

PILOTAGE:
THE REAL CHARLESTON BAR

Charles H. Raley, Jr.
of the South Carolina Bar and State Bar of Georgia
Raley & Raley, P.C.
Savannah, Georgia

I. INTRODUCTION

The confluent subjects of Charleston's rich maritime history, pilotage, and states' rights set against a powerful central government continue to leave their mark in the waters where the Ashley and Cooper Rivers join to form the Atlantic Ocean.

It follows, then, that the original Charleston Bar was not an organization made up of Holy City lawyers, but a topographical hazard to vessel navigation at the mouth of Charleston Harbor, including, for a vessel approaching from the northeast, the dreaded Rattlesnake Shoals.

In pre-revolutionary Charles Town, pilotage

[w]as a risky, competitive business because of the narrow, winding channel leading to the port; the swift currents; and the necessity to wait off the bar in bad weather for an incoming ship to beat the competition to the job of bringing it in. In 1762 the colonial Assembly passed an act requiring that local pilots use Sullivans Island as a base of operations. . .The pilot's duty was an essential part of bringing a ship in or out of port; few ship captains could keep abreast of changes in the harbor. Sand bars and shoals shifted regularly, and sunken vessels formed new hazards. The financial loss of a grounded or lost vessel was far greater than any piloting fees.

Pilots were cursed and praised. One day they would be blamed for the loss of a ship, and the next praised for saving one. . .[in 1731]a ship attempting to follow HMS Albrough over the bar was lost for lack of a pilot. . .

Piloting in Charles Town developed in haphazard manner. . .as the colony grew, an apprentice system sprang up based upon practices in England. The pilots would compete with each other for business by waiting off the bar for an incoming ship. The first one to the vessel usually brought

it in and collected the fee, some of which went to the government. In this competition, business went to the quick and the maneuverable...The first recorded powered pilot boat was the 111' screw steamer Pilot that was placed in service in 1849, but wrecked three years later.

Sullivans Island became the base of operations for local pilots, since they could easily put out from there in small craft. As the profession became more competitive, the pilots went further offshore to meet incoming ships, a venture that required larger, more seaworthy pilot boats.

Priestly C. Coker, III, Charleston's Maritime Heritage 1670-1865 35-36 (CokerCraft Press 1987).

The "practices in England" included, in 1514, the formation of Trinity House, the pilot organization developed under Henry VIII. Ultimately, the genesis of pilotage can be found in Roman law and the Hanseatic ordinances of 1457 requiring the "captain to take a pilot under the penalty of a mark of gold." Alex L. Parks & Edward V. Cattell, Jr., The Law of Tug, Tow, and Pilotage 981(3d ed. 1994).

Today, with the channel project depth from the sea buoy to the South Carolina State Ports Authority's container berths at the North Charleston Terminal at 45 feet, pilots are vital to the safe navigation of the harbor, for a cursory glance at NOAA chart number 11524 will reveal "a rather tricky series of 'S' turns" required to be transited by a containership inbound to the Wando Terminal, including the Mt. Pleasant Range, Rebellion Reach, Folly Reach, Shutes Reach, Horse Reach, and Hog Island Reach. (The transit is outlined in Nicholes v. M/V MAYA, 1997 A.M.C. 872 (DSC)).

As long as we have foreign trade executed daily by oceangoing shipping traffic, we will have pilots:

Pilots are thus indispensable cogs in the transportation system of every maritime economy. Their work prevents traffic congestion and accidents which would impair navigation in and to the ports. It affects the safety of lives and cargo, the costs and time expended in port calls, and in some measure, the competitive attractiveness of particular ports.

Kotch v. Board of River Port Pilot Comm'rs for Port of New Orleans, 330 U.S. 552 (1947).

Because pilot activities necessarily involve their varying relationships to multiple parties, both known (federal government, state government, pilot commission, pilot association, vessel, vessel owner/charterer, ship's master, cargo interests, tug companies, docking pilots, and port authorities) and unknown but foreseeable (owners/operators of underway, anchored, and moored commercial, governmental, and recreational vessels of domestic and foreign flags; and owners/operators of shoreside terminals and structures), their activities occasionally require the scrutiny of the legal system.

For example:

When a vessel under the command of a pilot creates an unreasonably large wake, allides with a fixed structure (or anchored/moored vessel), collides with another moving vessel, or runs aground:

Is negligence committed by the pilot imputed to the vessel itself? To the vessel owner/charterer? May the pilot be sued individually? May his pilot association be sued and its members be held jointly and severally liable?

What is the obligation of the ship's master upon identifying a pilot's dangerous commands (concerning the ship's navigation relative to course, speed, passing arrangements with other vessels, decision to continue underway, location of anchorage, etc.)?

In the above example, under what circumstances will regulating authorities (state pilotage commission and/or the United States Coast Guard) initiate suspension and revocation (S&R) proceedings against the pilot's license?

Can the Coast Guard seek license sanctions or civil penalties against a state pilot?

Can the local pilotage commission seek sanctions against a federal pilot?

What if a pilot is injured in the course of his duties?

Is he a Jones Act seaman? A LHWCA statutory harborworker? Neither?

When these situations occur, certain members of the "other" Charleston Bar engaged in a maritime practice are then left to discern the "local knowledge" of this practice area. Hopefully, this paper will serve as a rudimentary aid to navigation.

II. DEFINITIONS: PILOT, PILOTAGE, AND PILOTAGE GROUNDS

A. Pilot

A pilot is defined as:

[a] qualified individual possessing local knowledge of shallows, rocks, currents, and so on and usually licensed by public authority, who is taken on board at a particular place, to conduct a ship through a river, road or channel, or from or into port. Pilots are established by legislative enactments at the principal sea ports, and have rights and are bound to perform duties in accordance with these provisions of the laws establishing them.

International Maritime Dictionary 581(2d ed. 1961).

