EBB AND FLOW OF THE TIDE: A VIABLE DOCTRINE FOR DETERMINING ADMIRALTY JURISDICTION OR A RELIC OF THE PAST?

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I. INTRODUCTION

Two of the most significant factors considered when evaluating the merits and value of a case are the jurisdiction in which the case will be heard and the law that the court will apply to that case. When a litigant wishes to have a case tried before a federal court, the litigant may do so based upon the federal court's federal question jurisdiction,[1] diversity of citizenship jurisdiction,[2] or admiralty and maritime jurisdiction.[3] The focus of this article is the third source of jurisdiction, the court's admiralty and maritime jurisdiction.

For many years, the federal courts in the United States decided whether they had admiralty and maritime jurisdiction over tort litigation based on where the tort occurred.[4] Although in some cases the American courts also seemed to take into account the relationship of the incidents to the shipping industry,[5] this relationship test was not formally acknowledged as a prerequisite to admiralty and maritime jurisdiction by the United States Supreme Court until its decision in *Executive Jet Aviation v. City of Cleveland.*[6] In *Executive Jet,* the Court held that no admiralty jurisdiction ex-

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1 *See* 28 U.S.C. § 1331 (1988).

2 *See id.* § 1332.

3 *See id.* § 1333(1). Judicial power over "all Cases of admiralty and maritime Jurisdiction" was originally provided for in Article III, Section 2 of the Constitution.

4 *See* Executive Jet Aviation v. City of Cleveland, 409 U.S. 249, 253-54 (1972); The Plymouth, 70 U.S. (3 Wall.) 20, 33 (1865); *see also* Frederick Swaim, Jr., *Yes, Virginia, There is an Admiralty: The* Rodrigue *Case,* 16 LOY. L. REV. 43, 45 (1970).

5 *See* 409 U.S. at 257-58 (citing Atlantic Transp. Co. v. Imbrovek, 234 U.S. 52 (1914)); The Plymouth, 70 U.S. (3 Wall.) 20 (1865); ERASTUS CORNELIUS BENEDICT, THE AMERICAN ADMIRALTY 173 (1850); 7A JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶¶ .325[3],[5] (2d ed. 1972); Charles L. Black, Jr., *Admiralty Jurisdiction: Critique and Suggestions,* 50 COLUM. L. REV. 259, 264 (1950); Charles Merrill Hough, *Admiralty Jurisdiction—Of Late Years,* 37 HARV. L. REV. 529, 531 (1924)); *see also* McGuire v. City of New York, 192 F. Supp. 866, 868-72 (S.D.N.Y. 1961).

6 409 U.S. at 268.

isted over the crash of a landbased airplane unless two criteria were satisfied: (1) the incident must have occurred on navigable waters (maritime situs); and (2) a significant relationship must have existed between the wrong and some maritime service, navigation, or commerce on navigable waters (maritime nexus).[7] Subsequently, the Court applied the two-part test of *Executive Jet* to all cases in which admiralty jurisdiction was sought, regardless of whether the cases involved aircraft.[8]

Despite the apparently well-defined criteria for determining admiralty jurisdiction, the interpretation of these criteria has generated considerable litigation and commentary over the years. Depending on which forum is more favorable or which law is more favorable to their sides,[9] litigants have attempted to sail in and out of admiralty jurisdiction, arguing for a narrow or broad interpretation of the above criteria.

This article specifically focuses on the meaning of the first criterion, maritime situs, and traces its development through opinions by the United States Supreme Court as well as opinions by the lower federal courts. The Supreme Court has not consistently interpreted the term "maritime situs" nor has it clearly defined the term as it applies to coastal waters, and the federal circuit courts are split as to its meaning.

The following case provides a good backdrop for the issues discussed herein.[10] A helicopter crashed in the marsh off the coast of Louisiana. The helicopter was ferrying passengers to and from an offshore platform; thus, the maritime nexus requirement was not questioned.[11] The question before the court was whether the

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7 *See id.* Additionally, the Court subsequently defined the second requirement, the "nexus" requirement, to require not only a significant relationship to traditional maritime activity, but also "a potentially disruptive impact on maritime commerce." Sisson v. Ruby, 497 U.S. 358, 362-64 & n.2 (1990); *see also* Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043, 1048 (1995); D.T. Plunkett, Note, Sisson v. Ruby: *Muddying the Waters of Admiralty Jurisdiction*, 65 TUL. L. REV. 697, 700 (1991).

8 *See* Foremost Ins. Co. v. Richardson, 457 U.S. 668, 673 (1982).

9 The test for determining whether admiralty law applies to a particular case is the same test used to determine whether a court has admiralty jurisdiction over a tort. *See id.*

10 *See* Duplantis v. Petroleum Helicopters, Inc., No. CIV.A.93-1265, 1993 WL 370619 (E.D. La. Sept. 10, 1993). For further discussion of *Duplantis*, see *infra* notes 150-52 and accompanying text.

11 *See* LeDoux v. Petroleum Helicopters, Inc., 609 F.2d 824, 824 (5th Cir. 1980) (holding that the crash of a helicopter, which occurred while the helicopter was ferrying passengers to and from offshore drilling sites, satisfies the maritime nexus requirement because the helicopter was being used in place of a vessel).

marshy area into which the helicopter crashed satisfied the maritime situs requirement.[12] The water into which the helicopter crashed was three to five feet deep and was subject to the ebb and flow of the tides of the Gulf of Mexico. However, the water was full of reeds, making navigation by most vessels impossible.[13]

To evaluate maritime situs, the court first had to define the term "navigable waters." The court considered two definitions: 1) navigable waters are waters that are subject to the ebb and flow of the tide; and 2) navigable waters are waters that are navigable in fact, or capable in their present state of supporting navigation.[14]

Some courts and commentators have concluded that the above definitions or standards cannot and do not co-exist, and that ebb and flow of the tide was replaced with the navigable-in-fact standard in the middle of the nineteenth century.[15] However, the conclusion reached in this article is that water that is within the ebb and flow of the tide of a coastal waterway is a "navigable waterway" for purposes of satisfying the maritime situs requirement, regardless of whether that particular portion of the waterway is navigable in fact. Two alternative theories support this conclusion.

The first theory is that two distinct standards exist under the admiralty law for determining which waters are "navigable waters" for admiralty and maritime jurisdiction—ebb and flow of the tide is the standard applicable to coastal waterways and navigability-in-fact is the standard applicable to inland waterways. The second theory is that, assuming that the standard for navigable waters is navigability-in-fact, such status is given to a waterbody from shoreline to shoreline or from high water mark to high water mark, which necessarily includes areas within the ebb and flow of the tide for coastal waterways.

A review of the decisions of the Supreme Court and the lower

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12 *See Duplantis*, 1993 WL 370619, at *1.

13 *See id.* at *2.

14 *See id.* A third definition of navigable waters considered by some federal courts is a more liberal interpretation of navigable in fact—navigable capacity. Navigable capacity refers to the actual *or potential* ability of a waterway to sustain navigation between different states. *See, e.g.*, Finneseth v. Carter, 712 F.2d 1041, 1044 (6th Cir. 1983); *infra* text accompanying note 161.

15 *See, e.g., Duplantis*, 1993 WL 370619, at *2; *see infra* notes 151-52 and accompanying text; 1 STEVEN F. FRIEDELL, BENEDICT ON ADMIRALTY § 141 (7th ed. 1996) ("Our courts have generally rejected the tidewater test of jurisdiction."); John F. Baughman, Note, *Balancing Commerce, History & Geography: Defining the Navigable Waters of the United States*, 90 MICH. L. REV. 1028, 1036 (1992). But see FRIEDELL, *supra*, at 9-3 n.8, in which Professor Friedell recognizes that courts have found admiralty jurisdiction over occurrences in areas within the ebb and flow of the tide "even though those areas are not covered by water at the time of the alleged event."

federal courts on this issue reveals the lack of uniformity among the federal courts as to the proper standard to be applied to determine maritime locale where the question of the court's admiralty jurisdiction has been raised. Additionally, this review provides support for the two theories set forth above.

II. THE JURISPRUDENCE

A. *United States Supreme Court Decisions*

One of the early cases in which the United States Supreme Court recognized the ebb and flow of the tide standard to determine whether a waterway is navigable is *The Steamboat Thomas Jefferson.*[16] The standard was based on the standard that had been applied by the admiralty courts in England.[17] *The Steamboat Thomas Jefferson* involved a wage claim on a voyage on the Missouri River, hundreds of miles from the ebb and flow of the tide. The Court considered where the wages sought had been earned and held that it lacked admiralty jurisdiction over the matter, reasoning that the service must have been performed "upon the sea, or upon waters within the ebb and flow of the tide."[18] This rule worked well in the United States at that time because, just like England, the major commerce occurring on water in the original states took place on the seas or on waters within the ebb and flow of the tide.[19] Little trade took place on inland waterways not within the ebb and flow of the tide.

