RECENT DEVELOPMENTS
IN MARITIME CASE LAW 2013-2014

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PUNITIVE DAMAGES

McBride v. Estis Well Servs., LLC, ____ F.3d ____ (5th Cir. 2014)

This case will be addressed by another panel in this year’s seminar. However, it is notable and we therefore include it for your review.

In this consolidated action for wrongful death and personal injury under the General Maritime Law and under the Jones Act, plaintiffs employed on an inland drilling barge in Louisiana sued the employer and vessel owner/operator for pecuniary as well as punitive damages. The trial court ruled on Motions brought by each party that nothing in the Townsend Supreme Court decision allowed for recovery of punitive damages for breach of the warranty of seaworthiness and dismissed the claim for such damages.

On appeal, the original panel of the U.S. Fifth Circuit Court of Appeals unanimously reversed and held that the reasoning and rationale of Townsend applied to the action. They found that the right of a seaman to sue for damages under the General Maritime Law predated the Jones Act which was enacted with the intent to expand the rights of seamen. They went on to hold that nothing in the Jones Act prevents recovery of punitive damages under the General Maritime Law for breach of the warranty of seaworthiness where the vessel owner is grossly negligent.

The defendant applied for and was granted a rehearing en banc. The Court rendered its opinion this past September 2014. The en banc court now affirmed the District Court ruling and concluded that the Supreme Court's decision in Miles v. Apex Marine Corp. (1990) was controlling in its conclusion that a seaman's recovery is limited to pecuniary losses when liability is predicated on the Jones Act or unseaworthiness.
They held the U.S. Supreme Court in Townsend did not overrule Miles but instead took pains to distinguish maintenance and cure cases from cases involving unseaworthiness and negligence under the Jones Act. They found that because punitive damages are non-pecuniary remedies, they cannot be recovered in an unseaworthiness claim.


In this case, PCL was hired to replace a deteriorating bridge span across the Brazos River. PCL moored two barges holding bridge components to an H-beam piling by a single loop of two-inch thick mooring line without the requisite permit. The barges were moored for four weeks until they broke free from their moorings during a storm, drifted down river, and struck and damaged a wooden reef-fishing vessel owned by plaintiff. Prior to trial, the parties settled claims for repairs and storage fees and PCL admitted liability for compensatory damages based on its negligence. The parties went to trial to determine the issues (a) compensatory damages for lost profits, survey fees, emergency repairs and crew payments, (b) whether PCL was liable for punitive damages and (c) whether PCL acted in bad faith in negotiations with the plaintiff to be liable for attorney’s fees.

After the trial, the court found PCL’s conduct was reckless with regard to the inadequate moorings with a storm approaching and lack of an established protocol to check the weather. In deciding punitive damages were warranted, the court concluded that the U.S. Supreme Court’s ruling in Exxon Shipping v. Baker1 allowed such damages when a defendant is guilty of “gross negligence, or actual malice, or criminal

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indifference which is the equivalent of reckless or wanton conduct.” The court acknowledged while there was no malice, “the failure to take easily available precautions demonstrated an indifference to the magnitude of risks involved.” The court noted this was a lower threshold for punitive damages under most state laws. The court then used the ratio of 0.65:1 based on the compensatory damages to award punitive damages of $69,512. This was the ratio the Baker court determined for cases where there is no malicious conduct or willful intent.

With regard to the claim for attorney’s fees, the court noted the Fifth Circuit recognizes a limited exception in maritime cases to the general rule that attorney’s fees are not recoverable. Only when the losing party acts in “bad faith, vexatiously, wantonly, or for oppressive reasons”2 will such attorney fees be awarded. In reviewing the timeline of discussions on the damages and handling of same, the court found that PCL did not act in bad faith. PCl met with plaintiff on the day of the incident, conducted surveys to assess the damage to plaintiff’s vessel and even attempted to pay a settlement amount for the total loss of his vessel. The court found that the mere disagreement as to amount of damages owed did not constitute bad faith as such attorney’s fees were not appropriate.

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MAINTENANCE & CURE


Plaintiff, a seaman employed by Bisso, brought suit against his employer under the Jones Act and general maritime law after an explosion on deck engulfed him in flames. He alleged that he suffered physical and psychological injuries and sought judgment against Defendant for maintenance and cure. He was diagnosed with PTSD following the incident. When applying for work with Bisso, Kaminaga did not disclose a prior history of mental illness.

The court noted the Fifth Circuit decision of McCorpen v. Central Gulf Steamship Corp.\(^3\) established that an award of maintenance and cure may be denied where a seaman knowingly or fraudulently concealed a pre-existing illness from his employer. For an employer to rely on this defense, he must show that (1) the seaman intentionally misrepresented or concealed medical facts; (2) the misrepresented facts were material to the employer's hiring decision; and (3) there is a causal link between the pre-existing condition that was concealed and the injury now incurred.

Bisso submitted evidence (a) Kaminaga suffered from PTSD prior to his employment with Bisso, (b) Bisso required Kaminaga to submit to a medical examination and interview prior to hiring him and Kaminaga concealed his prior history of mental illness from the medical examiner, (c) the concealed information was material to Bisso's hiring decision, and (d) the PTSD Kaminaga incurred after the explosion was related to his pre-existing PTSD. Based on this evidence the court entered summary

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\(^3\) 396 F.2d 547 (5th Cir. 1968).
judgment in favor of Bisso and found that Kaminaga was not entitled to maintenance
and cure to the extent he sought it for PTSD.


Plaintiff alleged that he was injured while employed by Defendant when he fell
into an obscured hole on Defendant’s barge. He initially demanded $65 per day in
maintenance and cure benefits from his employer but only identified the date of the
incident. In his request, he failed to specify his injuries, living expenses, or to identify the
vessel on which he was working at the time of the incident. His employer responded
that it was unaware of any accident and requested more information. Eventually,
Defendant agreed to pay him maintenance at the rate of $35 per day “under protest”
retroactively to the date of the employee’s first letter. Plaintiff brought suit requesting
further maintenance and cure benefits as well as compensatory and punitive damages
for his employer’s failure to pay benefits on a timely basis.

The court first addressed the law on maintenance and cure which recognized
that a vessel owner must pay such benefits to ensure that the seaman receives proper
care and treatment without consideration of whether there is liability for negligence or
unseaworthiness. However, the court also noted the vessel owner is entitled to
investigate and corroborate the claims prior to paying maintenance and cure benefits. It
further noted that the vessel owner will only become liable for compensatory and
punitive damages if he unreasonably rejects a claim after the investigation. Additionally,
the court confirmed the vessel owner will only be liable for punitive damages and
attorney’s fees if he displays a malicious and deliberate disregard of a seaman’s rights
in denying a valid claim for benefits. Examples of such malevolent conduct that would qualify for punitive damages included negligent investigation of a claim, termination of benefits for refusing settlement or retaining counsel, or failure to reinstate benefits after discovering a previously undetermined injury.

Here, the court found Richoux failed to produce any evidence that the employer acted callously or wantonly after receiving the request for maintenance and cure. The record indicated the employer was quick in its responses to the plaintiff’s correspondence while plaintiff instead took weeks to respond to his employer’s requests for documentation and even cancelled a meeting with the employer. Of note, the defendant produced affidavits from company personnel that they had no record or knowledge of the alleged accident. In response, the plaintiff produced a contrary affidavit given by a co-worker attesting that he witnessed the accident which was then reported to the captain. The court found that in light of the fact the employer paid and continued to pay maintenance and cure and made a diligent effort to investigate the employee’s claim, summary judgment in favor of the employer would be entered denying punitive damages.

However, the court found the co-worker’s affidavit created a genuine issue of material fact for the claim for compensatory damages in conducting its investigation of the claim for maintenance & cure. The compensatory claim turned on the reasonableness of the employer’s request for further information including the right to take plaintiff’s statement despite the co-worker’s affidavit. The court therefore denied the motion for summary judgment on the compensatory damages claim instead allowing it to proceed to trial on the merits.

The Plaintiff alleged back injuries when he pulled a facewire out of the water while employed as a tankerman on Blessey’s vessel. Plaintiff was diagnosed with ruptured cervical and thoracic discs. He sued the company for claims of negligence, unseaworthiness, and for maintenance & cure benefits including punitive damages for failing to pay for a second surgery. After trial on the merits, the trial court found in favor of the employer on the claims for negligence and unseaworthiness. The court’s analysis then turned to the remaining maintenance and cure issues.

