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Governmental Immunity Under the Suits in Admiralty Act, The Public Vessels Act, and the Federal Tort Claims Act

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Today, more than 90 percent of U.S. war fighters' equipment and supplies travels by sea.[1] *Military Sealift Command, MSC,* provides high-quality, efficient and cost-effective ocean transportation for the Department of Defense and other federal agencies during peacetime and war. The program manages a mix of 123 government-owned and long-term-chartered dry cargo ships and tankers, as well as additional short-term or voyage-chartered ships. Civilian mariners account for 80 percent of the MSC workforce. In addition, MSC has access to the Maritime Administration's Ready Reserve Fleet consisting of approximately 46 ships.[2] That is a total of 169 commercially-operated but government-owned vessels. According to the Maritime Administration there are a total of 179 United States-flagged, privately-owned ocean-going merchant vessels.[3] When one views this data from the perspective of the ocean-going U.S. civilian seaman, employment on government-owned vessels makes up approximately half the job market. As this Comment will discuss, the government's liability as a shipowner is very different from the liability of private commercial shipowners, and this has an important impact on the rights of seamen and third-party litigants.

I
INTRODUCTION

According to the doctrine of sovereign immunity, the United States, as a sovereign government, cannot be sued unless it has expressly consented to be

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[1]See *Military Sealift Command's Strategic Plan 2012-2018,* available at http://www.msc.navy.mil/publications/MSC_StrategicPlan.pdf.

[2]The Maritime Administration's Ready Reserve Force, (Apr. 9, 2014), available at http://www.marad.dot.gov/ships_shipping_landing_page/national_security/ship_operations/ready_reserve_force/ready_reserve_force.htm.

[3]*United States Flag Privately-Owned Merchant Fleet, 2000 – 2014,* available at http://www.marad.dot.gov/library_landing_page/data_and_statistics/Data_and_Statistics.htm.

sued.[4] In the realm of admiralty law, the federal government has done just that in five statutes: the Suits in Admiralty Act (SAA),[5] the Public Vessels Act (PVA),[6] the Federal Torts Claims Act (FTCA),[7] the Tucker Act,[8] and the Contract Disputes Act.[9] Under these statutes, a suit can be brought against the United States *almost* like it could against any private party.

The waiver of sovereign immunity is strictly construed in favor of the United States.[10] Further, it is important to remember that the waiver of sovereign immunity by itself does not create a cause of action. As the United States Court of Appeals for the Fifth Circuit has correctly pointed out, these acts merely waive sovereign immunity and provide subject matter jurisdiction; the plaintiff must still have a traditional admiralty claim that can be brought against a private party.[11]

First, this Comment will examine the historical background of the United States waiver of sovereign immunity in admiralty law. Second, each of the tort statutes will be examined in turn: The Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act. Third, this Comment will examine special government defenses applicable to the actions. Finally, this Comment will discuss the complications that arise when a party brings a claim against the government under the wrong statute, only to be time-barred from bringing his claim under the correct statute. The unification of the civil and admiralty rules of procedure, as well as the liberalization in pleading and amendments to complaints, have helped, but problems still persist.[12]

II
HISTORICAL BACKGROUND OF THE SUITS IN ADMIRALTY ACT AND THE PUBLIC VESSELS ACT

Prior to 1916, the doctrine of sovereign immunity barred any suit by a private owner whose vessel was damaged by a vessel owned or operated by the

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[4]See United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941).

[5]46 U.S.C.A. §§ 741-752 (2000), recodified at 46 U.S.C. § 30901 et seq (2006).

[6]46 U.S.C.A. §§ 781-790 (2000), recodified at 46 U.S.C. § 31101 et seq (2006).

[7]28 U.S.C. §§ 1346(b), 1402, 2401-2402, 2412, 2671-2680 (2012).

[8]28 U.S.C. §§ 1346(a)(2), 1491(a)(1), 2401-2402, 2412 (2012).

[9]41 U.S.C. §§ 601-613 (2006).

[10]Servis v. Hiller Systems Inc., 54 F.3d 203 (4th Cir. 1995).

[11]Trautman v. Buck Steber, Inc., 693 F.2d 440, 444 (5th Cir. 1982) ("[T]he act merely provides a jurisdictional hook upon which to hang a traditional admiralty claim.").

[12]See Miller v. United States, 2011 WL 43616 (E.D. Wash. 2011) (refusing the plaintiff leave to amend the claim to properly seek relief under the SAA after improperly filing under the FTCA).

United States.[13] This meant that although the United States could recover damages caused by the negligent operation of a private vessel, a private vessel owner could not recover damages caused by the negligent operation of a public vessel under the same circumstances.[14] While Europe was engaged in World War I, the United States felt the ill effects of a world-wide shipping shortage, and enacted the Shipping Act of 1916 to create a "naval auxiliary" fleet to help meet the needs of the country's economy.[15] The United States then became a major player in the merchant shipping industry, and responded to the inequity suffered by private vessel owners by stating that government-owned Shipping Board vessels employed as merchant vessels were subject to the same laws as privately-owned merchant vessels.[16]

Applying the Shipping Act in 1919, the Supreme Court held that "subject to the same laws" meant that Shipping Board vessels were subject to the traditional admiralty *in rem* and *quasi in rem* procedures of arrest and attachment.[17] In *The Lake Monroe*, the Shipping Board purchased the LAKE MONROE, documented it in the name of the United States, assigned an operating and managing agent, and directed the vessel to carry coal in coastwise commerce.[18] In October of 1918, the LAKE MONROE collided with and sunk a fishing schooner off the coast of Cape Cod. The schooner's owner began arrest proceedings in the United States District Court for the District of Massachusetts. The United States made a special appearance and argued that because the vessel was the property of the United States and in its possession and control, the Court was without jurisdiction to enforce claims against her. The Court noted that the government did have an indirect interest in the vessel and the outcome of her voyage, but nonetheless her service at the time of the collision was purely commercial. Thus, the Court held that by the terms of the Shipping Act, "subject to all laws" meant that

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[13]See 1 Robert Force & Martin J. Norris, THE LAW OF SEAMEN §§ 14:4 (5th ed. 2003) ("The doctrine of sovereign immunity is sometimes expressed as the theory that "the King can do no wrong," and sometimes that there can be no legal right against the authority which itself makes the laws on which the right depends.") (internal citations omitted). See also Canadian Aviator v. United States, 324 U.S. 215, 218-219 (1945).

[14]Canadian Aviator, 324 U.S. at 219.

[15]The Shipping Act was passed "for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States; and for other purposes." 39 Stat. 730, 731 46 U.S.C. § 808 (1916).

[16]The Shipping Act provided: "Every vessel purchased, chartered, or leased from the board while employed solely as merchant vessels shall be subject to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested therein as owner, in whole or in part, or hold any mortgage, lien, or other interest therein." 39 Stat. 730, 731 46 U.S.C. § 808 (1916).

[17]The Lake Monroe, 250 U.S. 246 (1919).

[18]Id. at 249.

the LAKE MONROE was subject to the ordinary liability of a merchant vessel for the consequence of a collision, including *in rem* process.

The Lake Monroe decision prompted Congress to pass the Suits in Admiralty Act, out of the concern that the arrest and seizure of Shipping Board vessels would occasion unnecessary delay and expense.[19] The Suits in Admiralty Act expressly released government-owned vessels employed as merchant vessels from arrest and attachment, thereby overruling *The Lake Monroe*.[20] As originally enacted, The Suits in Admiralty Act provided:

> [I]n cases where if such vessel were privately owned or operated, or if cargo were privately owned and possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, . . . a libel in personam may be brought against the United States, . . . provided that such vessel is employed as a merchant vessel.[21]

A few months after the LAKE MONROE collision, another vessel owned by the Shipping Board was involved in a collision in New York Harbor in *The Western Maid*.[22] The WESTERN MAID was owned and operated by the United States, manned by a navy crew, and under instructions to deliver food aid to the civilian population in Europe during World War I. The Court rejected the argument that the WESTERN MAID was operated as a merchant vessel at the time of the collision merely because the food aid had to be paid for; it was clear the vessel was engaged in the public service as part of the war effort. The Court held that unlike the LAKE MONROE, government vessels *in public service* are not subject to arrest for collisions. The Court reasoned, "The personality of a public vessel is merged in that of the sovereign."[23]

Just as *The Lake Monroe* decision prompted Congress to pass the Suits in Admiralty Act, *The Western Maid* decision prompted Congress to pass the Public Vessels Act in 1925, authorizing claims *in personam* against public vessels, such as warships.[24] The Public Vessels Act provides a waiver of sovereign immunity in admiralty cases against the United States where a tort arises from the possession or operation of a public vessel. As originally enacted it provided, "[A] libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States, and for compensation for towage and salvage services,

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[19]See S. REP. NO. 223, 66th Cong., 1st Sess. (1919); H.R. REP. NO. 497, 66th Cong., 2d Sess. (1919).

[20]Id.

[21]Act of March 9, 1920, ch. 95, 41 Stat. 525.

[22]257 U.S. 419, 430 (1922).

[23]Id. at 433.

