

SEA VENTURE

DECEMBER 2020



1. Florida -Court Procedures Upheld



Some recent cases provide good news for defendants as the orders for dismissal are final, although plaintiffs have some legal avenues to explore. This is a useful article if you deal with legal cases in the United States.

2. Rescue of Migrants – Who Assists the Assisters?



Providing a link to the IMO/UNHCR “Rescue at Sea” Guide, this article by Darren Heppel looks at some recent difficulties encountered by ships in the Mediterranean, when involved in the rescue of migrants.

3. Steamship Mutual News



Read about the blessing of our Steamship office in Cyprus as well as the 35 year anniversary of another Steamship office in Rio, plus news about our Cruise & Ferry Department and our new recruit in Loss Prevention.

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1. フロリダ州における判例の紹介

Stephanie Haywardは、最近の起こった複数の事例を挙げてフロリダの裁判所がそれをどのように扱ったか、そして原告と被告の両方にどのような影響があるかを調査しています。



最近のフロリダ州の裁判所におけるいくつかの判例は、被告にとっていいニュースとなっています。この記事は米国で訴訟を取り扱う場合に役立つ記事です。これらの判決をみると一部の連邦裁判所の裁判官が、連邦民事訴訟規則の第7規則に基づき、申立てをせずに、訴えを修正するための時間的猶予を請求しなかった原告に対してより厳しい立場を取っているようです。

これらの判決は被告にとっていいニュースです。訴訟を却下するという命令は最終的なものであり、原告の選択肢は、裁判所の却下命令に対して上訴するか、再審理の申立てを提出するか、または新たな訴訟を起こすことに限定されます。

第7規則は新しくできた規則ではありませんが、最近の事件により一部の判事はこの規則を厳格に順守して判断するようになりました。当クラブとしてはこの姿勢が続くことを願っています。

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avenues to explore. This is a useful article if you deal with legal cases in the United States. It looks at some recent cases and how the courts have dealt with them, and what the implications might be for claimants and defendants alike.

Plaintiff's failure to issue motion for leave to amend-
Good news for Defendants!

Recent decisions in Florida suggest that some Federal Court judges are taking a tougher stance on plaintiffs who fail to seek leave to amend their complaint without filing a motion, as Rule 7 of Federal Rules of Civil Procedure requires:

Rule 7 of Federal Rules of Civil Procedure states:

"b) MOTIONS AND OTHER PAPERS.

(1) In General. A request for a court order must be made by motion. The motion must:

(A) be in writing unless made during a hearing or trial;

(B) state with particularity the grounds for seeking the order; and

(C) state the relief sought."

In the past, plaintiffs have sought leave to amend the complaint in their Response to the defendant's motion to dismiss, usually with a couple of sentences, and courts have generally allowed it. It has not been unusual for Plaintiffs to be given two or more opportunities to amend their complaint. Rule 15 of Federal Rules of Civil Procedure provides:

(a) Amendments Before Trial.

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.



The requirement to file a Motion seems to have been routinely ignored. However, it seems that some judges are now taking a hard line on those failing to comply with the rule. The recent case of *Avena v. Imperial Salon & Spa Inc.* (see below) appears to have given the cause some momentum.

The fact that a motion needs to be filed was raised in the case of *Long v. Satz*, 181 F.3d 1275 (11th Cir. 1999). At first instance, the district court dismissed the action without allowing the plaintiff to amend her complaint, and on appeal to the 11th Circuit, the Court stated "*Federal Rule of Civil Procedure 15(a) provides that 'leave [to amend] shall be freely given when justice so requires'*" and also confirmed that that the filing of a motion was the proper method to request leave to amend a complaint, the court referring to the Federal Rule 7 above.

Recent developments in Case Law

In the case of *Avena v. Imperial Salon & Spa Inc.*, 740 Fed.App'x679 683 (11th Cir 2018) the appellant argued that the district court abused its discretion in denying her request for leave to amend. The court, however, noted that:

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“[a] request for a court order must be made by motion for leave to amend “The motion must: (A) be in writing unless made during a hearing or trial; (B) state with particularity the grounds for seeking the order; and (C) state the relief sought. Further “a motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of the proposed amendment”

“...The appellate court found the request possessed no legal effect for two reasons”

Avena, the court further noted that the only request the appellant made for leave to file an amended complaint was by way of a single line at the end of her motion in opposition to the motion to dismiss. The court found the request was improper because it neither contained a proposed amendment, nor provided any substance of the proposed amendment.