The court correctly noted that maximum cure is achieved when further treatment will likely not better the seaman’s situation or the seaman is cured by treatment. Whether a seaman has obtained maximum medical cure is a medical question.

The plaintiff underwent one thoracic surgery paid for by Blessey under the broad maintenance and cure obligation. The company also continued to pay maintenance of $25.00 per day through the date of trial. Relying on medical testimony of its doctor, Blessey asserted the second cervical surgery that was performed was elective. At trial, the court found because plaintiff and his surgeon reported improvement in his symptoms after the second surgery, it was medically necessary. Therefore Blessey was responsible to pay for that surgery. The court found plaintiff reached maximum medical improvement twelve weeks following the second surgery despite his ongoing pain complaints; i.e. any further medical treatment would merely be palliative. As a result, Blessey was not liable for any additional maintenance and cure payments twelve weeks following the cervical surgery. Last the court found that Blessey was reasonable and
had honored its maintenance & cure obligation and therefore denied the claim for punitive damages.


In this case, a decedent’s wife brought suit for claims of unseaworthiness, maintenance and cure, and for negligence for the death of her husband after developing leukemia. It was claimed he developed the cancer from exposure to benzene during his employment with various defendants from 1961 to 2006. One of the defendants, for whom the decedent worked from 1964 to 1968, filed a FRCP Rule 12(b)(6) Motion to Dismiss. They argued the maintenance and cure claim should fail as a matter of law because the decedent worked on its vessel over forty years prior and the claim had not been made within a reasonable amount of time after his service for the company ended.

The court stated that a claim for maintenance and cure has no basis unless a plaintiff can show that the illness began while the seaman was in the service of the defendant, and a plaintiff may only receive such benefits until he has reached maximum cure. In a footnote, the court pointed to precedent from the Second Circuit Court of Appeals⁴ (apparently the only circuit court to have addressed the issue), which urged courts to recognize the concept of slow-growing, asymptomatic diseases that lurk in the body and progress over time. It noted in that case of *Messier* the court found the relevant time to evaluate was the time the injury or illness occurred, not when it started to present symptoms. The court concluded there were several questions to be resolved which prevented it from dismissing the complaint. These included whether the

decendant’s slow-progressing disease existed at the time of his service on the employer’s vessel. when the decendant became unfit for duty, and whether the decendant reached maximum cure prior to his death. Despite these difficult hurdles of proof for plaintiff, the court concluded dismissal would be improper. Under the federal rules, the court was required for such a motion to take the allegations in a light most favorable to the plaintiff and therefore found that a potential claim for maintenance and cure had been presented.

Stermer v. Archer-Daniels-Midland Co., 140 So.3d 879 (La. App. 3 Cir. 6/4/2014)

Plaintiff filed suit against her employer, ARTCO, for a claims of injury when working as a cook aboard one its towboats. She sued for negligence and unseaworthiness as the cause of her injuries, for retaliatory discharge, failure to pay maintenance & cure, and for punitive damages and attorney fees. She claimed the injury occurred when she lost her balance in the galley as the vessel was facing up to “make tow” causing a “jar” or “bump” on the vessel. She did not immediately report the alleged injuries to her hands and ankle. Stermer claimed she initially did not think she was seriously hurt and also was afraid she might lose her job reporting the injury. Several crew who were in the galley disputed whether Stermer fell forward as she claimed. However, one co-worker offered some support for her claim of pain and injury within a day or two of the incident.

She reported the injury five days later and completed a formal report. A week later, Stermer was taken to shore to a local hospital for evaluation and treatment. In the history given to the hospital as well the one she gave later to her treating physician, she
was consistent how she alleged the injuries occurred aboard the vessel. Ultimately, both her treating doctor as well as the doctor who evaluated her on behalf of ARTCO recommended she undergo surgery to repair her wrist. Throughout this time, ARTCO refused to pay her maintenance and cure or for the cost of surgery.

The trial court determined she proved her injury occurred as she claimed and that negligence of the crew was the cause but that she failed to prove any unseaworthiness of the vessel nor retaliatory discharge. She was awarded almost $637,000 in compensatory damages for loss of wages, earning capacity, fringe benefits and pain and suffering. The court also awarded punitive damages of $300,000 and attorney fees of $150,000 on the maintenance & cure claims. ARTCO appealed.

The appeals court noted that the duty of maintenance and cure duty requires the employer provide food, lodging, and necessary medical services to seamen who become ill or injured in the service of the vessel. The court also noted an employer has a right and duty to investigate the seaman’s claims and to require corroboration of such claims. However, it may only deny benefits if the seaman does not corroborate or document the claim but “that doubts or ambiguities as to whether the seaman is entitled to maintenance and cure are to be resolved in favor of the seaman.” If the employer fails to properly investigate the claim or unreasonably rejects a claim, he will be liable for compensatory damages. If he egregiously denies a proper claim for maintenance and cure or is “callous and recalcitrant, arbitrary or capricious, or willful, callous and persistent” the employer may also be liable for punitive damages and attorney’s fees.

The court found that ARTCO only considered evidence that indicated that the accident reported by Plaintiff did not happen without giving due consideration to
evidence corroborating her claims. These included the fact that (1) Plaintiff performed her duties as usual for a substantial period of time without signs of injury before the alleged incident, (2) two bumps occurred when the vessel faced up to make tow, (3) other employees corroborated Plaintiff’s position at the time she claimed injury, (4) the medical evidence supported her claims regarding how she sustained her injuries, and (5) a statement from another ARTCO crew indicated she suffered some injury while aboard the vessel. Although the ARTCO investigator had evidence supporting her claim, he admitted he did not know that when doubt or ambiguity existed as to the validity of the claim, the law required it be resolved in favor of the seaman. Under these facts, the court found ARTO’s investigation was not diligent or reasonable and that the company was arbitrary and capricious in denying her maintenance & cure claim.

Of interest, there was evidence at trial that Stermer did not reveal prior problems with her hands and wrists when she applied for work with ARTCO and filled out a medical questionnaire. The court noted an employer may avoid liability for maintenance & cure if it can show the existence of a causal link between the claimed injuries and a pre-existing condition. However, this McCorpen defense is effective only if the condition is proven to have been concealed by the applicant and it is further proved that the applicant reasonably believed the information would be considered important by her prospective employer. Since here ARTCO had not conducted a pre-employment physical examination but instead only had Stermer fill out a questionnaire, the court found that there was no evidence produced at trial that Stermer believed the condition was important. In fact, the evidence showed she had performed her same duties as a cook on a vessel for another company before she worked for ARTCO and was able to
perform those duties for years. Further, once employed with ARTCO, Stermer was able to do her cook duties for two years before this incident.

The court of appeal affirmed the trial court award of punitive damages in the amount of $300,000. However, the appeals court found the evidence at trial did not properly prove up the attorney fees awarded by the trial court of $150,000 and the case was remanded back to receive evidence on such fees. But, the appeals court did award an additional $10,000 in attorney fees to Stermer’s attorney for their work in responding to the appeal to “protect” Stermer’s trial court recovery for maintenance & cure.


Plaintiff filed suit to recover under the Jones Act and general maritime law for unseaworthiness and for maintenance & cure benefits. It was not disputed that the employer met and continued to meet its maintenance & cure obligations. The defendant moved to dismiss the maintenance & cure claim, as well the associated request for compensatory damages, attorney fees, and punitive damages. The plaintiff responded and sought to “reserve” these claims based on the speculation that defendant might wrongfully terminate maintenance & cure in the future. The Court rejected the plaintiff’s arguments and dismissed the claims noting that plaintiff is not entitled to recover for arbitrary conduct that may or may not occur in the future.


Plaintiff’s husband was injured and eventually died from the injuries suffered in an automobile accident while returning from authorized shore leave back to the vessel
where he worked as an engineer. The decedent had been a passenger in the car driven by another crew member. Both men were legally intoxicated. The decedent’s wife sued under the Jones Act, unseaworthiness, and for maintenance and cure.

The court first addressed Plaintiff’s fault-based Jones Act claim. To recover under a Jones Act claim for injury, an employee must demonstrate that he was injured within the scope of his employment, and that his injury was caused by the negligence of either his employer, ship master, or a fellow employee acting within the scope of his employment. The main issue in this case was whether the men were acting in the course and scope of their employment when the decedent was killed.

