional maritime activities. Many (but not all) of these decisions reached this conclusion by applying a four-part test to the significant connection prong that was first pronounced by the Fifth Circuit in *Kelly v. Smith*. [17] Those four factors consider: (i) the functions and roles of the parties; (ii) the types of vehicles and instrumentalities involved; (iii) the causation and type of injury; and (iv) traditional concepts of the role of admiralty.

Citing *Executive Jet* and *Foremost Insurance*, these decisions noted that asbestos litigation does not implicate the rules of navigation or the interests of vessel operators. They explain that contracts for services to a vessel laid up and out of navigation lacked a "maritime flavor." These courts also reasoned that asbestos claims do not require the special knowledge of the admiralty, but are garden variety torts that state courts were well equipped to handle. As such, these asbestos cases failed to implicate the traditional concepts of seagoing navigation and commerce with which maritime law had long been concerned.

IV. *Sisson v. Ruby*

Around the time that the lower federal appellate courts were closing their doors to asbestos cases brought by reference to maritime law, the Supreme Court returned to the issue of the parameters surrounding admiralty jurisdiction in *Sisson v. Ruby*. [18] In that case, a fire broke out on a pleasure boat docked at a pier on Lake Michigan. The fire, which was believed to have started in the area of a washer/dryer unit, spread to the pier and other vessels docked at the marina. The vessel owner filed in federal court under the Limitation of Liability Act, which provides protection for a vessel owner from claims of damage by limiting recovery to the value of the vessel. [19]

Quickly finding that the incident in question satisfied the locality test of maritime jurisdiction that had existed for more than a century, Justice Marshall, again writing for the majority (and this time picking up Justices Rehnquist and O'Connor, two of the four dissenters from *Foremost Insurance*) turned to the nexus test first announced in *Executive Jet*. Reviewing those two decisions, the Court explained that the nexus test which sprung from those decisions was actually comprised of a two-prong inquiry.

The first prong requires a court to assess the "general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." [20] The Court hastened to add that not every accident on navigable waters that might disrupt maritime commerce will support federal admiralty jurisdiction, and that deciding whether a given type of incident is likely to disrupt commercial activity does not turn on the particular incident's facts but on its "general character." Courts look to the "general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." Under the facts of Sisson, the Court elaborated, the jurisdictional inquiry does not turn on the actual effects on maritime commerce of this particular fire on this particular vessel. Instead, the Court described the general features of the case as a fire on a vessel docked at a marina on navigable waters, explaining that such a fire – which the Court described as "one of the most significant hazards facing a vessel" – has a potentially disruptive impact on maritime commerce because it can spread nearby commercial vessels or make the marina inaccessible to such vessels. This general category of incident plainly satisfied the first prong of the nexus requirement.

The second prong of the nexus test, the *Sisson* Court explained, requires a substantial relationship between the wrong and a traditional maritime activity. The Court again asserted that the relevant activity is not defined "by the particular circumstances of the incident, but by the general conduct from which the incident arose." [21] Applying that rule to the case before it, *Sisson* described the relevant activity as the "storage and maintenance of a vessel at a marina on navigable waters."

With that established, the Court invoked the language of *Foremost Insurance*, reasoning that the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce. That interest, the Court stated, cannot be fully vindicated unless "all operators of vessels on navigable waters are subject to uniform rules of conduct." The Court held that, just like navigation, storing and maintaining a vessel at a marina on a navigable water way is substantially related to a traditional maritime activity. At such a marina, vessels are stored for an extended period, docked to obtain fuels or supplies, and moved into and out of navigation.

Because the location test was satisfied and both prongs of the "nexus" test were also satisfied, *Sisson* fell within maritime jurisdiction.

V. *Grubart v. Great Lakes* – The Court's Most Recent Pronouncement on the Jurisdictional Test

There things stood when the Court returned to the issue of maritime jurisdiction in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.* [22] In *Grubart*, a dredge company's barge working on underwater structures in the Chicago River caused the flooding of several downtown properties in the City of Chicago. Like the vessel owner in *Sisson*, the dredge company also filed suit in federal court under the Limitation of Liability Act. Justice Souter's opinion in *Grubart* is the last decision in which the Court addressed its test for establishing maritime jurisdiction over tort claims.