One of the saltiest federal appellate jurists of all time, the Honorable John R. Brown (once holding that a diver's body was, itself, a vessel), shed his special light on the subject in Jackson v. Marine Exploration, 583 F.2d 1336, 1339 (5th Cir. 1978):

As a profession, pilotage owes its existence to the infinite variety of navigation hazards currents, tides, sand bars, submerged objects, weather conditions, and the like that mark the harbors and rivers open to commercial vessels. No matter how competent the master of a ship is at open sea, he cannot be expected to be familiar with the local navigation hazards of each harbor and river that he encounters as he conducts his ship in the course of a maritime trade. . . Accordingly, it has long been the practice of vessels to employ, for each port they enter and leave, a local pilot intimately familiar with the waters of that port to board and guide them through those waters in, from or back to the open sea. . .

Indeed, local pilotage has been regarded so important to the conduct of maritime affairs that for centuries commercial states with substantial shipping trades have required vessels entering or departing their ports to take onboard a local pilot or to pay some sort of penalty. In this country, compulsory pilotage laws date back to the time of the Revolution and today, at least 23 states have such laws as part of a comprehensive pilotage regulatory system.

Id.

B. Pilotage

The term is used to mean the act of piloting a vessel and the compensation for a pilot's services. Unpaid pilotage fees constitute a maritime lien against a vessel enforceable in rem through a Rule C arrest of the vessel. Parks & Cattell, supra at 985. Half-pilotage, a penalty due as a result of a vessel's refusal to accept the offer of a compulsory pilot, is considered the breach of a maritime contract rising to the level of a maritime lien. The Glenearne, 7 F. 604 (D.Or. 1881).

In Charleston, it is helpful for the vessel owner to know that

Vessels shifting in Charleston between berths that do not pass a "last line" from the dock to the vessel are not considered to be underway and do not require a pilot. However, if a vessel changes "sides to", or shifts from one berth on one side of the Columbus Street "knuckle" to the other side of the "knuckle", it requires a pilot because it is impossible for such a vessel to be shifted with a mooring line on the dock.

Charleston Branch Pilots' Association; What Vessels Must Take Pilots, at www.charlestonpilots.com, (last visited Jan. 16, 2007).

A pilotage fee would thus be due.

C. Pilotage Grounds

Pilotage grounds are defined as "that portion of the waters over which the pilot is required, usually by statute or regulations, to steer and direct the movements of a vessel." Parks & Cattell, supra at 981.

1. State Pilotage Grounds

State pilotage grounds are not concurrent with the three-mile limit customarily considered as state territorial waters under, for example, the Death on the High Seas Act, 46 U.S.C. § 761 (1920).

The recent case of Gillis v. State of Louisiana, 294 F.3d 755 (5th Cir. 2002), held that states may regulate pilotage outside of the three-mile limit (reviewing the Submerged Lands Act, 43 U.S.C. §§ 1301-1315 (2002)).

Consistent with this proposition, South Carolina law provides that: “The Pilot ground of the bar of Charleston shall extend from the bar thirty miles eastward, southward and northward.” S.C. Code Ann. § 54-15-160.

D. “Speaking a Vessel”

“To properly speak a vessel means simply to make a valid and proper tender of pilotage services. . .” Parks & Cattell, supra at 1056.

III. STATE AND FEDERAL PILOTAGE: A “SHARED” REGULATORY SYSTEM

Regulation of pilotage is exercised by the federal government and the governments of states under a

sharing arrangement. . .now comprehensively elucidated [in 46 U.S.C. Sec. 8501 – 8503]. They are as a general rule, and except as otherwise provided, [1] pilots in the waters of the United States shall be regulated only in conformity with the laws of the states; [2] a license issued by the federal government is required of any person who pilots a vessel engaged in the coastwise trade; and [3] if, in a particular port or place, there is no state requirement pertaining to pilotage, the Secretary of Transportation (or his designate, the Commandant of the U.S. Coast Guard) may issue ‘gap-filling’ regulations requiring employment of federally licensed pilots until the state moves to correct the omission. This statutory scheme shows a traditional preference for the state pilotage system, expresses the Congressional insistence upon the use of pilots in U.S. waters aboard seagoing vessels, and provides an exception for the coastwise trade.

Id. at 994.

A. Federal Grant of Regulatory Authority to States

The source of the states’ power to regulate pilotage is found in the Commerce Clause. The seminal case of Cooley vs. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How) 299, 13 L. Ed 996 (1851), determined that

a penalty equal to half the pilotage had been imposed pursuant to state statute upon a shipmaster who had failed to engage a local pilot while entering the port of Philadelphia. The shipmaster challenged the Pennsylvania compulsory pilotage law as an unconstitutional state

regulation of interstate commerce. The Supreme Court acknowledged that state laws concerning pilotage are regulations of commerce within the scope of Congress's Commerce Clause power, but held that pilotage was among those peculiarly local concerns that could constitutionally be regulated by the states in the absence of any conflicting federal legislation.

Cooley vs. Board of Wardens of the Port of Philadelphia, 53 U.S. (12 How) 299, 312 (1851), *construed in* Jackson v. Marine Exploration, 583 F.2d 1336, 1340 (5th Cir. 1978) (emphasis added).

B. State Law Governs Compulsory Pilotage in State Pilotage Grounds, Except Coastwise Vessels

This power is currently delegated, or acquiesced to, via federal statute. In reviewing the limits of federal and state power to regulate pilotage, it is important to distinguish between the documentation of the vessel involved in the pilotage sought to be regulated: “enrolled” (coastwise) versus “registered” (in foreign trade).

“A ‘coastwise vessel’ is an American flag vessel that travels between American ports.” U.S. v. Commonwealth of Massachusetts, 2006 A.M.C. 1889, 1899 n.74 (2d Cir. 2006), citing cases.

