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NAVIGATING THE LIMITS OF A FEDERAL COURT'S *IN REM* JURISDICTION

By: Lisa Reeves

Unlike most navigable waterways in the United States, the Delaware River is not confined within a single state. The Delaware River borders Pennsylvania, New Jersey, and Delaware, all of which host marine terminals along their shores. Commercial ships transiting the Atlantic enter the river through the Delaware Bay, a large body of water (between Delaware and New Jersey), into the commercial ship channel which runs 80 miles upriver to Philadelphia and beyond. Just north of Wilmington, Delaware, the eastern shore of the river is Pennsylvania.

This article explores the limits of a District Court's continued jurisdiction over a vessel arrested or attached in the district, in the event the vessel needs to shift to a berth or anchorage outside of the arresting court's geographic boundaries, for safety or commercial reasons.

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NAVIGATING THE LIMITS OF A FEDERAL COURT'S *IN REM*

JURISDICTION

By: Lisa Reeves

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I. A Case Study

Last year, a large tanker was arrested while docked at a marine terminal on the Pennsylvania side of the river. Pursuant to an order issued by the United States District Court for the Eastern District of Pennsylvania, the vessel was permitted to shift to another berth or anchorage as long as she remained within the District. Within a day or two of the arrest, the vessel moved to an anchorage adjacent to the berth, where she remained for several weeks.

Because of the vessel's size, her continued presence in the anchorage raised safety concerns for vessels transiting the area. The Coast Guard relayed this concern to the U.S. Marshal and the attorneys for the plaintiff and shipowner. Efforts to find a suitable lay berth or anchorage on the Pennsylvania side of the river

were unsuccessful, and the Court's order prohibited the vessel from journeying outside of the Eastern District of Pennsylvania.

Eventually, the Coast Guard directed the Master to move the vessel out of the anchorage. The Captain of the Port Order put the Master and shipowner in an impossible position. If they complied with the Coast Guard's demand, they would be in contempt of the District Court. If the ship failed to vacate the anchorage, they were subject to civil and criminal penalties for violating the Coast Guard directive. This gave rise to an interesting question as to whose authority trumped whose, but that is a question for another day/article.¹ Fortunately for the parties involved, security was posted and the arrest vacated shortly thereafter. As a result, the District Court did not need to address the limits of its *in rem* jurisdiction over the vessel, and the issue remains unresolved.² This article is intended to highlight the issue for maritime practitioners, and suggest avenues for further study of two central issues:

- (1) Where a body of water forms the boundary between two states (or even two District Courts within one state), where does one District Court's jurisdiction end and the other's begin?
- (2) Does a District Court lose jurisdiction over a vessel in its custody if the vessel moves across or down-river for practical or safety considerations?

II. The Muddy Waters of Geographic Boundaries

The geographic reach of the individual District Courts is dictated by statute. In our example, the Eastern District

¹ As a practical matter, this question is purely theoretical. It is hard to imagine a scenario wherein a federal judge would substitute her judgment for the safety concerns of the U.S. Coast Guard.

² Recognizing the potential for similar scenarios on the Delaware River, the local admiralty bar has formed an ad hoc committee to address the issue, and explore potential solutions in a neutral forum.

of Pennsylvania is defined by counties, four of which border the western shore of the Delaware River.³ New Jersey has but a single judicial district (comprised of several "vicinages"), and its shores define the entire eastern side of the navigable portion of the Delaware River and Bay.⁴ Delaware is also comprised of a single judicial district,⁵ and forms the western shoreline of the river from the Delaware Bay upriver until it reaches the Pennsylvania state line just north of Wilmington. Despite interstate compacts, there is no bright line separating the jurisdiction of the federal and state courts over vessels, persons, and activities within the navigable waters of the Delaware River. Much like the limits of the United States' authority over international waters bordering its shores, the answer often depends on the particular activity or subject being regulated.