Subsequently, the Court addressed the issue of the nature and extent of the admiralty jurisdiction in *Waring v. Clarke,*[20] a case arising from a vessel collision that took place approximately ninety-five miles north of New Orleans on the Mississippi River. Specifically, the Court addressed whether the federal court had admiralty jurisdiction over a collision that took place on a river within the ebb and flow of the tide when the location of the collision was *infra*

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16 23 U.S. (10 Wheat.) 428 (1825).

17 Justice Story, author of the opinion in *The Steamboat Thomas Jefferson,* authored the opinion in De Lovio v. Boit, 7 F. Cas. 418, 418-21 (C.C.D. Mass. 1815) (No. 3776), in which he traced the history of the admiralty and discussed its development in England. Writing of the admiralty jurisdiction in England, Justice Story explained, "In respect to torts and injuries, the jurisdiction is most explicitly asserted, as well in ports within the ebb and flow of the tide, as upon the high seas." *Id.* at 420 (citations omitted). *See also id.* at 421, 441.

18 23 U.S. at 429.

19 *See* The Abby, 1 F. Cas. 26 (C.C.D. Mass. 1818) (No. 14); Burke v. Trevitt, 4 F. Cas. 746 (C.C.D. Mass. 1816) (No. 2163); Thomas v. Lane, 23 F. Cas. 957 (C.C.D. Me. 1813) (No. 13,902).

20 46 U.S. (5 How.) 440 (1847).

corpus comitatus, or within the body of a county.[21] Appellants argued that the Court should apply the English definition of admiralty and maritime jurisdiction in effect at the time of the Revolutionary War or at the time of the signing of the Constitution, which excluded from jurisdiction cases arising out of incidents that occurred within the body of a county.[22] The Court held that admiralty jurisdiction extended to incidents occurring on the sea and to "tidewaters, as far as the tide flows," up to the high water mark, even if the incident took place *infra corpus comitatus*, and reasoned that such an interpretation was consistent with the interpretation of the admiralty jurisdiction in most of the states when they were colonies and with the "ancient practice in admiralty in England."[23]

Despite the decision in *Waring* to allow admiralty jurisdiction to travel inland from the sea with the tide, the increase in maritime commerce that took place on inland waterways not touched by the tide prompted the United States Congress to enact legislation in 1845 purportedly extending the jurisdiction of the federal courts to incidents occurring on the Great Lakes and the waters connecting the Lakes.[24] The constitutionality of this statute was upheld in *The Propeller Genesee Chief v. Fitzhugh*,[25] a case arising from a vessel collision that occurred on Lake Ontario, an inland waterway. However, the Court's decision to uphold the act was based in large part on its finding that these waters were previously meant to be included in the scope of admiralty and maritime jurisdiction when the Constitution was enacted.

The Court admitted that it erred when it limited admiralty jurisdiction to waters within the ebb and flow of the tide in *The Steamboat Thomas Jefferson*, explaining that such a rule required courts to

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21 *See id.* at 452.

22 *See id.*

23 *Id.* at 454-58, 464.

24 See The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 449-50 (1851) (quoting Act of Feb. 26, 1845, ch. 20, 5 Stat. 726 (current, amended version at 28 U.S.C. § 1873 (1994))). The Act gave the federal district courts jurisdiction

> in matters of contract and tort, arising in or upon or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and territories, as was at the time of the passage of the law possessed and exercised by the district courts in cases of like steamboats and other vessels employed in navigation and commerce upon the high seas.

Id.

25 *Id. See also* The Montello, 87 U.S. (20 Wall.) 430 (1874); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870); and The Plymouth, 70 U.S. (3 Wall.) 20 (1865).

draw jurisdictional lines across waterbodies, such as the Mississippi River, despite no difference in the activities, conditions, and hazards faced by those navigating on either side of the line.[26] Reasoning that jurisdiction should not be limited to tidewaters, the Court held, "The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide."[27] The Court explained:

> It is evident that a definition that would at this day *limit* public rivers in this country to tidewater rivers is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers in which there is no tide. And certainly there can be no reason for admiralty power over a public tidewater, which does not apply with equal force to any other public water used for commercial purposes and foreign trade.[28]

In the wake of *The Propeller Genesee Chief*, the Court again addressed the extent of the federal courts' admiralty jurisdiction in *The Hine v. Trevor*.[29] *The Hine* involved the seizure of a vessel on an inland waterway in Iowa. The vessel was seized pursuant to Iowa state law. The issue framed by the Court was whether the federal courts' admiralty jurisdiction over actions occurring on inland, navigable waterways was exclusive or whether the state courts could exercise concurrent jurisdiction.[30] The Court traced the history of the federal courts' admiralty jurisdiction and noted that, although *The Propeller Genesee Chief* was decided under the Act of 1845 and thus it was limited by the Act to cases arising on the Lakes or the waters connecting the Lakes, the federal courts used that case to exercise jurisdiction over all matters occurring on inland navigable waterways.[31] The Court explained that *The Propeller Genesee Chief* "removed the imaginary line of tidewater," thus allowing the courts

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26 *See* 53 U.S. at 456-57.

27 *Id.* at 457. Whether the Court's use of the word "here" in this statement meant "from this day forward" or meant "in cases such as this one, involving inland waterways" was left to be interpreted by later courts and commentators. However, the Court's decision necessarily must be limited to its facts because of the concept of obiter dicta. The Court in *The Propeller Genesee Chief* was deciding the navigability of an inland waterway. Its decision should not have been extended to affect the ebb and flow of the tide test for the navigability of coastal waters. Any discussion of the effects on the test for coastal waters should be treated as dicta. "The broad language [in an opinion] . . . [that is] unnecessary to the Court's decision . . . cannot be considered binding authority." Kastigar v. United States, 406 U.S. 441, 454-55 (1972). See also Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 661 (1935) discussing that parts of an opinion that go beyond the case under consideration are not controlling.

28 53 U.S. at 457 (emphasis added).

29 71 U.S. (4 Wall.) 555 (1866).

30 *See id.* at 557.

31 *See id.* at 565.

to exercise jurisdiction "wherever there was navigation which could give rise to admiralty and maritime causes."[32]

With the removal of the imaginary line of tidewater and the extension of the admiralty jurisdiction, the Court in *The Plymouth*[33] found it had jurisdiction over a case that arose on the Chicago River, an inland waterway. After quoting Justice Story's opinion in *Thomas v. Lane*, in which the court held that admiralty courts have jurisdiction over "'torts upon the high seas, or on waters within the ebb and flow of the tide,'" the *Plymouth* Court explained that since its decision in *The Propeller Genesee Chief* the term "navigable waters *may* be substituted for tide waters."[34] The Court further explained:

> It is admitted by all the authorities, that the jurisdiction of the admiralty over marine torts depends upon locality—the high seas, or other navigable waters within admiralty cognizance; and being so dependent upon locality, the jurisdiction is limited to the sea or navigable waters not extending beyond high-water mark.[35]

The Court's failure to require the replacement of the tide waters standard for determining admiralty jurisdiction with a navigable-in-fact standard and its reference to waters extending to the high water mark implicitly recognized the continued application of the tide waters or ebb and flow of the tide rule to coastal waters; the ebb and flow of the tide in coastal waters naturally extends to the high-water mark.[36]

The question of admiralty jurisdiction was again addressed by the Court in *The Eagle*,[37] a suit involving an incident that took place on the Canadian side of the Detroit River. In *The Eagle*, the Court purported to explain or synthesize its rulings in *The Propeller Genesee Chief* and the cases following that decision. The Court characterized the ruling in *The Propeller Genesee Chief* as one that "obliterated the limit, that had been previously adopted and enforced in the jurisdiction in admiralty, to tidewaters; and held that, according to the true construction of the grant of the Constitution, it extended to all public navigable waters, whether influenced by the tide or not."[38] The Court explained that the federal district courts had

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[32] *Id.* at 566-67.

[33] 70 U.S. (3 Wall.) 20 (1865).

[34] 70 U.S. at 34 (quoting Thomas v. Lane, 23 F. Cas. 957 (C.C.D. Me. 1813) (No. 13,902)) (emphasis added).

[35] *Id.* at 33.

[36] *See supra* text accompanying note 23.

[37] 75 U.S. (8 Wall.) 15 (1868).

[38] *Id.* at 20.

jurisdiction over civil causes of admiralty jurisdiction that take place "upon the lakes, and waters connecting them, the same as upon the high seas, bays, and rivers navigable from the sea."[39] Throughout the opinion, the Court referred to removal of *the limit* of tidewater and *extension* of the jurisdiction; the Court did not ever state that the traditional tidal waters standard may be too broad or that its ruling was in any way meant to constrict federal admiralty jurisdiction.