[24]See 2 Thomas J. Schoenbaum, ADMIRALTY AND MARITIME LAW § 20-1, 496 n.29 (5th ed. 2011).

including contract salvage, rendered to a public vessel of the United States."[25]

III
THE SUITS IN ADMIRALTY ACT

A. General Provisions

The Suits in Admiralty Act was originally enacted into the Appendix of Title 46 of the United States Code, and was recodified in 2006 as a part of Subtitle III, Maritime Liability, of Title 46 itself. The substance of the Suits in Admiralty Act, waiver of liability, authorizes suit *in personam* against the United States, providing:

> (a) In general.—In a case in which, if a vessel were privately owned or operated, or if cargo were privately owned or possessed, or if a private person or property were involved, a civil action in admiralty could be maintained, a civil action in admiralty in personam may be brought against the United States or a federally-owned corporation. In a civil action in admiralty brought by the United States or a federally-owned corporation, an admiralty claim in personam may be filed or a setoff claimed against the United States or corporation.
>
> (b) Non-jury.—A claim against the United States or a federally-owned corporation under this section shall be tried without a jury.[26]

However, in providing an *in personam* action under the SAA, the United States has not consented to be sued *in rem*. The SAA broadly provides that neither "a vessel owned by, possessed by, or operated by or for the United States or a federally-owned corporation" nor "cargo owned or possessed by the United States or a federally-owned corporation" is subject to arrest or seizure by judicial process in the United States.[27]

Although government vessels and cargo are exempt from arrest, an SAA action may proceed under the principles of an action *in rem* if the plaintiff so elects, and the plaintiff may also seek relief *in personam* in the same action.[28] For the most part, the SAA puts the United States in the same position as any private party, and like private parties the United States is also

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[25]46 U.S.C. § 31102 (2006); see also 46 U.S.C. § 31103 (incorporating the procedures of the Suits in Admiralty Act, 46 U.S.C. § 30901 by reference).

[26]46 U.S.C. § 30903 (2006).

[27]Id. § 30908.

[28]Id. § 30907.

entitled to limit its liability,[29] receive compensation for salvage services,[30] and may arbitrate or settle claims.[31] The United States is relieved of providing security if the vessel is arrested or attached in a domestic jurisdiction,[32] but where a vessel or cargo under the SAA is arrested or attached in a foreign jurisdiction, the Attorney General may execute a bond or pledge the credit of the United States for the vessel's release.[33]

Further, the remedy against the United States as provided by the SAA is exclusive of all other actions arising from the same subject matter against any "officer, employee, or agent of the United States whose act or omission gave rise to the claim."[34] The action must be brought within two years from when the claim arises.[35] For torts, this is the date of the injury, not the time when an administrative claim is disallowed.[36] Notably, although the SAA is intended to treat the government like a private party, there are certain circumstances with respect to seamen's claims where the government gets express advantages. For example, where the Jones Act provides for a three year statute of limitations, against the United States, the same Jones Act claim's limitation is fixed at the two years provided by the SAA.[37] Thus, the rules of the Jones Act only apply to the extent that they are inconsistent with the SAA; in the Jones Act seaman's suit against the United States, he loses one year from the time within which he can bring suit.[38] Further, despite the fact that the Jones Act provides a seaman a right to *in rem* process and a jury trial against his employer, when the seaman's Jones Act claim is brought against the United States, there is no right to *in rem* process or a jury trial.[39] Additionally, it is well-settled that punitive damages are not recoverable against the United States.[40]

Suit must be brought in the district court of the United States for the district in which (1) any plaintiff resides or has its principal place of business; or (2) the vessel or cargo is found.[41] However, if the United States is willing

[29]Id. § 30910.
[30]Id. § 30916.
[31]Id. § 30912.
[32]Id. §§ 30909, 30914.
[33]Id. § 30915.
[34]Id. § 30904.
[35]Id. §30905.
[36]McMahon v. United States, 342 U.S. 25, 27 (1951).
[37]See, e.g., Kakara v. United States, 157 F.2d 578, 579 (9th Cir. 1946)
[38]Id.
[39]See, e.g., Kakara, 157 F.2d at 579.
[40]Mo. Pac. R. Co. v. Ault, 256 U.S. 554 (1921).
[41]Id. §§30905-30906.

to defend in a different place, because the venue provision is not jurisdictional, it may be waived.[42]

Although there is no absolute entitlement to pre-judgment interest in general maritime law, absent inequitable circumstances, interest is usually awarded in the discretion of the court.[43] By contrast, there is a general rule that interest may not be recovered against the United States in the absence of a statute or contract provision providing otherwise.[44] Under the SAA, a money judgment against the United States *may* include costs[45] and 4 percent interest from the time of the suit's filing to the date of payment, unless a higher rate is stipulated in the contract.[46] Interest may not accrue prior to the filing of the suit except pursuant to an express contract stipulation[47] and compound interest is not presumed to run against the United States.[48] Judge Alvin Rubin noted that the interest provision in the SAA creates an anomaly; in a single suit, courts must sometimes apply different rates running during different periods depending on whether the claim is against a private party or the United States.[49]

As originally enacted, the SAA had special technical requirements for service of process, the "libellant" was required to serve a copy of his "libel" "forthwith."[50] In *Henderson v. United States*, the Supreme Court considered whether the Federal Rules of Civil Procedure, which authorize a 120-day extendable period for service of process, superseded the SAA "forthwith"

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[42]Hoiness v. United States, 335 U.S. 297, 301-02 (1948); The Umbria, 166 U.S. 404 (1897).

[43]Jeb T. Terrien, *Prejudgment Interest in General Maritime Law: A Study in Confusion "As Pre-Paid Damages Must Be Reduced at A Market Rate That Takes Account of Inflation, So Postpaid Damages Must Be Increased.,"* 20 TUL. MAR. L.J. 441, 447 (1996) (quoting City of Milwaukee v. Cement Div., Nat. Gypsum Co., 515 U.S. 189, 196 (1995)). See also Kurowsky v. United States, 660 F. Supp. 451 (S.D.N.Y. 1987).

[44]See Bos. Sand & Gravel Co. v. United States, 278 U.S. 41 (1928).

[45]Items of allowable costs, which do not include the fees and expenses of attorneys, are set out in 28 U.S.C. § 1920 (2012). Further, where the United States files suit against a private party, and that defendant obtains a dismissal, the successful defendant is entitled to costs. 28 U.S.C. 2412 (2012).

[46]46 U.S.C. § 30911(b).

[47]Id. § 30911(a).

[48]United States v. Isthmian S.S. Co., 359 U.S. 314 (1959).

[49]In that regard, the United States gets a discount. See Complaint of Sincere Navigation Corp., 447 F. Supp. 672, 674-76 (Judge Alvin Rubin, sitting as district judge by special designation of Chief Judge John R. Brown) (holding private party entitled to interest against the United States at 4 percent, and United States entitled to interest on its cross-claim at 6 percent although both judged according to the same standard of care).

[50]Act of March 9, 1920, ch. 95, 41 Stat. 525, section 2. The unification of the rules of admiralty and civil procedure in 1966 eliminated "mystical" terminology and remedied procedural technicalities such as the "dismissal of actions filed on the wrong 'side' of the court...." For example, the admiralty side used the following terminology: plaintiffs were called "libellants," defendants were "respondents," "complaints were "libels," and lawyers were "proctors in admiralty." Brainerd Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 ME. L. REV. 1, 13-14 (1965).

service provision, and concluded that it did.[51] The Court observed first, that the two provisions were clearly in conflict, and second, that section 2 of the SAA was procedural, not jurisdictional. The Court held that the Federal Rule of Civil Procedure Rule 4 superseded section 2 of the SAA, reasoned that Congress ordered in the Rules Enabling Act that in matters of "practice and procedure" the Federal Rules shall govern and "[a]ll laws in conflict with such rules shall be of no further force or effect."[52] Indeed, the language of the previous section 2 of the SAA was removed in the recodification of the SAA in Title 46.[53]

B. Admiralty Jurisdiction Requirements

Remembering that the waiver of sovereign immunity is merely a jurisdictional hook upon which to hang a traditional admiralty claim, the court must have admiralty subject matter jurisdiction over the claim.[54] Article III, Section 2 of the United States Constitution extends the judicial power of the United States to "all Cases of maritime and admiralty Jurisdiction."[55] Congress later implemented the grant of constitutional power in section 9 of the Judiciary Act of 1789, which provides "[t]hat the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."[56] Neither the Constitution, nor the admiralty jurisdiction statute, contains the criteria for determining when a case is an admiralty or maritime case or the general rules for determining admiralty jurisdiction.[57] The Supreme Court's most recent annunciation of the test for admiralty jurisdiction appears in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*:

> A party seeking to invoke federal admiralty jurisdiction over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must "assess the general features of the type of incident involved," to determine

[51]Henderson v. United States, 517 U.S. 654 (1996).

[52]Id. at 663-669 (quoting the Rules Enabling Act, 28 U.S.C. § 2072 (2012)).

[53]See 46 U.S.C. § 30901 et seq. (2006).

[54]United States v. United Cont'l Tuna Corp., 425 U.S. 164, 176 n.14 (1976).

[55]U.S. Const. art. III, §2.

[56]28 U.S.C. § 1333(1). Notably, the right to sue the United States was not one of the remedies saved to suitors. Judiciary Act 1789, 1 Stat. 76, § 9.

[57]1 Robert Force & Martin J. Norris, THE LAW OF MARITIME PERSONAL INJURIES §1:1 (5th ed. Supp. 2013).

whether the incident has "a potentially disruptive impact on maritime commerce." Second, a court must determine whether "the general character" of the "activity giving rise to the incident" shows a "substantial relationship to traditional maritime activity."[58]

Sometimes, whether the activities of the United States government have the required nexus to traditional maritime activity for admiralty jurisdiction can be a matter of characterization.[59] For example, in *Kelly v. United States*, the plaintiff alleged that the United States Coast Guard was negligent in failing to rescue the decedent after the capsizing of a 19 foot sailboat near Sodus Point, New York, on Lake Ontario. The United States Court of Appeals for the Second Circuit described the case as "not merely a pleasure boat accident case,"[60] but rather a rescue case involving the United States Coast Guard, only "tangentially" related to vessels at all.[61] Thus, because the claim satisfied both the locus and nexus requirements, the suit was properly brought under the SAA.