Pennsylvania/New Jersey

A good starting point is the bi-state compact between Pennsylvania and New Jersey, which provides that "...each state shall enjoy and exercise a concurrent jurisdiction within and upon the water, and not upon the dry land, between the shores of said [Delaware] river."⁶ Further,

every ship and other vessel, while riding at anchor before any city or town in either state, where she hath last laded or unladed, or where it is intended she shall first thereafter either lade or unlade, shall be considered exclusively within the jurisdiction of such state; and every vessel fastened to or aground on the shore of either state, shall in like manner be considered exclusively within the jurisdiction of such state.⁷

If the territorial limits of each state's jurisdiction form the basis of the District Court's geographic boundary, then the language of this bi-state compact may well confer *in rem* jurisdiction upon the District Court sitting in the state in which the vessel last loaded or unloaded cargo.

Although research revealed no maritime precedent directly on point, an analogous state court proceeding

lends credence to the argument.⁸ In *City of Philadelphia, City Solicitor's Office, Delaware River- Concurrent State Jurisdiction*,⁹ a vessel offloading her cargo at a Bucks County terminal on the Delaware River was served with writ of foreign attachment issued by a Pennsylvania state court.¹⁰ By agreement of counsel, the attachment was lifted to avoid blocking the terminal's berth, and vessel anchored downriver, across from Philadelphia¹¹ but on the New Jersey side of the river. In a formal opinion, the Philadelphia City Solicitor advised the Philadelphia Sheriff that he was authorized to, and indeed should, serve a writ of foreign attachment upon the vessel. His opinion was based upon the Compact language set forth above.

The Compact has also been cited by both the New Jersey and Pennsylvania state courts as conferring concurrent jurisdiction over criminal offenses occurring on vessels within and upon bridges which span the Delaware River.¹²

New Jersey/Delaware

The boundary between New Jersey and Delaware is a different matter, and has been the subject of several Supreme Court decisions over the last century.¹³ In 1934, the Supreme Court determined that, within a 12-mile circle from Newcastle, Delaware, the river and its subaqueous soil, up to the low water mark on the New Jersey side, "will be adjudged to belong to the

⁸ *City of Philadelphia, City Solicitor's Office, Delaware River- Concurrent State Jurisdiction*, 1958 A.M.C. 1253 (Formal Opinion 225, March 25, 1958).

⁹ *City of Philadelphia, City Solicitor's Office, Delaware River- Concurrent State Jurisdiction*, 1958 A.M.C. 1253 (Formal Opinion 225, March 25, 1958).

¹⁰ State law remedies may be used to supplement admiralty attachment procedures. 2 T. Schoenbaum, *Admiralty and Maritime Law* 21-2 (2d ed. 1994) (hereinafter "Schoenbaum").

¹¹ Philadelphia is both a city and a county in Pennsylvania.

¹² *Neal v. Commonwealth*, 1827 Pa. LEXIS 123 (Pa. Dec. 26, 1827); *Domenick v. Sigler*, 23 Pa. D. & C.3d 765 (Pa. C.P. 1982); *State v. Garcia*, 687 A.2d 804 (N.J. Mun. Ct. 1996); *Commonwealth v. Shaw*, 8 Pa. D. 509 (Court of Quarter Sessions 1899); See also *Shulman Inc. v. Perskie*, 24 Pa. D. & C.2d 118 (Pa. C.P. 1960) (Pennsylvania had jurisdiction over motor vehicle accident on New Jersey side of bridge.)

¹³ In the latest of several conflicts between the states, the Supreme Court upheld Delaware's right to bar the construction of an LNG facility on the New Jersey side of the river, *New Jersey v. Delaware*, 552 U.S. 597 (2008).

³ 28 U.S.C. § 118.

⁴ 28 U.S.C. § 110.

⁵ 28 U.S.C. § 87.

⁶ N.J.S.A. § 52:28-25; 71 Pa. C.S. § 1805.

⁷ *Id.*

state of Delaware, subject to the Compact of 1905.”¹⁴ Although the 1905 Compact¹⁵ preserves the riparian rights of each state on its own side of the river and acknowledges that the river is a common highway, it provides no clear answer to the jurisdictional issues at hand. This is particularly troublesome as a vessel arrested at one of the few terminals on the New Jersey¹⁶ side of the river, within the aforementioned 12-mile circle, would immediately enter Delaware’s jurisdiction as soon as her dock lines were released.