“Registered vessels” are foreign-flag vessels and U.S.-flag vessels engaging in foreign trade. Id. at 2006 A.M.C. 1899 n.75.

1. State Regulation of Registered Vessels

a. 46 U.S.C. Sec. 8501: State regulation of pilots

“(a) Except as otherwise provided in this subtitle [46 U.S.C.S. §§ 2101 et seq.], pilots in the bays, rivers, harbors, and ports of the United States shall be regulated only in conformity with the laws of the States.

(b) The master of a vessel entering or leaving a port on waters that are a boundary between 2 States, and that is required to have a pilot under this section, may employ a pilot licensed or authorized by the laws of either of the 2 States.

(c) A State may not adopt a regulation or provision that

discriminates in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or against vessels because of their means of propulsion, or against public vessels of the United States.

(d) A State may not adopt a regulation or provision that requires a coastwise vessel to take a pilot licensed or authorized by the laws of a State if the vessel--

(1) is propelled by machinery and subject to inspection under part B of this subtitle [46 U.S.C.S. §§ 3101 et seq.]; or

(2) is subject to inspection under chapter 37 of this title [46 U.S.C.S. §§ 3701 et seq.].

(e) Any regulation or provision violating this section is void.”

2. “Federal Regulation” of Enrolled (Coastwise) Vessels

As previously noted, the federal government’s regulation of pilotage through (1) its acquiescence to the states’ police power to regulate pilotage; (2) its retention of power to regulate pilotage on coastwise vessels; and (3) its retention of gap-filling power is illustrated in these federal statutes:

a. 46 U.S.C. Sec. 8502: Federal pilots required

“(a) Except as provided in subsections (g) and (i) of this section, a coastwise seagoing vessel shall be under the direction and control of a pilot licensed under section 7101 of this title if the vessel is--

(1) not sailing on register;

(2) underway;

(3) not beyond 3 nautical miles from the baselines from which the territorial sea of the United States is measured; and

(4) (A) propelled by machinery and subject to inspection under part B of this subtitle [46 U.S.C.S. §§ 3101 et seq.]; or

(B) subject to inspection under chapter 37 of this title [46 U.S.C.S. §§ 3701 et seq.].

(b) The fees charged for pilotage by pilots required under this section may not be more than the customary or legally

established rates in the States in which the pilotage is performed.

(c) A State or political subdivision of a State may not impose on a pilot licensed under this subtitle [46 U.S.C.S. §§ 2101 et seq.] an obligation to procure a State or other license, or adopt any other regulation that will impede the pilot in the performance of the pilot's duties under the laws of the United States.

(d) A State or political subdivision of a State may not levy pilot charges on a vessel lawfully piloted by a pilot required under this section.

(e) The owner, charterer, managing operator, agent, master, or individual in charge of a vessel operated in violation of this section or a regulation prescribed under this section is liable to the United States Government for a civil penalty of \$ 10,000. The vessel also is liable in rem for the penalty.

(f) An individual serving as a pilot without having a license required by this section or a regulation prescribed under this section is liable to the Government for a civil penalty of \$ 10,000.

(g) (1) The Secretary shall designate by regulation the areas of the approaches to and waters of Prince William Sound, Alaska, if any, on which a vessel subject to this section is not required to be under the direction and control of a pilot licensed under section 7101 of this title [46 U.S.C.S. § 7101].

(2) In any area of Prince William Sound, Alaska, where a vessel subject to this section is required to be under the direction and control of a pilot licensed under section 7101 of this title [46 U.S.C.S. § 7101], the pilot may not be a member of the crew of that vessel and shall be a pilot licensed by the State of Alaska who is operating under a Federal license, when the vessel is navigating waters between 60 degrees 49' North latitude and the Port of Valdez, Alaska.

(h) The Secretary shall designate waters on which tankers over 1,600 gross tons subject to this section shall have on the bridge a master or mate licensed to direct and control the vessel under section 7101(c)(1) of this title [46 U.S.C.S.

§ 7101(c)(1)] who is separate and distinct from the pilot required under subsection (a) of this section.

(i) (1) Except as provided in paragraph (2), a dredge to which this section would otherwise apply is exempt from the requirements of this section.

(2) If the Secretary determines, after notice and comment, that the exemption under paragraph (1) creates a hazard to navigational safety in a specified area, the Secretary may require that a dredge exempted, by paragraph (1) which is operating in that area shall comply with this section.

b. 46 U.S.C. Sec. 8503: Federal pilots authorized

“(a) The Secretary may require a pilot licensed under section 7101 of this title [46 U.S.C.S. § 7101] on a self-propelled vessel when a pilot is not required by State law and the vessel is--

(1) engaged in foreign commerce; and

(2) operating--

(A) in internal waters of the United States;

or

(B) within 3 nautical miles from the baselines from which the territorial sea of the United States is measured.

(b) A requirement prescribed under subsection (a) of this section is terminated when the State having jurisdiction over the area involved--

(1) establishes a requirement for a State licensed pilot; and

(2) notifies the Secretary of that fact.

(c) For the Saint Lawrence Seaway, the Secretary may not delegate the authority under this section to an agency except the Saint Lawrence Seaway Development Corporation.

(d) A person violating this section or a regulation prescribed under this section is liable to the United States Government for a civil penalty of not more than \$ 25,000. Each day of a continuing violation is a separate violation. The vessel also is liable in rem for the penalty.

(e) A person that knowingly violates this section or a

regulation prescribed under this section commits a class D felony.

