

Texas Ports and Courts Update

May 2021

We have collected and summarized these items to help keep you apprised of the latest news and developments from the ports and courts on the Texas coast.

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1. COVID-19 Update

General Statewide Status

Texas COVID-19 infections and hospitalizations have remained at lower levels over the past few months. Vaccinations are now available in Texas for all individuals aged 16 and over. Recent data indicates that approximately 40% of the state's adult population has received at least one vaccination dose, and about 31% of adults are fully vaccinated.

Our statewide COVID-19 restrictions on restaurants and bars have remained relaxed, and some public spectator events have returned to more normal capacities (for instance, the Houston Astros baseball team currently permits attendance at over 50% capacity, and the Texas Rangers baseball team in Dallas permits attendance at 100% capacity). Many offices in Texas that adopted remote work models during earlier stages of the pandemic are returning to in-person work environments (and rush-hour traffic has unfortunately returned as well).

Texas Ports

Stevedores and terminal facilities continue normal operations with appropriate protective gear and social distancing. The Ports of Brownsville, Corpus Christi, Freeport, Galveston, Houston, and Port Arthur/Beaumont continue to permit shore leave, and crew changes/repatriation requests are allowed on a case-by-case basis.

U.S. Customs and Border Protection (CBP) and USCG personnel are conducting in-person boarding activities and many agents personally attend vessels at this time. Strict adherence to COVID-19 precautionary measures (e.g., facemasks, avoidance of physical contact, etc.) is generally required, and many vessels and terminal facilities have mandatory temperature checks. Vessels still need to advise CBP and USCG boarding teams of any crew illnesses prior to embarkation.

Vessels are also required to notify the Coast Guard Captain of the Port of any crewmember showing COVID-19 symptoms. COVID-19 testing kits

are readily available. Recent reports have advised that rapid tests (results in ~20 minutes) cost ~\$400-500 apiece, and PCR standard tests (results in ~48 hours) cost ~\$350 per test.

Travel arrangements for departing crewmembers continues to create difficulties. Recognizing these problems, CBP has eased some of its prior restrictions. For instance, in certain situations CBP is no longer requiring departing crewmembers to leave the U.S. via direct, non-stop flights, allowing one U.S. stop to connect with an international departing flight.

USCG-Houston is experiencing some COC inspection delays due to human resource shortages, causing delays in excess of ten days for some vessels. At this time, USCG-Houston is not granting COC deferments and/or remote exams. USCG-Houston will only attend a berthed vessel. Thus, it is best to make COC requests as far in advance as possible.

Texas Courts

Like other business sectors in the state, in-person activities are expanding at the Texas federal and state courts. The Corpus Christi and Houston Divisions of the Southern District of Texas are now open for civil jury trials. The other divisions, including but not limited to Brownsville and Galveston, are expected to soon announce their respective plans to resume in-person civil jury trials. The Beaumont Division of the Eastern District of Texas has also adopted additional COVID-19 practices/procedures in conjunction with an anticipated increase in in-person proceedings and trials. Although Texas state courts have generally trailed the federal courts in resuming in-person activities, indications from many state courts are that they too are making efforts to resume more in-person activities in the coming weeks.

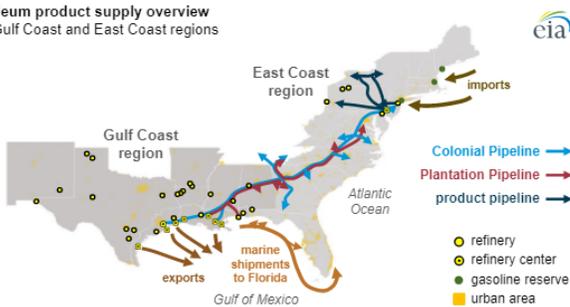
Over the past couple of months, we have observed an uptick in the scheduling of in-person hearings and non-jury trial proceedings, and we have participated in such activities without substantial difficulty. We also note that most courts that have resumed in-person activities continue to permit options for remote attendance via telephone and/or videoconference in many situations.

2. Recent Port Activity and Development Projects

While the Colonial Pipeline shutdown initially appeared as though it might have an extended impact upon shipping operations along the Texas Gulf Coast, it seems that recent recovery efforts are gaining momentum and normal operations should be restored in the near term. Nevertheless, the disruptions initially raised medium-range and short-haul spot rates to 12-month highs in many instances. Although there was significant early interest in floating storage availability, that activity has largely dissipated as the prospects for an extended shutdown have diminished over recent days. Due to the supply disruptions and extraordinary consumer fuel purchases that have plagued the East Coast, the Biden administration has issued a single temporary Jones Act waiver to permit a foreign-flagged tanker to transport gasoline and jet fuel to the East Coast. Additional waiver requests are reportedly under consideration.

