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Schiffahartsgesellschaft Leonhardt: A Dangerous Precedent for the Effectiveness of the Supplemental Rules for Certain Admiralty and Maritime Claims

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I. INTRODUCTION

On May 24, 1982, Schiffahartsgesellschaft Leonhardt & Co. (Leonhardt) filed a complaint in admiralty in the Southern District of Georgia seeking the issuance of a summons with process of attachment against the *M/V Puntas Malvinas*, a foreign vessel whose owner was listed in *Lloyd's Register of Shipping* as A. Bottacchi S.A. de Navegacion (Bottacchi).[1] Pursuant to Rule B(1) of the Supplemental Rules for Certain Admiralty and Maritime Claims (the Supplemental Rules), which are part of the Federal Rules of Civil Procedure,[2] Leonhardt's attorney complied with the following statutory requirements

1. Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 773 F.2d 1528, 1529-30 (11th Cir. 1985) [hereinafter cited as *Leonhardt*]. In March 1982, Bottacchi time-chartered the *M/V Barbara Leonhardt* from Leonhardt. In April 1982, the ship and her cargo were damaged as a result of Bottacchi's alleged negligence while operating under the charter party on a voyage from St. Johns, Canada to Buenos Aires, Argentina. Upon arrival of the vessel in Buenos Aires, Leonhardt was required to post $450,000 in favor of cargo interests to avoid arrest of the ship. *Id.* at 1529.

Leonhardt filed a complaint in admiralty against Bottacchi alleging that it was entitled to either indemnity or contribution from Bottacchi for any damages that it might be adjudged to owe. The following day Leonhardt learned that Bottacchi did not own the vessel, but rather operated under a bareboat charter. He owned certain bunkers and stores, however, and Leonhardt amended its complaint to pray for the issuance of service of process of attachment against those bunkers and stores. *Id.* at 1529-30. The district court was particular to mention that the initial attachment based on the mistaken ownership demonstrated the imperfection of Rule B(1) (prior to the 1985 amendments) under the strictures of procedural due process. Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 552 F. Supp. 771, 773 (S.D. Ga. 1982). For a discussion of the mistaken seizure of property in this case, see Schwartz, *Due Process and Traditional Admiralty Arrest and Attachment Under the Supplemental Rules*, 8 MAR. LAW. 229, 244-46 (1983).

2. Leonhardt's attorney verified the complaint in compliance with Supplemental Rule B(1) as it read at the time the suit was initiated. The Rule was subsequently amended effective August 1, 1985. *See* AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, H.R.

for attaching a defendant's property. The attorney verified the complaint on behalf of Leonhardt because none of Leonhardt's officers were present in the district, and he submitted an affidavit stating that to the best of his belief Bottacchi could not be found within the district for the purpose of service of process.[3]

In response to Leonhardt's request to initiate process, the United States Marshal informed the vessel's local husbanding agent of the impending seizure of the vessel.[4] The local agent contacted Bottacchi's attorney who, pursuant to Rule E(5), petitioned for an immediate release of the property after posting security in the form of a

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Doc. No. 99-63, 99th Cong., 1st Sess. 7-13 (1985). Prior to the 1985 amendment, Supplemental Rule B(1) read:

> (1) When Available; Complaint, Affidavit and Process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees named in the complaint to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. When a verified complaint is supported by such an affidavit the clerk shall forthwith issue and summons and process of attachment and garnishment. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

FED. R. CIV. P. SUPP. B(1), 28 U.S.C. Supplemental Rules for Certain Admiralty and Maritime Claims (1982). The Rule now reads:

> 1) WHEN AVAILABLE; COMPLAINT, AFFIDAVIT, JUDICIAL AUTHORIZATION, AND PROCESS. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. *The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed.* In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, H.R. DOC. NO. 99-63, 99th Cong., lst Sess. 7-8 (1985) (emphasis added to show where the rule was amended).

3. *Leonhardt*, 773 F.2d at 1530.

4. *Id.*

bond for Leonhardt's claim.[5]

The district court, following an immediate postattachment hearing,[6] held that although Supplemental Rule B(1) was consistent with due process "as applied" because Bottacchi received preseizure notice of the impending hearing,[7] it nevertheless violated procedural due process under the fifth amendment.[8] The district court found that Rule B(1) was facially unconstitutional because it lacked procedural safeguards in place of preseizure notice and hearing and prompt postattachment hearing.[9] The Eleventh Circuit Court of Appeals reversed.[10] The court held that it was unnecessary for the district court to have reached the issue of the constitutionality of Rule B(1) because Bottacchi had received both preseizure notice and a prompt postseizure hearing; thus, the district court had accorded it due process.[11] The court granted a rehearing en banc[12] to address the confusion[13] in the district courts over the relationship between the federal

5. Supplemental Rule E(5)(a) provides for the release of property by order of the court or clerk upon giving security in the form of a "special bond." FED. R. CIV. P. SUPP. E(5)(a).

6. The hearing was held on May 26, 1982. Bottacchi argued that Supplemental Rule B(1) violated his procedural due process rights under the fifth amendment because it failed to provide adequate judicial supervision. In addition, he argued that because the rule was the sole authority for the issuance of the writ, the writ should be quashed. The court eventually found that since Bottacchi had both preseizure notice and an immediate postseizure hearing, he had been accorded due process. Despite this finding, however, the court held that Supplemental Rule B(1) was invalid under the Due Process Clause. *Leonhardt*, 552 F. Supp. at 784.