3. State Regulation of Compulsory Pilotage, Except Coastwise Vessels:

The following are two examples of compulsory pilotage laws from South Carolina and Georgia:

a. South Carolina law: S.C. Code Ann. § 54-15-270

(a) All vessels entering into the pilotage area of a port for the purpose of entering such port, except United States vessels engaged in coastwise trade having on board a pilot licensed by the United States Coast Guard for that area and United States vessels under one hundred net registered tons, are required to receive on board for entering into, departing from, or shifting within the port, an amply licensed pilot offering to board.

b. Georgia law: O.C.G.A. § 52-6-45

(a) Except as otherwise provided in this Code section, every vessel shall be under the direction and control of a pilot licensed by this state when underway in the bays, rivers, harbors, and ports of this state and the approaches thereto.

(b) The requirement of subsection (a) of this Code section shall not apply to the following vessels:

- (1) Vessels exempted by the laws of the United States;
- (2) Vessels under 200 gross tons; and
- (3) Vessels in distress or jeopardy, except that any such vessel shall take a state licensed pilot as soon as one arrives at the vessel.

4. Examples of Tension Between the Federal and State Regulators

The tensions between the federal and state governments in the regulation of pilotage are crystallized in the following cases.

a. State Cannot Legislatively Compel Coastwise Vessels to Take on State Pilots

In Ray v. Atlantic Richfield, 435 U.S. 151 (1978), 1978 A.M.C. 527, the Coast Guard, armed with navigation safety regulations promulgated pursuant to authority of the Secretary of Transportation, squared off against the Washington Tanker Law. The feds won, with the Supreme Court (1) striking down the Tanker Law's requirement for coastwise vessels to carry a state pilot in Puget Sound and adjacent waters and (2) rejecting Washington's safety design requirements, "standing alone". The Court allowed the state to require Washington pilots on foreign-flag vessels and held that tug escorts, as an alternative to the mandated safety design features, were acceptable, since there was no federal preemption.

More recently, a District Court in Massachusetts reached a similar result, in reviewing the constitutionality of certain provisions of Massachusetts' Oil Spill Prevention Act (OSPA), enacted in response to the spill of thousands of gallons of oil into Buzzards Bay when the BOUCHARD BARGE-120 holed itself on an outcropping of rocks:

To the extent that they require coastwise vessels to take on a Massachusetts licensed pilot, § 16 and § 17 of the OSPA are expressly preempted by federal law and are unconstitutional under the Supremacy Clause of the United States Constitution. The Commonwealth, accordingly, is permanently enjoined from enforcing Massachusetts General Laws Chapter 103, § 21 as it applies to all coastwise tank vessels (both tankers and tank barges) and towing vessels.

U.S. v. Commonwealth of Massachusetts, 2006 A.M.C. 1889, 1901 (D.Mass).

b. Coast Guard Cannot Sanction Dual License Holder While Acting Under Authority of State License

Can the Coast Guard sanction a pilot holding both a federal and state license for negligence committed in his handling of a foreign-flag vessel? The Ninth Circuit, in reviewing the state pilotage commission's requirement that state pilots also hold federal licenses, rejected the Coast Guard's argument that its jurisdiction extends to state pilots

in such a situation. Soriano v. United States, 494 F.2d 681, 684, 1974 A.M.C. 283 (9th Cir. 1974). The Court stated:

The Commandant's condition-of-employment regulation leads to precisely this result: it affects the power of the states to regulate pilots of foreign-flag merchant vessels in state waters. We acknowledge that the state is free to eliminate this result. All Washington need do is abolish the requirement that an applicant for a state license must possess a valid federal license. Nonetheless, even though it chooses to require a federal pilot's license as a condition for the issuance of a state license, the state of Washington still might not wish to see its own pilots investigated and reprimanded for alleged misconduct while serving as compulsory pilots pursuant to state law.

A state pilot, not required to hold a federal license under any federal law, cannot be "acting under the authority of his license" merely because his state happens to require a federal license as a prerequisite to the issuance of a state license. At the time of the collision, Soriano was acting under the authority of his state license, not his federal one. The Commandant's regulation, which purports to place state pilots under Coast Guard discipline, infringes upon an area specifically reserved by Congress for 185 years for regulation by the states and acknowledged by the Supreme Court for more than 120 years to be a subject of peculiarly local concern. See Cooley vs. Board of Wardens of Port of Philadelphia, 53 U.S. (12 How.) 299 (1851). The regulation is void.

We hold, therefore, that the Commandant had no jurisdiction to suspend Soriano's federal pilot's license for alleged misconduct while Soriano was acting as a pilot required by state law.

Soriano v. United States, *supra* 494 F.2d at 684.

c. State Licensing Board Cannot Sanction Dual License Holder While Acting Under the Authority of Federal License

The Eleventh Circuit, in an opinion authored by Senior Circuit Judge Clement Haynsworth of the Fourth Circuit (sitting by designation) held that abstention was improper and ordered the district court to issue an injunction to prevent the state board's prosecution.

Florida has an important interest in insuring that state licensed marine pilots do not navigate registered vessels in a dangerous manner. Congress, however, has determined that the United States has an identical interest in insuring safe pilotage of enrolled vessels, and that the states should not interfere with federal enforcement of its requirements of pilots operating under federal licenses.

Baggett was not attempting to defend himself against otherwise valid and proper state charges on the basis that the charges themselves, or their prosecution, violated some First Amendment or other federally protected right of his. The assertion of preemption went to the jurisdiction and power of the state administrative agency to proceed at all, and Florida has no interest in having her administrative agencies prosecute disciplinary complaints that the administrative agency has no jurisdiction to initiate. By its assertion of exclusive jurisdiction to control the pilotage of enrolled vessels, the Congress has decreed, in effect, that no deference is due state proceedings which would entrench upon the exclusive federal domain.