The Court began by stating that the party asserting the application of maritime jurisdiction who bears the burden of establishing maritime jurisdiction. In terms of how that burden is to be met, the Court rejected the Fifth Circuit's four-part test in *Kelly* as overly complicated. Instead the Court, hearkening back to its own prior decisions, pronounced the test for maritime jurisdiction that governs today. First, the party must satisfy the "locality" test, "demonstrating that the alleged negligence occurred in the navigable waters of the United States." [23] Second, the party must satisfy the "connection" (or nexus) test for maritime jurisdiction. This element of the *Grubart* test

is, in turn, comprised of two prongs: (i) whether (reviewed at an "intermediate level of possible generality") the "general features of the type of incident involved" have a "potentially disruptive impact on maritime commerce"; and (ii) whether the "general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity."

Having set forth the test, the Court applied it. There was no doubt that the first (locality) test was met. The Chicago River is a navigable water and the injury was caused by a vessel (the barge) afloat on the River. Addressing the second (connection) test, the Court described the first prong thereunder as determining "whether the incident could be seen within a class of incidents that posed more than a fanciful risk to commercial shipping." Here, the Court described the incident as one of "damage by a vessel in navigable water to an underwater structure" and explained that such an event "could lead to restrictions on the navigational use of the waterway during required repairs."[24]

Turning to the "substantial relationship" prong of the connection test, the Court described its jurisdictional assessment as one aimed at the "same objectives" as the Fifth Circuit's test in *Kelly*, which is to "weed out torts without a maritime connection," reasoning that the test turns on the comparison of traditional maritime activity to the arguably maritime character of the tortfeasor's activity. The Court determined that this test is aimed specifically at whether "a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply…."[25] The Court explained that navigation of boats on navigable waters and storing a boat at a marina on navigable waters are "close enough" to establish maritime jurisdiction. Analogizing those situations to the facts before it, the Court described the defendant's activities as "repair and maintenance work on a navigable waterway performed from a vessel" and held that "there is no question that the activity is substantially related to traditional maritime activity."[26]

Meanwhile, the Court rejected defendant City of Chicago's argument that admiralty jurisdiction was absent because the City's alleged wrongful activity, maintaining and operating a tunnel, did not resemble traditional maritime activity. The Court observed that *Sisson* upheld jurisdiction without considering the activities of the manufacturer of the washer/dryer unit onboard the vessel that was believed to have been the source of the conflagration, even though the product manufacturer's activities were "hardly maritime" within the contemplation of *Grubart* or its predecessors.[27] *Grubart* concluded that the substantial-relationship prong is satisfied "when at least one alleged tortfeasor was engaging in activity substantially related to traditional maritime activity and such activity is claimed to have been a proximate cause of the incident."[28] Having said that, the Court did not make a finding that maritime jurisdiction extended over the claims against every defendant in a case, including those whose activities were deemed to be "hardly maritime" in nature. In her concurring opinion in *Grubart*, Justice O'Connor wrote separately to offer: "I do not … understand the Court's opinion to suggest that, having found admiralty jurisdiction over a particular claim against a particular party, a court *must* then exercise admiralty jurisdiction over *all* the claims and parties involved in the case. Rather, the court should engage in the usual supplemental jurisdiction and impleader inquiries."

VI. Asbestos Cases After *Grubart* Appear to Have Misapplied the Maritime Jurisdiction Test

In light of *Grubart*'s rejection of the *Kelly* test, litigants began asking courts (including state courts, as discussed below) to reconsider the circuits' previous holdings that maritime jurisdiction did not extend over ship-related asbestos claims. application of maritime law to such claims. The result has been effective, as many such courts have since concluded that with *Grubart*, asbestos claims are now properly brought under maritime law. That said, examination of these more recent decisions reveals two overarching issues with those cases that merit consideration. The first centers on what is almost certainly a misapplication – and overextension – of the two-prong connection test cultivated by the Court from *Executive Jet* to *Grubart*.[29] The second surrounds the treatment (or lack thereof) these post-*Grubart* cases give to the earlier federal circuit court cases. This article addresses each of these in turn.