Further, the court can have federal admiralty subject matter jurisdiction over the claim through the Admiralty Extension Act, which provides that, "[t]he admiralty and maritime jurisdiction of the United States extends to and includes cases of injury or damage, to person or property, caused by a vessel on navigable waters, even though the injury or damage is done or consummated on land."[62] However, there are special procedures for bringing suit against the United States on the basis of jurisdiction under the AEA.[63] First, the exclusive remedy is provided by the Suits in Admiralty Act or the Public Vessels Act, and second, that remedy "may not be brought until the expira-

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[58]Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995).

[59]Kelly v. United States, 531 F.2d 1144 (2d Cir. 1976). Although Kelly was decided before the Supreme Court's decision in Grubart, the Court's instruction that the test is applied without looking too closely or too generally at the details of the case leaves plenty of room for the kind of characterization by courts in Kelly. See e.g., H_2O Houseboat Vacations, Inc. v. Hernandez, 103 F.3d 914 (9th Cir. 1996) (refusing to ignore the "actual incident" that caused the injury).

[60]At the time of the Kelly decision, lower court were unsure whether there was admiralty jurisdiction over cases involving recreational vessels. However, after the Supreme Court's holding in Foremost Ins. Co. v Richardson, 457 U.S. 668 (1982), it is clear that there can be.

[61]Id. at 1147.

[62]46 U.S.C. § 30101 (2006). Note that there is a circuit split over whether the Grubart factors apply to a jurisdictional analysis under the Admiralty Extension Act or whether the AEA provides an independent basis of jurisdiction. The question was expressly reserved by the Supreme Court in Grubart, 513 U.S. at 534 n.5, and the Court has yet to pass on the precise issue. In the United States Court of Appeals for the Fourth and Eighth Circuits and under the interpretation provided by Professors David W. Robertson and Michael F. Sturley, the AEA is an independent basis of jurisdiction. However, in the United States Court of Appeals for the Fifth and Eleventh Circuits, the jurisdictional analysis must continue to determine whether the nexus requirement is met. See, David W. Robertson & Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. MAR. L. & COM. 209 (2003).

[63]Id. § 30101(c).

tion of the 6-month period after the claim has been presented in writing to the agency owning or operating the vessel causing the injury or damage."[64] Thus, this effectively limits the time in which a plaintiff can file suit under the SAA or PVA to 18 months, because the claimant must wait six months for an agency response, but still bring his suit within two years.[65]

For example, in *Anderson v. United States*, the United States Court of Appeals for the Eleventh Circuit found admiralty jurisdiction over the plaintiff's SAA claim through the AEA.[66] In *Anderson*, a civilian was injured when an aircraft launched from the U.S.S. JOHN F. KENNEDY dropped two bombs that missed their targets and injured the plaintiff on Vieques Island, Puerto Rico on April 19, 1999.[67] The Court held that the suit was properly brought under the SAA because the aircraft was an appurtenance of the vessel. The plaintiff filed his administrative claim with the United States twenty-three months after the incident occurred and within the two-year statute of limitations, on March 21, 2001. On April 10, 2001, the United States denied Anderson's claim. Subsequently, on April 18, 2001, less than one month after filing his administrative claim, but still within the two-year statute of limitations, Anderson filed suit in district court. The plaintiff argued that he followed the spirit of the law, if not the letter of the law, by filing his administrative claim within the statute of limitations and awaiting the government's denial before filing suit. The Eleventh Circuit dismissed the plaintiff's suit because he did not comply with the six month waiting period, notwithstanding the fact that the claim had been denied. The Eleventh Circuit expressly rejected the plaintiff's argument that the six-month waiting period was impractical once the claim was denied and therefore should be ignored in such instances. The court reasoned that the AEA itself did not contain textual support for the proposition that once a claim is denied, the waiting period no longer applies.[68] Thus, this is an important feature of an SAA or PVA claim brought against the United States under AEA jurisdiction that can often lead to dismissal of the claims.

Moreover, tort claims brought under the SAA are not limited to personal injury claims, but include some employment-related claims, such as wrongful termination, provided that they are brought against the proper party. For

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[64]Id.

[65]See, e.g, Loeber v. Bay Tankers, Inc., 924 F.2d 1340, 1343 (5th Cir. 1991) (per curiam).

[66]317 F.3d 1235, 1236 (11th Cir. 2003) (per curiam).

[67]Id.

[68]Id. (citing Pacific Bell v. United States, 636 F. Supp. 312 (N.D. Cal. 1986), with approval). The AEA provides: "A civil action [brought against the United States under the SAA or PVA] may not be brought until the expiration of the 6-month period after the claim has been presented in writing to the agency owning or operating the vessel causing the injury or damage." 46 U.S.C. § 30101 (2006).

example, in *Ali v. Rogers*, the United States District Court for the Northern District of California held that a seaman's action for violation of his civil rights based on claims of wrongful termination, discrimination in contracting, and discrimination in hiring fell under the SAA.[69] The seaman, Abdulhalim Ali, was employed aboard the USNS PETERSBURG, a public vessel owned by the United States. The seaman filed suit against the vessel's captain and the Vice President of the vessel's operator, Interocean American Shipping Corp., who was in charge of hiring and termination of employees. The seaman alleged that the Vice President ordered the captain to "terminate the employment of all persons then working aboard the subject vessel who appeared to be of Yemanese origin and/or of Arabic descent and/or a follower of Islam." The court held first that the claim satisfied the admiralty jurisdiction requirement of the SAA. The seaman's presence on the vessel satisfied the location test, and his termination could have had a disruptive impact on maritime commerce because the vessel would have to sail undercrewed. However, because the seaman's claims were subject to the SAA, his claim was ultimately dismissed because the SAA's exclusive remedy was against the United States and not its agent or captain.

Finally, some tort claims involving seamen or maritime contracts are so "salty" that there is admiralty jurisdiction over them notwithstanding the locus and nexus test or the AEA.[70] Some examples include the "blacklisting" of seamen and other tortious interference with seaman's employment contracts,[71] picketing which amounts to tortious interference with a contract of affreightment,[72] and tortious interference with a voyage charter party.[73]

C. Seamen's Claims and the Clarification Act

The Clarification Act gives to seamen employed on government-owned vessels the same rights against the United States as they would have against the owners of private vessels with respect to "death, injuries, illness, maintenance and cure, loss of effects, detention, or repatriation" and "collection

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[69]Ali v. Rogers, 12-CV-0340 NC, 2012 WL 5932672 (N.D. Cal. July 31, 2012).

[70]See Robert Force, *Determining Admiralty Tort Jurisdiction: An Alternative Analytical Framework*, 21 J. MAR. L. & COM. 1, 78-80 (1990).

[71]Carroll v. Protection Maritime Ins. Co., 512 F.2d 41 (1st Cir.1975); Pino v. Protection Maritime Ins. Co., 599 F.2d 10 (1st Cir. 1979).

[72]The Poznan, 276 Fed. 418 (S.D.N.Y. 1921).

[73]Cocotos Steamship of Panama v. Sociedad Maritima Victoria S. A. Panama, 146 F. Supp. 540 (S.D.N.Y. 1956).

of wages."[74] The Clarification Act, like the Admiralty Extension Act, also provides an administrative claim requirement, "Any claim referred to . . . shall, if administratively disallowed in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act, notwithstanding the vessel on which the seaman is employed is not a merchant vessel within the meaning of such Act.[75]

The history and purpose of the Clarification Act was thoroughly discussed by the Supreme Court in *Cosmopolitan Shipping Co. v. McAllister*.[76] The Court considered the national backdrop of the Clarification Act during World War II, noting:

> At the time of the wartime requisition of the privately owned merchant fleet the government administrative agencies gave careful study to the question of whether the crews were to be employees of the shipping companies or the United States. There were outstanding many collective bargaining agreements between the private shipping companies and the maritime unions. It was manifestly undesirable to disturb these existing agreements and for the government to negotiate new ones. Yet it was essential that the masters and crews be government employees in order to obviate strikes and work stoppages, to insure sovereign immunity for the vessels, and to preserve wartime secrecy by confining all litigation concerning the operation of the vessels to the admiralty courts where appropriate security precautions could be observed.[77]

In *Cosmopolitan*, the Court noted that the seaman's remedy for Jones Act negligence could be against only "one person, firm, or corporation."[78] However, the particular issue in that case was whether the operating company of the vessel, Cosmopolitan, or the Government, was the Jones Act employer. The Court then decided the case on the interpretation of the contract between the seaman and Cosmopolitan on one hand and the contract between Cosmopolitan and the United States on the other. The Court then easily concluded that a company like Cosmopolitan, who contracted to manage certain shoreside business of a vessel operated by the War Shipping Administration, was acting as an agent for the United States and therefore not liable to a seaman for injury caused by the negligence of the master or crew as a result of the exclusivity provision.

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[74]50 U.S.C. App. 1291 (2006). The statute refers to "employees of the United States through the War Shipping Administration." Id. The Maritime Administration is the successor of the War Shipping Administration. Martin v. Miller, 64 F.3d 434 (5th Cir. 1995).

[75]Id.

[76]377 U.S. 783 (1949).

[77]Id. at 788-89.

[78]Id. at 791. The Court also noted that the seaman's substantive rights were the same against either defendant, although under the Jones Act he would be entitled to a jury trial against Cosmopolitan, but would not have a right to a jury against the United States. Id.

Although the administrative claim requirements are found in the Clarification Act itself, provisions of the Code of Federal Regulations govern the rules and regulations regarding their enforcement.[79] Section 327.4 sets forth the substantive requirements of a claim[80] which can be filed by the seaman or his beneficiary by personal delivery or registered mail to the Chief of the Maritime Administration's Division of Marine Insurance.[81] In addition, a copy must be sent to the Ship Manager or Agent of the vessel with respect to which the claim arose.[82] If the Maritime Administration fails to give written notice of allowance or disallowance of a claim, in whole or in part, within sixty calendar days following the date of proper receipt of the claim it shall be presumed to have been "administratively disallowed," within the meaning of the Clarification Act.[83] Thus, with regard to claims brought by civilian seamen employed on government-owned vessels, the administrative claim requirement effectively makes the statute of limitations twenty-two months, or sixty days less than the two year statute of limitations provided by section 30905 of the SAA.