This decision was followed by *Newton v Duke Energy Florida, LLC* 895 F.3d 1270,1277 (11th Cir.2018) where the appellant appealed the decision denying them leave to amend their complaint. The appellate court found the request possessed no legal effect for two reasons:

“First, “[w]here a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly”. ...Second :[a] request for a court order must be made by motion. The motion must be in writing unless made during a hearing or trial. And it must “state with particularity the grounds for seeking the order[,] and state the relief sought. Plaintiffs’ inclusion of the request for leave in their opposition to a motion to dismiss did not constitute a “motion” and thus did not comply with this rule 7(b) command”

In the case of *Rygula v NCL (Bahamas) Ltd*, Civil Action No.18-24535-Civ, 2019 U.S Dist.LEXIS 147586 S.D Fla. Aug 28,2019, the Federal Court judge cited *Avena* and *Newton* to support dismissal of the complaint and to deny the appellant’s request to file a second amended complaint.

In the recently decided case of *Sanlu Zhang v. Royal Caribbean Cruises, Ltd.*, Civil Action No. 19-20773-Civ, 2019 U.S. Dist. LEXIS 199362 (S.D. Fla. Nov. 14, 2019), the Federal Court judge relied again on

An attempt at sandbagging that backfired

Avena and *Newton*, finding that the plaintiff’s request for leave to amend was improperly presented as an afterthought in response to a motion to dismiss and the court confirmed in those circumstances the request would not be considered. Although the court dismissed the complaint without prejudice, the ruling denying the request to amend effectively ended the case (prior to this ruling, the court of its own motion dismissed the initial complaint finding it was a shotgun pleading).

In *Garcia v. Goodwill Indus. of S. Fla.*, No. 18-25042-CIV, 2019 U.S. Dist. LEXIS 198676 (S.D. Fla. Nov. 15, 2019) the Federal Court judge also dismissed the Complaint in November 2019 as in *Zhang* above, citing Plaintiff’s failure to file a motion requesting leave to amend.

On 25 March 2020, the court denied Zhang’s motion for reconsideration and the Order is a word of warning to Claimant attorneys who produce shotgun pleadings:

“Zhang reviewed the Defendants’ motions to dismiss, vigorously opposed them and then sat back and waited to see if the Court would let his pleading fly. And then, when the Court granted the motions to dismiss, Zhang suddenly came up with a litany of new facts that he claims fix his pleading’s deficiencies. Zhang had every opportunity to fix the deficiencies the Defendants identified prior to the Court’s careful and thorough review. He should have taken his best shot from the get go; he should not have waited for the Defendants and the Court to have worked through his pleading before bothering to inform all involved that he had a much better pleading in his back pocket in case things went badly for him. At best this was a poor strategic decision; at worst this was an attempt at sandbagging that backfired.

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Comment

These recent cases are good news for defendants as the orders for dismissal are final and the only options for a plaintiff are to appeal the court order, file a motion for reconsideration (although as we see in Zhang above, such motion may not be successful) or, if the claim is still within time, to file a new lawsuit.

Whilst Rule 7 is not a new rule, the case of *Avena* seems to have motivated some judges into action to ensure the rules are adhered to. We hope this pattern continues, although at present, not many courts have taken the harsh path of the *Zhang* court.

If you have any questions about the article please email stephanie.hayward@simsl.com

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2. 難民の救助について—誰が支援者を支援する？

このDarren Heppelによる記事は、本船が地中海で移民の救助に関与したときに直面した問題をいくつか紹介しています。



毎年、何千人もの移民と亡命希望者が、安全や、迫害からの避難、または単により良い経済状況を求めて、海上で危険な旅をしています。しかしながら、輸送や政治が大惨事を防止しようとしている人々に及ぼす影響はあまり知られていません。

国際海事機関 (IMO)、国際海運会議所 (ICS)、国連難民高等弁務官事務所 (UNHCR) は、この度「[Rescue at Sea—難民と移民に適用される原則と実践のガイド](#)」(ガイド) を発行しました。この文章は、とりわけ船長、船主、政府当局、保険会社を対象としており、政府と海事救助調整センター (「MRCC」) の義務などを紹介しています。また、この文書は国際難民法に注目したうえで、当事者となったときに遵守すべき手続きと手引きも掲載しています。

船長がIMOの手引きに基づき、確実に当局からの指示に従っていることが非常に重要です。また、船長は、救助に際して行われた措置の正確な記録をとり保持しておく必要があります。

Rescue of Migrants – Who Assists the Assisters?

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Providing a link to the IMO/UNHCR “Rescue at Sea” Guide, this article by Darren Heppel looks at some recent difficulties encountered by ships in the Mediterranean, when involved in the rescue of migrants.



Every year, thousands of migrants and asylum seekers undertake perilous journeys at sea in search of safety, refuge from persecution, or simply better economic conditions. Whilst the difficulties experienced by migrants attempting to cross seaways are well publicised, the logistical and political consequences for those seeking to prevent catastrophe are less well known.