A lengthy crisis appears to have been avoided, but the Colonial Pipeline shutdown highlights the need for contractual and risk management protections tailored to address these increasingly common network attacks. Over the past few years, we have received a notable increase

Petroleum product supply overview
U.S. Gulf Coast and East Coast regions



in client inquiries to further prepare for these types of issues, and we anticipate that this recent event will spur further interest to address these critical areas of concern.

Below are some highlights of recent activities and expansion efforts at the Ports of Brownsville, Corpus Christi, Freeport, Galveston, Houston, and Port Arthur/Beaumont.

Brownsville: Sunoco announced the development of a refined products terminal at the Port of Brownsville. The terminal, with 560,000 barrels of storage and throughput capacity of 50,000 barrels per day, is expected to provide supply flexibility to Sunoco's existing fuel distribution business in South Texas, and it will also position Sunoco to sell into the growing fuels export market to Mexico. Sunoco expects the terminal to be in service by the second quarter of 2022.

Brownsville continues to be a major U.S. location for shipbreaking activities, with multiple companies currently engaged in such operations. One of these companies, International Shipbreaking, was recently awarded a project to dismantle the amphibious assault ship, USS Bonhomme Richard, which was the victim of a massive four-day fire that broke out last July while the vessel was docked in San Diego. With repair costs expected to approach \$2.5 billion, the U.S. Navy elected to proceed with dismantling, which is estimated to cost \$30 million.

International Shipbreaking also recently completed a substantial upgrade of its facilities and earned European Union Ship Recycling Regulation (EU SRR) accreditation, which will permit it to dismantle and recycle EU-member flagged vessels. The first EU-member flagged vessel (Wolverine) recently arrived at its facility for dismantling.

Corpus Christi: Shipping activities at the Port of Corpus Christi continue at a furious pace. While 2021 first-quarter tonnage is down slightly from last year, tonnage remains nearly double 2019 levels. Additionally, liquefied natural gas (LNG) shipments in January and March were at record levels. Recent statistics show that 75% of the Port's business is on the export side, mostly involving hydrocarbons. Local port authorities believe that the Biden administration will continue to support U.S. energy export activities to, among other things, compete with and displace Russian and Iranian oil products.

The Port of Corpus Christi Authority and Stabilis Solutions announced plans to construct LNG fueling facilities as they seek to expand the Port's support of decarbonization efforts. According to the announcement, the Port will provide suitable access to dock space for shore-to-ship fueling operations while Stabilis will deploy its existing fleet of mobile cryogenic assets, including LNG transportation and distribution equipment, from its LNG production plant in South Texas to support LNG fueling operations.

In another effort to incorporate new energy sources, the Port of Corpus Christi Authority is taking initial steps to pursue green hydrogen. The Port entered into a nonbinding Memorandum of Understanding with Ares Management Corporation for the development of the infrastructure on Port-owned property that would support the "production of green hydrogen and optionality to provide renewable power directly to the port and its customers." Green hydrogen is produced by passing an electric current, generated from a renewable energy source, through water without any emissions. The agreement between the Port and Ares outlines preliminary items for a renewable energy and clean fuel hub that will include solar, battery storage, and electrolyzer facilities.





Although U.S. offshore drilling activity has dropped in recent years, the industry still remains an important cog in the Texas economy. Argos, a 60,000-ton semi-submersible, floating production platform recently arrived at Kiewit Offshore Services in Ingleside from a shipyard in South Korea. Upon completion of final preparation work and inspections, Argos will be transported for use at BP's Mad Dog 2 project, about 200 miles south of New Orleans. Argos will operate in 4,500 feet of water, and it has the ability to produce up to 140,000 barrels of oil per day.

Freeport: A third LNG liquefaction train went into commercial operation at the Freeport LNG export terminal. The Freeport LNG facility incorporates the largest electric motor-driven refrigeration compressors in the world. Freeport LNG, Osaka Gas and JERA (formerly Chubu Electric) have been venture partners on the project since 2012.



Shell has predicted that global LNG demand could reach 700 million metric tons annually by 2040 – double its current rate. In view of anticipated market conditions and recent inquiries regarding long-term supply contracts, Freeport LNG is reportedly considering construction of a fourth LNG liquefaction train at the facility.