Delaware River Basin Compact

There is no bi-state compact between Pennsylvania and Delaware, although both are parties to the Delaware River Basin Compact, along with New Jersey and New York.¹⁷ A cursory review of this mostly environmental compact offers little guidance on the issues at hand.

Other Ports

While no comprehensive investigation of similarly situated ports in the United States was undertaken, the issue has apparently been resolved by bi-state compacts or agreements in the Ports of New York/New Jersey and along the Columbia River in Oregon/Washington. For an overview of the history of concurrent jurisdiction over boundary waters, see *State v. Garcia*.¹⁸

III. Across the River—Continued Jurisdiction by Arresting Court

A. The Basics

The federal district courts have original jurisdiction over admiralty and maritime claims.¹⁹ Actions against a vessel *in rem* are within the exclusive jurisdiction of the federal courts.²⁰

It is well settled that in order to arrest a vessel, it must be present within the jurisdiction of the District Court when process is served.²¹ Indeed, Rule C of the Supplemental Admiralty Rules requires the Complaint to state that the vessel is or will be within the district while the action is pending.²² Process can only be served within the District.²³

Rule E(3)(a) applies to Rule B attachments as well, and requires that process may only be served within the district.²⁴

At least within the Third Circuit, a standard order for arrest or attachment of a vessel usually provides that the vessel may shift to another berth or anchorage with consent of the plaintiff or by court order, as long as she remains within the jurisdiction of the District Court. Allowing such movement of the ship, as with permitting cargo operations to proceed during the pendency of the arrest/attachment, is desirable for both practical and commercial considerations. In general, the vessel is present within the port in order to load or discharge her cargo, with the expectation that she will depart as soon as cargo operations are completed. Her continued presence at the berth during the pendency of the arrest may have serious commercial consequences for terminal, cargo receivers, and other vessel interests with no involvement in the underlying dispute. In many cases, the plaintiff’s claims are covered by the vessel’s P&I insurance, who quickly arrange to post security to obtain the vessel’s release, but occasionally the vessel

¹⁴ *State of Delaware v. State of New Jersey*, 291 U.S. 361 (1934).

¹⁵ N.J.S.A §52-28-41 and 24.

¹⁶ New Jersey has many port facilities along the Delaware River, the majority of which are located across from Pennsylvania.

¹⁷ 7 Del. C. § 6501, *et seq.*

¹⁸ *State v. Garcia*, 687 A.2d 804 (N.J. Mun. Ct. 1996).

¹⁹ Judiciary Act of 1789 Sec. 9; 28 U.S.C. § 1333.

²⁰ *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Dluhos v. Floating and Abandoned Vessel, known as NEW YORK*, 162 F.3d 63, 71 (2d Cir. 1998). State courts may adopt similar remedies if not inconsistent with substantive maritime law. *American Dredging Co.*, 510 U.S. at 447.

²¹ *The RIO GRANDE*, 90 U.S. 458 (1874); *Vitol, S.A. V. Primerose Shipping Co., Ltd.*, 708 F.3d 527, 540 (4th Cir. 2013), citing *Republic Nat’l Bank of Miami v. U.S.*, 506 US 80 (1992); *Reed v. Steamship YAKA*, 307 F.2d 203 (3d Cir. 1962), *rev’d on other grounds* 373 U.S. 410 (1963).

²² Supplemental Admiralty Rules, Rule C (2) and (3)(a).

²³ Supplemental Admiralty Rules, Rule E(3)(a). The Advisory Committee Notes to Rule E(3) state: “the Advisory Committee has concluded for practical reasons that process requiring seizure of property shall continue to be served only within the geographical limits of the district.” (1966). “Service in an admiralty or maritime proceeding still must be made within the district, as reflected in Rule C(2)(c)” (2006).