IMO/UNHCR Guide: Rescue at Sea

The rescue of persons at sea is a long-standing tradition with seafarers all too aware that, one day, it could be they who are reliant upon such assistance. In addition to the humanity and morality of rendering assistance, a Master also has a legal obligation to go to the assistance of those in distress at sea pursuant to Art 98(1) of the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”) and Chapter V, Regulation V33/1 of the 1974 International Convention for the Safety of Life at Sea (“SOLAS”).

The International Maritime Organization (“IMO”), International Chamber of Shipping (“ICS”) and United Nations High Commissioner for Refugees (“UNHCR”) have issued their publication “[Rescue at Sea. A Guide to Principles and Practice as applied to Refugees and Migrants](#)” (the “Guide”). This is intended for Masters, Shipowners, Government Authorities and insurance companies amongst others and includes information about the obligations

of Governments and Maritime Rescue Coordination Centres (“MRCC”). The document looks at international refugee law and has guidance on procedures to be followed.

Despite the guidance provided by such eminent organisations, commercial vessels can still experience problems when requested to render



assistance, as was discovered in a recent case involving a Club Member when their vessel responded to a search and rescue (“SAR”) instruction received from MRCC Rome – the Italian Coastguard.

The original instruction required the vessel to proceed to stated coordinates within Libyan waters where a boat was reported adrift with 17 migrants onboard. If sighted, the vessel was then required to seek further instructions from the Libyan Coastguard who MRCC Rome had advised were the SAR Competent Authority.

The Member’s vessel was fully laden with a gas cargo and was too small to accommodate the number of reported migrants without severe difficulty. Nonetheless the Master complied with the instruction and deviated from his original course expecting that, when he arrived, the responsible authority would provide further instructions.

When arriving on site, it was found that another larger vessel was already in attendance alongside the migrant vessel. As directed by MRCC Rome, the Master then sought instructions from the Libyan Coastguard who advised that they had no available vessels to assist and instructed him to contact MRCC Malta. MRCC Malta, in turn, advised that they were not concerned with the matter as the

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migrant vessel was outside of Maltese waters and that the Master should contact MRCC Rome in its capacity as the original instructing party.

“Commercial vessels are commonly called upon to act as first responders...”

MRCC Rome subsequently advised that since it was not the coordinating MRCC and as the migrant vessel was not Italian flagged nor in Italian waters, the Master should contact the Libyan Coastguard or Flag State. Although the vessel was Maltese-flagged the position of the Maltese authorities remained unchanged. This continued to be the case whilst the vessel remained in situ for over 19 hours.

The other attending vessel subsequently departed whereafter the Master himself contacted the migrant vessel and was informed that no assistance was required. With this assurance the Master notified the various MRCC/SAR authorities and departed.

This scenario highlights the practical problems faced by commercial vessels who respond to SAR instructions and raises the question as to what reasonable steps a Master may take in the absence of specific instructions from the concerned authorities.

In the subject case the Master stayed on site for a lengthy period of time, continually sought instructions from all MRCC/SAR authorities and obtained confirmation from the migrant vessel that no assistance was required - all of these steps being documented in the ship's records.

The aforementioned Guide advises that under UNCLOS, SOLAS and the 1979 International Convention on Maritime Search and Rescue (“SAR Convention”) Member States have a duty to provide a place of safety for rescued persons and are also obliged to ensure that Masters of commercial vessels rendering assistance are released from their obligations with minimum delay and deviation from their original voyages.

The Guide further explains that the Government responsible for the SAR region where assistance is required is primarily responsible for providing a place of safety for persons in distress. The first MRCC contacted should immediately begin efforts to transfer the case to the MRCC that is responsible for the region in which the assistance is being rendered. That recipient MRCC should immediately accept responsibility for undertaking rescue efforts and initiate necessary contact and coordination with the local SAR Competent Authority (Coastguard, Navy etc.). However, the first MRCC remains responsible for coordinating the case until the recipient MRCC has formally taken over responsibility.

Although the above provisions stipulate the intended procedure, the situation encountered by the Member's vessel suggests a breakdown of this system which resulted in the concerned national authorities themselves failing to assist the Master.

As well as the Member's own experience, a similar situation was recently encountered by the Maersk tanker “MAERSK ETIENNE” which had, until recently, been denied permission by various nations to disembark 27 migrants that it had rescued in response to a request from MRCC Malta. As a consequence, the vessel, its crew and the rescued migrants were left stranded for some 40 days.

Commercial vessels are commonly called upon to act as first responders by an MRCC and are generally asked to attend and monitor a situation from a distance until the respective Navy, Coastguard or recognised NGO vessel appears on the scene.

Once this has occurred the commercial vessel would be released and permitted to continue its voyage.