Galveston: After an absence extending over a year, cruise ships have once again returned to the Port of Galveston. Earlier this month, two Carnival cruise ships (Carnival Breeze and Carnival Vista) called at the Port of Galveston. As part of a recent vaccination campaign coordinated by port officials in partnership with the University of Texas Medical Branch, COVID-19 vaccines were administered to crewmembers of the two vessels. Local officials are optimistic that cruise travel may return to Galveston as early as this summer.



Norwegian Cruise Lines has also announced that the Norwegian Prima is set to call late next year. Local officials indicate that the cruise line is looking at Galveston as a new homeport.

Houston: The Port of Houston continues to emerge from recent weather-related disruptions and the upheavals of the global pandemic. Indicative of these gains, the Port of Houston announced that container volume in March 2021 was the highest ever reported. The Port of Houston handled 297,397 twenty-foot equivalent units (TEUs) in the last month – a 20% gain over March of last year.



The Port has broken ground to start construction to widen and deepen the 52-mile Houston Ship Channel. Known as Project 11, the nearly billion-dollar dredging project will provide for safer and more efficient navigation for the vessels calling the more than 200 private and eight public terminals at the Port of Houston. Project 11 will also permit better accommodation of post-Panamax ships. The project will widen the channel by 170 feet along its Galveston Bay reach, from 530 feet to 700 feet. It will also deepen segments up to 46.5 feet, make other safety and efficiency improvements, and craft new environmental features.

ExxonMobil recently announced a plan to build one of the world's largest projects for carbon capture and storage (CCS) along the Houston Ship Channel. The proposed project would cost \$100 billion and capture/store 100 million metric tons of carbon dioxide per year. The emissions saved would be equivalent to removing 1:12 cars on U.S. roads. ExxonMobil is



proposing to build infrastructure to capture its own carbon dioxide emissions, as well as those from power plants, oil refineries, and chemical plants in the Houston area. The carbon dioxide would be piped into a storage reservoir thousands of meters under the water in the Gulf of Mexico.

For the ExxonMobil project to be economically viable, it would need major public funding and the introduction of a price on carbon in the U.S. ExxonMobil says the project could be fully operational by 2040. It will be interesting to see what develops from this proposal.

Port Arthur/Beaumont: Completing another important project increasing local transport capabilities, Fortress Transportation and Infrastructure Investors, LLC and Jefferson Energy Companies announced the completion of the Southern Star pipeline project. The project consists of a 24-inch crude oil pipeline connecting the Jefferson Energy terminal to the Motiva Port Neches terminal. The Southern Star pipeline allows for efficient oil pipeline movements between the two locations and provides pipeline throughput capacity up to 288,000 barrels per day of light and heavy crude oil. Jefferson Energy expects crude types originating from all of the major North American production basins, including, but not limited to, Western Canada, Permian, Mid-Continent, Bakken, and Rockies, will utilize the pipeline. The Jefferson Energy terminal is located on the Neches River in the heart of the Beaumont refining complex. The Jefferson Energy terminal has been in operation for almost ten years and currently has over 4.3 million barrels of storage servicing both crude oil and refined products.



3. News from the Courts

***Sanchez v. Smart Fabricators* – The Fifth Circuit reassesses its seaman status calculus and finds that a welder injured on the Outer Continental Shelf is not a seaman.**

Courts generally employ a two-prong test to address the question of whether or not a plaintiff qualifies as a “seaman”: (1) did the plaintiff’s duties contribute to the function of the vessel or to the accomplishment of its mission, and (2) did the plaintiff have a substantial connection to a vessel in both nature and duration. As we have reported previously, *Sanchez v. Smart Fabricators* afforded the Fifth Circuit an opportunity to reassess this calculus. In an opinion recently issued by an 18-judge *en banc* panel, the Fifth Circuit exercised this opportunity and significantly reframed the nature component of the substantiality requirement in the second prong to better conform to U.S. Supreme Court precedent.

By way of brief recap, the pertinent facts of *Sanchez* are as follows. At the time of the incident giving rise to the suit, Plaintiff Sanchez was a land-based welder employed by Defendant Smart Fabricators. Over the course of a one-year period from August 2017 to August 2018, Sanchez worked for Smart Fabricators for a total of 67 days. For six of the 67 days, Sanchez worked on land or other work irrelevant to his status as a seaman in this case. For the remaining 61 days, Sanchez worked on two jack-up drilling barges owned by Smart Fabricators’ customer, Enterprise. Sanchez spent 48 days working on the first barge, which was positioned level with and alongside a shoreside dock, leaving the barge only separated from the dock by a gangplank. Sanchez commuted home from the first barge on a daily basis. For the other 13 days, Sanchez worked on the second jack-up barge, which was located on the Outer Continental Shelf (OCS). Sanchez fell and sustained injuries while working on the second barge.