The seaman must wait for a claim's actual denial or the sixty day presumed denial period before filing an action in a district court.[84] For example, in *Rodinciuc v. United States*, the United States Court of Appeals for the Third Circuit dismissed a cause of action where the administrative claim was properly filed with the Maritime Administration, because the plaintiff filed suit in the district court before he did so.[85] The court held that the defect of the early suit could not be cured by filing the claim before the sixty day waiting period that preceded the statute of limitations. The court reasoned, "Here there is the statutory plan that claims go *first* to the Administrator, and we think the plan thus enacted by the Congress must be followed."[86]

Circuit Courts of Appeals strictly enforce the requirement that the claim be denied or the sixty day waiting period elapse. For example, in *Morales v. United States*, the Second Circuit dismissed a seaman's claim where he filed it with the Maritime Administration only twenty-three days before the expiry of the SAA's two year limitation period.[87] The court noted also that the Maritime Administration's prompt reply indicating that the claim was

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[79]46 C.F.R. § 327.1 (2009).

[80]See id. § 327.4

[81]Id. § 327.5(a).

[82]Id. § 327.5(b).

[83]Id. § 327.7.

[84]Rodinciuc v. United States, 175 F.2d 479 (3d Cir. 1949); accord Smith v. United States, 873 F.2d 218, 221 (9th Cir. 1989) ("[T]he Clarification Act unmistakably prohibits [the plaintiff] from filing a claim in federal court before obtaining an administrative disallowance.")

[85]175 F.2d at 482.

[86]Id.

[87]38 F.3d 659 (2d Cir. 1994) (per curiam).

incomplete was not to be construed as a denial.[88] Likewise, in *Herbert v. United States*, the Fifth Circuit dismissed a seaman's claim brought less than fifty days before the two year statute of limitations under the SAA.[89] Like Morales, Herbert argued that his claim was denied where "[t]his is way off" was written in the claim's margin.[90] The court disagreed, as that did not constitute written notice delivered to Herbert sufficient for a denial under the procedures set forth in the Code of Federal Regulations.[91]

More recently, the Fifth Circuit in *Martin v. Miller* has discussed the administrative claim requirements of the Clarification Act and the exclusivity provision of the SAA.[92] In *Martin*, a seaman filed suit for double wage damages on an unpaid wages claim against the master of the M/V CAPE FLORIDA, Michael Miller, in his individual capacity.[93] The M/V CAPE FLORIDA was owned by the Maritime Administration and operated by International Marine Carriers, Inc. Martin brought suit against the master only in the United States District Court for the Southern District of Texas on the basis of diversity subject matter jurisdiction.

As a preliminary matter, the defendant argued that the claim must be dismissed because the seaman did not exhaust the administrative claim requirements of the Clarification Act.[94] The court, however, correctly pointed out that the administrative claim requirement applies only to suits against the United States. Thus, the court had subject matter jurisdiction over the claim notwithstanding that the seaman had not presented her claim to the Maritime Administration.

Next, the court addressed the seaman's argument that her claim was not at all within the Clarification Act because it was not expressly listed in the statute.[95] The court noted the text of the Clarification Act references "all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated vessels," and easily concluded that because the purpose the Act was to ensure that seamen such as Martin would enjoy the same rights as seamen employed on privately-owned vessels, her wage claim fell within the Act.[96]

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[88]Id. at 660.
[89]53 F. 3d 720 (5th Cir. 1995) (per curiam).
[90]Id. at 722-23.
[91]Id.
[92]64 F. 3d 434 (5th Cir. 1995).
[93]Id. at 436.
[94]Id. at 440-41.
[95]Id. at 441-42.
[96]Id.

Finally, because the claim properly fell within the Clarification Act, the court turned to its enforcement under the Suits in Admiralty Act.[97] The court noted that the claim fell within the SAA because maritime law would permit the claim against a private owner. However, because in this case the vessel's owner was the United States, the case then turned on the exclusivity provision of the SAA, which provides that the SAA is *exclusive of all other actions arising from the same subject matter* against any "officer, employee, or agent of the United States whose act or omission gave rise to the claim."[98] Thus, because the United States was the proper defendant, but Martin had only filed suit against the master, the case was dismissed.

It is well settled that the mere filing of an administrative claim does not toll the statute of limitations.[99] The Supreme Court has stated that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed."[100] However, once Congress has expressly granted a waiver, applying the doctrine of equitable tolling against the government in the same manner as private parties amounts to little, if any, broadening of that waiver.[101] In *Irwin v. Department of Veterans Affairs*, the Court held that statutes of limitations governing actions against the United States are subject to "the same rebuttable presumption of equitable tolling applicable to suits against private defendants."[102] After *Irwin*, lower courts are split on the issue of whether the limitation period is jurisdictional, for which the government must move for a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, or not jurisdictional, for which the government must make a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted. The Ninth Circuit has continued to hold that the failure to file within the SAA's two year period of limitations deprives the court of subject matter jurisdiction.[103] However, the majority of the courts of appeals have held that in light of *Irwin*, the limitation period is procedural.[104] For example, the Third Circuit

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[97]Id. at 442-443.

[98]Id.

[99]See Rashidi v. United States, 96 F.3d 124 (5th Cir. 1996); accord Hedges v. United States, 404 F.3d 744, 751-52 (3d Cir. 2005); Ayers v. United States, 277 F.3d 821, 828 (6th Cir. 2002); Raziano v. United States, 999 F.2d 1539 (11th Cir. 1993).

[100]Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 95 (1990) (quoting United States v. Mitchell, 445 U.S. 535, 538 (1980)).

[101]Id. at 95-96.

[102]Id.

[103]See, e.g., Bullen v. United States, 24 F.3d 245 (9th Cir. 1994) (citing Smith v. United States, 873 F.2d 218, 219-20 (9th Cir. 1989).

[104]See Hedges v. United States, 404 F.3d 744, 747 (3d Cir. 2005) (citing Wilson v. United States Gov't, 23 F.3d 559 (1st Cir. 1994) (stating that the doctrine of equitable tolling applies to § 745)); Raziano v. United States, 999 F.2d 1539, 1540–41 (11th Cir. 1993) (same); Favorite v. Marine Pers. & Provisioning, Inc., 955 F.2d 382, 389 (5th Cir. 1992) (same); Arthur v. United States, 299 F. Supp.2d 431, 434 (E.D. Pa. 2003) (same)).

has applied the Supreme Court's *Beggerly* and *Brockamp* factors[105] to conclude that the *Irwin* presumption that equitable tolling applies to the SAA is not rebutted.[106] Thus, where the statute of limitations is not jurisdictional, the government must file a Rule 12(b)(6) motion for failure to state a claim upon which relief can be granted, rather than a Rule 12(b)(1) motion for lack of subject matter jurisdiction.[107]

D. Agency and Independent Contractors

The exclusivity provision of the SAA can act as a liability shield for agents and private operators of government-owned vessels because it requires that for claims arising from the same subject matter, suit be brought *only* against the United States.[108] To determine whether the United States can be exclusively liable for any injuries, the first question to ask is whether the United States is the owner, or owner *pro hac vice*, of the vessel.[109] For example, where the United States is a bareboat charterer, exercising possession, command, and control of the vessel, the vessel is considered a public vessel.[110] In reverse, where the United States demise charters its vessel to a private company, and that private company exercises the privileges of ownership over the vessel, the United States will not be liable unless that company is acting as an agent of the United States— which vessel operators generally are.[111]

However, where the United States is merely a time-charterer, and the vessel is owned and operated by a private party, that private party cannot relieve itself of liability simply because it entered into a contract with the United States. For example, in *Pardo v. Vessel Charters, Inc.*, the private shipowner attempted to shift liability for unseaworthiness onto the United States, the

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[105]They are: 1) whether equity is already incorporated into the statute; 2) the length of the limitations period; 3) the substantive area of law; 4) the statutory language of the limitations period; 5) the availability of other explicit exceptions; and 6) the potential administrative burden of equitable tolling. See generally United States v. Beggerly, 524 U.S. 38 (1998); United States v. Brockamp, 519 U.S. 347 (1997).

[106]Hedges, 404 F.3d at 748.

[107]Id. at 750.

[108]See Sam v. Keystone Shipping Co., 913 F. Supp. 514 (S.D. Tex. 1996) (same for penalty wage claim).

[109]Favorite v. Marine Personnel and Provisioning, Inc., 955 F.2d 382 (5th Cir. 1992).

[110]Id.

[111]See Len v. Am. Overseas Marine Corp., 171 F. App'x 489, 492 (5th Cir. 2006) (Jones Act negligence and retaliatory discharge); Dearborn v. Mar Ship Operations, Inc., 113 F.3d 995, 1000 (9th Cir. 1997) (Jones Act negligence and unseaworthiness); Manuel v. United States, 50 F.3d 1253, 1254 (4th Cir. 1995) (maintenance and cure); DiBiase v. United States, 711 F. Supp. 648, 652 (D. Me. 1989) (Jones Act negligence, unseaworthiness, and maintenance and cure); Cruz v. Marine Transport Lines, Inc., 806 F.2d 252 (3d Cir. 1986) (Jones Act negligence and unseaworthiness).

time-charterer of the vessel.[112] The United States District Court for the Southern District of New York held that the general maritime law rule that a time charterer assumes no liability for the unseaworthiness of the vessel applies unless the owner can show otherwise from the time-charter agreement.[113] Further, the court looked to the charter party and noted that "none of the articles of the time-charter agreement unambiguously articulate an intent to pass liability for a seaman's personal injury to the United States."[114] Thus, unless the vessel is in fact owned or operated by the United States, or there is an agreement unambiguously providing for United States' assumption of liability, the United States can only be liable in the same circumstances where a private time-charterer would be.