Baggett v. Department of Professional Regulation, 717 F.2d 521, 523-24 (11th Cir. 1983).

d. State Licensing Board Can Sanction State Pilot While Acting Under the Authority of Federal License

In Hochstetler v. Board of Pilot Commissioners, 1992 A.M.C. 2367, 2377 (Ca. App. 1992), the Court of Appeals of California -- in permitting a state board's action against a dual license holder for negligence committed while acting under the authority of his federal license -- considered and rejected the holdings in both Soriano and Baggett:

To summarize, the state retains complete power to suspend or revoke a state license, as part of its historically preeminent role over pilotage. (See Steamship Company v. Joliffe, supra, 69 U.S. at 462-463 [17 L. Ed. at 808-809].) In recognition of this preeminent state role, the federal government cannot revoke a pilot's federal license for actions he took under his state license. (Soriano v. United States, supra, 494 F.2d at 684.) Nor can a state revoke a federal license, for any reason. However, the state may suspend a state license in the exercise of its plenary power

over pilotage, as a result of any relevant misconduct-- including misconduct while acting under a federal license.

Hochstetler, *supra* 1992 A.M.C. at 2377.

e. Coast Guard Can Sanction State Pilot with Civil Penalty, as Opposed to License Action

Demonstrating that there is more than one way to regulate pilots, a U.S.C.G.

Commandant's Decision, involving not a suspension and revocation proceeding against a pilot, but a civil penalty assessed against the pilot, distinguished Soriano:

While Soriano clearly places limits on the Coast Guard's authority to regulate State-licensed pilots, I am not persuaded that either 46 U.S.C. § 8501 or Soriano restricts the Coast Guard's civil penalty action in this case. Rather, I see Williams as being dispositive. Soriano and the other cases that you cited in your brief all pertain to the Coast Guard's authority to suspend/revoke merchant mariner licenses, including those held by pilots, under the authority of 46 U.S.C. § 239 (now 46 U.S.C. § 7703). Under this section, the Commandant was authorized to establish rules and regulations regarding licensed officers for certain acts while "acting under the authority of their federal license." The federal regulation at issue in Soriano defined this term rather broadly as including situations where the federal license was only required as a condition of employment. The Soriano court held that the Coast Guard regulation was invalid because it exceeded the authority provided by the statute. However, as Williams makes clear, Soriano does not stand for the proposition that State-licensed pilots are totally exempt from Coast Guard regulation, even for acts committed while not serving under the authority of their federal license. In Williams, a State-licensed pilot sought to enjoin the Coast Guard from issuing a letter of warning following administrative civil penalty action that alleged negligent operation of a vessel under 46 U.S.C. § 1461(d), the predecessor statute to 46 U.S.C. § 2302(a). At the time, Captain Williams was not operating under the authority of his federal license. The Court of Appeals for the Eleventh Circuit ruled in favor of the Coast Guard and allowed the assessment of the penalty. Addressing the very issue you raise on behalf of Captain Weiss, the Court ruled that 46 U.S.C. § 211 (the predecessor to 46 U.S.C. §

8501) did not grant states the exclusive power to regulate pilots, but merely allowed state regulation until Congress provided otherwise.

M/V SKAVA (John W. Weiss), 2001 A.M.C. 2071.

5. The Boundary Waters Act: Pilotage Wars Between Adjacent States

Interestingly, for the neighboring states of South Carolina and Georgia, federal law allows “[t]he master of a vessel entering or leaving a port on waters that are a boundary between 2 States, and that is required to have a pilot under this section, may employ a pilot licensed or authorized by the laws of either of the 2 States.” 46 U.S.C. § 8501(b). This subsection of the statute is sometimes referred to as the Boundary Waters Act.

State pilots associations from neighboring states have occasionally engaged in “pilotage wars” using this code section.

While there are no such wars between the States of South Carolina and Georgia at the moment, the two States are not strangers to boundary conflicts involving the interpretation of the 1787 Treaty of Beaufort. See Georgia v. South Carolina, 257 U.S. 516, 42 S. Ct. 173, 66 L. Ed. 347, (1922) (boundary is middle of the river at ordinary stage, not middle of navigation channel); Georgia v. South Carolina, 497 U.S. 376, 110 S. Ct. 2903, 111 L. Ed. 2d 309 (1990) (Georgia keeps islands extant at time of treaty, except those forfeited by inaction; South Carolina gets newly-formed islands).

This section has been tested in several cases. The district court in the Glenarne, 7 F. 604 (D.Or. 1881) held that “boundary” means boundary, rejecting the Washington pilot’s attempt to provide pilotage to a ship on an Oregon tributary (Willamette) of the boundary river (Columbia).

The Supreme Court addressed the issue in Leech v. Louisiana, 214 U.S. 175, 178 (1909), where a Mississippi pilot was denied the right to pilot foreign-flag vessels into and out of New Orleans because the Mississippi River was not the boundary between the two States at the port:

The [pilot’s case] depends upon the assumption that the ‘waters which are the boundary between the two States’ are, in this case, the whole Mississippi River so far as navigable. We are of the opinion that the assumption is

wrong, and that the limit of the waters referred to is the point at which they cease to be a boundary between the two States. Neither continuity of water nor identity of name will carry them beyond that point . . . But New Orleans, although upon the Mississippi, is not situated upon waters which are the boundary between two states, and therefore the section relied upon does not apply.

Id. (Emphasis added).

The true meaning of boundary was, again, explored in Sweatt v. Florida Board of Pilot Commissioners, 1992 A.M.C. 442 (M.D. Fla. 1991). Georgia pilots were rejected from piloting vessels in and out of the Port of Fernandina, Florida, situated on the Amelia River, despite the fact that the Amelia is a tributary of boundary waters (St. Mary's River).

See also Interport Pilots Agency, Inc. v. Sammis, 774 F. Supp. 734, 1992 A.M.C. 416 (E.D.N.Y. 1991) (Connecticut pilots allowed to pilot foreign-flag and U.S. vessels under register vessels into and out of New York harbors off of Long Island Sound, reasoning that the intent of 8501(b) was to "prevent pilotage wars between states claiming exclusive pilotage rights each for its own pilots." Parks & Cattell, supra at 993.)

