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Cassidy v. Chertoff, Lake Champlain Transportation Company, Inc., et al. United States Court of Appeals for the 2nd Circuit 2006 U.S. App. LEXIS 29388 (Decided November 29, 2006)

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Published bi-annually by the Admiralty Law Society of St. John's University School of Law, to bring to the attention of practitioners and other interested persons the highlights of recent court decisions in the admiralty field. The case summaries presented herein may not discuss all issues addressed by the various courts. Therefore, readers are advised to consult the original case sources.

RANDOM SEARCHES OF FERRY PASSENGERS' BAGGAGE AND VEHICLES PURSUANT TO THE MARITIME TRANSPORTATION SECURITY ACT OF 2002 NOT VIOLATIVE OF THE FOURTH AMENDMENT

The United States Court of Appeals for the 2nd Circuit affirmed an order of the district court dismissing plaintiff ferry passengers' suit against defendant ferry operator. The passengers claimed the company's practice of searching the carry-on baggage of randomly selected passengers and inspecting randomly selected vehicles pursuant to the Maritime Transportation Security Act of 2002 violated the Fourth Amendment. The Court of Appeals held that because the searches were minimally intrusive and the prevention of terrorist attacks on large vessels constituted a special need, the searches did not constitute an unreasonable method of deterring the prohibited conduct and thus were not violative of the Fourth Amendment.

Cassidy v. Chertoff, Lake Champlain Transportation Company, Inc., et al.
United States Court of Appeals for the 2nd Circuit
2006 U.S. App. LEXIS 29388
(Decided November 29, 2006)

Plaintiffs-appellants, Vermont residents, appealed from a judgment of the United States District Court for the District of Vermont granting defendants-appellants' motion to dismiss plaintiffs' claim that Lake Champlain Transportation Company's ("LCT") practice of searching the carry-on baggage of randomly selected passengers and inspecting randomly selected vehicles, including their trunks, pursuant to the Maritime Transportation Security Act of 2002 ("MTSA"), 46 U.S.C. §§ 70101-70119 (2006), violated plaintiffs' Fourth Amendment rights.

Plaintiffs commuted to their jobs in New York using a car and bicycle, respectively, via an LCT ferry. In 2004, LCT posted a notice at its ticket window stating that it had been required by DHS and the Coast Guard to conduct random screening of persons, cargo, vehicles, or carry-on baggage, and that those refusing to submit to security screening would not be allowed to board the ferries. Plaintiffs complied with search requests posed to them, opening a car trunk or bike pack, in order to avoid alleged repercussions of refusing to comply – the recording and transmission of vehicle license numbers to dock attendants, who would bar the vehicle from boarding any LCT ferry until its driver submitted to a search, and the creation of a report documenting such refusal, as required by 33 C.F.R. § 104.265(e)(4).

Plaintiffs sued, seeking injunctive and declaratory relief against defendants for Fourth Amendment violations. In granting defendants' 12(b)(6) motion to dismiss, the district court cited

Congress' intent in creating the MSTA, noted that the searches furthered the Act's goals and that the searches were reasonable because they were conducted in a manner no more intrusive than is necessary to achieve the compelling government interest of protecting passengers and deterring attacks. The court also concluded that plaintiffs had a diminished expectation of privacy when attempting to board the ferries because such search procedures were akin to those that passengers have been accustomed to expect, and which have been found constitutional, in the airline industry.

On appeal, the Court of Appeals analyzed the statutory background of the MTSA, which was enacted by Congress in the aftermath of the terrorist attacks of September 11, 2001. The MTSA contains a set of nationwide directives for increasing both vessel and port security, requiring the Secretary of the Department of Homeland Security ("DHS") to conduct a risk assessment of vessels in United States waters "that pose a high risk of being involved in a transportation security incident." After the assessments have been made, the MTSA requires the owners and operators of vessels that DHS believes may be involved in a transportation security incident to prepare a security plan "for deterring a transportation incident to the maximum extent practicable."

The United States Coast Guard conducted the initial assessment on behalf of DHS and determined that certain maritime vessels, including those that weigh more than 100 gross register tons or are licensed to carry more than 150 passengers were at a high risk of a "transportation security incident." Under the MTSA, vessels that fall into the high-risk category are required to prepare a Vessel Security Assessment ("VSA"), an analysis evaluating the vessel and its operations and threats and vulnerabilities. The VSA is used by the vessel's owner or operator to devise a Vessel Security Plan ("VSP") to initiate security measures designed to protect the vessel and the facility that the vessel is servicing or interacting with. The VSP must be submitted to the Coast Guard for review and approval. Owners of a vessel operating under a VSP must screen passengers, check passenger identification and screen baggage (including carry-ons), personal effects and vehicles for dangerous substances and devices, at the rate specified in the VSP.