Sanchez sued Smart Fabricators in Texas state court alleging that he was a Jones Act seaman. Smart Fabricators removed the case to federal district court. The district court denied remand to state court and granted Smart Fabricators summary judgment, finding that Sanchez was not a Jones Act seaman. The district court concluded that Sanchez met the first prong of the seaman status test and further concluded that Sanchez met the duration component of the second prong due to the fact that he spent more than 30% of his work time on the two jack-up barges. However, the district court also concluded that, because less than 30% of Sanchez’s work on the two barges was performed away from the dock, he did not satisfy the nature component of the substantiality requirement. Accordingly, the district court found that Sanchez was not a seaman.

Bound by Fifth Circuit precedent, the original three-judge Fifth Circuit panel found that Sanchez met the requirements for seaman status. In doing so, the initial panel based its decision on two previous Fifth Circuit opinions (*Naquin v. Elevating Boats, LLC* and

In re Endeavor Marine, Inc.). However, the initial panel also issued a unanimous concurring opinion questioning whether the Fifth Circuit caselaw was still valid in light of other Supreme Court decisions, and the matter was ultimately accepted for *en banc* review by the entire Fifth Circuit.

At the outset of its opinion, the *en banc* panel found that *Naquin* was erroneous and should be overruled. While the *en banc* panel would not go so far as to say that *Endeavor Marine* resulted in an incorrect holding, its rationale was rejected. Specifically, the *en banc* panel criticized *Naquin* and *Endeavor Marine* for relying upon an oversimplified analysis of whether the injured plaintiff was subject to the “perils of the sea”. While acknowledging that exposure to the “perils of the sea” is a valid consideration, the *en banc* panel found the following inquiries should be made as well:

- (1) Does the worker owe his allegiance to the vessel, rather than simply to a shoreside employer?
- (2) Is the work sea-based or involve seagoing activity?
- (3) (a) Is the worker’s assignment to a vessel limited to performance of a discrete task after which the worker’s connection to the vessel ends, or (b) Does the worker’s assignment include sailing with the vessel from port to port or location to location?

Applying the above inquiries to the specific facts of the case, the *en banc* panel analyzed whether Sanchez satisfied the nature component of the substantiality requirement. Because Sanchez’s work on the first barge was entirely performed while it was docked, Sanchez’s work on the first barge did not help him meet the nature component as his work on the docked barge was not “of a seagoing nature”, and his duties on the first barge did not “take him to sea”. With respect to Sanchez’s work on the second barge, the *en banc* panel noted that Sanchez performed the work on the OCS, but he had only worked on the second barge for well less than 30% of his total time of employment with Smart Fabricators, and Sanchez’s work on the second barge was for just a discrete, individual job that, when finished, would result in Sanchez’s return ashore and end any further connection between Sanchez and the second barge. Accordingly, as a specialized transient worker engaged to perform a specific, discrete short-term job, the *en banc* panel concluded that Sanchez did not qualify as a seaman, analogizing Sanchez’s specific, short-term work to that of a longshoreman.

This recent decision, and its reformulation of the seaman status calculus, should produce significant reverberations within the courts of the Fifth Circuit, particularly with respect to claims involving the offshore and shipyard industries.

A copy of the Fifth Circuit’s opinion may be accessed via the following link:

<https://www.ca5.uscourts.gov/opinions/pub/19/19-20506-CV2.pdf>

Douglass v. Nippon Yusen Kabushiki Kaisha (NYK Line) – Fifth Circuit finds no jurisdiction for suit arising from collision between the U.S.S. Fitzgerald and NYK Line’s ACX Crystal.

This one is a jurisdictional matter that arises from the tragic 2017 collision between the navy destroyer U.S.S. Fitzgerald and the NYK Line-chartered ACX Crystal, which occurred in Japanese territorial waters. The collision killed seven U.S. sailors and injured at least 40 additional sailors. After the incident, two sets of plaintiffs filed suit against NYK Line in Louisiana federal court. The Douglass plaintiffs were personal representatives of the seven sailors killed. They filed wrongful death and survival claims under the Death on the High Seas Act. The numerous sailors who were injured in the collision, along with 17 family members with consortium claims, sued separately as the Alcide plaintiffs. The plaintiffs in both cases asserted personal jurisdiction over NYK Line, alleging that, despite NYK Line’s status as a foreign corporation, NYK Line’s substantial, systematic, and continuous contacts with the United States should make NYK Line amenable to suit in U.S. federal court. NYK Line moved to dismiss for lack of personal jurisdiction. The Louisiana federal district court granted NYK Line’s motions and entered identical judgments in both cases. The plaintiffs’ appeals were subsequently consolidated before the Fifth Circuit.