IV. PILOT'S DUTIES AND LIABILITIES

A. Historical Basis for Liability

"It is established for a custom of the sea that yf a shyp is lost by default of the lodeman [pilot] the mariners may, if they please, bring the lodeman to the windlass, or any other place, and cut off his head without the mariners being bound to answer before any judge, because the lodeman has committed high treason against his undertaking of the pilotage.

The Laws of Oleron, Black Book, Vol. 1, p. 299, Sec. 1892, 2 Q.B. 279.

B. Admiralty and Maritime Jurisdiction

Since 1836, it has been well-settled that matters pertaining to pilotage are within the federal courts' admiralty and maritime jurisdiction. Parks & Cattell, supra at 985 citing Hobart v. Drogan, 35 U.S. (10 Pet.) 108 and other cases.

This would include state pilots' claims for injunctive relief from state agency action purporting to limit a state pilotage commission's regulation of its own activities beyond the three-mile limit. Gillis v. State of Louisiana, 294 F.3d 755, 2002 A.M.C. 2010 (5th Cir. 2002) (public service commission).

Cases involving a state-required pilot's performance bond would likewise be within the admiralty jurisdiction. Fort Armstrong, 51 F.2d 1063, 1931 A.M.C. 1145 (S.D. Ga. 1931).

1. Exclusive Federal Jurisdiction for In Rem Claims

Examples related to pilotage would include liens for necessities (pilotage fees) and tort liens arising from a pilot's negligent acts (groundings, collision, allision, wake damage, cargo damage/loss).

2. Concurrent Federal and State Jurisdiction for In Personam Claims

Under the Savings to Suitors Clause, the states retain the right to adjudicate most admiralty claims involving in personam liability. 28 U.S.C. § 1333.

C. Substantive Bases for Pilot's Liabilities to Third Parties

A pilot's liabilities to third parties for his own delicts are grounded in tort and contract, including the implied warranty of workmanlike performance in favor of parties with whom he is in privity of contract (vessel owner or charterers). Burgess v. Tamano, 564 F.2d 964 (1st Cir. 1977).

D. Standard of Care

Pilots are held to a very high standard of care:

The character of the skill and knowledge required of a pilot in charge of a vessel on the rivers of the country is very different from that which enables a navigator to carry his vessel safely on the ocean...[who has] a knowledge of the rules of navigation...[and] charts, [and a] compass...the pilot of a river steamer, like the harbor pilot, is selected for

his personal knowledge of the topography through which he steers his vessel...he must know where the navigable channel is, especially at night...it may be said this is exacting a very high order of ability in a pilot. But when we consider the value of lives and property committed to their control, for in this they are absolute masters, the high compensation they receive, and the care which Congress has taken to secure by rigid and frequent examinations and renewal of licenses, this very class of skill, we do not think we fix the standard too high.

Atlee v. N.W. Packet Co., 88 U.S. 39 (1874); See also Bunge Corp. v. M/V FURNESS BRIDGE, 558 F.2d 790 (5th Cir. 1977).

However, pilots are not required to be infallible and are most decidedly not the insurers of the safety of the vessel. Delta Transload v. M/V NAVIOS COMMANDER, 1988 A.M.C. 1155 (5th Cir. 1987) (pilot chargeable with constructive knowledge of local conditions, not including sunken object in unforeseeable location).

The test for determining whether a pilot acted as a prudent mariner is prospective, under the conditions prevailing then and there; hindsight judgment by “armchair admirals” and “Monday morning quarterbacking” has been explicitly rejected time and time again by the Courts. See P. Dougherty Co. v. United States, 207 F.2d 626, 634, 1953 A.M.C. 1541 (3rd Cir. 1953).

E. Pilot Negligence Imputed to Vessel Interests

A pilot, whether voluntary or compulsory, is considered to be the agent of the vessel for which he provides pilotage services. A pilot’s negligence will thus be attributed to the vessel in rem. The Barnstable, 181 U.S. 464 (1900); Ralli v. Troop, 157 U.S. 386 (1895); Kingfisher Shipping v. M/V KLAREDON, 651 F. Supp. 204 (S.D. TX 1986); Tampa Port Authority v. M/V DUCHESS, 65 F.Supp. 2d 1279 (M.D. Fla. 1997); Amoco v. M/V MONTCLAIR, 766 F.2d 473 (11th Cir. 1985).

The vessel owner/charterer is insulated from liability if a compulsory pilot’s negligence is the sole cause of the casualty. Thus, in personam liability would attach against the owner/charterer in the case of a solely negligent voluntary pilot or a

concurrently negligent compulsory pilot. Mount Washington Tanker Co. v. Wahyuen Shipping, Inc., 833 F.2d 1541 (11th Cir. 1987).

1. South Carolina Law

The following pronouncement of the South Carolina legislature confirms the state of maritime law relative to the vessel's in rem liability, but is in conflict with the state of the law concerning in personam liability of the vessel owner/charterer.

S.C. Code Ann. § 54-15-360. Owners and operators also liable.

When a pilot boards a vessel he becomes a servant of the vessel and its owner and operator. Nothing in this chapter exempts the vessel, its owner, or operator from liability for damage or loss occasioned by the ship to a person or property on the ground that (1) the ship was piloted by a pilot licensed by the State, or (2) the damage or loss was occasioned by the error, omission, fault, or neglect of a pilot licensed by the State.

As it pertains to in personam liability, this purported erosion of the protection given by federal maritime law to a vessel owner/charterer in the case of the sole negligence of a compulsory pilot may be attacked on the grounds of federal supremacy, because the state law purports to contravene a characteristic feature of federal maritime law. Southern Pacific Co. v. Jensen, 244 U.S. 20 (1917).