A. The Post-*Grubart* Asbestos Cases Apparent Misapplication of the Second Prong of the "Connection" Test for Maritime Jurisdiction

The U.S. Supreme Court made clear in *Grubart* that the inquiry to be made under the "substantial relationship" prong of its connection test is to "ask whether a *tortfeasor's activity*, commercial or non-commercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." Thus, the only relevant activity to application of the substantial relationship prong is: that of the defendant which takes place on navigable waters. It is in their lack of focus on defendants' conduct in this regard that the post-*Grubart* decisions have consistently misconstrued the instructions of the Court in assessing the reach of maritime jurisdiction.

For example, the first such case found, *Lambert v. Babcock & Wilcox Co.*,[30] addressed claims by a Navy sailor for asbestos exposure. In finding that the plaintiff's claim satisfied the "substantial relationship" prong of *Grubart*'s connection test, the district court defined the activity in question as "the maintenance and operation of a ship's boiler room," which the court held was "vital to the ship's ability to conduct maritime related activities." In doing so, the court focused on the ship's activity, rather than that of the manufacturers who provided the asbestos-containing products at issue.

The same can be said of the Supreme Court of Virginia's decision in *Garlock Sealing Technologies, LLC v. Little*.[31] *Little* reasoned that "ship repair" – which was the work done by the plaintiff, not the product supplier – was a maritime activity. Indeed, the conclusion that the Court's focus in *Little* was not on the product defendant before it is further evinced by the fact that the case law to which it cited (four U.S. Supreme Court and two state supreme

court decisions) all dealt with defendants who were actually in the business of repairing ships (i.e., shipyards), or were the vessel owners themselves. Both of those types of entities are traditional maritime defendants. [32]

Two years after *Little* was decided, the Supreme Court of Virginia returned to the question of maritime jurisdiction in *John Crane, Inc. v. Jones*. [33] This time, the manufacturer being sued argued that the manufacture and sale of asbestos-containing products into the stream of commerce is too far removed from traditional maritime activities to create the necessary relationship that would support the exercise of maritime jurisdiction. Rejecting that argument, the court now emphasized the company's advertising efforts, explaining that the company marketed its material directly for the marine industry and advertised its products for marine engine and general ship use. The court held that this marketing activity bore a substantial relationship to traditional maritime activity. According to the court, the fact that the company did not directly undertake any activity aboard a maritime vessel did not obviate the connection.

The reliance in *Jones* on the marketing activities of the defendant is contradicted by federal precedent. [34]

> A presumption underlying the constitutional grant of federal admiralty jurisdiction was the need to establish a uniform body of maritime law for the nation. For the same reason Congress was given legislative authority over that subject. A correlative doctrine has developed to the effect that state legislatures are without authority either to extend or to restrict federal admiraltyjurisdiction. In order to achieve the constitutionalobjective underlying the grant of admiralty jurisdiction, the power of state courts and state legislatures to create or destroy remedies that might be sought under the saving to suitors clause has been limited.274 Va. 581, 650 S.E.2d 851 (Va. 2007). Neal v. McGinnis, Inc., 716 F. Supp. 996, 998 (E.D. Ky. 1989) (quoting 14 Wright & Miller, Federal Practice and Procedure §3672 (1985) (emphasis added); Kulesza v. Scout Boats, Inc., No. 99-3488, 2000 U.S. Dist. LEXIS 11972 at *14 n.3 (E.D. Pa. Aug. 8, 2000) (unpublished opinion) (same). First, as the *en banc* Fourth Circuit explained in *Oman v. Johns-Manville Corp.*, [35] relying on the marketing of products as a basis for federal maritime jurisdiction is "inconsistent with *Executive Jet* and *Foremost Insurance*. Under this requirement, the nexus test would be met with some products whose use in maritime commerce is important but which do not raise the traditional maritime concerns discussed in *Executive Jet*." Indeed, not only does reliance on the marketing activity of a defendant run afoul of the Supreme Court's earlier decisions in *Executive Jet* and *Foremost Insurance*, it similarly falls short under *Grubart*, which makes clear under its "connection" test that courts look at "a tortfeasor's activity … *on navigable waters*."