Addressing whether the district court could constitutionally exercise personal jurisdiction over NYK Line, the Fifth Circuit panel, bound by the rule of orderliness (requiring three-judge panels to follow the decisions of earlier panels), concluded that it was constrained to affirm the district court’s ruling based on existing Fifth Circuit precedent, namely, *Patterson v. Aker Solutions, Inc.* A special concurrence agreed that *Patterson* muddled the Fifth Amendment due process inquiry by applying Fourteenth Amendment caselaw, and it urged a course correction, noting that the case “presents a good vehicle” for *en banc* review.

Thus, like *Sanchez*, this one may end up before a full *en banc* panel of the Fifth Circuit judges. We will keep an eye on it and let you know if there are any further developments.

A copy of the Fifth Circuit’s opinion may be accessed via the following link:

<https://www.ca5.uscourts.gov/opinions/pub/20/20-30382-CV0.pdf>

In re Allstate Indem. Co. – The Texas Supreme Court assists personal injury defendants’ ability to effectively and efficiently challenge plaintiffs’ medical expenses evidence.

This opinion from the Texas Supreme Court is expected to be quite useful to our defense of personal injury matters pending in Texas state courts. In our state courts, a plaintiff is permitted to introduce evidence that his/her past medical expenses are reasonable and necessary by filing an affidavit from the medical provider. Texas state courts likewise allow defendants to refute these affidavits by submitting a counter-affidavit “made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise, to testify in contravention of all or part of any of the matters contained in the initial affidavit.”

Over the course of the past several years, in an attempt to protect efforts to present exorbitant and unrealistic past medical expenses totals, the plaintiff’s bar has increasingly moved to strike counter-affidavits. In doing so, the plaintiff typically asserts that the expert preparing the counter-affidavit does not meet the qualification standard for expert testimony. Such arguments are often made in response to counter-affidavits by certified professional coders as to the reasonableness of medical charges.

Allstate concerned a counter-affidavit as to the reasonableness of medical charges prepared by a registered nurse who is also a certified professional coder. The counter-affidavit stated that the nurse/certified professional coder determined whether multiple medical providers had used the correct Current Procedural Terminology (CPT) codes for the treatment provided and used a database to determine the median charges for services associated with those CPT codes in the geographical area where the services were provided.

The plaintiff in *Allstate* filed a motion to strike the counter-affidavit on the basis that the registered nurse/certified professional coder was not qualified to controvert the reasonableness of charges of a hospital, doctor, physical therapist, and/or pharmacy and that her opinions and data were unreliable. The trial court granted the motion to strike and the intermediate appellate court denied the defendant’s petition for writ of mandamus to challenge the trial court’s decision.

On further appeal, the Texas Supreme Court agreed with the defendant and found that the trial court abused its discretion in striking the counter-affidavit. Significantly, the Texas Supreme Court held:

- (1) A counter-affidavit challenging the reasonableness of medical charges by a hospital or medical provider does not have to be made by someone in the same field of medicine. (Thus, experienced professional coders may be qualified to testify about the reasonableness of medical expenses from multiple providers and may utilize national databases to reach their opinions.)
- (2) The typical expert witness factors regarding reliability of expert opinions relate to admissibility of testimony and are not a proper basis for striking a counter-affidavit. The purpose of a counter-affidavit is to provide reasonable notice to the plaintiff of the basis on which the reasonableness and/or necessity of his or her medical expenses will be challenged. A counter-affidavit which provides such reasonable notice cannot be struck on the basis that it is not made by an expert in the same field of medicine or on the basis that the opinions do not meet the reliability standards typically applied to expert testimony.
- (3) A defendant’s failure to serve a compliant counter-affidavit has no impact on the defendant’s ability to challenge reasonableness or necessity of medical expenses at trial.

We anticipate that this opinion will likely reduce the number of motions to strike counter-affidavits and will assist the defense bar’s efforts to respond to these arguments. Another practical consequence of the *Allstate* decision is that, once a sufficient counter-affidavit is filed, both the plaintiff and the defendant will likely need expert testimony on medical expenses.

A copy of the Texas Supreme Court’s opinion may be accessed via the following link:

<https://www.txcourts.gov/media/1452189/200071.pdf>

This update was collectively prepared by our offices in Houston, Galveston, Corpus Christi, and Brownsville. Our offices remain open and fully operational, and our lawyers and marine investigators are conveniently located near each of Texas’ major ports.

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