Like the preceding cases, the next cases in which the Court relied on the decision in *The Propeller Genesee Chief* involved incidents occurring on inland waters, not coastal waters; thus, the standard for determining navigable waters for a coastal waterway was not specifically addressed in these cases.[40] Moreover, these cases involved the Commerce Clause[41] and did not raise the question of the court's admiralty jurisdiction in a tort context, although later courts have relied on them frequently for determining maritime situs. For example, *The Daniel Ball* presented a question of whether Congress could exercise its commercial power over the transportation of goods along the Grand River and require that a license be obtained to operate on the river.[42]

The Court in each of these cases, however, followed *The Propeller Genesee Chief*, adopting the rule that navigable waters must be waters that are navigable in fact and adding that the waters must, on their own or in connection with other waterways, form a continuous highway capable of supporting commerce with other states and foreign countries.[43] Notably, despite some broad language in *The Daniel Ball* as to the scope of its holding, the Court expressly focused its opinion on rivers, which was the type of waterway at issue in that case. The Court explained:

> The doctrine of the common law as to navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all as to the navigability of waters . . . . A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must

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39 *Id.* at 21. The Court held that federal courts had jurisdiction over the lakes and the waters connecting them by virtue of the Judiciary Act of 1789, and not by virtue of the Act of 1845. *See id.* at 25.

40 *See* The Montello, 87 U.S. (20 Wall.) 430 (1874); The Daniel Ball, 77 U.S. (10 Wall.) 557 (1870).

41 U.S. CONST. art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes").

42 *See* 77 U.S. at 557.

43 *See id.* at 563; *The Montello*, 87 U.S. at 439, 441-42.

> be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the Acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.[44]

This line of cases was followed by the Court in *The Robert W. Parsons*,[45] a case that required the Court to classify a boat repair contract as maritime or not maritime.[46] The contract at issue was for the repair of a canalboat in an inland, manmade canal. Although the case did not involve maritime tort jurisdiction, the Court nonetheless looked to some of the earlier tort jurisdiction cases, as well as the above Commerce Clause cases, to determine the status of the canal on which the contract was to be performed.[47]

The Court held that the Erie Canal was a navigable waterway of the United States because it was "a highway of commerce between ports in different states and foreign countries," and was navigable by vessels.[48] The Court explained that its decision in *The Steamboat Thomas Jefferson*[49] had been "flatly overruled" by its decision in *The Propeller Genesee Chief*,[50] but it acknowledged that the "actual navigability" rule espoused in *The Propeller Genesee Chief* applied only to cases that arose on the Great Lakes until it was "extended to cases arising upon the rivers above the tidal effect."[51] Thus, although the Court indicated that the ebb and flow of the tide rule was no longer the test of jurisdiction, it specifically fo-

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44 77 U.S. at 563.

45 191 U.S. 17 (1903).

46 If the contract was maritime, then the federal court would have exclusive jurisdiction over the contract, and the state statute granting a lien on the vessel and its equipment would not be applicable; if the contract was not maritime, then the statutory lien would apply and would be enforceable in a state court proceeding. *See id.* at 23-24.

47 *See id.* at 25-26.

48 *Id.* at 28.

49 *See supra* notes 16-19 and accompanying text.

50 *See supra* notes 25-28 and accompanying text.

51 191 U.S. at 26 (citing Fretz v. Bull, 53 U.S. (12 How.) 466 (1852); Jackson v. The Magnolia, 61 U.S. (20 How.) 296 (1857)).

cused its holding on cases involving the Great Lakes, rivers above the tidal effect, and inland canals.[52]

Moving to some of the more modern cases decided by the Supreme Court, the ebb and flow test has been recognized by the Court on several occasions. In *Victory Carriers, Inc. v. Law*,[53] decided in 1971, the Court noted that admiralty jurisdiction for torts has long been dependent on locality. The Court explained that maritime tort jurisdiction extends to incidents that occur on the navigable waters of the United States, and quoted Justice Story's remarks defining maritime torts as those torts that "'are committed on the high seas, or on waters within the ebb and flow of the tide.'"[54] The Court explained that this "view has been constantly reiterated."[55]

The Court in *Victory Carriers* specifically addressed the question of whether admiralty law should apply to a suit brought by a longshoreman for injuries sustained on a pier in the Port of Mobile, Alabama. Admiralty law would apply to the case if the case was one within the federal court's admiralty and maritime jurisdiction.[56] The Court held that admiralty law did not apply because the pier was not a maritime locale.[57]

In *Executive Jet Aviation*,[58] a case that arose from the crash of an airplane into Lake Erie, the Court squarely held that maritime locale or situs alone is not sufficient to determine that a federal court has admiralty jurisdiction; along with a maritime situs, a maritime nexus must also be found. The Court discussed the maritime situs requirement and explained, "If the wrong occurred on navigable waters, the action is within admiralty jurisdiction; if the wrong occurred on land, it is not."[59] Quoting Justice Story, the Court stated that "navigable waters" include the "'high seas, or . . . waters within the ebb and flow of the tide.'"[60]

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52 *See id.* at 26, 28.

53 404 U.S. 202, 205 (1971) (quoting Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1813) (No. 13,902)).

54 *Id.* at 205 (quoting *Thomas v. Lane*, 23 F. Cas. at 960).

55 *Id.*

56 *See id.* at 204.

57 *See id.* at 211-12, 214.

58 409 U.S. 249 (1972); *see supra* notes 6-8 and accompanying text.

59 409 U.S. at 253.

60 *Id.* (quoting Thomas v. Lane, 23 F. Cas. 957, 960 (C.C.D. Me. 1813) (No. 13,902)) (Justice Story, writing for the Supreme Court in 1825, used this same language to define maritime locale in The Steamboat Thomas Jefferson, 23 U.S. (10 Wheat.) 428, 429 (1825)). The Court again recognized Justice Story's reference to the ebb and flow of the tide in Askew v. American Waterways Operators, Inc., 411 U.S. 325, 340 & n.9 (1973), and noted that it had quoted the statement with approval in

Notably, the Court then clarified the impact of its decision in *The Propeller Genesee Chief* and explained, "Later, this locality test was *expanded* to include not only tidewaters, but all navigable waters, including lakes and rivers."[61] This notion of an expansion of the meaning of maritime locale, as opposed to a contraction, is consistent with the Court's language in *The Hine v. Trevor*,[62] *The Eagle*,[63] and *The Plymouth*.[64]

This view was reiterated by the dissent in *Kaiser Aetna v. United States*.[65] The issue in *Kaiser Aetna* was whether the Federal Government's "navigational servitude," pursuant to the Commerce Clause, creates a blanket exception to the Takings Clause. More specifically, the Court had to decide whether the federal government could require Kaiser Aetna and others to open up to the public a marina with a channel that connected to a bay and the Pacific Ocean, when Kaiser Aetna originally leased property that included a shallow pond and spent millions of dollars to transform the pond into the marina and channel.[66] The Court held that the government could not force Kaiser Aetna to open up this waterway to the public without compensating Kaiser Aetna.[67] The Court emphasized that although the waterway may be subject to federal regulation pursuant to the Commerce Clause, the owner's rights under the circumstances were protected by the Takings Clause.[68]

Justice Blackmun pointed out in his dissent, in which he was joined by Justices Brennan and Marshall, that this holding necessarily is based on the assumption that the waterway was not navigable prior to the improvements, and thus, was Kaiser Aetna's private property. The dissenters disagreed with this assumption, explaining that the pond, in its original state, was a navigable waterway "by virtue of its susceptibility to the ebb and flow of the tide."[69] The dissent then noted the three tests used by the Court to determine navigable waters—navigability in fact, navigable capacity, and ebb

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Executive Jet. At issue in *Askew* was whether federal maritime law preempted enforcement of a Florida statute that imposed strict liability for damage resulting from an oil spill in Florida waters. The Court held that the statute was constitutional and that federal law did not preempt state law in this case. *See id.* at 343-44.

61 409 U.S. at 253 (emphasis added).

62 71 U.S. (4 Wall.) 555 (1866); *see also* notes 29-32 and accompanying text.

63 75 U.S. (8 Wall.) 15 (1868); *see also* notes 37-39 and accompanying text.

64 70 U.S. (3 Wall.) 20 (1865); *see also* notes 33-36 and accompanying text.

65 444 U.S. 164, 181-84 (1979) (Blackmun, J., dissenting, joined by Brennan, J. & Marshall, J.).

66 *See id.* at 165-66, 169, 172.

67 *See id.* at 179-80.