Thus, the test to be applied is not the same as that employed when considering the exercise of personal jurisdiction. The inquiry is not whether and to what extent a defendant directed activity (like marketing or advertising) towards a particular jurisdiction, in order to establish jurisdiction over that party in an *International Shoe* type analysis. Instead, as the *Grubart* Court reiterated, the question is one of connection between the defendant and the subject matter of the admiralty; in particular, whether a defendant's acts are "so closely related to activity traditionally subject to admiralty law that the reasons for applying specialty admiralty rules would apply in the suit and hand." Nowhere has the Supreme Court (or any federal appellate court) held that advertising is closely related to any traditional maritime activity. The *Jones* court's emphasis on land-based marketing by a land-based company was not relevant to the subject matter jurisdiction inquiry established in *Grubart*.

Turning next to the decision in *In re Asbestos Litigation*, [36] out of Delaware, the state court again found that maritime jurisdiction extended over asbestos claims. In so holding, the court acknowledged that the activities of product defendants were "a far cry from the maritime-related activities of the barge owner in *Grubart*, or the owner of the yacht docked at a marina in *Sisson*." The decision even conceded that the conduct of product manufacturers may not "lie at the heart of traditional maritime activities." Nevertheless, the court reasoned that the conduct of product suppliers does relate to systems that are "'essential for the proper functioning of' naval ships, at least more than washer/dryers."

At the outset, it is difficult to contemplate any product aboard a ship (other than, apparently, a washer and dryer) that would not invoke maritime jurisdiction under this decision. But the Delaware court's decision offers a more fundamental problem than even the decisions above in *Lambert* and *Little*. By admitting the conduct of the defendant did not "lie at the heart of traditional maritime activities," the Delaware court effectively conceded that the maritime concerns expressed in *Executive Jet* and its progeny did not exist in the case yet extended maritime jurisdiction anyway. The critique of *Lambert* and *Little* above discussed how they misconstrued the meaning of the second prong of the connection test in *Grubart*, through their focus on what was "essential" to the functioning of a vessel and not the activity of any manufacturer who provided the asbestos-containing product at issue. The Delaware court did not misconstrue the second prong of the connection test. It simply dismissed its importance.

Perhaps the most consequential opinion post-*Grubart* has been the decision in *Conner v. Alfa Laval, Inc.* [37] Because the Eastern District of Pennsylvania is home to the federal system's multi-district litigation involving asbestos, other federal courts look to its decisions for "useful guidance." [38] *Conner* involved asbestos claims brought on behalf of three Navy sailors. The court did focus on the products of the defendants rather than the activity taking place onboard ship. But contrary to the circuit court cases unanimously finding that maritime jurisdiction does not reach land-based product manufacturers, the MDL court in *Conner* held that such claims did fall within maritime jurisdiction. It dedicated just two short paragraphs to the second prong of *Grubart*'s connection test.

In doing so, the MDL court distinguished those earlier federal appellate decisions by asserting that "unlike the asbestos manufacturers who were defendants" in those cases, whose products again were asbestos insulation, "the products manufactured in these cases – turbines, pumps, purifiers, generators, boilers, valves, gaskets, packing, and steam traps – were essential for the proper functioning of ships and made for that purpose." The problem with this reasoning is that the typical asbestos-containing products at issue in cases involving vessels

are insulation, gaskets, and packing. More specifically, the equipment manufacturers (turbines, pumps, valves, etc.) at issue in *Conner* are sued for the presence of these components in their equipment. It is hard to understand how a strand of packing in a valve stem is any more "essential" to the proper operation of a vessel than is the insulation – to which maritime jurisdiction has been held unanimously not to apply – that is ubiquitous onboard Navy fighting ships. *Conner*'s conclusory statement to the contrary draws between these various components a distinction without a difference.