7. *Id.* at 773-74.

8. *Id.*

9. In determining the unconstitutionality of the Rule, the court cited the *Sniadach-Fuentes* line of cases: Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982); North Georgia Finishing v. Di-Chem Inc., 419 U.S. 601 (1975); Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969).

The court also noted that there were no local rules of court to supplement Rule B(1) so as to afford defendants a prompt postseizure hearing and thus, adequate due process protection under the Constitution. 552 F. Supp. at 784.

10. 732 F.2d 1543 (llth Cir. 1984).

11. *Id.* at 1549.

12. 773 F.2d 1528, 1530 (llth Cir. 1985).

13. There has been much controversy over the constitutional validity of Supplemental Rule B(1) and accordingly, the courts' power to grant writs of attachment. Specifically, some courts have held Supplemental Rule B(1) unconstitutional. If a court finds that the Supplemental Rule is the sole source of authority for granting a writ of attachment, then once the rule is declared invalid, the power to grant the writ is lost. *See, e.g.*, Crysen Shipping Co. v. Bona Shipping Co., 553 F. Supp. 139 (M.D. Fla. 1982); Cooper Shipping Co. v. Century 21 Exposition, 1983 A.M.C. 244 (M.D. Fla. 1982); Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd., 450 F. Supp. 447 (W.D. Wash. 1978) (all holding Rule B(1) violates fifth amendment procedural due process). *Cf.* Parcel Tankers, Inc. v. Formosa Plastics Corp., 569 F. Supp. 1459 (S.D. Tex. 1983) (The procedural due process requirements necessary before a deprivation of property takes place in a nonmaritime action are not also necessary before attachment occurs under Rule B(1).). *But see* Trans-Asiatic Oil Ltd. S.A. v. Apex Oil Co., 743

courts' *inherent* admiralty powers and the powers granted to them by the Supplemental Rules.[14] On rehearing,[15] the Eleventh Circuit held that the district court had authority to issue the writ of attachment under the Court's inherent power to apply maritime law.[16] The court then analyzed the district court's procedures and determined they were in accord with fifth amendment procedural due process.[17]

This note will first examine the relationship between the constitutional grant of authority to the federal courts to apply maritime and admiralty law and the Federal Rules of Civil Procedure, in particular, the Supplemental Rules. Then it will discuss the constitutional challenge to Supplemental Rule B(1) and the solutions offered by the 1985 Amendments. Finally, the note will analyze the detrimental effect on any of the Supplemental Rules which *Schiffahartsgesellschaft Leonhardt & Co v. A. Bottacchi S.A. de Navegacion* could have. *Leonhardt*

F.2d 956 (lst Cir. 1984); Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982) (holding Rule B(1) does not violate due process).

14. The Eleventh Circuit engaged in an elaborate analysis of the federal courts' inherent powers to apply traditional maritime law. *See infra* note 95 and accompanying text (discussing *Leonhardt*, 773 F.2d at 1531-33).

15. *Leonhardt*, 773 F.2d at 1533. Circuit Judge Johnson wrote a dissenting opinion in which Circuit Judge Vance joined. Judge Johnson argued that Rule B(1) violated the due process clause of the fifth amendment because it did not at least require a prompt postseizure hearing. *Id.* at 1541.

16. *Id.* at 1539.

17. *Id.* The Eleventh Circuit actually stated that the procedures were "entirely consistent with Rule B(1)" but it was referring to Rule B(1) as it existed prior to amendment. *Id.* at 1533. This is an erroneous finding since the Supplemental Rules had been amended on April 30, 1985, and became effective on August 1, 1985, which was prior to the date of the rehearing. The rules took effect ninety days subsequent to their being submitted to Congress without any legislative action taken. For the text of the old and the amended rule, see *supra* note 2.

Although the requirement of a postseizure hearing was not in force at the time the case was in the district court, a postseizure hearing was nonetheless held. After the appeal was filed, the Rule was amended to require such a postseizure hearing. The Eleventh Circuit mistakenly believed the rule was still in the process of being amended at the time the decision on rehearing was written. *See* 773 F.2d at 1538 n.29.

Rule B(1), as amended, was designed to provide safeguards against violations of procedural due process. *See infra* notes 73-79 and accompanying text. The procedures the district court followed were entirely consistent with the requirements of Rule B(1) as amended because not only did Bottacchi receive preseizure notice, he was also afforded an immediate postattachment hearing. *See supra* notes 1-6 and accompanying text. Since the prior Rule B(1) was no longer in effect when the Eleventh Circuit heard Leonhardt's appeal, the court was conducting a futile exercise when it called upon its inherent maritime powers to avoid ruling on the constitutionality of prior Rule B(1).

The court would never have addressed the constitutionality of the prior rule had it known the rule had already been amended. For this reason, *Leonhardt* is a weak precedent for future litigants who wish to rely on *Leonhardt* for the proposition that maritime courts are free to invoke their "inherent power" to apply maritime law in circumvention of the Supplemental Rules. This obviously conflicts with the very purpose of the Supplemental Rules, which is to simplify and make understandable the practice of admiralty law. *See infra* notes 39-41 and accompanying text.

threatens the Supplemental Rules. The majority reasoned that "district courts are free either to follow or to disregard the Rules,"[18] and could elect to resort to their "inherent power to apply traditional maritime law."[19]

II. TRADITIONAL MARITIME LAW AND THE ADMIRALTY RULES

The Constitution of the United States extends federal judicial power to "all Cases of admiralty and maritime Jurisdiction."[20] This constitutional grant of jurisdiction[21] presupposed that American jurisprudence would accept maritime law as it existed before the adoption of the Constitution.[22] The Constitution additionally provides Congress with the power[23] "to revise and supplement the maritime law within the limits of the Constitution."[24] Thus, the Constitution gives the federal courts broad jurisdiction over admiralty and maritime cases and Congress broad power to revise and supplement the admi-

18. *Leonhardt*, 773 F.2d at 1540.