²⁴ See Advisory Committee Note to Rule B(1) (1966). (“Process of attachment or garnishment will be limited to the district. See Rule E(3)(a).”). See also *World Wide Supply OU v. Quail Cruises Ship Management*, 802 F.3d 1255, 1262 (11th Cir. 2015); *World Fuel Services Europe Ltd. v. Thoresen Shipping Singapore Private Ltd.*, 155 F. Supp. 3d 1226, 1231 (S.D. Ala. 2015) (“Jurisdiction is ‘predicated upon the presence of the defendant’s property within this Court’s territorial reach.’”).

will remain under arrest for long periods of time as the parties scramble to find a suitable lay berth or anchorage until the arrest is vacated or security posted. In more extreme cases, the admiralty rules provide for the interlocutory or final sale of the vessel.²⁵

B. Stasis not Required

An argument can be made that continuous presence of the *res* in the District is not necessary to maintain the District Court's *in rem* jurisdiction, if the *res* was properly arrested or attached within the District in the first instance.²⁶

It appears to be settled that once the vessel is seized by the Marshal, an accidental, fraudulent, or improper removal of the *res* will not destroy the Court's jurisdiction.²⁷ "We do not understand the law to be that an actual and continuous possession of the *res* is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court and brought within its control the jurisdiction was complete. A subsequent improper removal cannot defeat such jurisdiction."²⁸ This rule has been acknowledged in a variety of cases, with varying results depending on the nature of the proceeding (*in rem*, *quasi in rem*, forfeiture, and possessory actions) and the reason for the absence of the *res* from the jurisdiction (arrest vacated by court, substitution of security, sale of vessel, etc.).²⁹

The seminal case, *Republic Nat'l Bank of Miami v. U.S.*, was decided in the context of forfeiture, but has nonetheless formed the basis of numerous admiralty decisions.³⁰ In that case, the bank asserted a claim to protect its mortgage lien on the property in question. After a trial on the merits, the bank's claim was denied, and the funds were transferred from the Marshal to the

U.S. Treasury. In response to the bank's appeal, the government argued that the federal court no longer had jurisdiction over the funds, which had been removed from its jurisdiction. The Supreme Court rejected the government's argument, which "relie[d] on what it describes as a settled admiralty principal: that jurisdiction over an *in rem* forfeiture proceeding depends on continued control of the *res*."³¹ Finding that "stasis is not a general prerequisite to the maintenance of jurisdiction," the Court essentially held that the federal court retained its *in rem* jurisdiction despite the absence of the *res*, unless the seizure was voluntarily abandoned by the plaintiff, or the release of the property would render any future judgment useless.³²

Certainly, the application of this forfeiture case to traditional admiralty cases is debatable. Nonetheless, the *in rem* principles cited in this Supreme Court's decision have been applied to maritime attachments and arrests under Rules B and C.³³ It has also been applied in treasure salvage cases.³⁴

C. Constructive Possession

There is also a line of cases supporting a court's exercise of *in rem* jurisdiction over vessels based on the theory of constructive possession.³⁵ As their names imply, many of these cases involve treasure salvage, which like forfeiture, is governed by specific federal statutes, in addition to general maritime law and the Supplemental Admiralty Rules. Nonetheless, they are worthy of

²⁵ Supplemental Admiralty Rules, Rule E(9)(a).

²⁶ *Vitol S.A. v. Primerose Shipping Co. Ltd.*, 708 F.3d 527, 540 (4th Cir. 2013); *Puerto Rico Ports Authority v. Barge KATY-B*, 427 F.3d 93 (1st Cir. 2005); *Elliott v. M/V LOIS*, 980 F.2d 1001 (5th Cir. 1993); *See also* Schoenbaum, § 21-2.

²⁷ *The RIO GRANDE*, 90 U.S. 458 (1874).

²⁸ *The RIO GRANDE*, 90 U.S. 458, 463 (1874).

²⁹ *See, e.g. The World Wide Supply OU v. Quail Cruises Ship Management*, 802 F.3d 1255 (11th Cir. 2015); *Vitol, S.A. v. Primerose Shipping Co., Ltd.*, 708 F.3d 527, 540 (4th Cir. 2013); *Ventura Packers v. F/V JEANINE KATHLEEN*, 424 F.3d 852 (9th Cir. 2005); *The Denny*, 127 F.2d 404 (3d Cir. 1942); *World Fuel Services Europe, Ltd. v. Thoresen Shipping*, 155 F. Supp. 3d 1226 (S.D. Ala. 2015).