F. Pilot Liability

The rule imputing a pilot's negligence to the vessel does not relieve the pilot himself of liability:

It goes without saying that, of course, the general rule applicable to all pilots applies and the harbor [docking] pilot is still responsible individually to injured parties for his or her own negligence.

Parks & Cattell, supra at 1045.

G. Limits on Liability

South Carolina law purports to limit the liability of individual pilots:

S.C. Code Ann. § 54-15-350. Limit on liability for damages caused by pilots.

A licensed ship's pilot is not liable for damages in excess of five thousand dollars for damages or loss occasioned by the pilot's errors, omissions, fault, or neglect in the performance of pilotage services, except for willful misconduct or reckless disregard for safety by the pilot.

This provision, apparently standing only with a similar statute in Texas, has caught the attention of the leading legal commentators in the area:

The difficulty with [the South Carolina] formulation is that anyone can sue the pilot merely by alleging gross negligence or willful misconduct in the complaint. Absent the imposition of sanctions by the court (unlikely at best), there is no risk to the party who sues the pilot. The pilot, even if successful in his or her defense, will have to bear the cost of that defense, which can be substantial. In this regard, the Oregon statute, which provides for defense and indemnity, offers more protection.

Parks & Cattell, *supra* at 1016.

Moreover, at least one state court has held that state limitations of liability for pilots are not applicable when the pilot is acting under the authority of his federal license. Leson v. Pollution Control Hearings Board, 864 P.2d 384 (Wis. Ct. App. 1993).

V. DUTIES OF SHIP'S MASTER WHILE PILOT "AT THE CONN"

1. Master's Duty to Countermand

The vessel's master has a duty to countermand the orders of the pilot when the pilot's orders place the ship in a position of jeopardy. Nautilus Motor Tanker Co., Ltd. v. Naughton, 862 F. Supp. 1260 (D.N.J. 1994).

2. Master's Duty to Intervene

The master's duty to intervene in the pilot's actions is intertwined with the issue of the vessel and its owner's liability in the case of pilot negligence:

. . .[W]e must first explore the relationship between and relative responsibilities of the master of a ship and a compulsory pilot. In The CHINA, 74 U.S. 53, 7 Wall. 53,

19 L. Ed. 67 (1868), the Supreme Court held that the master has a duty to intervene when a compulsory pilot is on board only "in cases of the pilot's intoxication or manifest incapacity, in cases of danger he does not foresee, and in all cases of great necessity." After a discussion of then existing authority the Supreme Court concluded: The statute giving the immunity [to a vessel and her owner] where a licensed pilot is employed, abridges the natural right of the injured party to compensation, and is therefore to be construed strictly.

The exemption applies only where the pilot is actually in charge of the vessel, and solely in fault.

If there be anything which concurred with the fault of the pilot, in producing the accident, the exemption does not apply, and the vessel, master, and owners are liable. . . The pilot's responsibilities are broad and he supersedes the master for the time being in the command and navigation of the ship and his orders must be obeyed in all matters connected with navigation. However, "the master is not wholly absolved from his duties while the pilot is on board and may advise him and even displace him in case he is intoxicated or manifestly incompetent. He is still in command of the vessel, except so far as her navigation is concerned, and bound to see that there is sufficient watch on deck and that the men are attendant to their duties." The OREGON, 158 U.S. 186, 194-195, 15 S. Ct. 804, 808, 39 L. Ed. 943 (1895).

The master is entitled to assume that the pilot is an expert on local conditions and practices, until it becomes manifest that the pilot is steering the vessel into danger. Kim Crest, S.A. v. M/V SVERDLOVSK, 753 F. Supp. 642, 646 (S.D.Tex.1990). In M/V SVERDLOVSK, the master did intervene and take responsibility away from the pilot, but not early enough to prevent the collision. Although that court's discussion of whether the master was negligent in not intervening earlier is very fact specific, and distinguishable from the case before us, M/V SVERDLOVSK, supports the conclusion that the master has a responsibility to monitor the pilot's decision making. If the master's responsibility to intervene in cases of great necessity means anything, it must require that he have an adequate level of information to determine when "great necessity" arises. Captain Rivera's omission was not simply

in failing to intervene, but rather in failing to pay attention so that he would know that he needed to intervene. His responsibility to observe and ask questions increased as the margin of error decreased.

Avondale Indust., Inc. v. Int'l Marine Carriers, Inc.,
15 F. 3d 489, 492-93 (5th Cir. 1994) (emphasis added).

VI. LIABILITIES OF PILOT ASSOCIATIONS

Contrary to the familiar concept of the joint and several liability for individual members of an association or partnership, pilot associations and their members are not vicariously liable for the wrongs of individual pilots, who are considered independent contractors

As a pilot association is apparently a species of partnership, one might expect that the association could be held liable for the negligence of its individual members. Such is not the case. Almost without exception recovery has been denied.

Parks & Cattell, supra at 1049.

This principle was enunciated in Guy v. Donald, 203 U.S. 399 (1906), in which Justice Holmes stated:

. . . [I]f we imagine a [negligent] pilot performing his duties within sight of the assembled association, he still would be sole master of his course. If all of his fellows passed a vote on the spot that he should change, and shouted it through a speaking trumpet, he would owe no duty to obey, but would be as free as before to do what he thought best.

Id.

State pilotage commissions and other regulatory bodies which control the pilots' state licensing cannot be held liable for the negligence of a pilot. Kitanihon-Oil Steamship Co. v. General Construction Co., 678 F.2d 109, 1982 A.M.C. 2275 (9th Cir. 1982).

VII. PERSONAL INJURY CLAIMS BY PILOT

Pilots face occupational hazards before, during, and after boarding the vessel, including poor operators of pilot boats, faulty ladders, slippery decks, and bad coffee.

When injured by the negligence of vessel interests, the question of an appropriate legal remedy: is the pilot a Jones Act seaman, a statutory employee under the Longshore and Harborworkers Compensation Act (LHWCA), a worker covered by neither one but still entitled to the benefits of the warranty of seaworthiness?