19. *Id.* at 1533.

20. U.S. CONST. art. III, § 2. This grant of federal judicial power in admiralty and maritime cases is vested in the "supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." *Id. See generally* 14 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS §§ 3671-3778 (1985) (broadly discussing admiralty jurisdiction and its history); 1 E. JHIRAD, A. SANN & B. CHASE, BENEDICT ON ADMIRALTY § 109 (7th ed. 1985) (discussing the legislative power of Congress as it relates to admiralty jurisdiction).

21. Congress first implemented this constitutional grant in the Judiciary Act of 1789. Act of September 24, 1789, ch. 20, § 9, 1 Stat. 76-77, *revised by* the Act of June 25, 1948, ch. 646, § 79, 63 Stat. 101 (currently codified at 28 U.S.C. § 1333 (1982)).

22. In Panama R.R. v. Johnson, the Supreme Court discussed precisely the issue of whether prior maritime law was superseded by the Constitution: "After the Constitution went into effect, the substantive [admiralty and maritime] law theretofore in force was not regarded as superseded or as being only the law of the several states, but as having become the law of the United States . . . ." 264 U.S. 375, 386 (1924).

23. U.S. CONST. art. III, § 2, cl. 1.

24. Romero v. International Terminal Operating Co., 358 U.S. 354, 361 (1959) (citing Cromwell v. Benson, 285 U.S. 22 (1932)); *see also* O'Donnell v. Great Lakes Dredge & Dock Co., 318 U.S. 36 (1943); Pryor v. American President Lines, 520 F.2d 974 (4th Cir. 1975), *cert. denied*, 423 U.S. 1055 (1976). *See generally* G. GILMORE & C. BLACK, THE LAW OF ADMIRALTY 47 (2d ed. 1975) (analyzing the substantive law in admiralty cases in the context of history).

In Detroit Trust Co. v. Barlum, furthermore, the Supreme Court stated: "[T]he existing maritime law [at the time the Constitution was implemented] became the law of the United States 'subject to power in Congress to modify or supplement it as experience or changing conditions might require.' " 293 U.S. 21, 43 (1934) (quotinq Panama R.R. v. Johnson, 264 U.S. 375, 386 (1924)).

In *Leonhardt*, after a similar analysis of the statutory source of maritime law, Judge Tjoflat concluded that "[f]ederal courts . . . are empowered to apply maritime procedure and law as it existed at the time of the Constitution's adoption, with such modifications as changing needs and circumstances require, subject to congressional alteration of that law." 773 F.2d at 1532 (citations omitted).

ralty and maritime law. In formulating the Process Act of 1792,[25] Congress exercised its power by directing the courts to use "forms and modes of proceeding [consistent with] principals, rules and usages, which belong to courts of admiralty, as contradistinguished from courts at common law."[26] Accordingly, as early as 1792, Congress sanctioned the use of a set of procedural rules in admiralty cases which differed from those used in other actions.

The Supreme Court, pursuant to Congressional authorization,[27] adopted the first set of maritime rules in 1842[28] "to assure uniformity in only the most general features of practice and to resolve a few conflicts between districts . . . ."[29] The Admiralty Rules of 1920, a set of uniform but intricate rules for all federal courts to follow, superseded these rules.[30] Under these rules, federal courts conducted in separate civil actions suits at law, in equity, and in admiralty.[31] Chief Justice Taft advocated for their unification as early as 1921.[32] It was not until 1966, however, that the Supreme Court "effectively disposed of the fiction of an independent admiralty jurisdiction"[33] by amending the Federal Rules of Civil Procedure to enable all three types of suits to be brought in one civil action.[34] At that time, Congress rescinded the General Admiralty Rules, and admiralty and maritime claims became grounds for invoking federal question jurisdiction. Most of the antiquated nomenclature and forms of pleading formerly associated with admiralty actions became obsolete.[35]

Unification had several desireable effects, which included ensur-

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25. Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276.

26. Manro v. Almeida, 23 U.S. (10 Wheat.) 473, 487 (1825) (citing Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276). The history of admiralty law is in the civil law. The Process Act of 1789 therefore directed the courts to apply civil rather than common law. Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93. *See* G. GILMORE & C. BLACK, *supra* note 24, at § 1-3 (discussing the ancient civil law roots of admiralty and maritime law).

27. Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 518 (codified as amended in 28 U.S.C. § 2072 (1982)).

28. *See* Wiswall, *Admiralty: Procedure Unification in Retrospect and Prospect*, 35 BROOKLYN L. REV. 36 (1968).

29. *Id.* at 39. For a text of the 1842 Rules, see E. BENEDICT, THE AMERICAN ADMIRALTY: ITS JURISDICTION AND PRACTICE 425 (4th ed. 1910).

30. *See* Crutcher, *Imaginary Chair Removed From the United States Courthouse; Or, What Have They Done to Admiralty?*, 5 WILLAMETTE L.J. 367, 374 (1969).