³⁰ *Republic Nat'l Bank of Miami v. U.S.*, 506 U.S. 80 (1992).

³¹ 506 U.S. at 84.

³² *Republic Nat'l Bank of Miami v. U.S.*, 506 U.S. 80 (1992) citing *The RIO GRANDE*, 90 U.S. 458 (1874), and *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960).

³³ *Vitol, S.A. v. Primerose Shipping Co., Ltd.*, 708 F.3d 527, 540-541 (4th Cir. 2013) and cases cited therein (Rule B); *Ventura Packers v. F/V JEANINE KATHLEEN*, 424 F.3d 852, 859 (9th Cir. 2005) (Rule C).

³⁴ *Salvors, Inc. v. Unidentified Wrecked and Abandoned Vessel*, 861 F.3d 1278, 1286 (11th Cir. 2017).

³⁵ *The RIO GRANDE*, 90 U.S. 458 (1874); *BRIG ANN*, 13 U.S. (9 Cranch) 289 (1815); *Salvors, Inc. v. Unidentified Wrecked and Abandoned Vessel*, 861 F.3d 1278 (11th Cir. 2017); *RMS TITANIC*, 171 F.3d 943 (4th Cir. 1999), *cert denied*, 528 U.S. 825 (1999); *Dluhos v. Abandoned Vessel*, 162 F.3d 63 (2d Cir. 1998); *The DENNY*, 127 F.2d 404 (3d Cir. 1942). It should be noted that Rule E(4)(b) permits the Marshal to take constructive possession of a vessel or other property if the taking of actual possession is impractical. The rule also provides that the Marshal may request that clearance of the vessel be withheld until proper notice of the vessel's release is received from the Marshal or Clerk.

consideration with respect to the absence of the *res* (or a substantial portion thereof) from the District Court's jurisdiction.

In *Salvors Inc. v. Unidentified Wreck*, the Eleventh Circuit provides a comprehensive review of the subject.³⁶ There, the district court's *in rem* jurisdiction over a shipwreck was predicated on the court's possession of a single artifact (a cannon ball). Relying on forfeiture decisions from the Supreme Court (*Brig Ann, Republic Bank*) and various treasure salvage cases, the Court acknowledged that "the theory of constructive *in rem* jurisdiction is well established in admiralty cases," and held that possession of a portion of the ship was sufficient to maintain the Court's *in rem* jurisdiction over the entire wreck.³⁷ As another court explained, the requirement that the vessel or *res* be present within the district is "predicated upon admiralty's fiction of convenience that a ship is a person against whom suit can be filed and judgments entered. . . . Personification of the ship allows actions to be brought against the vessel when her owner cannot be reached. In these circumstances the fiction may perform a useful and salutary function. But when a legal fiction which exists solely to effectuate the adjudication of disputes is invoked for the opposite purposes, we have no hesitation in declining to employ it."³⁸

Interestingly, the use of the constructive possession construct when only a piece of the shipwreck is present within the district "rests upon the fiction that the *res* is not divided and therefore possession of some of it is constructively possession of all."³⁹

Accordingly, the Courts have both invoked and dispensed of these fictions in order to reach practical and fair resolutions to knotty *in rem* jurisdictional questions.

D. Venue Decisions

The fiction of the personification of the ship was thoroughly explored (and abandoned) by the Supreme Court

in a traditional maritime decision involving an *in rem* claim against a barge in the Eastern District of Louisiana (New Orleans).⁴⁰ A related *in personam* suit was filed in Tennessee, where the casualty giving rise to the *in rem* claim against the barge had occurred. Upon motion, the Louisiana District Court transferred the *in rem* claim to Tennessee. A battle over venue found its way to the U.S. Supreme Court, with the appellant arguing that the *in rem* claim against the barge could not have been brought in Tennessee, rendering the transfer improper.