The court noted that the term “course of employment” equated with the “service of the ship” formula used in maintenance and cure actions. As recently applied by the Fifth Circuit in *Beech v. Hercules Drilling Co.*\(^5\), the standard to determine whether a Jones Act employee was acting within the scope of his employment is whether his actions at the time of injury were in further of his employer’s business interests. The court had to address whether authorized shore leave furthered the employer’s business interests, and if so, whether any exceptions applied. The court noted that the Supreme Court precedent of *Aguilar v. Standard Oil Co. of N.J.*\(^6\) that shore leave is an integral part of business in the sailing of ships, because relaxation outside of the ship’s quarters is necessary for the workers to be efficient and for the work to run smoothly. The court found that, generally, seamen relaxing on shore leave are promoting their employer’s business. However, it also noted that this was subject to exceptions including venereal disease and, in some cases, injuries caused by intoxication. The court distinguished

\(^5\) 691 F.3d 566 (5th Cir. 2012).
\(^6\) 318 U.S. 724 (1943).
between injuries caused by a seaman’s intoxication, and injuries that occur while a seaman happens to be intoxicated.

The evidence in this case indicated both the driver and the decedent were legally intoxicated at the time of the accident. The court found that the decedent, as a passenger, *happened to be* intoxicated at the time of injury, while the driver’s intoxication directly *caused* the decedent’s injuries and death. Therefore, since both the injured seaman and the negligent fellow employee were required to be acting within the scope of their employment during the incident for employer liability to accrue, the employer was not responsible for the injuries caused by the decedent’s co-worker’s negligence under the Jones Act. Because the negligent co-worker was not acting within the scope of employment when he was intoxicated and driving, it found the employer was not responsible for his actions. Plaintiff also had claimed the employer condoned the driver’s actions but the court determined the evidence at trial did not prove the employer condoned drinking to excess or driving while intoxicated.

Next, the court addressed the Plaintiff’s unseaworthiness claims, recognizing that, *if* the seaman was in service of the vessel, the seaman’s condition that rendered him unfit for service of the vessel may make the vessel unseaworthy based on strict liability. However, under the same analysis the court made for the Jones Act claim, it was determined the driver was not acting within the scope of his employment, not in service to the vessel, and the unseaworthiness claim was also dismissed.

Last, the court addressed the claim for maintenance and cure which did not depend on the employer’s fault. The maintenance and cure claim in this case was for benefits that accrued between the accident and the eventual death of the decedent.
Since the decedent was an “innocent” seaman returning from shore leave and riding in the vehicle driven by his intoxicated fellow crew member, he was found to be in the course and scope of his employment when injured. Accordingly, it was determined the employer was responsible for the maintenance & cure benefits regardless of the fact that the driver was not acting within the scope of his employment at the time.

ARBITRATION & MARINE INSURANCE


This case involves an insurance claim filed by owners of sunken vessel for loss under a yacht policy. The policy included a provision requiring that disputes be settled by binding arbitration, the request for which must be filed within one year of the date of loss or damage. Ace denied the plaintiff’s insurance claim one month after his property loss, but the owner did not file a lawsuit against the insurer until almost one year after the boat sank. After removing the case to federal court, the insurer filed a motion to compel arbitration, which the court granted. Not until eight months later did the owner file a demand for arbitration which was more than two years after the vessel sank. Once the arbitrator was selected, the insurer immediately asked the arbitrator to dismiss the proceeding as untimely. The arbitrator heard evidence on this request and then dismissed the owner’s claim for failure to adhere to the time limits included in the insurance policy. The arbitrator declined to reconsider his decision, and the district court confirmed the arbitral decision.

The owner appealed to the Fifth Circuit, arguing that the arbitrator erroneously interpreted the time limits set forth in the insurance policy. The Fifth Circuit found that, in
light of the arbitrator’s findings that the vessel owner was aware of the arbitration requirement and time periods within which to bring a claim, the arbitrator did not exceed his powers in determining that the deadline for filing an arbitration request had not been waived. The appeals court agreed the owner’s request was untimely.

The 5th Circuit also found that arbitrators enjoy inherent authority to police the arbitration proceeding, and the arbitrator did not commit misconduct by declining the owner a second opportunity to be heard. The Fifth Circuit affirmed the district court’s decision to confirm the arbitrator’s award and dismiss the lawsuit with prejudice.

**CONTRACTUAL INDEMNITY**

*Duval v. N. Assurance Co. of Am., 722 F.3d 300 (5th Cir. 2013)*

Duval, an employee of the Wood Group, was injured during a personnel basket transfer from a Deep Marine supply vessel to a tension leg platform owned/operated by BHP. Wood Group was a contractor to BHP. Deep Marine had entered into a Master Service Agreement (MSA) with BHP which had reciprocal indemnity obligations supported by insurance. Duval sued Deep Marine but did not sue BHP. Under the MSA, Deep Marine tendered its defense, indemnity and additional insured status to BHP which was accepted. However, later, Deep Marine filed bankruptcy. Duval then amended and added Deep Marine’s insurers.

Deep Marine’s insurers then sought the same defense, indemnity and insurance protection afforded Deep Marine under the MSA. On cross motions for summary judgment, BHP was found not to be responsible under the MSA to protect the insurers of Deep Marine.
The case was appealed and the Fifth Circuit court found that the insurers cannot benefit from an indemnity provision that only names the contractor and its affiliates, but did not include the insurer, as indemnitees. The court held the parties could have included insurance companies under the contract definitions but failed to do so. The court upheld the summary judgment in favor of BHP and against the insurer.

**LHWCA INSURERS’ RIGHT TO SUBROGATION LIEN**

*Chenevert v. Travelers Indem. Co.*, 746 F.3d 581 (5th Cir. 2014)

The Fifth Circuit issued this opinion which supplemented its prior decision of *In Re: Massey v. Williams–McWilliams, Inc.* which held that a shipowner/employer who made voluntary payments to an injured employee under the Longshore and Harbor Workers’ Compensation Act (“LHWCA”) but later held liable to the worker in a Jones Act negligence suit was entitled to “a credit against those items of [Jones Act] damages ... that bear a reasonable relation to the items of loss compensated by [LHWCA] benefits.” The case in *Chenevert* required the court to answer a related question: whether an insurer who makes voluntary LHWCA payments to an injured employee on behalf of a shipowner/employer is entitled to recover these payments from the employee’s recovery in a Jones Act claim against the shipowner/employer based on the same injuries for which the insurer has already compensated him. The Fifth Circuit in *Chenevert* held the LHWCA insurer acquired a subrogation lien on the employee’s Jones Act recovery for the amount of LHWCA benefits it had paid. They reversed the district court ruling which denied the motion to intervene filed by the LHWCA insurer and remanded to allow the intervention and recovery.
The facts of the case were that Chenevert fell and was injured while working on a barge with a mounted crane. The LHWCA insurer provided coverage for compensation claims for injured longshore and harbor workers, but not for masters or members of the crew of a vessel; i.e. no Jones Act coverage. Between May 2007 and May 2010, this insurer voluntarily paid Chenevert a total of $277,728.72 in compensation and medical benefits under the LHWCA.

In May 2010, Chenevert sued his employer in federal court, alleging that he was working as a seaman at the time of his accident and seeking damages under the Jones Act. Based on Chenevert's claim that he was a “seaman” (rather than a “longshoreman”), the insurer stopped making payments under the LHWCA. In November 2010, the employer filed a notice of lien claiming that, in the event judgment is rendered in favor of Chenevert on his Jones Act claim, the employer had a lien against any funds due and payable to the LHWCA carrier.

In October 2011, the LHWCA carrier was granted permission to file an untimely motion to intervene in the lawsuit for the purpose of asserting its subrogation rights against any money recovered by Chenevert.

At that same time, Chenevert and the employer agreed on a settlement of his Jones Act claim. In November 2011, the parties notified the district court that a settlement was reached in the total amount of $1,7525,000 and of that amount, the sum of $277,782.22 in settlement funds were to be deposited into the court's registry pending the outcome of the dispute between Chenevert and the LHWCA carrier.
Ultimately, the district court ruled on the intervention holding that the LHWCA carrier had no right of subrogation as to the settlement proceeds, and therefore no interest in the property in the case. The carrier appealed that ruling to the Fifth Circuit.

The Fifth Circuit noted that the district court appeared to have viewed the LHWCA carrier’s attempt to assert a lien on settlement funds paid by the employer as an attempt to subrogate against its own insured. However, the appeals court noted that an insurer is only prohibited against subrogation against their own insured for claims arising from the very risks covered by that insurer. Because the LHWCA carrier did not insure the employer against Jones Act liability the court found they were not trying to avoid the risk against which they insured.