31. *Id.*

32. *See* Colby, *Admiralty Unification*, 54 GEO. L.J. 1258, 1258 (1966); Taft, *Three Hundred Steps of Progress*, 8 A.B.A. J. 34 (1922).

33. Crutcher, *supra* note 30, at 374.

34. For the text of the proposed amendments to the Federal Rules of Civil Procedure, see Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 34 F.R.D. 325 (1964).

35. *See generally* Crutcher, *supra* note 30, at 374-75 (discussing how the Supplemental Rules reformed admiralty and maritime causes of action).

ing "more certainty and simplicity to admiralty practice"[36] and establishing "effective law administration."[37] After unification, lawyers unfamiliar with admiralty law could more competently bring actions without fear of facing the independent and unfamiliar admiralty side of the court.[38] As one scholar stated, "[t]he mystery engendered by separatism makes the nonspecialist judge and attorney even more likely to err."[39] Since unification, plaintiffs have brought admiralty and maritime claims in the district courts in which the Federal Rules of Civil Procedure govern, as in any other civil action. In addition to the Federal Rules, the Supplemental Rules of Civil Procedure for Certain Admiralty and Maritime Claims govern these actions.

III. THE PURPOSE OF THE SUPPLEMENTAL RULES

The Supplemental Rules preserved certain maritime remedies which derive from traditional maritime law, and have no counterpart in the common law.[40] They provide a series of procedures concerning the granting of these remedies:

> Remedies which had no equivalent in common law or equity, such as arrest in rem, foreign attachment, partition, limitation of liability, were preserved by new Supplemental Rules, but even in those Rules a new nomenculture appeared, and the procedure for invok-

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36. Colby, *supra* note 32, at 1275.

37. Currie, *Unification of the Civil and Admiralty Rules: Why and How*, 17 ME. L. REV. 1, 14 (1965). *See* Colby, *supra* note 32, at 1259 ("The goal [of unification] was not total a priori uniformity, but a single simplified set of rules to dispose of most of the practical problems of procedure in both civil and admiralty cases in a uniform way.").

38. *See* Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 MICH. L. REV. 1627, 1693-94 (1976).

39. *See also* Romero v. International Terminal Operating Co., 358 U.S. 354 (1959). Upon proposing unification, the Advisory Committee on Admiralty Rules stated:

> To the extent that admiralty procedure differs from civil procedure, it is a mystery to most trial and appellate judges, and to the nonspecialist lawyer who finds himself—sometimes to his surprise—involved in a case cognizable only on the admiralty "side" of the court. "Admiralty practice," said Mr. Justice Jackson, "is a unique system of substantive law and procedure with which members of this Court are singularly deficient in experience." The comment applies generally to all levels of the judiciary. The distinctiveness of substantive maritime law is a matter beyond the competence of this Committee, even if we were disposed to concern ourselves with it, indeed, it is probably too much to hope that we can ever be spared the necessity of more or less recondite bodies of substantive law, whether they relate to maritime affairs, or patents, or copyrights, or combinations in restraint of trade. It is multiplying the burden of the bench and bar, however, to require mastery of unnecessarily distinctive systems of practice and procedure.

Preliminary Draft of Proposed Amendments to Rules of Civil Procedure for the United States District Courts, Proposed by the Advisory Committee on Admiralty Rules, 34 F.R.D. 325, 333-34 (1964) (citations omitted).

40. *See* FED. R. CIV. P. SUPP. A advisory committee note.

> ing the remedies was subject to the general Rules of Civil Procedure to the extent they were not inconsistent with the Supplemental Rules.[41]

According to the advisory committee note which accompanies Supplemental Rule A, the Supplemental Rules are not a complete and self-contained code governing these distinctively maritime remedies.[42] They provide procedures which govern the granting of the remedies, but are malleable to the extent that they remain consistent with historical maritime law:

> The more limited objective is to carry forward the relevant provisions of the former Rules of Practice for Admiralty and Maritime Cases, modernized and revised to some extent but still in the context of history and precedent. Accordingly, these Rules are not to be construed as limiting or impairing the traditional power of a district court, exercising the admiralty and maritime jurisdiction, to *adapt* its procedures and its remedies in the individual case, consistently with these rules, to secure the just, speedy, and inexpensive determination of every action.[43]

The Eleventh Circuit interpreted this language to mean that "these [Supplemental Rules] were not to be the exclusive source of maritime procedure available to the courts."[44] In its analysis, the court moved onto very dangerous grounds. It condoned ignoring the Supplemental Rules altogether by stating that they were only *one* source of law applicable in admiralty and maritime claims. Regardless of whether the Supplemental Rules directly addressed the remedy sought, the courts could choose not to apply them, but instead to apply traditional maritime law.[45] This is contrary to the apparent intent of the framers of the Supplemental Rules.

Supplemental Rule A specifically provides that the Supplemental Rules apply to the procedure in admiralty and maritime claims with respect to *only* maritime attachment and garnishment, actions in rem, possessory, petitory and partition actions, and actions concerning

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41. Crutcher, *supra* note 30, at 374-75.

42. FED. R. CIV. P. SUPP. A advisory committee note.

43. *Id.* (emphasis added). For a discussion of the former rules as they relate to the Supplemental Rules, see Robertson, *supra* note 38.

44. *Leonhardt*, 773 F.2d at 1533.

45. For a discussion of the court's equitable powers in admiralty and maritime law, see Wiswall, *supra* note 28, at 40-41, and Robertson, *supra* note 38, at 1637-45.