The United States will not be responsible under the SAA for the negligence of independent contractors. Private contractors are considered to be agents of the United States only if they are conducting governmental maritime activity aboard the vessel.[115] For example, in *Gaussoin v. Port of Portland*, the Court of Appeals of Oregon considered whether a shipyard was acting as an agent for the United States while it was performing repairs to a public vessel.[116] The primary factor to consider when determining whether an agency relationship exists is the degree of control exercised by the United States over the defendant's operations, which must be determined by examining the entity's contract with the government, as well as its conduct.[117]

Specifically, the court held that under the terms of its contract with the government, the shipyard had no authority to conduct the maritime business of the vessel; the shipyard's only responsibility was to make the necessary repairs. The court found that the contract did not contain the "less than full maritime operational control of the vessel by the contractor" that might even arguably give rise to an agency relationship. In particular, the agreement was titled "Master Agreement for Repair and Alteration of Vessels," and referred to the shipyard as a "contractor," not an "agent."[118] The government agreed to leave the correctness of the job order to the shipyard and "comply with all

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[112]731 F. Supp. 145 (S.D.N.Y. 1990).

[113]Id. This general rule is that a time charterer who has no operational control over the vessel assumes no liability for negligence of the crew or unseaworthiness of the vessel absent a showing that the parties to the charter intended otherwise. Williams v. Cent. Gulf Lines, 874 F.2d 1058, 1062 (5th Cir. 1989).

[114]731 F. Supp. at 149.

[115]Servis v. Hiller Systems Inc., 54 F.3d 203, 207-09 (4th Cir. 1995).

[116]Gaussoin v. Port of Portland, 144 Or. App. 247, 253-55 (Or. Ct. App. 1996).

[117]Id.

[118]Id.

[shipyard's] rules and regulations governing personnel at its shipyard."[119] In exchange, the government agreed not to control the shipyard's business operations or its performance of the repair work. Thus, the court held that the United States did not have the kind or degree of operational control over the business of the repair contractor to find an agency relationship, such that the United States would assume liability for the agent.

In another example, in *Nelson v. United States*, the Ninth Circuit held that the United States is not liable for injuries to the employees of its independent contractors arising out of the performance of inherently and peculiarly dangerous work.[120] There, a worker was engaged in performing maintenance to a wave suppressor, an aquatic barrier erected to protect the Coast Guard Station vessels from waves caused by weather and passing vessels in San Francisco Bay. There were no safety lines, guard rails, toe boards, life lines, or nets in use while the decedent was working on the job. In addition, no lookout was posted to warn the worker of oncoming waves or swells. Indeed, a swell hit the suppressor; the worker fell into the water, never to be found. The court found that the accident was caused by a failure to observe adequate safety precautions and work practices.

The worker's wife brought suit against the United States under the Suits in Admiralty Act. The government impleaded the contractor. The contractor-employer alleged the Government was negligent because it failed to specify and delegate safety precautions in contracting for the job and supervising the work. Noting that there was no specific controlling general maritime law on the question, the court looked to Supreme Court precedent in *West v. United States*, the Restatement of Torts, and Ninth Circuit case law for guidance. The court concluded that under the general admiralty law, the United States is not liable for injuries to the employees of its independent contractors arising out of the performance of inherently and peculiarly dangerous work. The contractor was financially solvent and as well informed and competent as the government in the methods necessary to avoid accidental injuries to workers, and the government was not significantly involved in managing the safety aspects of the job or aggravating the job's danger.[121]

E. The Merchant-Public Vessel Distinction

Although the SAA and the PVA are simple enough on their faces, courts had great difficulty defining the mutually exclusive terms "public vessel"

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[119]Id.

[120]639 F.2d 469, 479 (9th Cir. 1980).

[121]Id.

and "private vessel." As originally enacted, the SAA required that the vessel be "owned, possessed, or operated by or for the United States and be *employed as a merchant vessel*."[122] The PVA requires the vessel be a "*public vessel*."[123]

Calmar S.S. Corp. v. United States demonstrates this problem.[124] In *Calmar*, the Supreme Court was faced with whether a vessel owned by Calmar S.S. Corp., but "undoubtedly operated for the United States" on a voyage charter to carry military equipment and supplies was employed as a merchant vessel under the SAA.[125] The Court held that it was, reasoning that, "[t]he Suits in Admiralty Act and the Public Vessels Act are not to be regarded as discreet enactments treating related situations in isolation."[126] Thus, the public service of the vessel did not alter its merchant character, and the federal district court had proper jurisdiction under the SAA. But recall from the discussion of *The Western Maid* that there the Court held a government-owned vessel delivering food aid during World War II was in the public service and not employed as a merchant vessel.[127]

The SAA was amended in 1960 to remove this confusing technical distinction between the SAA and the PVA.[128] The SAA now provides,

> In a case in which, if a vessel were privately owned or operated, or if cargo were privately owned or possessed, or if a private person or property were involved, a civil action in admiralty could be maintained, a civil action in admiralty in personam may be brought against the United States or a federally-owned corporation.[129]

Thus, if one relies only on the SAA's current text, it may seem applicable to claims involving "public vessels."

However, the Supreme Court has held that Congress had no intention of expanding the SAA at the expense of the PVA and that "claims within the scope of the Public Vessels Act remain subject to its terms after the 1960 amendment to the Suits in Admiralty Act."[130] For example, in *United States v. United Continental Tuna Corp.*, a Philippine shipowner brought suit against the United States under the SAA and the PVA for damages arising from the sinking of its vessel, the MV ORIENT, after a collision with the

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[122]41 Stat. 525, 46 U.S.C. § 742 (1958 ed.) (emphasis added).

[123]46 U.S.C. § 31102(a) (2006).

[124]345 U.S. 446 (1953). See United States v. United Cont'l Tuna Corp., 425 U.S. 164, 172 n. 1 (1976); See also Blanco v. United States, 775 F.2d 53, 57 n. 4 (2d Cir. 1985).

[125]345 U.S. at 447.

[126]Id. at 455.

[127]See text accompanying footnotes 22 & 23 for a discussion of The Western Maid.

[128]See United Cont'l Tuna Corp., 425 U.S. at 167.

[129]46 U.S.C. § 30903 (2006).

[130]425 U.S. 164, 181 (1976).

U.S.S. PARSONS, a naval destroyer.[131] The main contention of the shipowner was that the claim was properly brought under the SAA because the 1960 amendment to the SAA broadened it to include actions involving public vessels.[132] The Court rejected that argument, reasoning it was inappropriate to assume that in amending the SAA, Congress meant to strip the PVA of its application to public vessels. The Court held that the PVA applied to the case because the naval destroyer was clearly a "public vessel."[133]

IV
THE PUBLIC VESSELS ACT

A. General Provisions

The Public Vessels Act provides a waiver of sovereign immunity in admiralty cases against the United States where a tort arises from the possession or operation of a public vessel:

> A civil action in personam in admiralty may be brought, or an impleader filed, against the United States for (1) damages caused by a public vessel of the United States; or (2) compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States.[134]

Further, the United States has waived sovereign immunity for counterclaims brought against the United States where the United States brings an admiralty claim against a private party for damages caused by a privately owned vessel arising out of the same subject matter.[135] However, it is clear that the PVA cannot be construed as recognizing the existence of a lien against a public vessel.[136]

Next, the PVA incorporates the procedures of the SAA to the extent that they are not inconsistent with the provisions in the PVA.[137] For example, the PVA incorporates the interest provisions of the SAA, but restricts the period during which they can accrue.[138] The SAA provides that interest may be awarded from the time of the suit's filing unless a contract provides other-

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[131]Id. at 165-66

[132]Id. at 181.

[133]Id.

[134]46 U.S.C. § 31102(a) (2006); see also 46 U.S.C. § 31103 (incorporating the procedures of the Suits in Admiralty Act, 46 U.S.C. § 30901 by reference).

[135]Id. § 31102(b).

[136]Id. § 30112.

[137]Id. § 31103.

[138]Id. § 31107.

wise.[139] However, the PVA interest provision states that interest may not accrue prior to the date of judgment unless an express contract provision provides otherwise.[140] Thus, under the SAA a party may be awarded interest from the time of filing, but under the PVA a party may only be awarded interest from the time judgment is entered.[141]

Another difference between the SAA and the PVA is found in the venue provisions; the PVA distinguishes between cases where the vessels or cargo can or cannot be found within the United States.[142] For example, the SAA provides that venue is proper in any district court where (1) a plaintiff resides or has its principal place of business *or* (2) the vessel or cargo is found.[143] However, under the PVA, when the vessel or cargo can be found within the United States or its territorial waters, venue is restricted to only the district court of the United States where the vessel or cargo is found, and the plaintiff cannot sue in the district he resides in.[144] Only when the vessel or cargo cannot be found within the United States, then the action shall be brought in the district court of the United States for any district in which any plaintiff resides or has an office for the transaction of business.[145] Finally, if the vessel or cargo cannot be found within United States and no plaintiff resides or has an office for the transaction of business in the United States, only then may the action may be brought in the district court of the United States for any district.[146]

Next, the PVA expressly restricts the ability to subpoena officers of a public vessel without consent.[147] Consent to subpoena an officer or member of the crew of a public vessel must be given by either the head of the government agency or independent establishment having control of the vessel, or the vessel's master.[148]

Finally, the most unique feature of the PVA is that its reciprocity requirement prohibits foreign nationals from suing the United States where United

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[139]46 U.S.C. § 30911 (2006).

[140]46 U.S.C. § 31107 (2006).