68 *See id.*

69 *Id.* at 181 (Blackmun, J., dissenting).

and flow of the tide.[70] The dissenters recognized the ebb and flow of the tide test as being the oldest of the three tests and explained that this test was not abandoned in *The Propeller Genesee Chief* or *The Daniel Ball*.[71]

The dissenters explained that these cases were concerned with extending admiralty jurisdiction to cover the inland lakes and rivers and "fresh-water commerce," venues for which ebb and flow was certainly not a suitable test.[72] The dissenters reasoned:

> But the inadequacy of the test for defining the interior reach of federal power over navigation does not mean that the test must be, or must have been, abandoned for determining the breadth of federal power on our own coasts.
>
> The ebb-and-flow test is neither arbitrary nor unsuitable when applied in a coastwise setting. The ebb and flow of the tide define the geographical, chemical, and environmental limits of the three oceans and the Gulf that wash our shores. Since those bodies of water in the main are navigable, they should be treated as navigable to the inner reach of their natural limits.[73]

Several years later, Justices Blackmun, Brennan, and Marshall, the dissenters in *Kaiser Aetna*, were joined by Justices White and Rehnquist in the majority and had occasion to address the viability of the ebb and flow of the tide standard.[74] At issue in *Phillips Petroleum Co.* was ownership of certain waterbottoms in the State of Mississippi, which the State claimed it owned in public trust because these lands were tidelands when the State entered the Union.[75] Petitioners, those opposing the State, argued that the State owned only those waterbottoms of tidal waters that were navigable in fact.

The Court reaffirmed its decision in *Shively v. Bowlby* that states entering the Union "received ownership of all lands under waters subject to the ebb and flow of the tide."[76] Moreover, the Court directly addressed the petitioners' arguments for a navigable-in-fact standard. To support their argument, petitioners relied on an ar-

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70 *See* 444 U.S. at 182 (Blackmun, J., dissenting).

71 *See id.*

72 *See id.* at 183 (Blackmun, J., dissenting).

73 *Id.*

74 *See* Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 479 (1988).

75 Clarifying the public trust doctrine, the Court in Shively v. Bowlby, 152 U.S. 1, 57 (1894), held that all states joining the Union, or becoming member states of the United States, are vested with title and dominion to all lands within their borders that are washed by the tide waters. Later, this doctrine was extended to include lands under navigable fresh water lakes and rivers. *See* 484 U.S. at 479 (citing Barney v. Keokuk, 94 U.S. 324, 338 (1877)).

76 484 U.S. at 476.

gument previously made in *The Propeller Genesee Chief* and contended that the tidewater standard, which was adopted from England, was in practice a navigable-in-fact standard because England did not have nonnavigable tidewaters.[77] Further, petitioners contended that *The Propeller Genesee Chief* abolished the ebb and flow of the tide standard for determining admiralty jurisdiction and replaced it with a navigable-in-fact standard, which the Court then applied in public trust cases beginning with its decision in *Barney v. Keokuk*.[78]

Responding to these arguments, the Court noted that the fact that it has applied a navigable-in-fact standard in cases involving freshwaters should not indicate that it has abandoned the ebb and flow of the tide test for tidewaters.[79] The Court explained:

> This Court's decisions in *The Genesee Chief* and *Barney v. Keokuk* extended admiralty jurisdiction and public trust doctrine to navigable freshwaters and the lands beneath them. But we do not read those cases as simultaneously withdrawing from public trust coverage those lands which had been consistently recognized in this Court's cases as being within the doctrine's scope: all lands beneath waters influenced by the ebb and flow of the tide.[80]

Interestingly, the extension or expansion of the public trust doctrine to accommodate freshwater venues has followed and paralleled the extension or expansion of the admiralty jurisdiction to accommodate freshwater venues.[81] *Phillips Petroleum Co.* is a decision in which the Court was faced with a public trust doctrine case involving nonnavigable tidewaters, and the Court held that the ebb and flow of the tide standard had survived the introduction of a navigable-in-fact standard for freshwater; because of the similarities between the development of the applicable standards in these two areas of law and the dicta concerning the applicable standard for admiralty jurisdiction, this case certainly supports a similar decision by the Court in an admiralty jurisdiction case involving tidewaters that are not navigable in fact.

Additionally, both the majority and the dissent in *Phillips Petro-*

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77 *See id.* at 477-78.

78 *See id.* at 479 (citing *Barney*, 94 U.S. at 338 (1877)); *see also supra* note 75.

79 *See id.*

80 *Id.* at 479-80; *see also* Oregon *ex rel.* State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374-75 (1977).

81 *See* 484 U.S. at 479 (citing *Oregon ex rel. State Land Board*, 429 U.S. at 374). *But see id.* at 488 (O'Connor, J., dissenting joined by Stevens, J. & Scalia, J.) ("This Court long ago abandoned the tidal test in favor of the navigability test for defining federal admiralty jurisdiction . . . .") (citing The Propeller Genesee Chief, 53 U.S. (12 How.) 443, 457 (1851)).

leum Co. acknowledged that under either test, the nonnavigable tidewaters bordering the oceans, bays, and Gulf of Mexico are subject to the public trust doctrine.[82] The dissent went so far as to point out that these navigable tidewaters extend to the high tide line and noted that "[t]he question whether a body of water is navigable is answered waterway by waterway, not inch by inch."[83] Thus, under either test, for those waters subject to the ebb and flow of the tide, the entire waterbody should be classified as navigable up to the high water mark if the waterbody as a whole is navigable in fact. This standard necessarily includes parts of the waterbody that are not navigable in fact, but that are within the ebb and flow of the tide, such as shallow waters and coastal marshes.

As the dissenters pointed out in *Kaiser Aetna,* the ebb and flow of the tide defines the boundaries of the oceans and the Gulf of Mexico that wash the shores of the United States and, thus, is a standard particularly well-suited for determining the navigable waters of the United States in a coastal setting.[84] Such a standard is consistent with the theory of classifying a waterbody as a whole and not "inch by inch." Further, such a standard is practical in coastal settings to avoid having to draw an imaginary line across a waterbody to separate the part of the waterbody that is navigable in fact from the part of the waterbody that is not.[85]

As can be discerned from the above discussion, the Court has not been faced with an admiralty jurisdiction case in which it has been called upon to directly rule on the viability of the ebb and flow of the tide standard for determining maritime situs in coastal waters in the wake of its decision in *The Propeller Genesee Chief.* However, the Courts of Appeal for the Ninth and Fourth Circuits have been faced with just such a decision, as have district courts within the Courts of Appeal for the First and Fifth Circuits. Further, other federal appellate and district courts have addressed the issue, and these decisions are discussed below. Notably, much like the apparent lack of agreement among the members of the Supreme Court, the federal circuits are also at odds on this issue.

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82 *See* 484 U.S. at 481, 490-91.

83 *Id.* at 490 (O'Connor, J., dissenting).

84 *See supra* note 73 and accompanying text.

85 The Ninth Circuit Court of Appeals may have been required to draw such a line across the Pacific Ocean in *Paradise Holdings* had the Ninth Circuit not applied the ebb and flow of the tide standard to determine maritime locale. *See infra* notes 89-93 and accompanying text.

B. Federal Appellate Court and District Court Decisions

Much like, and perhaps because of, the inconsistencies found when reviewing the Supreme Court's pronouncements on this issue, the federal courts of appeal differ in their interpretations of the law on this issue. Of the eight circuits containing coastal waterways,[86] five of those circuits or district courts within those circuits have recognized the ebb and flow of the tide rule as an integral part of an evaluation of navigability for admiralty jurisdiction.[87] In the remaining circuits,[88] the courts have either not faced the issue involving a coastal waterway or have relied on cases involving inland waterways to adopt a navigable-in-fact standard.

1. Jurisdictions With Coastal Waters That Have Employed The Ebb And Flow Of The Tide Standard

The Ninth Circuit, a district court sitting in the First Circuit, the Fourth Circuit, the Second Circuit, and the Third Circuit have recognized the ebb and flow of the tide standard. The Ninth Circuit faced this issue in *In re Paradise Holdings*[89] and expressly held that the ebb and flow of the tide standard is the appropriate standard to employ in cases involving tidal or coastal waters. The incident at issue in that case occurred in an area of the Pacific Ocean known as Point Panic, which was clearly within the ebb and flow of the tide, but was not navigable in fact because of "shallow waters, reefs, and state regulations prohibiting boating."[90] A boat drifted out of control into the Point Panic area and injured a swimmer in the water.

The court applied the ebb and flow of the tide test to determine whether the waters were navigable waters for the purpose of

86 The First, Second, Third, Fourth, Fifth, Ninth, Eleventh, and D.C. Circuits include territory that fronts coastal waterways. See 28 U.S.C. § 41 (1993) for a listing of the composition of the circuits. No cases were found in which the issue of maritime situs for admiralty jurisdiction was discussed by the Federal Circuit, which has jurisdiction over cases from all federal judicial districts.