The Supreme Court's opinion provides a lengthy discussion of the "longstanding admiralty legal fiction" which underpins the nature of *in rem* jurisdiction, and acknowledges its critics.⁴¹ In a rather salty opinion, the Court upheld the transfer by putting common sense ahead of the fiction, finding that the "failure to do so would practically scuttle the *forum non conveniens* statute as far as admiralty actions are concerned."⁴² To do otherwise, would work an injustice to admiralty law and practice, which "should not be tied to the mast of legal technicalities it has been the forerunner in eliminating from other federal practices."⁴³

The *Continental* Court's discussion of the legal fiction, and a court's ability to jettison it where appropriate, has been cited in certain forfeiture and salvor cases referenced earlier in this article, and thus its application has not been limited to *forum non conveniens* or transfer cases.⁴⁴

E. Waiver

Finally, it should be noted that the *in rem* jurisdiction of the Court can be waived, by filing a claim of owner without preserving a jurisdictional defense, and/or by posting security to obtain the vessel's release, or to prevent her seizure in the first place.⁴⁵

³⁶ *Salvors, Inc. v. Unidentified Wrecked and Abandoned Vessel*, 861 F.3d 1278 (11th Cir. 2017).

³⁷ 861 F.3d at 1286.

³⁸ *Treasure Salvors, Inc. v. Unidentified Wreck*, 569 F.2d 330, 334-335 (5th Cir. Fla. 1978) (citing *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960)).

³⁹ *RMS Titanic* 171 F.3d at 964.

⁴⁰ *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960).

⁴¹ 364 U.S. at 22-23.

⁴² 364 U.S. at 24.

⁴³ 364 U.S. at 25.

⁴⁴ See, e.g., *Treasure Salvors, Inc. v. Unidentified Wreck*, 569 F.2d 330 (5th Cir. Fla. 1978); *Republic Nat'l Bank of Miami v. U.S.*, 506 U.S. 80 (1992).

⁴⁵ *Cactus Pipe & Supply Co., Inc. v. M/V MONTMATRE*, 756 F.2d 1103 (5th Cir. 1985); *Reed v. Yaka*, 307 F.2d 203 (3d Cir. 1962). See also, dissent in *Continental*, *supra*.

III. Practical Considerations

To put these legal issues in perspective, a return to the case study, and an understanding of the Delaware River ports, is required.

1. To the international shipping community and the P&I Clubs, the Delaware River constitutes a single port, and is not divided by state lines;
2. The entire Delaware River is under the authority of a single Coast Guard District (Sector Delaware Bay);
3. The District Courts (E.D. Pa., D. Del., D.N.J.) bordering the river are all within the Third Circuit; however, each have different requirements for arrests and attachments, including the amount of security required to arrest/attach a vessel;
4. With limited exceptions, all commercial cargo vessels transiting the river require compulsory pilots, who are advised when a vessel is seized by or released from the U.S. Marshal's custody. The river pilots will not sail a vessel while it is under arrest.

As a practical matter, a vessel's arrest by one District Court will effectively prevent her from leaving the port, irrespective of where in the river or bay she is located.

IV. Conclusion

As stated at the outset, this article is intended to provide potential avenues for further exploration of the questions surrounding the territorial limits of a district court's *in rem* jurisdiction. A seasoned maritime attorney could distinguish any of the referenced cases on a variety of factual or legal grounds, and this author does not suggest any concrete answer to the central questions:

- (1) Where a body of water forms the boundary between two states (or even two District Courts within one state), where does one District Court's jurisdiction end and the other's begin?
- (2) Does a District Court lose jurisdiction over a vessel in its custody if the vessel moves across or downriver for practical or safety considerations?

Author's View

From a legal perspective, the answer to the first question depends upon a combination of federal and state law, and has not been addressed by the courts in this context. Similarly, there would appear to be no reported decisions addressing the second question directly, although cogent arguments could be made supporting or refuting the court's continued jurisdiction over a vessel in this circumstance.

As a practical matter, a district court's *in rem* jurisdiction over a vessel should not be forfeited simply because safety or commercial considerations require movement of the vessel to another berth or anchorage within the Delaware River. How this can be accomplished from a legal standpoint remains an open question that is being explored by the local admiralty bar. The views and experiences of other practitioners are both welcome and appreciated.

Lisa Reeves is the senior partner in Reeves McEwing LLP, which handles maritime and transportation issues in Pennsylvania, New Jersey, Delaware and beyond. She acknowledges and thanks her colleague Michael Schleigh for his valuable research assistance for this article.