[141]Compare 46 U.S.C. § 30911 (2006), with 46 U.S.C. § 31107 (2006). See Gretchen v. United States, 618 F.2d 177, 178 (2d Cir. 1980) (holding that under the PVA, interest runs from entry of formal judgment rather than the judge's handing down of oral findings and conclusions).

[142]Compare 46 U.S.C. § 30906 (2006), with 46 U.S.C. § 31104 (2006). See also Wade v. Bordelon Marine, Inc., 770 F. Supp. 2d 822 (E.D. La. 2011) (examining the venue provisions of the PVA, 46 U.S.C. § 31104 (2006)).

[143]46 U.S.C. § 30906 (2006).

[144]Id. § 31104(a).

[145]Id. § 31104(b)(1).

[146]Id. § 31104(b)(2).

[147]Id. § 31110.

[148]Id. § 31110.

States citizens could not sue foreign nations under similar circumstances.[149] Section 31111 of the Public Vessel Act provides:

> A national of a foreign country may not maintain a civil action under this chapter unless it appears to the satisfaction of the court in which the action is brought that the government of that country, in similar circumstances, allows nationals of the United States to sue in its courts.

B. The Operation or Possession of a Public Vessel

The first question arises naturally; what are example of torts arising from the possession and operation of a public vessel? In *Grillea v. United States*, Judge Learned Hand, writing for the Second Circuit, held that where a ship was owned by the United States, even though chartered to another, the United States was liable under the Public Vessels Act.[150] In *Grillea*, a longshoreman fell into the hold of vessel owned by the United States after the wrong hatch cover was placed over a hold.[151] The court held that the unseaworthy condition was the cause of the longshoreman's injury, and like any other owner, the United States was liable to the longshoreman for his damages caused by the unseaworthiness of the vessel under the Public Vessels Act.

However, just because a claim involves a public vessel does not mean that it will always arise under the PVA.[152] For example, in *Uralde v. United States*, the United States Coast Guard failed to provide medical assistance to a Cuban national during interdiction of a vessel.[153] The plaintiff and his wife, both Cuban nationals, were attempting to illegally enter the United States in a speedboat. A Coast Guard officer fired two shotgun rounds into the speedboat's engine block, causing injury to the passengers. The plaintiff's wife later died from her injuries, and the claims specifically urged that it was not the operation of the USCG vessel that caused the woman's injuries, but rather the continued denial of medical assistance. The Eleventh Circuit held that the PVA did not apply to the claims. The court reasoned that because the claims were based on the Coast Guard's decisions regarding whether and how to provide proper care and timely access to medical treatment of a passenger on a private vessel interdicted at sea, those decisions were distinct from the operation of a public vessel. None of the Coast Guard members were operating, or even aboard, a public vessel at the time the medical assis-

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[149]Id. § 31111.

[150]232 F.2d 919 (2d Cir. 1956).

[151]Id. at 922.

[152]See text accompanying footnotes 59-61 for discussion of Kelly v. United States, 614 F.3d 1283 (11th Cir. 2010), finding SAA jurisdiction over negligence in conducting a rescue operation. See also, Jefferson A. Holt, *Salvaging a Capsized Statute: Putting the Public Vessels Act Back on Course*, 29 GA. ST. U. L. REV. 493, 537 (2013).

[153]614 F.3d at 1283.

tance was denied; instead they were stationed on land or were aboard the speedboat when the decisions regarding the wife's treatment and transportation were made. Thus, although a public vessel was involved in the interdiction, it was not the vessel that caused the damages, and therefore the SAA properly applied to the claim.[154]

C. The Reciprocity Requirement

What the *Urlade* plaintiff above successfully avoided was the reciprocity requirement of the PVA. For example, in *United States v. United Continental Tuna Corp.*, the Supreme Court enforced the reciprocity requirement of the PVA, preventing a Filipino shipowner from bringing an action against the United States where United States citizens could not sue the Philippine government under the same conditions.[155] In *United Continental Tuna*, a Filipino shipowner brought suit against the United States under the SAA and the PVA for damages arising from the sinking of its vessel, the MV ORIENT, after a collision with the U.S.S. PARSONS, a naval destroyer.[156] The district court applied the reciprocity requirement of the PVA, and after finding that a United States citizen could not bring suit against the Philippine government in similar circumstances, dismissed the suit.

The main contention of the shipowner on appeal was that its claim was properly brought under the SAA because the 1960 amendment to the SAA broadened it to include actions involving public vessels, and therefore the reciprocity requirement did not apply.[157] The Court rejected that argument, reasoning it was inappropriate to assume that in amending the SAA, Congress meant to strip the PVA of its application to public vessels. The Court noted the differences between the PVA and the SAA other than the reciprocity requirement, such as the inability to subpoena officers of public vessels and that under the PVA, the interest on judgments does not accrue prior to the time of judgment. The Court held that the shipowner could not make an end-run around the PVA's reciprocity requirements because the suit against the naval destroyer was clearly a "public vessel."[158] Unlike the plaintiff in *Uralde*, United Continental Tuna had no way of characterizing its claim as other than caused by the operation of a public vessel. Indeed factu-

[154]Id. at 1288.
[155]425 U.S. 164 (1976).
[156]Id. at 165-66.
[157]Id. at 181; see also, notes supra.
[158]Id. at 181.

ally, most cases will be like *United Continental Tuna*, and some may view *Uralde* as unique to its facts.[159]

V
FEDERAL TORT CLAIMS ACT

A. General Provisions

Congress has also partially waived sovereign immunity under the Federal Tort Claims Act:

> The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.[160]

However, jurisdiction is only proper under the FTCA where there is no federal admiralty jurisdiction.[161] Thus, a remedy under the SAA or the PVA is exclusive of a remedy under the FTCA. It follows then, that where there is no federal admiralty jurisdiction, general maritime law cannot apply and state law is applied to FTCA cases.

Like the administrative claim requirements under the Extension of Admiralty Jurisdiction Act and the Clarification Act, the FTCA has its own administrative claim requirement which requires the claimant first to present the claim to the appropriate federal agency, and wait for denial by the agency

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[159]See Tobar v. United States, 639 F.3d 1191, 1199 n.3 (9th Cir. 2011) (noting the outcome in Uralde, but applying the PVA's reciprocity requirement more broadly to dismiss a similar claim involving the United States Coast Guard's improper interdiction of an Ecuadorian fishing vessel incorrectly suspected of smuggling drugs).

[160]26 U.S.C. § 2674 (2012).

[161]The FTCA is found in 28 U.S.C. §§ 1346(b), 1402, 2401-2402, 2412, 2671-2680 (2012) and 2680(d) expressly excludes "[a]ny claim for which a remedy is provided by chapter 309 [the SAA] or 311 [the PVA] of title 46 relating to claims or suits in admiralty against the United States." 28 U.S.C. § 2680(d) (2012).

in writing and sent by certified or registered mail, or a period of six months to elapse.[162]

Further, just because a claim is asserted against the United States Coast Guard does not mean that the claim will be brought under the SAA or the PVA. For example in *Moore v. United States Coast Guard*, the plaintiff bus driver was injured when a Coast Guard employee ran a red light and drove his vehicle into the bus the plaintiff was driving.[163] The plaintiff's claim was properly brought under the FTCA. Indeed, admiralty jurisdiction was not even alleged, but the suit was ultimately dismissed because the plaintiff did not file an administrative claim before bringing his suit.

VI
THE GOVERNMENT'S DEFENSES

A. The Feres Doctrine

Although on its face the FTCA applies to "all claims against the United States," the Supreme Court has carved out an exception for claims brought by members of the armed forces, the *Feres* doctrine.[164] Further, the circuit courts of appeals are in agreement that the *Feres* doctrine applies with equal force in the context of all three statutes, SAA, PVA and FTCA.[165] This includes claims by the families of servicemen, because those suits are derivative of the servicemen's.[166]

Under the *Feres* doctrine, servicemen injured in the course of activity "incident to service" may not recover against the United States under the FTCA.[167] The Court noted that "[w]ithout exception, the relationship of military personnel to the Government has been governed exclusively by federal law."[168] In addition, there are alternative schemes of compensation for the

[162]28 U.S.C. § 2675 (2012).

[163]Moore v. U.S. Coast Guard, CIV. A. 95-3015, 1996 WL 137640 (E.D. La. Mar. 26, 1996).

[164]Feres v. United States, 340 U.S. 135, 144 (1950).

[165]See Lanus v. United States, 492 F. Appx. 66 (11th Cir. 2012) (per curiam), cert. denied, 133 S. Ct. 2731 (2013); Lewis v. United States Navy, 976 F.2d 726 (4th Cir. 1992) (per curiam); Potts v. United States, 723 F.2d 20 (6th Cir. 1983) (per curiam); Charland v. United States, 615 F.2d 508, 509 (9th Cir. 1980); Beaucoudray v. United States, 490 F.2d 86 (5th Cir. 1974) (per curiam).

[166]Lewis, 976 F.2d at 726.

[167]340 U.S. at 145-46. Notably, there is a circuit split over whether accidents occurring during off-duty informal recreational activities, such as rafting and boating, are performed "incident to service." Compare Regan v. Starcraft Marine, LLC, 524 F.3d 627, 629 (5th Cir. 2008), with Costo v. United States, 248 F.3d 863, 864 (9th Cir. 2001).