Owners and operators of high-risk vessels are permitted to "opt-out" of identification checks and passenger screening, provided they:

- (1) Search selected areas prior to embarking passengers and prior to sailing; and
- (2) Implement one or more of the following:
 - (i) Performing routine security patrols;
 - (ii) Providing additional closed-circuit television to monitor passenger areas; or
 - (iii) Securing all non-passenger areas.

A vessel owner or operator may, with the express permission of the Coast Guard, opt out of any regulatory requirement contained in a VSP so long as the Coast Guard has determined that the waiver will not reduce the overall security of the vessel. Owners and operators are permitted to propose an "equivalent" to any of the security measures required by a VSP, or may fulfill the requirements of the MTSA by implementing an Alternative Security Program ("ASP"), a third-party developed standard that the [Coast Guard] Commandant has determined provides an equivalent level of security to that established by the agency's regulations. Vessel owners and operators who adopt an ASP must develop and make available for Coast Guard inspection a vessel-specific security assessment report. LCT had adopted an ASP devised by the Passenger Vessel Association.

The Court noted that warrantless, suspicionless searches unsupported by probable cause may be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v. Wisconsin*, 483 U.S. 868, 873, (1987). The Court cited its own decision upholding random searches of subway passengers' baggage as constitutional under the special needs doctrine in *MacWade v. Kelly*, 460 F.3d 260 (2d Cir. 2006), among others, as merely one of numerous Supreme Court and Second Circuit decisions upholding warrantless,

suspicionless searches in a variety of circumstances in which the government's actions were motivated by "special needs."

In applying the special needs doctrine, courts must assess the constitutionality of the challenged conduct by weighing "the government conduct -- in light of the special need and against the privacy interest advanced"-- through the examination of three factors: 1) the nature of the privacy interest involved; 2) the character and degree of the governmental intrusion; and 3) the nature and immediacy of the government's needs, and the efficacy of its policy in addressing those needs. *Palmieri v. Lynch*, 392 F.3d 73, 81 (2d Cir. 2004).

After a lengthy analysis of the three factors, the Court, while conceding that plaintiffs enjoyed undiminished privacy expectations in their carry-on baggage and in the trunks of their vehicles, found that the remaining two factors under the "special needs" doctrine weighed heavily in the government's favor. Because the Court found the intrusions on plaintiffs' privacy interests to be minimal and the measures adopted by LCT "reasonably efficacious" in serving the government's "undisputedly important" special need to protect ferry passengers from terrorist acts, there was no Fourth Amendment violation. Accordingly, the Court of Appeals affirmed the district court's judgment granting defendants' motion to dismiss.

Alan Katz
Class of 2007

COURT OF APPEALS RESOLVES DISPUTE AS TO MULTIPLE FORUM SELECTION CLAUSES IN CASE ARISING FROM GOODS DAMAGED IN INTERCONTINENTAL SHIPMENT

In a case arising from damage to a shipment of steel coils shipped from Taiwan to the United States, the Court of Appeals was presented with the question whether a forum selection clause contained in a contract of charter, stipulating that claims be litigated in United States District Court for the Southern District of New York, or a forum selection clause contained in bills of lading, stipulating that claims be litigated in South Korea, governed the dispute. The Court concluded that the former was controlling.

Asoma Corporation v. SK Shipping Co., Ltd., et al.
United States Court of Appeals for the 2nd Circuit
467 F.3d 817
(Decided October 24, 2006)

In September 1999, Plaintiff-Appellant Asoma Corporation's ("Asoma") affiliate Macsteel International Far East Limited ("Macsteel Far East"), entered into a contract with Yieh Loong Enterprise Co., Ltd. ("Yieh Loong"), a Taiwanese company, for the purchase of 10,000 metric tons of steel coils for \$2.75 million. The steel was to be shipped to the United States during October or November 1999. Defendant-Appellee SK Shipping Co., Ltd. ("SK"), as "time chartered owner," entered into a "contract of charter," leasing a vessel to another Asoma affiliate, Metall und Rohstoff Shipping London Ltd. ("MUR London") for shipment of the coils. Adding to the complexity of the transaction was the fact that two other Asoma affiliates -- Metall und Rohstoff Shipping London USA Corp. ("MUR USA"), and Macsteel International USA Corp. ("Macsteel USA") -- played a role in the transaction.

The contract of charter identified the "charterer" as MUR London, or its "nominee." MUR London nominated Asoma. The contract of charter contained a forum selection clause requiring that