Instead, they held the LHWCA insurer's right of reimbursement from an employee's tort recovery is derived from the employer's right of reimbursement. That is, by paying LHWCA benefits to the injured employee on behalf of the employer, the insurer is subrogated to the employer's right of reimbursement. At the time of settlement, it is the insurer, not the employer, who had the lien. The insurer, by satisfying the employer's payment obligations under the LHWCA, became subrogated to all of the employer's repayment rights. This repayment lien in favor of the LHWCA carrier was independent of, and could not be nullified by, the employer. If this were not so, an employer and employee could easily settle around the insurer's lien and prevent any possibility of recovery by the insurer.

The court held that an insurer who makes voluntary LHWCA payments to an injured employee on behalf of the employer acquires a subrogation lien on any recovery by the employee in a Jones Act suit against the employer based on the injuries for
which the insurer has already compensated him. They found the LHWCA carrier was entitled to the disputed funds in the district court’s registry and granted the right of intervention to collect those funds. The decision of the district court was reversed and remanded to allow the intervention.

SEAMAN STATUS

The Jones Act itself does not define the term “seaman.” However, courts have defined the term by looking at the general maritime law which pre-existed the enactment of the Jones Act and by distinguishing seaman from land-based maritime workers covered by the Longshore and Harbor Worker’s Compensation Act (“LHWCA”). The key factors for defining “seaman” as applied by the courts today stem from the Supreme Court’s guidance on the issue. To qualify as a seaman, the Supreme Court in Chandris created a two-prong test that a worker’s duties must contribute to the function of the vessel or accomplishment of its mission, and he must have a connection to the vessel in navigation that is substantial in duration in nature. The guideline for what qualifies as “substantial” in terms of duration is generally 30% of time serving aboard a vessel, although the Chandris court noted this percentage was one from which the court could depart in appropriate cases. In Harbor Tug & Barge Co. v. Papai, the Supreme Court gave substance to the duration and nature inquiry by stating that to be a seaman, a worker must regularly be exposed to the perils of the sea.

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Pitre v. Custom Fab of La., LLC, No. 12-1074, 2013 WL 4499029 (E.D. La. Aug. 20
2013)

A welder working aboard a vessel offshore was injured when he fell from a scaffold and onto the vessel's deck. A motion for summary judgment was filed by his employer seeking to determine if the injured welder was a seaman under the Jones Act allowed to bring a civil action against his employer. To determine whether the welder was a seaman, the court used the two-prong test issued by the Supreme Court in Chandris, Inc. v. Latsis and demonstrate that (1) his duties contributed to the function of the vessel or to accomplish its mission, and (2) there was a connection to a vessel or identifiable group of vessels in navigation that was substantial in terms of its duration and nature.

The first prong of the test was relatively easy to satisfy, and the court found that Pitre contributed to the function of the vessel in that he was at sea when servicing the ROV system, which was an important part of the vessel's function of drilling for oil. Under the second prong, while it was shown that the welder had only just begun his assignment a few days prior to the accident, it was also shown that Pitre agreed to stay aboard for this two to three month job working ten to twelve hours per day on the vessel. The court reasoned that a jury could conclude this qualified as substantial in duration. Additionally, the court found that a jury could also potentially find that the welder's work would have regularly exposed him to perils of the sea. The court therefore denied granting summary judgment allowing the issue to go to trial on seaman status.
Larry Naquin, Sr. ("Naquin") was a vessel repair supervisor at the EBI shipyard facility in Houma. After Naquin was severely injured in an accident in the shipyard, he filed suit and a jury found that Naquin qualified as a seaman, that EBI was negligent under the Jones Act, and awarded him money damages. On appeal, because the evidence support the jury's determination of seaman status and liability, the Fifth Circuit affirmed the lower court's judgment on liability. However, because the damages determination was erroneously based upon emotional anguish resulting from the death of a third party, it vacated the damages award and remanded for a new trial on damages.

EBI manufactures, operates, and maintains a fleet of specialty lift-boats and marine cranes. EBI employed Naquin at its shipyard in Houma, Louisiana, where he had served as a vessel repair supervisor since 2005. Naquin's primary responsibility as a vessel repair supervisor was the maintenance and repair of EBI's fleet of lift-boat vessels. Ordinarily, Naquin worked aboard the lift-boats while they were moored, jacked up, or docked in EBI's shipyard canal. Naquin spent approximately 70 percent of his total time working aboard these vessels, including inspecting them for repairs, cleaning them, painting them, replacing defective or damaged parts, performing engine repairs, going on test runs, securing equipment, and operating the vessel's marine cranes and jack-up legs. Two to three times per week, Naquin would do his work while the vessel was being moved to another position in the canal. Occasionally, EBI dispatched Naquin to repair a vessel or fill in as a vessel crane operator while the vessel was operating in
open water. Naquin spent the remaining 30 percent of his time working in the shipyard's fabrication shop or operating the shipyard's land-based crane.

In November 2009, Naquin was using the shipyard crane, which had been designed and constructed by EBI, to relocate a test-block, a heavy iron weight used to test the lifting capacity of cranes. Although the test-block was well within the crane's rated capacity, the crane suddenly failed. The boom and crane house separated from the crane pedestal. As the crane toppled over onto a nearby building, Naquin was able to jump from the crane house. He sustained a broken left foot, a severely broken right foot, and a lower abdominal hernia. Naquin's cousin's husband, who happened to be another EBI employee, was working in the building and was crushed by the crane and killed. Naquin learned of his death while in the hospital after the accident later that same day.

Naquin filed suit under the Jones Act alleging that EBI was negligent in the construction and/or maintenance of the shipyard crane. After a three-day trial, a jury concluded that Naquin was a Jones Act seaman and that EBI's negligence caused his injury. The jury awarded Naquin $1,000,000 for past and future physical pain and suffering, $1,000,000 for past and future mental pain and suffering, and $400,000 for future lost wages. EBI immediately filed motions requesting a judgment as a matter of law, a new trial, a new trial on damages, and remittitur. The district court denied all of EBI's post-trial motions and the employer then appealed to the Fifth Circuit arguing that Plaintiff was not a Jones Act seaman, and that the district court erred in admitting evidence of Plaintiff's relative's death for his emotional damages claims.
Applying the Supreme court test of *Chandris* (described above), the court found Naquin contributed to the function of the vessel since he spent almost 70% of his time repairing and maintaining the lift-boat vessels his employer operated. Although Naquin’s job typically only required him to work on docked vessels or vessels near the shore, the court found that his work was substantial in nature and he was exposed to perils of a maritime work environment. For these reasons, the court upheld the trial court finding that Plaintiff was a seaman.

On the subject of whether the court improperly admitted evidence regarding the death of the relative, the court noted the Jones Act does not permit compensation for emotional damages resulting from the death of another person. The court reasoned that the negligence provision of the Federal Employers’ Liability Act ("FELA") (incorporated into the Jones Act and which extended FELA jurisprudence for the Jones Act) applies the test to determine whether a worker qualifies for an emotional damage award. That test is whether he was in the “zone of danger” of the accident. The court found while Naquin was in the zone of danger, it had to determine if Naquin was then eligible for a full spectrum of emotional damages, including emotional harm arising from an injury to another person.

The court reasoned emotional damage awards under the Jones Act are limited to damages for emotional harm suffered from either being physically injured or almost physically injured. But, they did not include emotional harm from having witnessed the injury of someone else. Therefore, Plaintiff could recover for the emotional harm from his injuries but could not recover damages for emotional harm strictly arising out of the death of his relative. Since the appeals court could not determine whether the emotional
damages award was based on Plaintiff’s own injury or fear of injury or whether it was based on the death of his relative. As a result, the court remanded that part of the case for a new trial on damages.

As an aside, a Petition for Certiorari on the question of whether emotional damages arising from the death of a relative are recoverable under the Jones Act was filed with the U. S. Supreme Court in July and the matter was scheduled for conference and consideration by the court on October 10, 2014.


Plaintiffs in this case are two ironworkers, a foreman and an ironworker, who were severely injured in the course of the reconstruction of the Interstate-10 twin span bridge across Lake Pontchartrain following Hurricane Katrina. The two performed part of their work from a derrick barge, BIG MAC, and part from the bridge itself. For purposes of the Jones Act claims, the district court found that they were seaman awarding Jones Act damages. The employer appealed the district court's conclusion that the men contributed to the mission of the derrick barge and had a connection to it which was substantial in terms of nature and duration. The Fifth Circuit affirmed the judgment and the conclusion that both men are seamen under the Jones Act.