Some cases hold that the pilot is not a Jones Act seaman. Bach v. Trident Steamship Co., Inc., 920 F.2d 322 (5th Cir. 1991). The Court stated:

Although some of our seaman status cases discuss the perils of the sea that the worker faces, we have never held that seaman status is coextensive with exposure to seaman's risks. We have frequently refused to extend seaman's protections to workers exposed to a seaman's perils but who lacked the requisite connection to a vessel or identifiable fleet of vessels.

Id. at 325. See also Chandris v. Latsis, 515 U.S. 347 (1995).

A notable decision from the Fourth Circuit Court of Appeals holds that the pilot is not a Jones Act seaman, but is covered under the LHWCA as a statutory maritime employee. Harwood v. Partredereit, 944 F.2d 1187, 1992 A.M.C. 375, (4th Cir. 1991). In relying upon McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991), the Court held that “[s]ince Harwood was not “more or less permanently attached” to the M/V CAPTAIN MOST, he cannot satisfy the definition of “master or member of a crew” under the LHWCA.” Id. at 1192. Other cases hold that the pilot is not covered by the Jones Act or the LHWCA, but is nonetheless entitled to the warranty of seaworthiness under the Sieracki doctrine. Blanq v. Hapag-Lloyd, 986 F.Supp. 376 (E.D.La. 1988).

VIII. COAST GUARD SUSPENSION AND REVOCATION PROCEEDINGS AGAINST FEDERAL PILOTS

Coast Guard license suspension and revocation proceedings against federal pilots licensed under 46 U.S.C. Section 7101 are authorized by 46 U.S.C. Section 7703. Among the charges that may be brought by the Coast Guard against a federal pilot after an investigation are those for negligence and misconduct.

Negligence is defined as “the commission of an act which a reasonable and prudent person of the same station, under the same circumstances, would not commit, or the failure to perform an act which a reasonable and prudent person of the same station, under the same circumstances, would not fail to perform.” 46 C.F.R. § 5.29.

Interestingly, “in license suspension actions, proof of injury or damage and of causation are not required, as they are in a civil action for negligence. Negligent conduct is by itself sufficient to support a charge of negligence under the U.S. Coast Guard regulations for license suspension.” Craig H. Allen, Farwell’s Rules of the Nautical Road, 95, n. 26 (8th ed. 2004).

All pilot errors do not constitute negligence:

The question that must be asked by enforcement agencies and the courts is whether the choice amounts to an error in judgment or a culpable failure to exercise good seamanship. A choice between reasonable alternatives does not in itself constitute negligence. Good decisions do not ineluctably produce good outcomes. The quality of any decision must be judged by the information available at the time it was made, not by that which was only revealed later. Where reasonable seamen disagree over which course of action should be taken in a given situation, it is not negligence to choose one course over the other, even if the chosen course turns out to have been the wrong one.

Allen, supra at 95-96 (citations omitted).

The error in judgment defense is perhaps best summed up by the Court in Dahlia Maritime Co. Ltd. v. The NORDIC CHALLENGER, 1994 A.M.C. 2208, 2218:

“Whether he neglected something he should have done must be determined, not by the result, but by the situation as it presented itself to him at the time.” (Emphasis added).

IX. CONCLUSION

The state compulsory pilotage system has been called “one of the country’s oldest monopolistic regulatory systems.” Jackson v. Marine Exploration, 583 F.2d 1336, 1338 (5th Cir. 1978). In 1947, against charges of nepotism in the United States Supreme Court, the Louisiana state pilotage scheme survived scrutiny on the grounds that

the advantages of early experience under friendly supervision in the locality of the pilot's training, the benefits to morale and esprit de corps which family and neighborly tradition might contribute, the close association in which pilots must work and live in their pilot communities and on the water, and the discipline and regulation which is imposed to assure the State competent pilot service after appointment, might have prompted the legislature to permit Louisiana pilot officers to select those with whom they would serve.

Kotch v. Board of River Pilot Commissioners for New Orleans, 1947 A.M.C. 535, 330 U.S. 552 (1947).

For the lawyer , "...state compulsory pilotage is not a body of law familiar to most legal practitioners, much less one at the forefront of public attention. Yet it is not a particularly difficult body of law. Indeed, unlike the state of flux that characterizes many areas of contemporary law, pilotage law is remarkably straightforward and firmly established. Jackson v. Marine Exploration, supra, at 1350 (5th Cir. 1978).

Compare Judge Brown's assessment of pilotage law in 1978 with that of Parks & Cattell:

The interaction between state and federal governments pertaining to regulation of pilotage remains a dynamic area of the law. The decline of U.S. flag shipping, the increased reliance upon tug and barge combinations for the coastwise carriage of petroleum cargoes, and the heightened public concern over vessel safety and oil pollution following the 1989 EXXON VALDEZ disaster are just a few of the circumstances which have retrained the spotlight upon pilotage in the United States. The EXXON VALDEZ grounding (involving a federally licensed pilot) was followed in 1989 by several other casualties, namely the PRESIDENTE RIVERA in the Delaware River and the OLYMPIC PRIDE in Narragansett Bay, each of which involved the conduct of state-licensed pilots. However, a Coast Guard-commissioned report on the subject of pilotage (Report of the Bauman Study Group, September 15, 1989) recommended retention of the *status quo*.

Parks & Cattell, supra at 997 (emphasis in original).

In the booming ports of Charleston and Savannah, there can be no doubt that these "megatrends" in maritime commerce and federal and state statutory development –

particularly relating to the transport of petroleum products -- will call some of us to handle cases involving pilots, although many times only tangentially.

When you receive that call, local knowledge of pilotage law can mean the difference between being a member (in good standing) of – or being aground upon – the Charleston Bar.