There was a fourth plaintiff presented in *Conner*, a land-based shipyard worker. Although this shipyard plaintiff's claim could not easily be distinguished from that of the Navy plaintiffs with whose claims his was joined – other than the amount of time the former split between doing his work on vessels and on land – his suit was found not to fall within maritime jurisdiction. Curiously, while the *Conner* court found that exposure by sailors to defective products while doing repair work could potentially slow or frustrate work done on the vessels, it held that the same exposures by shipyard workers, despite the possibility of the "same disruptions to maritime commerce," were "too attenuated" to fall within the reach of the admiralty. That appears to contradict the Supreme Court's opinion 40 years earlier in *Executive Jet*. The *Conner* court's distinction between the land-based and seafaring workers attached controlling significance to the plaintiff's location. *Executive Jet* expressly rejected exclusive reliance on location to determine maritime jurisdiction.

B. The Circuit Court Decisions of the 1980s Can be Easily Reconciled with *Sisson* and *Grubart*

Turning to the second issue raised by the extension of maritime jurisdiction by the post-*Grubart* asbestos cases, the treatment (or lack thereof) they give to the earlier federal circuit court cases, it is worth pointing out here that the Court in *Grubart* expressly recognized that its test and those of the federal courts of appeals were both "aimed at the same objectives … the elimination of admiralty jurisdiction where the rationale for the jurisdiction does not support it." Equally as important, nowhere in *Grubart* – which did not deal with product liability claims generally or asbestos specifically – does the Court ever even suggest (much less hold) that the eight federal circuits had reached the wrong decision. In fact, these decisions continue to be cited as good law. [39]

Not only are the two bodies of cases "aimed at the same objective" of excluding cases from the reach of maritime jurisdiction, the decisions of the federal appellate courts can easily be reconciled with the test articulated in *Grubart*. Both apply "locality" and "connection" tests. Both examine the "connection" test under the same "disruptive impact" and "substantial relationship" prongs. It is only in their examination of the "substantial relationship" prong of the connection test that the lower federal appeals courts looked at essentially four elements (rather than two): (i) the function and roles of the parties; (ii) the types of vehicles and instrumentalities involved; (iii) causation and the nature of the injury suffered; and (iv) traditional concepts of admiralty rules.

1. *Sisson* and *Grubart* Did Not Alter *Executive Jet* or *Foremost Insurance*, the Precedent on which the Circuit Court Decisions were Based

The importance of the lower court decisions is not in how they framed the test, but that they reached consistent conclusions that fit neatly within *Grubart*'s articulation of the connection test. Moreover, nothing in *Grubart* suggests – much less expresses – a desire to set aside the principles espoused in its earlier decisions in *Executive Jet* and *Foremost Insurance*. As to the latter case, it is notable that even in a case involving a collision between vessels on navigable waters, the exercise of maritime jurisdiction was upheld by the slimmest of margins. With that established, and in conducting their respective analyses, those eight earlier decisions faithfully and repeatedly apply the principles set forth in *Executive Jet* and *Foremost Insurance*.

From one case to the next, these decisions repeatedly invoked the principles espoused by the Supreme Court in those earlier cases, noting that asbestos litigation does not implicate the rules of navigation, the interests of vessel operators, or the concerns of maritime liens, the general average, captures and prizes, limitation of liability, cargo damage, or claims of salvage with which the law of the sea had become familiar through long experience. Indeed, they explained that contracts for services to a vessel laid up and out of navigation lacked a "maritime flavor."

