

# Legal Update: The Shipping Act and Related Laws

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April 14, 2011

# Undue Preference Cases

- Maher Terminals v. PANYNJ, Dkt. 08-03
  - Started as dispute between APMT and the Port over Port's duty to turn over land that Maher had not yet vacated
  - Port third-partied in Maher for refusing to vacate
  - Original case settled: the tail of the dog lives on

# The issues

- Undue prejudice claims
  - From lease terms years ago
  - Alleged rent differential based on square footage – a standardless claim that should concern every port
  - Investment requirement
  - Throughput requirement

# Discovery Lessons

- A million emails
- Trying the discovery, not the merits
- An ancient curse – may you have a lawsuit in which you are right
- Takeaway from Judge Guthridge’s rulings
  - AS SOON AS YOU LOCATE AN INADVERTANT PRODUCTION, NO SLEEPING UNTIL YOU GET IT BACK

# More Unpleasant Development

- Docket 09-08: SSAT challenges a P3 project, alleging that the private partner was given a better deal
- Comparing a 15 year lease for a new terminal with a 50 year concession on an very old terminal
- Terminal costs – very competitive issue

# American Shipping, Inc.

- Barge Service – Brooklyn to New Jersey
- Port discontinued subsidy
- Prior claim – settled (or not)
- Does a port have a duty to apply for federal funds and earmarks?
- Allegations that PANY/NJ has a duty to subsidize a tenant – say what?

# 11<sup>th</sup> Amendment Issues

- The 11<sup>th</sup> Amendment is alive and well and living in Argentina
- Prohibits private party claims against State ports
- Does not prohibit BOE enforcement of the Shipping Act

# Who is a state under the 11<sup>th</sup> Amendment?

- Who wants to know?
- FMC
- Appeals Courts



## Some History

- SCSPA
- Supreme Court Reversal
- Odyssey/PRPA
- D.C. Circuit Reversal

# PRPA in the D.C. Circuit

- Three ways to establish 11<sup>th</sup> Amendment immunity in the D.C. Circuit
- Arm of the State
- State agent
- State liable for judgment
- Not everyone reads the case this way

# Arm of the State

- Three part test for most cases
- Not case dependent – either are or are not immune until state law changes
- State intent to provide immunity
- State control over entity
- Overall effect on state treasury

# State Agent

- Under PRPA a respondent that is acting as an agent of a state is entitled to that state's 11<sup>th</sup> Amendment immunity.
- Tidelands Trust – Trustee for the state
- California case law
  - Mosher
  - Hanson

# Bridgeport Ferry Case

- Tariff on passengers used to pay for virtually all general port operations
- U.S. Court of Appeals for Second Circuit affirms finding that the tariff violated
  - Commerce clause
  - Duty of tonnage
- Legal fees tariff also a problem

# Bridgeport Ferry Continued

- Other claim (right to travel) that is probably passenger specific.
- Did not reach 33 U.S.C. 5 – no non-federal entity can tax a vessel in navigable water
- White water rafting cases barring taxes
  - Pennsylvania
  - Tennessee
  - Idaho legislature

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