The court once again relied on the two-prong test in *Chandris* and determined that the men easily satisfied the first prong, since the barge was a vessel in navigation, and the men's primary responsibility was to aide in the vessel’s purpose of constructing the Pontchartrain Bridge. As to the foreman, the court found that his connection to the vessel was substantial in duration since he spent anywhere from 30 to 95% of his time...
on the barge supervising the men and materials to construct the bridge. The fact that the foreman’s job as an ironworker (who returned to shore daily) was traditionally thought to be a land-based occupation did not preclude the court from classifying him as a seaman. Instead, the court found, based on Fifth Circuit precedent, that even a crane operator who performed a traditionally land-based job and which never carried him beyond the immediate vicinity of the port was a seaman as a matter of law; i.e. he remained exposed to maritime perils. Thus, the court held that the foreman was a seaman.

The court applied the same rationale as above with regards to the other ironworker. Even though he was injured on his first day of work, the court considered the full breadth of his intended scope of employment rather than the fact that he was injured on his first day of employment. He was to be a full-time employee on the bridge project. While several workers gave conflicting testimony regarding the amount of time the other worker would have spent on the barge, the Fifth Circuit refused to disturb the trial court’s finding that he would have spent at least 30% of his time aboard the barge. Therefore, the court affirmed the finding he also was a seaman under the Jones Act.

**VESSEL STATUS**

The following cases involve issues regarding whether or not certain structures on water qualify as “vessels” under the Jones Act or general maritime law. 1 U.S.C. § 3 defines a vessel as “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.” Both Riley and
*Warrior Energy Services* discuss the vessel status of offshore floating oil platforms, and *Martin* discusses whether a floating barge quarters qualifies as a vessel.


In this case, a worker on a floating oil and gas spar platform located in the Gulf of Mexico on the Outer Continental Shelf brought an action against his employer and the platform owner for damages under the Jones Act and general maritime law for work related injuries. The central issue in this case was whether the floating platform was a “vessel” as defined by the Jones Act. The court found that the spar was assembled onsite, had no steering mechanism, no system of self-propulsion, or raked bow, and was intended to be used in the same location for 25 years. Additionally, the platform was connected to permanent mooring chains attached to eleven suction piles driven 4500 feet into the seabed. Additionally it was connected to two oil and gas pipelines buried in the seabed of the OCS. The spar could move, at most, a distance of 221 foot within the radius of its mooring.

The court noted that before determining if a person qualifies as a seaman for purposes of the Jones Act, one must determine first whether the structures worked on are “vessels.” The court noted that whether a structure qualifies as a vessel under 1 U.S.C. § 33 hinges on whether the vessel can practically, rather than theoretically, provide transportation on water.

The court found that the floating platform or spar in question was not a vessel for several reasons. The vessel while capable of movement on its moorings, this was not actual transportation. Additionally, disconnecting the infrastructure holding the platform
in place would take approximately sixteen months. The court concluded this was not a vessel and dismissed the worker’s claims under the Jones Act and for unseaworthiness.

In analyzing the maritime tort negligence claim, the court noted that such claim requires a plaintiff to show that a tort occurred on navigable water, that the incident had a potentially disruptive effect on maritime commerce, and that the activity performed at the time of the injury had a substantial relationship to maritime activity. Relying on Fifth Circuit precedent, the court also held that the worker’s claim failed, because construction on this fixed offshore platform did not bear any significant relation to traditional maritime activity. However, the court did note that because the platform was not a vessel, the Longshore Harborworkers Workmans Compensation Act allowed the worker to recover from his employer for the injury while working on the Outer Continental Shelf.


The TITAN is a floating oil and gas production facility moored on the Outer Continental Shelf miles offshore of Louisiana. This suit results from services provided by a contractor to the facility for which he was not paid. After the owner of the facility declared bankruptcy, the contractor filed suit against the TITAN *in rem* claiming a maritime lien for its services.

The court first discussed the claim under the Maritime Lien Act, which provides that “a person providing necessaries to a vessel . . . has a maritime lien on the vessel [and] may bring a civil action in rem to enforce the lien.” Thus, the main issue under this analysis was whether the facility was a vessel as required by the Act. The court again
pointed to the definition of a vessel under 1 U.S.C. § 3 and expounded upon by the U.S. Supreme Court in *Stewart v Dutra Construction* that it must be “practically capable of maritime transportation.” The court relied on the following characteristics for its findings: (1) the TITAN was moored to the seabed by twelve mooring tendons connected to massive anchor piles, (2) had not moved since it was constructed and installed three years earlier, (3) could not propel itself other than repositioning itself within a 200 foot radius by manipulating its mooring attachments, and (4) moving the structure would require over one year of preparation, 15 weeks for execution and cost between $70 and $80 million dollars. In light of these findings, the court held the facility was not a vessel and therefore the contractor could not obtain or enforce a maritime lien on the structure.


Martin brought a Jones Act claim for negligence and unseaworthiness against his employer, Fab Con, after an injury sustained when he slipped on diesel oil on the quarters barge UNITY. Defendants moved to dismiss the case for lack of subject matter jurisdiction, arguing that the barge was not a vessel. The court agreed.

The court pointed to 1 U.S.C. § 3 but noted that, in spite of the general definition provided by the statute and contrary district and appellate court rulings, the Supreme Court in *Lozman v. City of Riviera Beach, Fla.*\(^9\) had held that “not every floating structure is a vessel.” Instead, according to *Lozman*, a court must determine whether a reasonable person looking at the structure’s characteristics and activities would consider the structure as designed to regularly and practically transport people or things over water. The court noted that the Supreme Court had previously specified that such

\(^9\) 133 S.Ct. 735 (2013)
a quarters barge should not be considered a vessel merely for the fact that it can transport its own furnishings and personal effects over water. Instead, the *Lozman* Court implied that would consider a structure that transported cargo, rather than “mere appurtenances” to be more readily classifiable as a vessel.

The court here found that the barge in question was not a vessel for several reasons. The barge had no steering mechanism, was incapable of self-propulsion, had been stationary for several years, and its living quarters were similar to those used on land. Additionally, the barge had never transported any cargo besides personal effects and its own furnishings, and it was not designed to a practical degree to transport people or cargo over water. Instead, the court found it was designed exclusively as a “floating hotel” with living quarters. For these reasons, the court found it was not a vessel. This determination was fatal to Plaintiff’s negligence and unseaworthiness claims against his employer and the court granted summary judgment to defendants.

**VALIDITY OF SEAMAN’S SETTLEMENT AND RELEASE**


This case stems from back injuries sustained by Plaintiff, a deckhand, while working within the course and scope of his employment. The deckhand sought treatment the day of the incident at a hospital emergency room, where he was diagnosed with a pulled muscle and advised he could not work. He returned to the hospital emergency room for a follow-up, where a second physician cleared him for work without performing any diagnostic tests or referring the deckhand to a specialist. A day later, Plaintiff met a claims adjuster at a gas station and signed a release
relinquishing all claims against his employer in connection with the incident for a payment of $530. A month later, after the Plaintiff experienced more back pain, he saw an orthopedist who ordered an MRI and later diagnosed him with herniated discs that resulted from the incident. Despite the signed release, Plaintiff sued his employer alleging negligence and unseaworthiness and seeking maintenance and cure. Defendant moved for summary judgment based on the settlement agreement.

The court scrutinized the settlement agreement to determine its validity. In reviewing releases involving a seaman, the court recognized that it must determine whether the seaman had an informed understanding of his rights and a full appreciation of the consequences of executing the agreement. In its analysis, the court looked at several factors, including: (1) the adequacy of consideration; (2) the nature of medical and legal advice available to him; (3) whether the parties negotiated at arm’s length and in good faith; and (4) whether there was an appearance of fraud, deception, coercion, or overreaching.

In opposition to the motion, the plaintiff’s affidavit set out that he did not understand the full ramifications of the release. The judge found this was sufficient to create a genuine issue regarding whether Nuber executed the release freely and with an understanding of his rights. Additionally, the court noted the deckhand only completed special education classes up to the 10th grade level and the settlement amount paid of $530 was not adequate. The court was uncomfortable with the fact that the deckhand signed the release in a gas station the same day he received treatment without any legal advice. The judge went on to note that the Fifth Circuit has repeatedly emphasized the importance of legal counsel in determining whether a seaman fully
understands the consequences of releasing his rights. The court also cited the inadequacy of the medical advice initially given to the deckhand, and the lack of diagnostic tests performed by the emergency room physicians. In light of these factors weighing against the deckhand’s full understanding of the consequences of the release, the court denied Defendant’s motion for summary judgment.