However, the withdrawal of EU Naval support, Covid-19, increasing immigration pressure upon nations bordering the Mediterranean, political instability and hostility shown towards NGO ships seeking to provide assistance raises the prospect of commercial shipping being increasingly called upon to provide assistance.

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The ability of individual commercial vessels to provide such assistance within their own capabilities and resources combined with the lack of coordination between MRCC/SAR authorities and seeming unwillingness of Governments to permit the disembarkation of rescued migrants, risks a further deterioration of an already difficult situation.

Until a fully cohesive approach to the issue of migration is adopted, should a responding vessel encounter a similar situation, it is important to ensure that the Master complies with instructions with the customary due diligence expected, giving consideration to the aforementioned guidance and maintains an accurate record of all steps taken.

If you have any questions about the article please email darren.heppel@simsl.com



Steamship Office Blessing In Cyprus

In common with all UK based P&I Clubs, Steamship Mutual was required to open a European domiciled insurance company in order to continue covering its European members after the Brexit transition period. Dublin, Rotterdam and Luxembourg proved popular destinations for some Clubs, but Steamship finally decided upon Limassol in Cyprus. Its strong maritime community and a clear commitment from the Cypriot government to support Shipping are among many of Cyprus' attractions. The Managers' dealings with the Cypriot regulator and the government have only reinforced our view that Steamship has found exactly the right home for its European entity. The sun, beaches, delicious food and driving on the left hand side of the road had nothing to do with the decision!



L – R Cristine Christodoulou, Ioannis Mavrides, Haris Papadema, Eftychia Christodoulou, Harry Van Overbeek, Marina Taouxi.

As a strong shipping centre, there is plenty of expertise in Cyprus and the Club has been able to bring together a strong team to service the membership from the office in Limassol. On 6 October 2020 we celebrated the opening of the new office with a traditional blessing led by a Greek Orthodox priest. His words of love, compassion and togetherness had particular meaning given the challenges the World currently faces.



Chris Adams, Steamship Group Managing Director, and Rupert Harris, Steamship Europe Chief Executive Officer, joined the ceremony by video link and said a few words, before Cyprus' Shipping Deputy Minister, Mr Vassilios Demetriades, thanked Steamship for choosing Cyprus and said he believed Steamship would make a positive contribution to the Cyprus shipping cluster. Although it was necessary to keep the number of guests to a minimum, we were also delighted to welcome representatives from the Club's Board, our Cypriot members, as well as the Director General of the Cyprus Shipping Chamber, Mr Thomas Kazakos. As the newest office of the Steamship Group, the Limassol team, in conjunction with their colleagues in London, are looking forward to providing the high levels of service Steamship's Members have come to expect and enjoy.

Steamship also has offices in London, Piraeus, Singapore, Tokyo, Hong Kong, Rio and Bermuda.



Steamship Mutual Rio Celebrates 35 Years

On the subject of Steamship's overseas offices, our Rio de Janeiro office has recently celebrated its 35th anniversary. South America has been an important area for Steamship for many years, and with our presence there growing through the early 1980's, we established a presence in 1985 to provide local claims support to our members. It is no coincidence that our local membership has continued to grow as our local office likewise flourished. Our office manager, Katia Oliveira, has been with us since the beginning, providing claims handling expertise to our Brazil based members, as well as further afield across South America. Katia has become a cherished friend and colleague to so many of our local members who have got used to the pre Covid welcome of a bear hug whenever they meet. Happy anniversary Rio !



L- R Ana Maria Lima; Jorge Castro; Katia Oliveira

Cruise And Ferry Department

A few weeks ago, Steamship was proud to launch its Cruise and Ferry department. Click this link to read more on the Steamship website

https://www.steamshipmutual.com/underwriting/cruise_ferry.htm

Ross Millar New Loss Prevention Associate

Regular readers may recall that in Sea Venture 32 magazine, published in May 2020, we published an article on page 80 about Steamship's Loss Prevention team.

https://www.steamshipmutual.com/Downloads/Sea-Venture/SeaVenture_32.pdf

That team has now grown with the addition of Ross Millar. Ross is a Master Mariner based in Steamship's London office. Before joining the Club, Ross was employed as a casualty investigator at a well known city law firm. He has dealt with collisions, groundings, fire, major loss of life, salvage and cargo claims.

Prior to coming ashore, Ross held a Marine Pilotage position handling all vessel types from modern offshore vessels to unmanned barges with towage assets. He also has experience as Master on Ro-Pax vessels with a respected Ferry Operator. He has 14 years sea going experience encompassing Pilotage, Ro-Pax, Offshore and Cruise. Ross also holds an Honours Degree from Glasgow University in Mechanical Engineering.



Ross Millar