Professor Robertson elaborates upon the following statement made by Judge Brown in Compania Anonima Venezolana de Navegacion v. A.J. Perez Export Co., 303 F.2d 692 (5th Cir. 1962), *cert. denied*, 371 U.S. 942: "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels." *Id.* at 699. *See Robertson*, *supra* note 38, at 1640.

exoneration from or limitation of liability.[46] The combined language of the Supplemental Rules and the advisory committee notes indicates that, with respect to the admiralty remedies listed in Supplemental Rule A, the drafters intended the Supplemental Rules to apply *in toto* and to govern exclusively. Judge Johnson, dissenting in *Leonhardt*, agrees:

> It is apparent that the advisory committee sought to instruct district court judges that the Supplemental Rules did not prevent them from devising appropriate procedures to cover situations *other than* the four covered by the Supplemental Rules. However, the advisory committee note does not mean that, with respect to actions that *are* covered by the Supplemental Rules, district courts are free either to follow or to disregard the Rules, depending upon what the situation requires.[47]

The Supreme Court addressed a similiar issue in *Mobil Oil Corp. v. Higginbotham*[48] in the context of the Death on the High Seas Act.[49] The Court determined whether traditional maritime law applied despite the existence of a federal statute which directly addressed the matter in dispute. In addition to seeking the pecuniary damages authorized by the federal statute, the decedent's survivors sought to recover damages for loss of society, which were available only under general maritime law.[50] The Court held that the statute limited the survivors' recovery.[51] It reasoned: "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."[52] The Court dis-

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46. Supplemental Rule A states:

> These Supplemental Rules apply to the procedure in admiralty and maritime claims within the meaning of Rule 9(h) with respect to the following remedies:
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> (1) Maritime attachment and garnishment;
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> (2) Actions in rem,
>
> (3) Possessory, petitory, and partition actions;
>
> (4) Actions for exoneration from or limitation of liability.

FED. R. CIV. R. SUPP. A.

47. *Leonhardt*, 773 F.2d at 1540 (Johnson, J., dissenting).

48. 436 U.S. 618, *reh'g. denied*, 439 U.S. 884 (1978).

49. 46 U.S.C. §§ 761-768 (1982).

The Death on the High Seas Act must be distinguished from the Supplemental Rules for Certain Admiralty and Maritime Claims. Congress enacted the High Seas Act while the Supreme Court promulgated the Supplemental Rules which were *then* ratified by Congress. Congress, by legislative fiat, granted the judiciary the authority to draft these rules. For a detailed discussion of the process involved in promulgating the Rules of Civil Procedure, 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1001-1008 (1969); see Spaniol, *Making Federal Rules: The Inside Story*, 69 A.B.A.J. 1645 (1983).

50. 436 U.S. at 619.

51. *Id.* at 626.

52. *Id.* at 625. *See generally* Sea-land Serv. v. Gaudet, 414 U.S. 573 (1974) (recovery

tinguished an earlier case[53] where Congress did not specifically address by statute a given cause of action or remedy. In that case, the Court permitted application of the general maritime law.[54]

The court in *Leonhardt* should have applied the same reasoning to the Supplemental Rules. When the Supreme Court promulgated the Rules, it listed only certain remedies. Once Congress ratified the Rules,[55] the Rules excluded any other remedies. On the other hand, the Eleventh Circuit could have held that both the Rules and the accompanying advisory committee notes did not make exclusive the procedures for invoking the remedies and, therefore, the courts could use their traditional maritime powers when adapting their procedures in the interest of justice in a particular case.[56]

IV. RULE B(1) AND THE AMENDED SUPPLEMENTAL RULES

The *Leonhardt* court cited *Manro v. Almeida*[57] for the proposition that "maritime attachment was a part of American jurisprudence at the time the Constitution was adopted."[58] Maritime attachment was first authorized in 1845 when the Court promulgated Rule 2 in the former *Rules of Practice for Admiralty and Maritime Cases*.[59]

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available for wrongful death under general maritime law); Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970) (remedy available for wrongful death of a longshoreman under general maritime law); Kozoidek v. Gearbulk, Ltd., 481 F. Supp. 513 (D. Md. 1979) (action maintainable for loss of consortium where Congress had not passed a statute which spoke to this issue).

53. Moragne v. States Marine Lines, Inc., 398 U.S. 375 (1970).

54. *See supra* note 49. The *Higginbotham* court stated that "[*Moragne*] depended on our conclusion that Congress withheld a statutory remedy . . . in order to encourage and preserve supplemental remedies." *Higginbotham*, 436 U.S. at 625.

55. Congress has the power to ratify rules which the Supreme Court promulgates. *See supra* note 48.

56. *See supra* notes 41-47 and accompanying text.

57. 243 U.S. (10 Wheat.) 474 (1825).

58. *Leonhardt*, 773 F.2d at 1532 (citing Manro v. Almeida, 23 U.S. (10 Wheat.) 473 (1825)).

The issue in *Manro* was whether attachment was available under the existing admiralty law to compel the appearance of the respondent, who was located outside the jurisdiction of the court. 23 U.S. (10 Wheat.) at 487-88. The Court stated:

> Upon the whole, we are of opinion, that for a maritime trespass, even though it savors of piracy, the person injured may have his action in personam, and compel appearance by the process of attachment on the goods of the trespasser, according to the forms of the civil law, as engrafted upon the admiralty practice. And we think it indispensable to the purposes of justice, and the due exercise of the admiralty jurisdiction, that the remedy should be applied, even in cases where the same goods may have been attachable under the process of foreign attachment issuing from the common-law courts.