87 The First, Second, Third, Fourth, and Ninth Circuits or district courts within these circuits have recognized the ebb and flow of the tide test. *See In re* Paradise Holdings, 795 F.2d 756, 759 (9th Cir. 1986); Hassinger v. Tideland Elec. Membership Corp., 781 F.2d 1022, 1026 (4th Cir. 1986); United States v. Stoeco Homes, Inc., 498 F.2d 597, 610 (3d Cir. 1974); Sound Marine & Mach. Corp. v. Westchester County, 100 F.2d 360, 362 (2d Cir. 1938); Medina v. Perez, 575 F. Supp. 168 (D.P.R. 1983), *rev'd on other grounds*, 733 F.2d 170 (1st Cir. 1984).

88 "Remaining circuits" refers to the remaining circuits with coastal waters—the Fifth, Eleventh, and D.C. Circuits—as well as those circuits without coastal waters—the Sixth, Seventh, Eighth, and Tenth Circuits.

89 795 F.2d 756, 759 (9th Cir. 1986).

90 *Id.*

evaluating federal admiralty jurisdiction.[91] The court concluded that it had federal admiralty jurisdiction over the incident.[92] Disagreeing with an argument that *The Propeller Genesee Chief* abolished the "tidal waters test," the court explained that *The Propeller Genesee Chief* merely extended admiralty jurisdiction beyond tidal waters.[93]

Subsequently, the Ninth Circuit followed this decision in *Leppaluoto v. United States*,[94] a case brought under the Federal Tort Claims Act (FTCA).[95] The court held that the suit was cognizable under the Suits in Admiralty Act,[96] and thus, it could not be brought under the FTCA.[97] To reach this decision the court had to determine that the action arose in admiralty, which it did by applying the two-part test of *Executive Jet*. With regard to situs, the court reasoned that this suit arose on the navigable waters of the United States because it arose on waters subject to the ebb and flow of the tides.[98]

An earlier Ninth Circuit decision, *Adams v. Montana Power Co.*,[99] has been relied on by several circuit courts in support of a navigability-in-fact standard.[100] *Adams* involved an incident that occurred on an inland waterway, and the court applied a test of present or potential ability to sustain commercial activity.[101] Notably, the Ninth Circuit in *Paradise Holdings* limited its ruling in *Adams* to cases involving inland bodies of water and explained that "it [the decision in *Adams*] was not intended to alter the rule pertaining to tidal waters."[102]

The Court of Appeals for the First Circuit has not directly addressed the viability of the ebb and flow standard, but the District of Puerto Rico, which is within the First Circuit, has squarely addressed the issue.[103] In *Medina v. Perez*, a swimmer was injured by a

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91 *See id.*

92 *See id.*

93 *See id.* (citing *The Propeller Genesee Chief*, 53 U.S. (12 How.) 443 (1851)).

94 891 F.2d 295 (unpublished disposition), published at No. CIV.A.89-35003, 1989 WL 149238 (9th Cir. 1989).

95 *See* 28 U.S.C. §§ 2671-2680 (1994).

96 *See* 46 U.S.C. § 745 (1975).

97 *See* 28 U.S.C. § 2680(d).

98 *See* 1989 WL 149238, at *1 (citing Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 253 (1972); *In re* Paradise Holdings, 795 F.2d 756, 759 (9th Cir. 1986)). The incidents at issue occurred in Ventura Harbor, Channel Islands Harbor, and three miles seaward of Santa Barbara.

99 528 F.2d 437 (9th Cir. 1975).

100 *See, e.g., infra* note 158 and accompanying text.

101 *See* 528 F.2d at 439.

102 795 F.2d at 759.

103 *See* Medina v. Perez, 575 F. Supp. 168 (D.P.R. 1983), *rev'd on other grounds*, 733

pleasure motor craft about 120 feet from the shore of a public beach. The court ruled that the maritime situs portion of the test of admiralty jurisdiction was satisfied.[104] The court enumerated the standards to be used to determine maritime situs as follows: "First, in cases of non-tidal waters (e.g. lakes, rivers, etc.) the alleged wrong must occur in navigable waters; in cases of tidal waters, the test of admiralty jurisdiction is the ebb and flow of the tide."[105]

The Court of Appeals for the Fourth Circuit has also recognized the viability of the ebb and flow of the tide standard, but it has put an interesting spin on its application, using the standard to define the *extent* of admiralty jurisdiction in tidal waters once navigability in fact has been determined. In its most recent decision involving admiralty jurisdiction over an incident occurring on tidal waters, the court concluded, "Admiralty jurisdiction in America therefore extends to all areas within the ebb and flow of the tide, regardless of whether those areas are actually covered by water at the time of the alleged event."[106]

In *Hassinger v. Tideland Electric Membership Corp.*, three men on a sailboat were electrocuted when the mast of their sailboat struck a power line while they were trying to beach the boat.[107] When the boat struck the wire, the boat was below the high water mark and was probably half in the water and half on the beach. Applying the rule set forth above, the court held that the situs requirement of admiralty jurisdiction was satisfied because the incident occurred on navigable waters.[108]

Subsequent to *Hassinger*, however, the court was faced with an incident that occurred on an inland waterway.[109] Attempting to reconcile its earlier decision in *Hassinger* with its analysis of admiralty jurisdiction concerning the inland waterway, the court announced that it uses a navigable-in-fact standard to determine if a waterway is navigable, and it uses the ebb and flow of the tide stan-

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F.2d 170 (1st Cir. 1984). Although the district court held that the incident occurred in a maritime situs, the court held that it lacked jurisdiction because no maritime nexus existed. *See id.* at 171. On appeal, the First Circuit found a maritime nexus and held that the court had admiralty jurisdiction over the case. *See* 733 F.2d at 171. The First Circuit did not address the maritime situs standard because the issue of maritime situs was not before it.

104 *See* 575 F. Supp. at 169.

105 *Id.* (citing United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974)).

106 Hassinger v. Tideland Elec. Membership Corp., 781 F.2d 1022, 1026 (4th Cir. 1986).

107 *See id.* at 1024.

108 *See id.* at 1028.

109 *See* Mullenix v. United States, 984 F.2d 101 (4th Cir. 1993).

dard in tidal waters to delineate the outer boundary of admiralty jurisdiction once navigability is found to exist.[110] The Fourth Circuit considers the "waterway's capability to bear commercial navigation."[111] Thus, according to the Fourth Circuit, the oceans and the Gulf of Mexico, which are indisputably navigable in fact, would be considered navigable bodies of water under this standard, and maritime situs would extend as far as the tide ebbs and flows, which would necessarily include parts of these waterbodies that are not navigable in fact.

The Court of Appeals for the Second Circuit employed the ebb and flow of the tide standard to determine jurisdiction in a case involving a nuisance claim brought against a New York county.[112] The county had placed a sewer pipe across the waterbottom at the entrance to a channel that was subject to the ebb and flow of the tide. The plaintiff claimed that the placement of the sewer pipe caused a significant reduction in the depth of the channel, which was used by the plaintiff's customers to reach his marine repair shop by boat. The court explained that "as to such torts admiralty jurisdiction was dependent upon the locality where the tort was committed, usually the sea or its tide waters."[113] The court held that admiralty jurisdiction was properly invoked because the plaintiff's right to a clear passage on the channel was invaded, resulting in an injury, the substance and consummation of which took place on navigable waters.[114]

On the other hand, in *Reynolds v. Bradley*,[115] a district court within the Second Circuit addressed the question of maritime situs in a case involving a landlocked body of water. Citing the decisions in *The Daniel Ball*,[116] *The Montello*,[117] and *Finneseth v. Carter*,[118] the court explained that the waterway must be part of a continuous

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110 *See id.* at 104-05.

111 *Id.* at 104; *see also* Price v. Price, 929 F.2d 131, 134 (4th Cir. 1991) ("[W]aters are navigable if they are currently being used as a highway of commerce *or* if they are susceptible of being so used.").

112 *See* Sound Marine & Mach. Corp. v. Westchester County, 100 F.2d 360, 362 (2d Cir. 1938).

113 *Id.*

114 *See id.* In two more recent cases, the Second Circuit spoke of maritime situs in more general terms, citing The Plymouth, 70 U.S. (3 Wall.) 20 (1866), and referring to the "high seas or navigable waters." *See* Kelly v. United States, 531 F.2d 1144, 1146 (2d Cir. 1976); Szyka v. United States Secretary of Defense, 525 F.2d 62, 64 (2d Cir. 1975).

115 644 F. Supp. 42, 45 (N.D.N.Y. 1986).

116 77 U.S. (10 Wall.) 557 (1870); *see supra* notes 40-44 and accompanying text.

117 87 U.S. (20 Wall.) 430 (1874); *see supra* notes 40-43 and accompanying text.