**DEEPWATER HORIZON/BP CASE:**

*In re Deepwater Horizon, 739 F.3d 790 (5th Cir. 2014)*

This was an interlocutory appeal from the district court's order certifying a class action and approving a settlement under Rule 23 of the Federal Rules of Civil Procedure. The parties including BP sought final approval of a proposed class-action settlement regarding certain claims, and moved for final class action certification for settlement purposes. The United States District Court for the Eastern District of Louisiana approved the settlement. Certain plaintiffs who objected to the settlement filed appeals. BP originally supported both class certification and settlement approval before the district court. However, in this appeal BP also asked the Fifth Circuit to vacate the district court's order, although BP was not formally an appellant. BP argued certain class members did not have standing to sue. BP also complained that the claims administrator paid out money to businesses and individuals that did not suffer losses resulting from the oil spill and had added thousands of businesses that suffered no injury at all to the plaintiff class. As a result they asserted the provisions of Rule 23 were not satisfied.
The court rejected the arguments of both BP and the objectors. It found that class certification is not precluded simply because a class may include persons who have not been injured by the defendant’s conduct. The court determined that for standing purposes, it was sufficient that plaintiffs sought to recover for an economic harm that they allege they suffered, because for argument’s sake, the court assumes the merits of their claims at the Rule 23 class certification stage.

*In re Deepwater Horizon: Ranger Ins., Ltd. v. Transocean Offshore Deepwater Drilling, Inc.*, 728 F.3d 491 (5th Cir. 2013)

In the original appeal in this matter reported at 710 F. 3d 338, the Fifth Circuit held under Texas law that BP (having been named as an additional insured in the insurance policies of Transocean) was entitled to full coverage under the Transocean policies. This was despite the fact that the drilling contract between BP and Transocean only required the insurance to make BP an additional insured for liabilities assumed under the drilling contract. This ruling by the Fifth Circuit held that BP was entitled to $750 million in pollution liability coverage under the Transocean policies. It was based on the Fifth Circuit’s interpretation of the decision by the Texas Supreme Court in *Evanston Ins. Co. v. ATOFINA Petrochems., Inc.*, 256 S.W. 3d 660 (Tex. 2008).

The insurers and Transocean petitioned for rehearing and the Fifth Circuit elected to withdraw its original opinion. At the same time it certified the following two questions to the Texas Supreme Court:

1. Whether *ATOFINA* compels a finding that BP is covered for pollution damages, because the language of the umbrella policies alone determines the extent of BP’s coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are “separate and independent”?
(2) Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, given the facts of this case?

On the first question of certification, BP argues that under *ATOFINA*, the court should not look at the underlying drilling contract to determine the scope of coverage. Instead, BP argues additional insured coverage applies to the full extent of the policy. Additionally, since the language in the Transocean policies does not limit coverage, the additional insured should enjoy the full benefits of the policy. Transocean and its insurers disagreed claiming that the insurance policies’ language incorporates the underlying drilling contract, thereby limiting the scope of additional insured coverage.

With regard to the second question, BP argued that *ATOFINA* correctly applies the rule that ambiguities in an insurance policy’s language should be construed in favor of coverage. Any doubt about coverage should be interpreted in a light most favorable to coverage for BP. Transocean and its insurers argue several points regarding the second question for certification, including that: (1) the documents are not ambiguous, so *contra proferentem* does not apply; (2) the insurers did not aid in drafting the drilling contract, so the principle cannot be applied to construe the document against the insurers; and (3) even if the court finds differently, the court should find that the “sophisticated user” exception should apply, because BP was a sophisticated company on equal footing in negotiations with Transocean’s insurers.

The Texas Supreme Court granted review on June 13, 2014 and agreed to address the questions for certification identified above. Oral arguments on the case were scheduled for September 16, 2014.
Both Anadarko and BP owned the Macondo well being drilled by Deepwater Horizon, a mobile offshore drilling vessel, owned and operated by Transocean. In April 2010, the cement that sealed the well failed and the blowout preventer on top of the well also failed. An uncontrolled flow of oil went through the riser connecting the well to the Deepwater Horizon vessel. The vessel caught fire and capsized and oil spewed through the broken riser into the Gulf of Mexico for months.

The government brought a civil enforcement action for violations of the Clean Water Act against BP and Anadarko as co-owners of the exploratory well involved in the Deepwater Horizon oil spill. The United States District Court for the Eastern District of Louisiana granted summary judgment in favor of the government on the question of defendants’ liability under 33 U.S.C. § 1321(b)(7)(A) (2006) (“the Clean Water Act”), which imposes mandatory penalties upon the owners of facilities “from which oil or a hazardous substance is discharged.” Defendants did not dispute that a massive amount of oil discharged into Gulf of Mexico or that they owned the well. The only question was whether it was beyond factual dispute that the well itself was a facility “from which” the harmful quantity of oil was discharged. The defendants argued on appeal that they did not violate the Clean Water Act because oil entered the environment through the riser which was part of Transocean’s vessel equipment rather than entering the water directly from their well. The Fifth Circuit rejected the argument and affirmed the district court ruling.

In doing so, the Fifth Circuit court first analyzed the language of the Clean Water Act. They concluded that discharge “includes but is not limited to, any spilling, leaking,
pumping, pouring, emitting, emptying, or dumping,” all of which the court found denotes the loss of controlled confinement. The district court below held that discharge is the point where “uncontrolled movement begins” and concluded that oil flowing from the well through the Deepwater Horizon’s riser was a discharge from the well, regardless of the fact that the oil flowed through parts of the vessel prior to entering the Gulf of Mexico. The Fifth Circuit affirmed that the cement, directly deposited into the well, failed, resulting in the loss of controlled confinement of oil such that the oil ultimately entered navigable waters. The well was therefore the facility “from which oil or a hazardous substance was discharged” “into or upon the navigable waters of the United States.

The court also rejected BP and Anadarko’s attempt to shift liability by alleging the third-party fault of the vessel owner. The Fifth Circuit in particular recognized the Clean Water Act as an absolute liability section with few narrowly-interpreted exceptions, not including an exception for civil-penalty liability. Thus, the Fifth Circuit affirmed the district court’s grant of partial summary judgment with respect to the well owners’ liability for civil penalties under the Clean Water Act. BP has applied to the Fifth Circuit for a rehearing en banc to review this decision which is still pending.

In Re: Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico

This is the ruling by Judge Barbier following the Phase One trial on liability held from February to April 2013. In this 153 page ruling, the Court concluded that BP was liable for gross negligence and willful misconduct in causing the blowout of the Macondo well and resulting oil spill. The Court found that contract parties Transocean, owner of
the drill unit DEEPWATER HORIZON, and Halliburton, the cement contractor, were liable as well but that they were merely negligent.

In evaluating the trial evidence, Judge Barbier focused on the recklessness of the personnel from BP in continuing to drill in spite of negative pressure tests indicating the well was not under control. More complex negligent acts by BP increased the risk of losing control of the well and contributed to the court finding there was gross negligence. The court apportioned fault 67 percent to BP, 30 percent to Transocean, and 3 percent to Halliburton.

Of note, the court concluded that the indemnity and release clauses in the contracts that Transocean and Halliburton had with BP were valid and enforceable and may mean most of the liability of these two contractors will shift to BP by the contractual indemnity provisions.

This finding of gross negligence and willful misconduct means BP is subject to enhanced penalties under the Clean Water Act and could lead to penalties estimated as high as $18 billion dollars.

With regard to the limitation of liability filing by Transocean, the Court recited a number of actions by Transocean that were within the “privity and knowledge” of the owner which meant the company could not be shielded by the limitation statute.

Judge Barbier also evaluated BP’s liability for punitive damages under Fifth Circuit precedent. He concluded that BP was not subject to punitives. While the court found that the conduct by BP’s employees would make an award of punitive damages appropriate, the rule in the Fifth Circuit is that the operational recklessness or willful disregard by company personnel must emanate from corporate policy or a corporate
an officer with policy-making authority who participated, approved or ratified the egregious conduct. This was the precedent in *In re: P & E Boat Rentals.*

While BP prevailed on the punitive damages claim, the issue may not be resolved. The State of Alabama asked the Court to make separate findings with respect to the punitive factors since not all circuits follow the Fifth Circuit rule and some claims may be determined in other circuits. The Court granted Alabama’s request and analyzed the factors under the Ninth and First Circuit standards. The court found the well site representatives of BP were in a “managerial capacity”, acted in the scope of their employment, and there was some level of corporate culpability for the conduct. Judge Barbier noted that to the extent the Ninth or First Circuit standards applied, BP would be liable for punitives.