Id. at 495-96. For a thorough discussion of *Manro*, see Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, 450 F. Supp. 447, 454-55 (W.D. Wash. 1978).

59. Substantively, maritime attachment remained the same from American common law

Rule 2 provided for attachment in suits in personam where the defendant could not be found within the district.[60] Rule 2 substantively remained the same when the Admiralty Rules of 1920 overrode the 1845 Rules.[61]

Supplemental Rule B(1)[62] is the direct descendant of Admiralty Rule 2.[63] The advisory committee states:

> [Supplemental Rule B(1)] preserves the traditional maritime remedy of attachment and garnishment, and carries forward the relevant substance of Admiralty Rule 2. . . . The rule follows closely the language of Admiralty Rule 2. No change is made with respect to the property subject to attachment. No change is made in the condition that makes the remedy available.[64]

The substance remained the same, but the Court[65] eliminated the antiquated nomenclature.[66] Although maritime attachment had its roots in admiralty law before the adoption of the Constitution of the United States,[67] it became another remedy recoverable in a civil action.[68] As a result of the unification of civil and admiralty law[69] and the "new era in procedural [and substantive] due process,"[70] attorneys began

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as enunciated in *Manro v. Almeida* until it was ratified as Rule 2. *See supra* note 57 and accompanying text. Rule 2 provided:

> In suits *in personam*, the mesne process may be by a simple warrant of arrest of the person of the defendant, in the nature of a capias, or by a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for; or if such property can not be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or by a simple monition in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for or elect.

Reprinted in 7A J. MOORE & A. PELAEZ, MOORE'S FEDERAL PRACTICE 224 (2d ed. 1983).

60. *Id.*

61. *See Leonhardt*, 773 F.2d at 1533.

62. *See supra* note 2.

63. *Grand Bahama Petroleum*, 450 F. Supp. at 455.

64. FED. R. CIV. P. SUPP. B(1) advisory committee note.

65. *See generally* Crutcher, *supra* note 30 (discussing the changed forms of admiralty pleadings); Robertson, *supra* note 38 (discussing the effect of the 1966 unification of the admiralty and civil rules).

66. *See supra* note 35 and accompanying text.

67. *See supra* note 57 and accompanying text.

68. *See supra* notes 34-39 and accompanying text (discussing the unification of admiralty and civil law).

69. *Id.*

70. Note, *Due Process in Admiralty Arrest and Attachment*, 56 TEX. L. REV. 1091, 1091-92 (1978); *see infra* note 74 and accompanying text. Although the remedies for arrest and attachment have been more severely attacked on procedural due process grounds, they have also been challenged as being violative of substantive due process under Shaffer v. Heitner, 433 U.S. 186 (1977). *See also* Schwartz, *supra* note 1, at 235-36.

Judge Beeks perhaps enunciated the most poignant criticism of this due process challenge in Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd.: "The recognized

challenging the constitutional sufficiency of the traditional maritime remedies.[71]

Leonhardt arose out of this litigious environment.[72] By its decision in *Leonhardt*, in 1982, the Southern District of Georgia became one of the few courts to hold Rule B(1) violative of procedural due process under the fifth amendment.[73] To quell the controversy over Supplemental Rule B(1), and to "eliminate doubts as to whether . . . Rule [B(1)] is consistent with the principles of procedural due process [as] enunciated by the Supreme Court"[74] in the *Sniadach v. Family Finance Corp.—Fuentes v. Shevin*[75] line of cases, the Supreme Court adopted amendments to the Supplemental Rules.[76] Under the amend-

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autonomy of admiralty jurisprudence, although not absolute, and the long constitutional viability of maritime attachment compel me to conclude that *Shaffer* does not reach Rule B(1) attachment." 450 F. Supp. 447, 455 (W.D. Wash. 1978).

71. Various commentators have discussed these challenges to both Supplemental Rules B and C extensively. *See, e.g.*, Batiza & Partridge, *The Constitutional Challenge to Maritime Seizures*, 26 LOY. L. REV. 203 (1980); Bohmann, *Applicability of* Shaffer *to Admiralty In Rem Jurisdiction*, 53 TUL. L. REV. 135 (1978); Culp, *Charting A New Course: Proposed Amendments to the Supplemental Rules for Admiralty Arrest and Attachment*, 15 J. MAR. L. & COMMERCE 353 (1984); Goodman, *The Due Process Mandate and the Constitutionality of Admiralty Arrests and Attachments Pursuant to Supplemental Rules B and C*, 12 VAND. J. TRANSNAT'L L. 421 (1979); Hunsaker, *supra* note 70; McNamara, *The Constitutionality of Maritime Attachment*, 12 J. MAR. L. & COMMERCE 95 (1980); Morse, *The Conflict Between the Supreme Court Admiralty Rules and* Sniadach-Fuentes *A Collision Course?*, 3 FLA. ST. U. L. REV. 1 (1975); Robol, *Admiralty's Adjudicatory Jurisdiction Over Alien Defendants: A Functional Analysis*, 11 J. MAR. L. & COMMERCE 395 (1979-80); Note, *Maritime Attachment and Arrest: Facing a Jurisdictional and Procedural Due Process Attack*, 35 WASH. & LEE L. REV. 153 (1978).