118 712 F.2d 1041 (6th Cir. 1983); *see infra* note 161 and accompanying text.

waterway over which interstate commerce may be conducted.[119]

Although the Third Circuit has not directly addressed the issue of navigable waters in a maritime tort context, dicta regarding the proper standard for determining jurisdiction in maritime tort cases in *United States v. Stoeco Homes, Inc.*[120] has been relied on by several courts in maritime tort cases, including other circuit courts and lower courts within the Third Circuit.[121] The court in *Stoeco Homes* had to determine the meaning of "navigable waters" as that term is used in the Rivers and Harbors Appropriation Act of 1899 (RHA).[122] The area in question previously had been a salt water marsh in Ocean City, New Jersey, and the United States government sought an injunction against a developer of waterfront homesites to prevent him from dredging the area and beginning construction.

The court held that the proper definition of navigable waters to be applied in a case arising under the RHA was the admiralty definition and noted that the classic statement of that definition was in *The Daniel Ball*.[123] However, the court then explained that the definition found in *The Daniel Ball* applied only to inland waterways and held that the proper definition for tidal waters is the ebb and flow of the tide standard.[124] The court reasoned, "When Section 9 of the Judiciary Act conferred admiralty jurisdiction upon the district courts, what was referred to was the pre-1789 admiralty jurisdiction."[125] This jurisdiction included areas within the ebb and flow of the tide.[126] The court explained that, subsequently, the decisions in *The Propeller Genesee Chief* and *The Daniel Ball* expanded admiralty jurisdiction to include incidents occurring on inland, non-tidal waterbodies that were navigable in fact.[127]

The Third Circuit expressly rejected the argument that the Court meant to contract admiralty jurisdiction over tidal areas by eliminating the ebb and flow of the tide standard.[128] The court

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119 *See* 644 F. Supp. at 44-45.

120 498 F.2d 597 (3d Cir. 1974).

121 *See, e.g., In re* Paradise Holdings, 795 F.2d 756 (9th Cir. 1986); Otto v. Alper, 489 F. Supp. 953 (D. Del. 1980); Marroni v. Matey, 492 F. Supp. 340, 342 (E.D. Pa. 1980) ("The Third Circuit has held that, in tidal waters, the test of admiralty jurisdiction is the ebb and flow of the tide.").

122 *See* 33 U.S.C. § 401 (1986).

123 *See* 498 F.2d at 609 (citing The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)).

124 *See id.* at 610.

125 *Id.* at 609.

126 *See id.*

127 *See id.* at 609-10.

128 *See* 498 F.2d at 610.

concluded, "In non-tidal waters the test is actual or reasonably potential navigability. In tidal waters the test, in our view, remains what it was before 1851, the ebb and flow of the tide."[129]

District courts within the Third Circuit have followed the court's pronouncement in *Stoeco Homes* when evaluating admiralty jurisdiction.[130] In *Otto v. Alper*, a collision occurred between two pleasure boats on a bay that was subject to the ebb and flow of the tide. The parties' primary dispute in this case, which was decided prior to the Supreme Court's decision in *Foremost Ins. Co. v. Richardson*,[131] was whether a maritime nexus was required for the court to exercise admiralty jurisdiction or whether a maritime situs alone was sufficient. The court found that no nexus was required, but that a nexus existed nonetheless; the court also found that the maritime situs requirement was satisfied.[132] To determine maritime situs, the court employed the ebb and flow of the tide test and explained that "[i]n tidal waters no showing of actual or potential navigability is required."[133]

2. Jurisdictions with Coastal Waters That Have Not Expressly Employed the Ebb and Flow of the Tide Standard

Like the circuits noted above, the Fifth Circuit, the Eleventh Circuit, and the D.C. Circuit contain coastal waters within their jurisdictions. Unlike the circuits noted above, these circuits have not expressly employed the ebb and flow of the tide standard to determine maritime situs for admiralty jurisdiction.

The Court of Appeals for the Fifth Circuit has followed the Third Circuit's decision in *Stoeco Homes* and has employed the ebb and flow of the tide standard to determine navigable waters in RHA cases.[134] The Fifth Circuit has also determined the existence of navigable waters in a maritime tort jurisdiction case involving an

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129 *Id.*

130 *See* Otto v. Alper, 489 F. Supp. 953 (D. Del. 1980) (discussed herein); Marroni v. Matey, 492 F. Supp. 340, 342 (E.D. Pa. 1980) (court recognized *Stoeco Homes* for applicability of the ebb and flow of the tide test to determine maritime locale for admiralty jurisdiction in tidal waters, but noted that this case occurred in a waterbody upstream of the tidal effect, thus the proper test was one of "'actual or reasonably potential navigability.'").

131 457 U.S. 668, 673 (1981).

132 *See* 489 F. Supp. at 954-56.

133 *Id.* at 954 n.* (citing Leslie Salt Co. v. Froehlke, 578 F.2d 742, 749 (9th Cir. 1978); United States v. Stoeco Homes, Inc., 498 F.2d 597, 610 (3d Cir. 1974)).

134 *See* United States v. DeFelice, 641 F.2d 1169, 1174 (5th Cir. Unit A Apr. 1981).

inland waterway and applied the navigable-in-fact standard.[135] However, in those maritime tort cases involving tidal waters, the Fifth Circuit has referred merely to the requirement of maritime situs or navigable waters and it has not defined the terms any further because maritime situs was not a question.[136]

In *United States v. DeFelice*,[137] the issue was whether DeFelice was required by the RHA to obtain authorization from the United States Corps of Engineers prior to filling a channel with sand and other materials. Authorization was required under the RHA if the waterbody was considered among the "'navigable waters of the United States.'"[138] DeFelice argued that this determination involved "a two-step finding of (i) navigability in fact and (ii) a connection with a continuous waterway system."[139] The court rejected DeFelice's contention, noting that "DeFelice has apparently confused the requirements of 'navigable waters of the United States' for tidal coastal waters, with the requirements for non-tidal inland waters."[140] The court explained that DeFelice's reliance on *The Daniel Ball* and *The Propeller Genesee Chief* to argue that navigable waters must be navigable in fact was misplaced because these cases "did not reject the tidal theory over coastal waters."[141] Rather, these cases dealt with "expanding admiralty jurisdiction beyond coastal tide waters to the inland non-tidal rivers of the United States."[142] The court pronounced that sloughs and marshes below the high water mark are subject to the RHA.[143]

On the other hand, in a case involving a question of situs for maritime tort jurisdiction on an inland waterway, the Fifth Circuit applied the navigable-in-fact standard and broadly pronounced that this test was the test to be applied to "all bodies of water."[144] The court declared that "navigable waters of the United States are those waters capable, in fact, of navigation in interstate travel or commerce, and distinctions between natural and man-made bodies

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135 *See* Sanders v. Placid Oil Co., 861 F.2d 1374 (5th Cir. 1988).

136 *See, e.g.*, Creppel v. Shell Oil Co., 738 F.2d 699, 701 (5th Cir. 1984); LeDoux v. Petroleum Helicopters, Inc., 609 F.2d 824, 824 (5th Cir. 1980).

137 641 F.2d 1169 (5th Cir. Unit A Apr. 1981) (Judges Brown, Politz, and Tate).

138 *Id.* at 1174 (quoting *Stoeco Homes*, 498 F.2d at 611).

139 *Id.* at 1173.

140 *Id.* at 1174.

141 *Id.* at 1175 n.14.

142 *Id.*; *see also* United States v. Sexton Cove Estates, Inc., 389 F. Supp. 602, 607-08 (S.D. Fla. 1975).

143 *See* 641 F.2d at 1175.

144 Sanders v. Placid Oil Co., 861 F.2d 1374, 1377 (5th Cir. 1988).

of water are immaterial."[145]

However, despite the absence of a Fifth Circuit decision particularly addressing the standard for navigability or maritime situs for admiralty jurisdiction in a coastal waters case, the Fifth Circuit has held that "the jurisdiction of the admiralty courts over navigable waters extends from shoreline to shoreline."[146] When applied to coastal waters, this rule would require that the Gulf of Mexico or the oceans be considered navigable waters up to their "shorelines." Thus, much like the Fourth Circuit's position,[147] the argument could be made in the Fifth Circuit that if the shoreline extends to the high water mark, then navigability in tidal waters extends to the high water mark or to the extent of the ebb and flow of the tide.

Decisions from the lower courts within the Fifth Circuit that have addressed maritime tort jurisdiction for incidents occurring on coastal waterways have not been consistent. In *Duke v. United States*,[148] the court described the approach to defining "navigability" for admiralty jurisdiction over torts as flexible and employed three tests of navigability to conclude that it had admiralty jurisdiction over the case. The court explained that (1) the water body in which the incident occurred carries substantial commercial traffic, thus satisfying the "highway of commerce" definition; (2) the water body in which the incident occurred is subject to tidal influence and thus meets the ebb and flow definition; and (3) the water body in which the incident occurred sustains actual navigation, thus satisfying the "navigable in fact" definition.[149] The court did not attempt to single out one definition as the correct definition, nor did it require the presence of a combination of the definitions for the finding of navigability.