BP was also found liable for damages and cleanup costs under OPA and that Transocean could also be deemed an “operator” under OPA which makes the company liable for cleanup costs.

Phase Two of the trial conducted between September and October 2013 was focused on the response to the disaster and the amount of oil spilled. No ruling has come yet from that trial. Phase Three of the trial will focus on penalties and is scheduled to begin in January 2015.

**UBERRIMAE FIDEI AS ENTRENCHED MARITIME LAW (just not in the 5th Circuit)**


The *Mark Twain*, a cement barge owned by Continental Cement Company, LLC and Summit Materials, LLC (Continental Cement), sank in the Mississippi River at St.
Louis. Insurers for the barge investigated the sinking and declined coverage for both the loss of the hull and the expense of removing the barge from the river. The insurers then brought this action in the district court seeking a determination of their rights and obligations under the insurance policies. Continental Cement counterclaimed for breach of contract and vexatious refusal to pay under Missouri law.

The insurers later located a survey of the *Mark Twain* from 2008 which indicated that the barge had not been watertight at the time Continental Cement obtained its policies. On the grounds that Continental Cement had breached its duty of “utmost good faith” by withholding this survey from its insurance application, the insurers amended the complaint to assert that the insurance policies were void. Continental Cement responded with a motion for partial summary judgment, asserting in part that the Eighth Circuit had not recognized the defense of utmost good faith in maritime insurance cases. The district court disagreed, concluded that the defense was “entrenched” in federal law, and denied the summary judgment motion. The case proceeded to trial, and the jury returned a general verdict in favor of the insurers. The district court entered a corresponding final judgment, and Continental Cement appealed. On appeal, the Eighth Circuit affirmed.

In addressing the merits of the case on appeal, the Eighth Circuit recognized that a dispute arising under a marine insurance contract is generally governed by state law, unless there is an established federal admiralty rule which addresses the issue raised. The insurer submitted the federal common law doctrine of “utmost good faith” or “uberrimae fidei” applied. This doctrine holds that a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the
insurer’s option. If this doctrine of federal law applied, the failure of the insured to disclose conditions of which he was aware and affected the risk would have allowed the insurer to void the contract at its option. However, if instead Missouri state law applied, the insurer would have to show a heightened element of fraud to void the contract.

The Eighth Circuit pointed to our Fifth Circuit decision in the case of Albany Insurance Co. v. Anh Thi Kieu, which identified the following three factors to consider when determining whether a federal maritime rule controls an issue: (1) whether the federal maritime rule constitutes entrenched federal precedent; (2) whether the state has a substantial and legitimate interest in the application of its laws; and (3) whether the state’s rule is materially different from the federal rule. Unbelievably, in the Anh Thi Kieu case, our Fifth Circuit court concluded that all three factors weighed in favor of application of state law and further concluded that the “uberrimae fidei” doctrine was no longer entrenched in maritime law.

The district court in this case called the Anh Thi Kieu decision an “aberration.” On appeal, the Eighth Circuit recognized the Fifth Circuit’s decision in Anh Thi Kieu was contrary to ruling in other circuits, including the Second, Third, Ninth, and Eleventh Circuits which all concluded that “uberrimae fidei” remains firmly established federal maritime precedent. Declining to follow the Fifth Circuit’s ruling, the court determined that the doctrine was indeed an established rule of federal law that

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10 927 F.2d 882 (5th Cir. 1991).
12 AGF Marine Aviation & Transp. V. Cassin, 544 F.3d 255, 262-63 (3d Cir. 2008).
13 Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc., 518 F.3d 645 (9th Cir. 2008) (“in the face of 200 years of precedent, it takes more than a single circuit case and spotty citation in recent years to uproot an entrenched doctrine”).
14 HIH Marine Servs., Inc. v. Fraser, 211 F.3d 1359, 1362-63 (11th Cir. 2000).
superseded Missouri state law. They affirmed the trial court ruling in favor of the insurers.

**NO CAUSE OF ACTION EVEN FOR SEVERE STRESS UNDER JONES ACT**

*Skye v. Maersk Line Ltd Corp.*, 751 F.3d 1262 (11th Cir. 2014)

Plaintiff filed suit against his employer under the Jones Act, 46 U.S.C. §30104, claiming that his working conditions had caused him to suffer left ventricular hypertrophy, a thickening of the wall of the heart, caused by hypertension (high blood pressure). Plaintiff claimed that this condition was caused by severe stress, caused by his employer’s negligence in failing to provide him with reasonable working hours, an adequate number of rest hours, and an adequate number of crew-mates. Plaintiff regularly worked between 90 and 105 hours per week for 10 to 12 weeks at a time. At trial, the jury found the defendant employer liable to plaintiff. The jury’s award of $2,362,299 was reduced to $590,574 by the trial judge on account of plaintiff’s comparative negligence. Defendant moved for judgment as a matter of law on the ground that plaintiff’s complaint was barred by the decision of the U.S. Supreme Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396 (1994). The district court denied the motion and gave judgment for the plaintiff. Defendant appealed.

The Eleventh Circuit reversed, holding, with considerable reluctance, that *Gotshall* did, indeed, preclude the possibility of recovery for the plaintiff’s condition. In *Gottshall*, the Supreme Court held that injuries caused by the long-term effects of work-related stress are not cognizable under the Federal Employers’ Liability Act (FELA)
because they are not caused by any physical impact or fear from the threat of physical impact. Because the Jones Act simply picks up FELA remedies, including the case law about FELA remedies, the Eleventh Circuit felt compelled to arrive at the conclusion that a worker such as the plaintiff, who had suffered severe work-related stress, had no remedy from his employer.

The Eleventh Circuit’s reversal was not exactly resounding. Judge Fay concurred in the result, feeling bound by Gottshall, but he expressed the opinion that the majority opinion in Gottshall “is contrary to the language, purpose and spirit” of FELA (Skye at 1267). Judge Fay said that the core purpose of both FELA and the Jones Act is to provide covered employees with a safe place to work. “Being required to work 90 and 105 hours per week for 70 to 84 days at a time is hardly being given a safe place to work.” (Skye, at 1267.) Judge Fay concluded his concurrence with the hope (perhaps quixotic) that the Supreme Court will revisit this area of the law.

Judge Jordan went still further, dissenting on the basis that Gottshall should be read narrowly, and could be distinguished in the present case on the basis that the plaintiff had suffered physical injury (damage to his heart), not merely emotional injury.

REMOVAL

The plaintiff in an admiralty action may bring his or her claim either in state court or in federal court. The relevant statute, 28 U.S.C. §1333, confers jurisdiction on federal district courts in admiralty matters, but it contains a clause, known as the “saving to suitors” clause, which reserves to plaintiffs the right to seek a remedy in state court.
Generally speaking, any action commenced in state court may be removed by the defendant to federal court if there exists a basis for federal court jurisdiction. For example, if a Louisiana plaintiff sues a Texas defendant in state court in Louisiana, the Texas defendant may remove the case to federal district court because diversity of citizenship is a basis for federal court jurisdiction, and the parties are citizens of different states. (28 U.S.C. §1332 confers jurisdiction on federal courts in diversity cases, provided the amount claimed is more than $75,000.) The federal court must then decide whether the case was properly removed, in which case it will retain the case, or whether to remand the case to state court. The removing party bears the burden of persuading the federal court to keep the case.

Until recently, it had long been held that admiralty cases are an exception to the general removal principles just described. The rule in admiralty cases was simple: There could be no removal of admiralty cases from state court to federal court, despite the fact that federal courts have jurisdiction in admiralty cases. That view was grounded in the “saving to suitors” clause, which was first enacted by Congress in 1789, but it derived considerable authoritative support from the decision of the U.S. Supreme Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), where Justice Frankfurter said: “[M]aking maritime cases removable to the federal courts…would make considerable inroads into the traditionally exercised concurrent jurisdiction of the state courts in admiralty matters – a jurisdiction which it was the unquestioned aim of the saving clause of 1789 [i.e., the “saving to suitors” clause] to preserve.”

Recently, some district courts have begun to hold that the traditional rule, as stated in *Romero*, has been changed by amendments made to the general removal

Other district courts have continued to hold that the traditional rule represents the law, even after the 2011 amendments.