[168]340 U.S. at 144.

military,[169] and creating liability in this context would undermine military structure and discipline.[170] Therefore, although the FTCA itself is silent as to military members, in the absence of express congressional command, the Court has been unwilling to hold that Congress, in drafting the FTCA, intended such a radical departure from established law.[171]

Of course, this does not prevent servicemen from filing suit against vessel owners, operators, or product manufacturers who are not acting as agents of the United States. However, the *Feres* doctrine has been held to bar third-party suits by those defendants against the government for contribution and indemnity.[172] Several decades after *Feres*, in *Stencel Aero Engineering Corp. v. United States*, the Supreme Court held that a private defendant in a serviceman's tort suit could not receive indemnity from the government on its third-party claim under the FTCA, even where the government had been guilty of active wrongdoing compared to the defendant's own merely passive wrongdoing.[173]

This can lead to seemingly unfair results. For example, in *Vulcan Materials Co. v. Massiah*, a navy seaman was killed in a collision between a Navy rigid hull inflatable boat and the tug WILLIAM POOLE as it was pushing an eight-barge flotilla up the James River.[174] The seaman's mother filed a wrongful death action against the tug owner, Vulcan. Vulcan, in turn, filed a third-party complaint against the United States under the PVA and the SAA, seeking contribution from the United States as a co-tortfeasor. After extensive findings of fact, the district court apportioned twenty percent of the fault to Vulcan and eighty percent of fault to the government, but dismissed Vulcan's claim for contribution on the basis of sovereign immunity. The United States Court of Appeals for the Fourth Circuit affirmed. The court held that because the *Feres* doctrine barred the government's direct liability for the death of the active-duty serviceman, it also barred Vulcan's claim for contribution. The *Vulcan* court distinguished its earlier precedent in *Ionian Glow Marine, Inc. v. United States*, where the government stipu-

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[169]For example, under the Veteran's Benefits Act. See Stencel Aero Engineering Corp. v. United States, 431 U.S. 666 (1977).

[170]Id.

[171]Id.

[172]See Hillier v. S. Towing Co., 714 F.2d 714, 723 (7th Cir. 1983) (holding that tug and barge owners are not entitled to contribution from the United States on their third-party claim under the SAA where a Coast Guard marine inspector died on duty from inhalation of ammonia as a matter of sovereign immunity). But see Trevino v. Gen. Dynamics Corp., 865 F.2d 1474, 1489 (5th Cir. 1989) (holding that an action based on an indemnification clause in contract between the government and a contractor must proceed under the Contract Disputes Act, 41 U.S.C. § 601 et seq., and in that case the failure to file an administrative claim deprived the court of subject matter jurisdiction).

[173]431 U.S. 666 (1977).

[174]645 F.3d 249, 251 (4th Cir. 2011).

lated to liability in a distinctly admiralty context.[175] Relying on the Supreme Court's more recent holding in *Lockheed*, the Court emphasized that the "military nature of the action" and the "military discipline" rationale as the primary support for *Feres* applied in this case.[176] The court noted that the litigation of liability resulted in numerous Navy witnesses being called into court to testify "about their own actions and those of fellow servicemen. . . exactly what the *Feres–Stencel Aero* doctrine was designed to avoid."[177] Thus, because Vulcan could not recover contribution from the United States, it was responsible for the full amount of the damages.[178]

The *Feres* doctrine has recently been the subject of great debate,[179] and appellate courts have not applied the *Feres* doctrine "incident to service" holding uniformly.[180] Some jurisdictions apply the three original policy rationales from the *Feres* case, the federal relationship, dual recovery, and military discipline rationales.[181] Others employ a "but for" test where the relevant question is whether the injury would have occurred but for the individual's status as a service member.[182] Additionally, the Ninth Circuit promotes a four-factor test that, rather than an analysis of the *Feres*, and considers the service member's location, duty status, benefits received and type of activity at the time of injury.[183]

B. The Discretionary Function Exception

Though the application of the *Feres* defense applies only to claims brought by servicemen, the discretionary function exception can apply to any claims against the government. For example, because the court in

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[175]Id. (refusing to extend Ionian Glow Marine, Inc. v. United States, 670 F.2d 462 (4th Cir.1982), beyond its facts)

[176]Id. at 257 (agreeing with the district court that the Supreme Court's decision in Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), "undermines a key step in the logic of *Ionian Glow*, thereby casting doubt on the propriety of extending *Ionian Glow* beyond its facts").

[177]Id. at 266 (internal citation omitted).

[178]Id.

[179]See Costo v. United States, 248 F.3d 863, 869 (9th Cir. 2001) (Ferguson, J, dissenting) ("I believe that the Feres doctrine violates the equal protection rights of military service men and women. I also believe that Feres violates our constitutional separation of powers.")

[180]See Jennifer L. Carpenter, Latchum v. United States: The Ninth Circuit's Four-Factor Approach to the Feres Doctrine, 25 U. HAW. L. REV. 231, 238 (2002). See also Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated Feres Doctrine*, 192 MIL. L. REV. 1, 4 (2007); Paul Figley, *In Defense of Feres: An Unfairly Maligned Opinion*, 60 AM. U. L. REV. 393, 394 (2010) William S. Myers, Comment, *The Feres Doctrine: Has it Created Remediless Wrongs for Relatives of Servicemen?* 44 U. PITT. L. REV. 929 (1983).

[181]Lewis v. United States Navy, 976 F.2d 726 (4th Cir. 1992) (per curiam); Zoula v. United States, 217 F.2d 81 (5th Cir. 1954); Chambers v. United States, 357 F.2d 224 (8th Cir. 1966).

[182]Hass v. United States, 518 F.2d 1138 (4th Cir. 1975).

[183]Costo v. United States, 248 F.3d 863, 867 (9th Cir. 2001).

Vulcan found the *Feres* doctrine barred the owner's claim for contribution, it found it unnecessary to address the government's argument that its selection of personnel for the training mission was protected by the discretionary function exception.[184] The discretionary function exception is found in the FTCA, 28 U.S.C. § 2280(a):

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Textually, the exception appears only in the FTCA and, at least initially, courts rejected reading the discretionary function exception into the SAA and PVA.[185] However, it is now well-settled that all circuit courts have extended the discretionary function beyond the FTCA to the SAA and the PVA as well.[186] Recently, the Fourth Circuit was the last circuit to adopt the majority view.[187] In *McMellon v. United States*, the Fourth Circuit, sitting *en banc*, reasoned, "the discretionary function exception embodies separation-of-powers principles that are important enough to require courts to apply a discretionary function exception to statutes that are silent on the issue."[188]

The Supreme Court has set out a two-part test for determining whether the discretionary function exception applies:

> [First], [t]he exception covers only acts that are discretionary in nature, acts that involve an element of judgment or choice; and it is the nature of the conduct, rather than the status of the actor that governs whether the exception applies. The requirement of judgment or choice is not satisfied if a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow, because the employee has no rightful option but to adhere to the directive.

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[184]Vulcan Materials Co. v. Massiah, 645 F.3d 249, 255 n.3 (4th Cir. 2011).

[185]See McMellon v. United States, 387 F.3d 329, 331 (4th Cir. 2004) (en banc) for a discussion of the discretionary function exception's judicial interpretation over the years.

[186]McMellon, 387 F.3d at 331 (citing Tew v. United States, 86 F.3d 1003, 1005 (10th Cir. 1996); Earles v. United States, 935 F.2d 1028, 1032 (9th Cir. 1991); Sea-Land Serv., Inc. v. United States, 919 F.2d 888, 893 (3d Cir. 1990); Robinson v. United States (In re Joint E. & S. Dists. Asbestos Litig.), 891 F.2d 31, 34-35 (2d Cir. 1989); Williams v. United States, 747 F.2d 700 (11th Cir. 1984) (per curiam); Gemp v. United States, 684 F.2d 404, 408 (6th Cir. 1982); Canadian Transp. Co. v. United States, 663 F.2d 1081, 1085 (D.C.Cir.1980); Bearce v. United States, 614 F.2d 556, 560 (7th Cir. 1980); and Wiggins v. United States, 799 F.2d 962, 964-66 (5th Cir. 1986)); See also Ryan M. McCabe, Note, *A Statutory Frolic of Its Own?: A Divided Fourth Circuit Calms the Seas of the Suits in Admiralty Act Discretionary Function Exception Circuit Split*, 30 TUL. MAR. L.J. 457 (2006).

[187]McMellon, 387 F.3d at 344.

[188]Id.

> [Second], even assuming the challenged conduct involves an element of judgment, it remains to be decided whether that judgment is of the kind that the discretionary function exception was designed to shield. Because the purpose of the exception is to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort, when properly construed, the exception protects only governmental actions and decisions based on considerations of public policy.[189]

Further, circuits are split over which party bears the burden of proof in discretionary function cases. In the Fourth and Fifth Circuits, the party bringing the action against the government has the burden of proving that the claim is not subject to the discretionary function exception.[190] On the other hand, in the Ninth Circuit, the Government has the burden of proving that the exception applies.[191]

Generally, decisions to place, design, and maintain aids to navigation and the production of nautical charts fall within the discretionary function exception except where a statute, regulation, or Coast Guard internal guideline mandates them.[192] However, if a government agency does place an aid to navigation and is negligent in the maintenance of it, the discretionary function exception no longer applies.[193] In the landmark case, *Indian Towing Co. v. United States*, the Supreme Court held that once the Coast Guard exercised discretion in undertaking to keep a lighthouse in good working order, and it engendered reliance, negligence in keeping it could not be avoided by applying the discretionary function exception.[194]

Likewise, the Coast Guard is authorized to undertake rescue efforts, but is not under an affirmative duty to commence them.[195] However, once a rescue

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[189]United States v. Gaubert, 499 U.S. 315, 322 (1991) (internal citations and quotations omitted).

[190]See Indem. Ins. Co. of N. Am. v. United States, 569 F.3d 175, 180 (4th Cir. 2009) (holding that the discretionary function exception applied to the United States Coast Guard's stability testing error when it certified a vessel to carry twenty-five passengers rather than fifteen); accord Osprey Ship Mgmt. Inc. v. Foster, 387 F. App'x 425, 431 (5th Cir. 2010) (per curiam) (holding that the National Oceanic and Atmospheric Administration's (NOAA) final decision as to what kinds of nautical information to include on chart of harbor, which outlined submerged obstructions in the harbor area, was firmly within the discretionary function exception where a vessel allided with a submerged submarine launchway in port relying on the government's chart).