Interpreting the maritime situs requirement more narrowly than the court in *Duke*, the court in *Duplantis v. Petroleum Helicopters, Inc.*,[150] held that the proper definition of navigable waters for purposes of determining maritime situs for admiralty jurisdiction is navigability in fact. *Duplantis*, which was briefly mentioned earlier in this article, involved the crash of a helicopter into a marsh off

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145 *Id.*; *see also* Hardwick v. Pro-Line Boats, Inc., 895 F. Supp. 145, 147-48 (S.D. Tex. 1995) (indicating that the proper test of navigability in the Fifth Circuit is current ability to sustain navigation).

146 McCormick v. United States, 680 F.2d 345, 347 (Former 5th Cir. 1982) (citing United States v. Ray, 423 F.2d 16, 19 n.4 (5th Cir. 1970)).

147 *See supra* notes 110-11 and accompanying text.

148 *See* 711 F. Supp. 332 (E.D. Tex. 1989).

149 *See id.* at 334.

150 No. CIV.A.93-1265, 1993 WL 370619 at *3 (E.D. La. Sept. 10, 1993); *see also supra* notes 10-14 and accompanying text.

the coast of Louisiana; the marsh was subject to the ebb and flow of the tides of the Gulf of Mexico. The helicopter crashed into water that was three to five feet deep, but navigation in the area was difficult due to the presence of reeds in the water.

The court traced the history of the situs requirement from the ebb and flow of the tide standard to its *extension* "beyond tidal waters to all navigable waters" in *The Propeller Genesee Chief*.[151] However, the court then explained that it was "not prepared to hold that water which is subject to the ebb and flow of the tide, but not navigable, should fall within this court's admiralty jurisdiction," reasoning that it felt that it should proceed cautiously in expanding the court's admiralty jurisdiction.[152] Thus, while recognizing the Supreme Court's *extension* of jurisdiction beyond tidal waters, the court contracted admiralty jurisdiction such that those waters that were originally the only waters within the jurisdiction—those waters touched by the ebb and flow of the tides—are no longer automatically within the court's jurisdiction.

The Eleventh Circuit has not squarely addressed the issue or defined the term maritime situs beyond stating that the term refers to "the high seas or navigable waters."[153] Accordingly, the Eleventh Circuit would look to pre-1982 Fifth Circuit decisions for guidance.[154] However, the United States District Court for the Southern District of Georgia, which is within the Eleventh Circuit, has addressed the issue of maritime locale concerning an inland water-

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151 *See* 1993 WL 370619, at *2.

152 *Id.* at *3. The court in *Duplantis* purported to rely on the Fifth Circuit's decision in Smith v. Pan Air, 684 F.2d 1102 (5th Cir. 1982), because the court in that case found that it lacked admiralty jurisdiction over an aircraft crash "in an inland Louisiana marsh." *Id.* at 1108. Interestingly, the court in *Smith* did not denounce the ebb and flow of the tide standard, and the decision in *Smith* does not provide support for the court's decision that navigability in fact is the only test to be applied to determine maritime tort jurisdiction. *See id.* at 1102. Although the published opinion in *Smith* refers to the place of the accident as "an inland Louisiana marsh," a review of the briefs from the case reveals that the accident took place on dry land on top of a levee. *Id.* at 1106-08; *see* Brief for Appellant and Brief for Appellee, Smith v. Pan Air Corp., 684 F.2d 1102 (5th Cir. 1982) (Nos. 81-3522, 81-3675 and 81-3638) (on file with the United States Court of Appeals for the Fifth Circuit). The primary issue in *Smith* was whether a court could exercise admiralty jurisdiction over a case based *solely* on the existence of a maritime nexus; the parties did not dispute that the crash of a helicopter onto a dry levee, which was the case in *Smith*, did not satisfy the maritime situs requirement. *See* 684 F.2d at 1106-08. Thus, reliance on *Smith* for the proposition that the ebb and flow of the tide standard as a means of determining maritime locale is no longer viable was misplaced.

153 Harville v. Johns-Manville Prods. Corp., 731 F.2d 775, 782 (11th Cir. 1984).

154 *See* Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting case law decided by the former Fifth Circuit on or before September 30, 1981).

way and has followed the Eighth Circuit's standard of "contemporary navigability in fact."[155]

The D.C. Circuit has also not addressed the issue in an admiralty case involving coastal waters. However, in *National Wildlife Federation v. Alexander*,[156] a case brought under the RHA involving an inland lake, the court adopted the definition of navigable waters from *The Daniel Ball* and *The Montello* that navigable waters of the United States are those waters that are navigable in fact and can be used in interstate commerce because they connect with other waters to form a continuous interstate waterway.[157]

3. Jurisdictions Without Coastal Waters, Which Have Had No Need to Employ the Ebb and Flow of the Tide Standard

Those circuits that geographically do not contain coastal waters include the Eighth, Seventh, Sixth, and Tenth Circuits. In cases involving non-tidal waters, these circuits differ as to whether the appropriate test is one of present navigability in fact or potential navigability in fact.

The Courts of Appeal for the Seventh and Eighth Circuits have required that a non-tidal waterway possess a present capability to sustain commercial shipping to establish maritime situs.[158] Within the Seventh Circuit, however, a federal district court has employed the Fifth Circuit's shoreline to shoreline test to determine the extent of admiralty jurisdiction over a waterway once the waterway has been deemed navigable.[159]

The incident at issue in *Kozan* took place on a part of Lake Michigan that did not sustain commercial activity at the time of the incident. The court adopted the Fifth Circuit's position that a waterway should be evaluated for purposes of admiralty jurisdiction "'from shoreline to shoreline,'" noting that in those cases in which courts have held to the contrary, the nonnavigable portions of the waterways were large, discrete parts of a body of water, such as a

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155 Seymour v. United States, 744 F. Supp. 1161, 1163 (S.D. Ga. 1990).

156 613 F.2d 1054 (D.C. Cir. 1979).

157 *See id.* at 1062, 1066.

158 *See In re* Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts, 921 F.2d 775, 778 (8th Cir. 1990) (approved en banc); Livingston v. United States, 627 F.2d 165, 170 (8th Cir. 1980); Chapman v. United States, 575 F.2d 147, 151 (7th Cir. 1978) (relying extensively on the Ninth Circuit's decision in *Adams v. Montana Power Co.*); *see supra* notes 99-102 and accompanying text (discussing *Adams*).

159 *See* Kozan v. United States, 570 F. Supp. 1351, 1352-53 (N.D. Ill. 1983) (citing McCormick v. United States, 680 F.2d 345, 347 (5th Cir. 1982)); *see supra* note 146 and accompanying text.

lake formed by damming a river.[160] Thus, although the Seventh Circuit has not evaluated maritime situs for admiralty jurisdiction in a case involving coastal waters, were it to apply the shoreline to shoreline rationale, ebb and flow of the tide may in practice be the test employed to determine the extent of jurisdiction, if not the existence of jurisdiction.

Unlike the Seventh and Eighth Circuits, the Sixth Circuit has applied a less stringent form of the navigability-in-fact standard. According to the Court of Appeals for the Sixth Circuit:

> an artificial water body, such as a man-made reservoir, is navigable in fact for purposes of conferring admiralty jurisdiction if it is used *or capable or susceptible of being used* as an interstate highway for commerce over which trade or travel is or may be conducted in the customary modes of travel on water.[161]

The court in *Finneseth* was faced with an incident that occurred on a landlocked lake.

Finally, the Tenth Circuit has not addressed the issue of navigability for admiralty jurisdiction for coastal or noncoastal waterways. The court addressed the definition of navigability in a case brought under the RHA and followed the definition of navigability set forth in *The Daniel Ball* and its progeny.[162] Additionally, in a case involving a dispute over the ownership of the riverbed of the Arkansas River, the court stated, "The Supreme Court has rejected as inapplicable to this country, the English rule that the test for navigability is the ebb and flow of the tides."[163]

III. Conclusions And Recommendations

Review of the above Supreme Court and federal court decisions reveals that the federal courts have developed and are applying at least three distinct standards for determining maritime situs when evaluating the existence of admiralty jurisdiction over tort claims, thus resulting in three distinct admiralty jurisdictions, which include:

(1) an admiralty jurisdiction that includes incidents with a maritime nexus that have occurred on a coastal waterway within

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160 *See* 570 F. Supp. at 1352-53 (quoting *McCormick*, 680 F.2d at 347).

161 Finneseth v. Carter, 712 F.2d 1041, 1044 (6th Cir. 1983) (emphasis added); *see also* Lynch v. McFarland, 808 F. Supp. 559 (W.D. Ky. 1992).