These courts also reasoned that asbestos claims do not require the conceptual expertise of the admiralty, but instead involved garden variety torts for which the state courts – invoking federalism concerns – were well equipped (not to mention experienced) to handle. In short, such claims were only "fortuitously and incidentally" connected to navigable waters. As such, these asbestos cases failed to implicate the traditional concepts of seagoing navigation and commerce with which maritime law had long been concerned.

Two other points should be made about *Grubart* and *Sisson*. The procedural posture of both cases was the same: vessel owners filing suit in federal court to minimize their financial exposure under the federal Limitation of Liability Act. Such interests regarding "limitations of liability" are expressly recognized by the Supreme Court (in the block quote above from *Executive Jet*) as among those with which maritime law has long been concerned. As to *Sisson*, it should be noted that two of the dissenting Justices from the 5 to 4 decision in *Foremost Insurance*, Justices Rehnquist and O'Connor, joined the majority opinion in *Sisson*. Neither could be mistaken for favoring the expansion of the national government's authority at the expense of the federalism concerns expressed in *Executive Jet*. Indeed, Justice Rehnquist was a member of the unanimous Court there that emphasized those concerns. Likewise, Justice O'Connor's concurring opinion in *Grubart* highlighted her sensitivity to the instruction in Victory Carriers that federal courts "proceed with caution" when determining the balance of interests between the state and federal governments. Neither *Sisson* nor *Grubart* could – or should – be read as visiting the sort of sea change upon the jurisdictional analysis of *Executive Jet* and *Foremost Insurance* that is suggested by the post-*Grubart* asbestos cases discussed above.

2. Product Manufacturers in Asbestos Cases are Analagous to the Washer/Dryer Manufacturer in *Sisson*

Grubart found it important to recognize the distinction between the vessel owner at issue in that case and the actual manufacturer of the washer/dryer unit that was the apparent source of the fire. Most importantly, while the Court explained that the vessel owner was readily engaged in traditional maritime activities, the Court at the same time observed that "the activities of the washer/dryer manufacturer, who was possibly an additional tortfeasor … were *hardly maritime*…". This same rationale was employed by a federal district court in Florida. In *Harris v. Flow International Corp.*,[40] the plaintiff claimed injury from an industrial strength washer that he was using while cleaning and scraping the hull of a ship. The court likened the manufacturer of the washer to the washer/dryer manufacturer in *Sisson* and concluded that the washer manufacturer in its case did not satisfy maritime jurisdiction.

In its concluding passages, *Grubart* stated that the case law had "carved out the approximate shape of admiralty jurisdiction in a way that admiralty lawyers understand reasonably well." As those lower courts explained, the asbestos fibers themselves, the products into which asbestos was incorporated, the tools used on asbestos-containing products, and any safety equipment "possess few maritime attributes."[41] They are not designed "specifically for maritime use," but are instead "used in a variety of land-based plants and refineries."[42] In short, these products have "no uniquely maritime character."[43] Thus, what practitioners addressing asbestos claims under maritime law understood reasonably well before *Grubart* – indeed, every court addressing the matter had held as such – was that such claims, based upon the teaching of *Executive Jet* and *Foremost Insurance*, had indeed been carved out of maritime jurisprudence. Nothing in *Grubart* changed that.

VII. Conclusion

Like the product manufacturers discussed in *Grubart*, and as unanimously recognized by the federal appellate courts, the activities of a land-based product manufacturer whose goods end up on a vessel are "hardly maritime" in nature. As those courts recognized, framing their findings in the language of *Grubart*, the conduct of those product suppliers is not "closely related to activity traditionally subject to admiralty law," nor does their business invoke "the reasons for applying special admiralty rules."

The Constitution makes clear that the exercise of admiralty jurisdiction must be "scrupulously confined" to the limits contemplated therein.[44] Courts therefore must ensure that the sovereign rights of states are not infringed and a compelling argument can be made that courts should restrain the expansion of maritime jurisdiction to these garden variety product liability cases, to which the federal appellate courts have consistently held maritime jurisdiction not to apply.

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