72. *See supra* note 13 and accompanying text.

73. *See* Crysen Shipping Co. v. Bona Shipping Co., 553 F. Supp. 139 (M.D. Fla. 1982); Cooper Shipping Co. v. Century 21 Exposition, 1983 A.M.C. 244 (M.D. Fla. 1982); Grand Bahama Petroleum Co. v. Canadian Transp. Agencies, Ltd., 450 F. Supp. 447 (W.D. Wash. 1978).

74. H.R. DOC. NO. 63, 99th Cong., lst Sess. 30 (1985).

75. *See supra* note 9.

76. The advisory committee stated:

> These Supreme Court decisions provide five basic criteria for a constitutional seizure of property: (1) effective notice to persons having interests in the property seized, (2) judicial review prior to attachment, (3) avoidance of conclusory allegations in the complaint, (4) security posted by the plaintiff to protect the owner of the property under attachment, and (5) a meaningful and timely hearing after attachment.

Advisory Committee's Explanatory Statement in the Proposed Amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 374 (1983).

The amended Rules were promulgated on April 30, 1985, and became effective on August 1, 1985. The actual process by which the Supplemental Rules were amended deserves some discussion. The Advisory Committee on Civil Rules submitted the amended Supplemental Rules to the Supreme Court. The amended rules provided for an *ex parte* judicial review and an immediate postattachment hearing in order to effect attachment under amended Supplemental Rules B and E. *See supra* note 2; *infra* note 79. The revisions to Rule B(1) received

ments, which became effective on August 1, 1985,[77] preseizure judicial scrutiny is necessary under both Supplemental Rules B and C,[78] and Rule E guarantees a prompt postseizure hearing.[79]

V. THE DANGER TO THE AMENDED SUPPLEMENTAL RULES: *Leonhardt*

The Eleventh Circuit erred in *Leonhardt* by not realizing that Congress had ratified the amendments to the Supplemental Rules prior to the time of the decision.[80] The Court discussed the amendments to the Supplemental Rules[81] as proposals. The Supreme Court had drafted the amendments to Rule B(1) to satisfy the requirements of procedural due process.[82] They became effective August 1, 1985.[83] The court of appeals' avoidance of the issue of Supplemental Rule

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criticism as not being consistent with the purpose of a maritime attachment pursuant to traditional maritime law. *See* Culp, *supra* note 71.

Despite the criticism, the Supreme Court approved the changes to Rule B(1) as stated in the Preliminary Draft of the Proposed Amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims. *See supra* note 73, at 375-76. Congress was given ninety days to either reject, accept, or make changes to the proposed rules. *See* Spaniol, *supra* note 49. The legislature, in fact, made no changes and took no action during the ninety days, thus the rules were ratified as proposed, effective August 1, 1985.

77. *See supra* note 76.

78. *See supra* note 2 (language of Rule B(1)); *see also* Culp, *supra* note 71, at 378-79 (discussing preseizure judicial scrutiny under the proposed amendments to Rules B and C). An analysis of Rule C is beyond the scope of this note.

79. In 1985, Rule E was amended to include new subsection (4)(f):

> PROCEDURE FOR RELEASE FROM ARREST OR ATTACHMENT. Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a certification of sufficient cause filed pursuant to Title 46, U.S.C. §§ 603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

FED. R. CIV. P. SUPP. E(4)(f).

80. October 1, 1985. *See* Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 773 F.2d 1528 (11th Cir. 1985).

81. *See* Proposed Amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims, Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, 98 F.R.D. 339, 374-80 (1983).

82. For a discussion of the amended Supplemental Rules and procedural due process, see *supra* note 76 and accompanying text.

83. WARREN E. BURGER, AMENDMENTS TO THE FEDERAL RULES CIVIL PROCEDURE, H.R. DOC. NO. 63, 99th Cong., 1st Sess. 30 (1985). The rules became effective on August 1, 1985, ninety days after Congress had received the proposed rules from the Supreme Court and had not acted upon them. *See* Spaniol, *supra* note 49. Because the Federal Rules of Civil Procedure are remedial, amendments to the rules have been retroactively applied. *See, e.g.*, Provident Tradesman Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968).

B(1)'s constitutionality, prior to its being amended,[84] can be a dangerous precedent for the future manageability of the *amended* Supplemental Rules. In fact, *Leonhardt* is significant because, after reversing the district court,[85] the Eleventh Circuit granted a rehearing en banc,[86] apparently, to circumvent the powerful reasoning of the district court concerning the unconstitutionality of Supplemental Rule B(1).[87]

The court of appeals' first opinion is more sound than its decision on rehearing. In the first opinion, the court held that because, under the facts of the case,[88] Bottacchi "was accorded the procedural due process to which it was entitled, the lower court erroneously proceeded to a determination of the facial constitutionality of Rule B(1)."[89] The district court's procedures in the present case were, ironically, consistent with the *amended* Supplemental Rules, even though it decided *Leonhardt* before their ratification.[90]

On rehearing, the Eleventh Circuit read the district court as having dissolved the writ of attachment on the theory that because Supplemental Rule B(1) was unconstitutional, the court lacked the power to issue the writ.[91] The court stated that the district court[92] had incorrectly viewed the Supplemental Rules as the sole authority for a federal court to issue a writ.[93] To expand the district court's "narrow" view of the federal courts' traditional maritime powers,[94] the Eleventh Circuit on rehearing held that the district court could have issued the writ of attachment independently of Rule B(1), under its inherent power to apply traditional maritime law.[95] This is not,

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84. *See supra* notes 14-17 and accompanying text.