162 *See* Hardy Salt Co. v. Southern Pac. Transp. Co., 501 F.2d 1156, 1169 (10th Cir. 1974). See *supra* notes 42-44 and accompanying text for a discussion of *The Daniel Ball* and its progeny.

163 Cherokee Nation or Tribe of Indians in Okla. v. Oklahoma, 402 F.2d 739, 746 (10th Cir. 1968).

the ebb and flow of the tide or on an inland waterway that is navigable in fact, currently or potentially;

(2) an admiralty jurisdiction that includes incidents with a maritime nexus that have occurred on a coastal or an inland waterway that is currently navigable in fact, and seemingly excludes incidents with a maritime nexus that have occurred on a part of a coastal waterway that is not currently navigable in fact;[164] and

(3) an admiralty jurisdiction that includes incidents with a maritime nexus that have occurred on a coastal or an inland waterway that is currently or potentially navigable in fact, and may exclude incidents with a maritime nexus that have occurred on a part of a coastal waterway that is not currently or potentially navigable in fact.

This use of different tests by different courts to determine maritime situs runs contrary to the driving principle behind the development of admiralty and maritime jurisdiction in the United States. "Admiralty jurisdiction in the federal courts was predicated upon the need for a uniform development of the law governing maritime industries."[165]

Such uniformity should be promoted by the decisions of the Supreme Court, but it is not. The Supreme Court has recognized the ebb and flow of the tide standard in cases decided since *The Propeller Genesee Chief*, like *Executive Jet*.[166] However, some Supreme Court opinions have appeared to interpret *The Propeller Genesee Chief* as a case in which the Court abandoned the standard for a more practical standard in the United States—the navigable-in-fact standard.[167] No post-*Genesee Chief* Supreme Court case has been found in which the Court has directly had to decide the proper test for maritime situs involving coastal waters. Thus, presently we are left with the Supreme Court's dicta and the inconsistency that exists among the federal circuits.

For example, had the helicopter incident at issue in *Duplantis*[168] occurred in a coastal marsh in the First, Third, Fourth or Ninth Circuits, the courts more than likely would have exercised admiralty jurisdiction and the case would have been tried in fed-

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164 *But see* McCormick v. United States, 680 F.2d 345, 347 (5th Cir. 1982) (recognizing a waterway as navigable from shoreline to shoreline). *See also supra* note 146 and accompanying text.

165 Peytavin v. Government Employees Ins. Co., 453 F.2d 1121, 1127 (5th Cir. 1972).

166 *See supra* notes 58-61 and accompanying text.

167 *See supra* notes 42-52 and accompanying text.

168 *See supra* notes 150-52 and accompanying text.

eral court under the federal admiralty law. Instead, the incident occurred in a coastal marsh within the jurisdiction of the Fifth Circuit and jurisdiction was denied. Notably, when the standards to determine federal admiralty jurisdiction are not uniform, no uniform development of admiralty law can be expected.

What standard then should be applied uniformly by the courts to determine maritime situs? The Supreme Court and appellate courts should uniformly recognize the ebb and flow of the tide standard for determining maritime situs in coastal areas and should employ a navigable-in-fact standard for inland waters. This resolution (1) would not expand the meaning of the terms "all cases of admiralty and maritime jurisdiction" found in the Constitution or in 28 U.S.C. § 1333(1), and (2) would negate the need for drawing an imaginary line across the waters.

First, a clear recognition of the ebb and flow of the tide standard for coastal waters would not expand the admiralty and maritime jurisdiction. As has been noted herein, this standard has already been expressly recognized and is being used by some federal courts. Further, other federal courts, like the Fifth Circuit, have implicitly recognized the standard by employing the principle of a waterway being navigable from shoreline to shoreline. This principle essentially incorporates the ebb and flow of the tide standard to determine the boundary of the shoreline of a coastal waterway. The oceans and the Gulf of Mexico are navigable in fact; their shorelines extend to the high water mark, which is determined by the ebb and flow of the tide.

Additionally, from an historical point of view and as Justice Story pointed out in 1815, this standard is consistent with, if not more restrictive than, the standard applied for maritime situs in the vice admiralty courts in the colonies at the time of the American Revolution and the standard generally applied by the English admiralty courts at that time. [169] Justice Story, in fact, suggested that the language of the Constitution concerning admiralty and maritime jurisdiction required that it be given "the most liberal

169 *See* De Lovio v. Boit, 7 F. Cas. 418, 441-43 (C.C.D. Mass. 1815) (No. 3776); *see also* Waring v. Clarke, 46 U.S. (5 How.) 440, 454 (1847) (Wayne, J.). Justice Story noted that some of the vice admiralty courts of the American colonies had an even broader admiralty jurisdiction than did the admiralty courts in England, and he quoted the commission to the governor of the royal province of New Hampshire as a typical admiralty commission. The jurisdiction included, "'the seashores, public streams, ports, fresh waters, rivers, creeks and arms, as well of the sea, as of the rivers and coasts whatsoever of our said province.'" 7 F. Cas. at 442 n.46 (quoting ANTHONY STOKES, A VIEW OF THE CONSTITUTION OF THE BRITISH COLONIES IN NORTH AMERICA AND THE WEST INDIES 166 (1783)).

interpretation."[170]

Moreover, the maritime nexus requirement functions as a restriction on the type of cases over which the federal courts sitting in admiralty may exercise jurisdiction, excluding those cases that lack a significant relationship to traditional maritime activity.[171] Thus, those non-maritime incidents that only fortuitously occur within the ebb and flow of the tide would not be included within the admiralty jurisdiction simply because of the use of the ebb and flow of the tide standard.

Second, use of the ebb and flow of the tide standard in coastal waters eliminates the need for courts to attempt to draw an imaginary line across the oceans or the Gulf of Mexico to indicate which parts of the waters are navigable in fact and which parts are not at the particular time of an accident. We cannot escape the fact that the outer boundaries of the oceans and the Gulf of Mexico do ebb and flow with the tide, thus providing us with a natural test particularly suited to the waterbodies at issue. Justice Blackmun aptly explained the practical value of the ebb and flow of the tide standard for coastal waters in his dissent in *Kaiser Aetna*, in which he focused on the natural "geographical, chemical, and environmental limits" of the oceans and the Gulf of Mexico and advised the Court to treat these waters as navigable to their inner limits.[172] Assuming that waters are navigable from shoreline to shoreline, or high water mark to high water mark, ebb and flow is then already a part of the law even in those jurisdictions that have seemingly denounced it. If waters are not navigable from shoreline to shoreline, where should the line be drawn? At a certain depth?

Unless the ebb and flow of the tide standard is used to determine admiralty jurisdiction in coastal waters or the shoreline to shoreline principle is employed, boats like the one in *Paradise Holdings* that drift into "nonnavigable" portions of waters will drift right out of admiralty jurisdiction. The courts would need to draw imaginary lines across clearly navigable waters, such as the Pacific Ocean, where the waterway becomes shallow or marshy or an ob-

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170 7 F. Cas. at 443.

171 But see Thomas C. Galligan, Jr., *Of Incidents, Activities, and Maritime Jurisdiction: A Jurisprudential Exegesis*, 56 LA. L. REV. 519 (Spring 1996), in which the author suggests that the decisions in Sisson v. Ruby, 497 U.S. 358 (1990), and Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 115 S. Ct. 1043 (1995), significantly weakened the value of the maritime nexus requirement, which the author refers to as the incident/activity test.

172 *See* 444 U.S. 164, 183 (1979) (Blackmun, J., dissenting); *see also supra* text accompanying notes 72-73.

struction underwater prevents navigation; likewise, courts might need to draw lines whenever the Coast Guard or some other body declared a particular waterway unsafe for boating.

Admiralty courts and Congress have drawn lines across waters in other situations, all in an effort to provide uniformity in the application of admiralty law.[173] Maritime locale is one area of admiralty law where a natural line has already been drawn by the tides in coastal waters. Federal courts should accept this line as the natural boundary for maritime situs for admiralty jurisdiction in coastal waters. The Supreme Court has declared that "the primary purpose of admiralty jurisdiction is unquestionably the protection of maritime commerce."[174] If incidents that occur in the nonnavigable portions of otherwise navigable coastal waterways are not worthy of admiralty's review because they do not require such "protection," perhaps these cases are unworthy because they in fact lack a significant relationship to traditional maritime activity and they fail to satisfy the maritime nexus requirement, not the maritime situs requirement.

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[173] *See, e.g.*, Moragne v. States Marine Lines, Inc., 398 U.S. 375, 393-402 (1970). In *Moragne*, the Court discussed the different cases and statutes that have provided remedies for wrongful death and the discrepancies that developed because the remedies varied depending on whether the death occurred on the high seas or within territorial waters. The Court attempted to eliminate those discrepancies and "give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'" *Id.* at 402.

[174] Foremost Ins. Co. v. Richardson, 457 U.S. 668, 674 (1982).