[191]Bailey v. United States, 623 F.3d 855, 859 (9th Cir. 2010) (holding that the discretionary function exception applied to the Army Corps of Engineers decision not to replace warning signs near a dam on the Yuba River where the river was so turbulent at that time as to threaten the safety of its workers who had to ford the river to attach new signs and buoys only four days before the boating accident).

[192]But see Sheridan Transportation Co. v. United States, 897 F.2d 795 (5th Cir. 1990) (Sheridan II) (holding that the Coast Guard's liability for moving a buoy without providing any notice to mariners turned on the fact that the buoy was Government-maintained, and not a private navigational aid).

[193]Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[194]Id.

[195]See 14 U.S.C. § 88.

operation is undertaken, the Coast Guard must act with reasonable care.[196] This duty of care provides that a rescuer, such as the Coast Guard, is liable for breach of a duty "voluntarily assumed by affirmative conduct, even when that assumption of duty was gratuitous."[197] The Good Samaritan doctrine, however, imposes a high bar to impose liability on a rescuer such as the Coast Guard; the evidence must show that the rescuer failed to exercise reasonable care in a way that worsened the position of the victim.[198] Thus, the test is whether "the risk was increased over what it would have been had the defendant not engaged in the undertaking at all."[199]

VII
CORRECTNESS IN PLEADING

A. Against the Right Party

Where the plaintiff sues a private party, where the action should have been brought against the United States in accordance with the exclusivity provision, the claim will be dismissed unless the United States is a party to the suit or the plaintiff is allowed leave to amend and relation-back.[200] For example, in *Arthur v. Maersk, Inc.*, a seaman who sustained four injuries on four different government-owned vessels brought a Jones Act suit against only the vessel's operators, Maersk and Dyn Marine on May 16, 2002.[201] That suit was timely under the three-year statute of limitations provided by the Jones Act. However, under the PVA and SAA, which each have only a two-year statute of limitations, the statute of limitations ran against the United States on December 20, 2002. The plaintiff's counsel knew or should have known at least as late as October 15— but perhaps much earlier becasue the vessels were each named "U.S.N.S."— that Maersk and Dyn Marine would deny

[196]Sagan v. United States, 342 F.3d 493, 498 (6th Cir. 2003).

[197]Turner v. United States, 869 F. Supp. 2d 685, 689 (E.D.N.C. 2012) aff'd, 736 F.3d 274 (4th Cir. 2013) (citing Sagan v. United States, 342 F.3d 493, 498 (6th Cir. 2003)); accord Patentas v. United States, 687 F.2d 707 (3d Cir. 1982).

[198]See Sagan, 342 F.3d at 498 (citing Myers v. United States, 17 F.3d 890, 903 (6th Cir. 1994)). "There are two ways in which a rescuer can worsen the position of the subject of the rescue. The first is by increasing the risk of harm to the person in distress. The second is to induce reliance, either by the subject or other potential rescuers, on the rescuer's efforts." Hurd v. United States, 34 Fed. Appx. 77, 84 (4th Cir. 2002) (collecting cases).

[199]Sagan, 342 F.3d at 498.

[200]See also text accompanying footnote 69 where court dismissed the plaintiff's wrongful termination suit as the exclusivity provision required suit be brought against the United States.

[201]Arthur v. Maersk, Inc., 434 F.3d 196 (3d Cir. 2006).

any responsibility because of the exclusivity provisions of the PVA and SAA. However, the plaintiff's counsel did not get direct evidence of government ownership of the ships and of Maersk and Dyn Marine's operating-agent contracts until after the December deadline for filing suit against the government. The facts even suggested that there may have been an intentional manipulation by Maersk and Dyn Marine. Finally, on April 14, 2003, the plaintiff moved to amend to make the government a defendant. The trial court granted the amendment, but refused to allow it to relate back to the date of the original complaint, May 16, 2002, before the statute of limitations would have run out against the government because the trial judge found that the plaintiff's counsel had unduly delayed in seeking the amendment from at the latest December 2002, until April 2003. The court then dismissed the case against the government as time-barred.

In reversing, the Third Circuit quoted the governing provisions of FRCP Rule 15(a), which controls the leave-to-amend issue, and FRCP Rule 15(c) which controls the relation-back issue. The court noted that a relation-back under rule 15(c) is not discretionary; when its requirements are satisfied, as they were in this case, the proponent of relation-back is entitled to it. Procedurally, if the trial judge was correct that the plaintiff had unduly delayed—the remedy would be to deny leave to amend in the first place. However, the Third Circuit disagreed that the plaintiff's counsel had, in fact, unduly delayed, for four reasons: (1) the government knew about the lawsuit all along, so it was not prejudiced; (2) the fact that the vessels were designated "U.S.N.S." did not conclusively establish they were government-owned; (3) the delay of eleven months was not too long; only one circuit court had ever denied leave to amend based on a delay of less than a year; and (4) "The liberality of Rule 15(a) counsels in favor of amendment *even when a party has been less than perfect in the preparation and presentation of a case*. It allows for misunderstandings and good-faith lapses in judgment, so long as the party thereafter acts reasonably and diligently."[202]

Judge Van Antwerpen dissented on the belief that the plaintiff's counsel could not have been mistaken for so long about the proper defendant in the case, and even if he was, as soon as he had doubts, he should have amended the complaint to name a "John Doe" defendant as a "placeholder party."

More recently, the Supreme Court in *Krupski v. Costa Crociere S. p. A.*, has held that relation back of an amendment changing parties or naming a party against whom a claim is asserted depended on what the party to be added knew or should have known, not on the amending party's knowledge

[202]Id. at 206.

or timeliness in seeking to amend the pleading.[203] However, the Court also cited the Third Circuit in *Arthur* and other lower court decisions and specifically noted that it expressed no view on whether or how lower court decisions may be reconciled with each other in light of their specific facts and the rule adopted in *Krupski*.[204]

B. Under the Right Statute

If a plaintiff mistakenly brings his suit under the wrong statute, his claim could be time-barred under the correct statute depending on whether the court finds admiralty jurisdiction. For example, the United States Court of Appeals for the Sixth Circuit in *Ayers v. United States* upheld admiralty jurisdiction over a claim where the U.S. Army Corps of Engineers negligently operated a lock and dam that resulted in a drowning on navigable waters.[205] The accident occurred on August 3, 1997, and on June 28, 1999, the plaintiff filed an administrative claim for wrongful death with the Corps, pursuant to the FTCA. On July 29, 1999, the Corps informed the plaintiff that his claim was incomplete, and alerted him specifically that the statute of limitations continued to run. The same day, the plaintiff sent a new claim containing the proper authorization and recognized that the six-month period for the United States' response to the claim would run from the date of the new claim. There was no disposition from the Corps within the six-month waiting period, and so on February 11, 2000, the plaintiff filed suit in the United States District Court for the Eastern District of Kentucky, alleging only that her action arose under the FTCA. Subsequently, the plaintiff amended her complaint to allege the claim arose under the FTCA or, in the alternative, under the SAA on June 7, 2000. The United States moved to dismiss on the grounds that there was admiralty jurisdiction over the claim and that the suit was untimely under the two-year statute of limitation provided by the SAA. The district court refused to apply the doctrine of equitable tolling, and granted the motion to dismiss.

Notably, the plaintiff argued that her claim was not untimely for "garden variety neglect," but instead resulted because her claim involved an issue of admiralty tort jurisdiction that was one of first impression in the Sixth

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[203] Krupski v. Costa Crociere S. p. A., 560 U.S. 538 (2010); See also Heather Zinkiewicz, *Navigating the Course of Relation Back: Krupski v. Costa Crociere S.P.A. and Standardizing the Relation-Back Analysis*, 44 LOY. L. REV. 1197 (2011).

[204] 560 U.S. at 546 n.2 (citing Arthur v. Maersk, Inc., 434 F.3d 196, 208 (3d Cir. 2006) ("A 'mistake' is no less a 'mistake' when it flows from lack of knowledge as opposed to inaccurate description").

[205] Ayers v. United States, 277 F.3d 821, 828-29 (6th Cir. 2002).

Circuit. The Sixth Circuit noted that equitable tolling allows an action to proceed despite its having been brought outside the statute of limitations when exceptional circumstances exist that have prevented timely filing of the action through no fault of the Plaintiff. However, in light of the Supreme Court's decision in *Irwin*, the court noted that courts would only apply the doctrine of equitable tolling against the United States "sparingly."[206] Appellant's claim that equitable tolling should be applied because she was misled by the United States' representations was held to be without merit. The court doubted whether the admiralty jurisdiction issue was unclear, but noted that if there was any doubt as to which statute to file under, she was free to include both in her initial filing, and alternative pleadings were not discouraged.

In another more recent case, the United States District Court for the Eastern District of Washington in *Miller v. United States* also dismissed a plaintiff's suit, refusing to allow the plaintiff leave to amend her complaint improperly brought under the FTCA to state a claim under the SAA.[207] Professor Robert Force has noted that this result is "unduly harsh" given that the United States had ample notice that the plaintiff was bringing a suit.[208]

VIII
CONCLUSION

It is important for litigants to be acutely aware of the nuances of the Suits in Admiralty Act, the Public Vessels Act, and the Federal Tort Claims Act. Failure to understand the proper pleading requirements, the statute of limitations, and the administrative claim requirements can have the effect of depriving the party of adjudication on the merits.

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[206]Id. at 828 (citing Irwin v. Department of Veterans' Affairs, 498 U.S. 89, 96 (1990)).

[207]Miller v. United States, 2011 WL 43616 (E.D. Wash. 2011).

[208]1 Robert Force & Martin J. Norris, THE LAW OF MARITIME PERSONAL INJURIES §14:3 (5th ed. Supp. 2013).