85. *See supra* note 10 and accompanying text.

86. *See supra* note 12 and accompanying text. The court granted the rehearing on September 21, 1984.

87. *See* Schwartz, *supra* note 1, at 389-91.

88. *See supra* note 1 and accompanying text.

89. *Leonhardt*, 732 F.2d at 1549.

90. *See supra* notes 2, 76 and accompanying text. This is of limited relevance, however, because the original opinion was decided on May 29, 1984, over one year before Congress ratified the amendments to the Supplemental Rules.

91. 773 F.2d at 1530 n.5. The district court held that the defendant had been accorded due process under Rule B(1) "as applied," but held that Rule B(1) was facially unconstitutional. *Id.* at 1530-31.

92. The Eleventh Circuit mentions two other cases in which a court held Rule B(1) unconstitutional and, therefore, powerless to issue a writ of attachment. *See* Crysen Shipping Co. v. Bona Shipping Co., 553 F. Supp. 139 (M.D. Fla. 1982); Cooper Shipping v. Century 21 Exposition, 1983 A.M.C. 244 (M.D. Fla. 1982). *Leonhardt* 773 F.2d at 1531 n.6.

93. 773 F.2d at 1530-31.

94. *Id.*

95. *See supra* notes 20-22 and accompanying text. The *Leonhardt* court analyzed at length

however, consistent with the purpose and function of the Supplemental Rules.

The advisory committee note applicable to Supplemental Rule A states that, while acting under its exclusive jurisdiction to hear admiralty and maritime cases, the district court may "adapt its procedures and remedies in the individual case, *consistently with these rules* . . . ."[96] In other words, the Supplemental Rules must always apply, but the courts may adjust the remedies and procedures so as not to undermine the purpose of the Rules. The Eleventh Circuit gave only lip service to the advisory committee. It said, "We view the procedures employed in the present case, including the postattachment hearing, as entirely consistent with Rule B(1)."[97] Because the court had already admitted its reliance on traditional maritime law and had expressed that there was no need for reliance on the Supplemental Rules, the statement was unnecessary verbiage.

This reasoning "trivializes"[98] not only Supplemental Rule B(1), but also all of the Supplemental Rules. The Supreme Court promulgated an amended Supplemental Rule B(1) to satisfy due process requirements.[99] What logical relevance could there be, then, to permit a court to disregard the Rules and decide instead under its "inherent powers"?[100] Although judicial power indisputably extends to "all Cases of admiralty and maritime Jurisdiction,"[101] Congress has empowered[102] the Supreme Court to promulgate rules to control the procedures used in the federal courts. These rules are binding on the federal courts.[103] In fact, Supplemental Rule A states that the "Supplemental Rules *apply* to the procedure in admiralty and maritime claims . . . ."[104] The Supplemental Rules give the federal courts the authority to invoke the special remedies provided in those rules.[105]

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the court's inherent power to apply traditional maritime law and the history of attachment in American jurisprudence. 773 F.2d at 1531-33.

96. FED. R. CIV. P. SUPP. A advisory committee note (emphasis added). *See supra* notes 42-48 and accompanying text.

97. *Leonhardt*, 773 F.2d at 1533. The court applied the requirements of procedural due process as expounded in the *Sniadach-Fuentes* line of cases. *See supra* note 76.

98. *Leonhardt*, 773 F.2d at 1540 (Johnson, J., dissenting).

99. *See supra* note 76 and accompanying text.

100. *See supra* note 16 and accompanying text.

101. U.S. CONST. art. III, § 2. *See supra* note 20 and accompanying text.

102. *See supra* note 27 and accompanying text.

103. C. WRIGHT & A. MILLER, 4 FEDERAL PRACTICE AND PROCEDURE § 1012 (1969). Rule 1 of the Federal Rules of Civil Procedure states, "these rules govern the procedure in the United States district courts in all suits of a civil nature . . . ." FED. R. CIV. P. 1.

104. FED. R. CIV. P. SUPP. A.

105. *See* FED. R. CIV. P. SUPP. A-E.

The courts retain their inherent power to hear admiralty cases,[106] but they should work under established guidelines promulgated by the Supreme Court and ratified by Congress when awarding special maritime remedies.

VI. CONCLUSION

The 1985 amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims reflect changing times. Maritime activity is no longer of the same economic magnitude as in the nineteenth century.[107] Maritime law no longer retains the traditional unique qualities it enjoyed prior to the 1966 unification of admiralty and civil law.[108] In fact, the 1966 unification was a great step in the evolution of the maritime law. Similarly, the 1985 amendments to the Supplemental Rules, which apply the procedural safeguards enunciated in the *Sniadach-Fuentes*[109] line of cases to maritime seizures and attachments, further develop maritime law. The Eleventh Circuit court's reasoning, which encourages courts to invoke their traditional powers in admiralty to circumvent the Supplemental Rules, poses a serious threat to the uniformity and stability of the Federal Rules of Civil Procedure and the Supplemental Rules for Certain Admiralty and Maritime Claims.

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106. *See supra* note 20.

107. *See generally* Crutcher, *supra* note 30 (discussing the modifications of admiralty law throughout history).

108. *See supra* note 41 and accompanying text.

109. *See supra* note 9.

* This note is dedicated to the loving memory of my grandfather, in homage and affection.

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