This rather technical-sounding difference of opinion between district courts has significant implications in practice, particularly in personal injury cases, where plaintiffs usually much prefer to bring their claims before state court juries rather than federal court judges. The issue has been considered in literally dozens of district court cases in the past two years. The decisions are divided between the two positions, for and against removal. For reasons that will be explained below, there is little immediate prospect of clarification of this question by a circuit court of appeals.

Before the amendments in 2011, subsection (b) of the general removal statute (28 U.S.C. §1441(b)) provided that there could be removal of what are usually called “federal question” matters (“a claim or right under the Constitution, treaties or laws of the United States”), but the Supreme Court held in Romero that admiralty cases do not fall into that category. The second sentence of subsection (b) went on to say that in “[a]ny other such action”, there could only be removal “if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.” In In re Dutile, 935 F.2d 61, 1991 AMC 2979 (5th Cir. 1991), the Fifth Circuit held that admiralty and maritime claims fell within the second sentence of paragraph (b) because they were “other such action[s],” given that Romero had held that they are not federal question claims, which would fall within the first sentence. The effect was that there could only be removal of an admiralty claim if there was complete diversity of
citizenship based on out-of-state defendants (see Dutile at 63). The second sentence of §1441(b) prohibited removal except in that narrow category of cases.

According to Dutile, the pre-2012 version of the removal statute only authorized removal of admiralty claims from state to federal court in very limited circumstances, and prohibited removal otherwise. If a Texas plaintiff sued a Louisiana defendant in an admiralty claim in Louisiana state court, there could not be removal. If a Louisiana plaintiff sued a Louisiana defendant in an admiralty claim in Louisiana state court, there could not be removal. If a Louisiana plaintiff sued a Louisiana defendant and a Texas defendant in an admiralty claim in Louisiana state court, there could not be removal. If, however, a Louisiana plaintiff sued a Texas defendant (and only a Texas defendant) in an admiralty claim in Louisiana state court, there could be removal, according to Dutile.

In 2011, the removal statute was redrafted and reorganized. Now, 28 U.S.C. §1441(b)(2) simply says that any action based solely on a “federal question” may not be removed from state to federal court if any of the defendants is a citizen of the state in which the action is brought. It no longer provides what should happen in cases that do not fall within the “federal question” category, as it used to do in the second sentence of the old §1441(b).

Some district courts have interpreted this amendment as a deliberate effort by Congress to remove the prohibition against removal that courts like the Dutile court saw in the second sentence of the old §1441(b). Without that prohibition, §1441(a) of the statute simply says that an action may be removed if the federal district court has original jurisdiction over the action – which federal courts do in admiralty cases. Thus, those courts have held that admiralty cases are now freely removable to district court,
even if there is no diversity of citizenship between the parties. In other words, for example, an admiralty claim brought by a Texas plaintiff against Texas defendants in a Texas state court may be removed to federal court. See, e.g., *Ryan v. Hercules Offshore, Inc.*, 945 F.Supp.2d 772 (S.D. Tex. 2013). Courts taking this attitude refuse to remand the removed case to the state court from which it came.

Other district courts have held that the removal statute does not now, and never has, authorized removal in admiralty cases, because the “saving to suitors” clause specifically provides that admiralty claims may be brought in state court. According to that view, the original jurisdiction that federal courts have to hear admiralty cases under 28 U.S.C. §1333 is qualified by the terms of §1333 itself, which gives state courts concurrent jurisdiction in admiralty cases. Thus, the basic premise of the removal statute - original jurisdiction conferred on the federal court - is not present. To put it another way, although the Fifth Circuit in *Dutile* might have relied on the language in the second sentence of the old §1441(b) as the basis for denying removal of admiralty claims, that was never the real reason for the non-removability of such claims. The real reason was the “saving to suitors” clause of §1333. See, e.g., *Pierce v. Parker Towing Co., Inc.*, --- F.Supp.2d ---, 2014 WL 2569132 at *12 (S.D. Ala, 2014); *Cassidy v. Murray*, No. GLR-14-1204, 2014 U.S. Dist. Lexis 100761 at *11 (D. Md., July 24, 2014). Courts taking this attitude remand the removed case to the state court from which it came.

In the competition between federal courts remanding and those refusing to remand, the score is now in favor of remand at the time of writing (October 7, 2014), reversing an earlier trend in favor of refusal, but there can be no doubt that either
alternative remains well and truly open. The issue has arisen most often in Louisiana
and Texas, but there are also cases from Alabama, Alaska, Hawaii, Kentucky, Mary-
land, and Washington. It is difficult to keep track precisely, but there seem (as of
October 7, 2014) to be almost 30 cases so far, with the score currently standing at 19
for remand and 9 for removal. (The cases are collected in an Appendix to this note.
This score counts only those cases where the question whether general maritime law
claims are removable was determinative.)

There are disagreements within districts and between districts, particularly here
in the Fifth Circuit. Normally, one would expect such intense disagreement on an
important practical point to be resolved authoritatively by a circuit court of appeals, but
that is unlikely to happen in relation to this issue. The general rule is that there cannot
be an appeal from an order that is not final, unless permission is given for what is
known as an interlocutory appeal, which is an appeal from one of the court’s orders
before the case is finally decided. An order denying remand is not final, as the case will
continue in the federal court once that court has retained the case after removal. Thus,
an order denying a motion to remand is not immediately appealable: see Caterpillar Inc.
v. Lewis, 519 U.S. 61, 72, 117 S.Ct. 467, 475 (1996). If there is an appeal from the
federal district court’s decision after it has retained the case, including a decision to
dismiss the case, the appeal court can review the refusal to remand as part of the
district court’s final disposition of the case. See, e.g., Manges v. McCamish, Martin,
Brown & Loeffler, P.C., 37 F.3d 221, 223 n.4 (5th Cir. 1994)(“We have jurisdiction over
the district court’s denial of [the] motion to remand to state court because it is coupled
with the appeal of a final judgment”); City of Warren v. City of Detroit, 495 F.3d 282, 286
(6th Cir. 2007)(“Because the district court dismissed the case, thereby rendering a final judgment, this court has jurisdiction to consider the denial of the motion to remand.”)

Although there is no appeal as of right from an order refusing to remand, the court may certify the case for interlocutory appeal under 28 U.S.C. §1292(b). In order to do that, however, the court must “be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” The first part of this statutory test – substantial ground for difference of opinion – is clearly satisfied in relation to this issue, but as yet no judge refusing remand has given permission for an interlocutory appeal, perhaps on the basis that the second part of the test is not satisfied.

One might think that an order granting remand should be regarded as final (and thus appealable) because it brings an end to the proceedings in federal court. However, 28 U.S.C. §1447(d) provides that an order remanding a case to the state court from which it was removed “is not reviewable on appeal or otherwise.” The U.S. Supreme Court has said that §1447(d) prohibits appellate review of remand, no matter how plain the legal error in ordering remand (see Kircher v. Putnam Funds Trust, 547 U.S. 633, 126 S.Ct. 2145 (2006)), so it seems that the only possible avenue for an appeal to find its way to a circuit court of appeals is by interlocutory appeal from an order refusing remand. Unless and until that happens, district courts are free to go on disagreeing with one another, with the disposition of the issue depending more on the attitude of the judge than on the facts or posture of the case.
The basic (albeit rather complex) question of whether or not to remand cases that have been removed is complicated still further by questions of severability. For example, there is no doubt that a Jones Act claim cannot be removed from state court to federal court. *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 455, 121 S.Ct. 993, 1004 (2001) (“[A] Jones Act claim...is not subject to removal to federal court even in the event of diversity of the parties”) If, as is very commonly the case, the plaintiff brings both a Jones Act claim in state court and general maritime law claims for unseaworthiness and maintenance and cure, there is then a question of what impact the non-removability of the Jones Act claim should have on the removability of the general maritime law claims. Can the plaintiff’s action be severed into parts, with the general maritime law claims going to federal court and the Jones Act claim going to state court? Or must they all be kept together in one court?

The answers to those questions depend, in part, on another subsection of the general removal statute, 28 U.S.C. §1441(c). This subsection, too, was amended in 2011. Before 2012, §1441(c) provided that if a “separate and independent claim or cause of action” was removable, but was joined with non-removable causes of action, the entire case could be removed, including the otherwise non-removable parts. That led to the question whether a Jones Act claim was “separate and independent” from claims for unseaworthiness and maintenance and cure, a question that was generally answered in the negative. Because the three typical personal injury actions - Jones Act, unseaworthiness, and maintenance and cure – usually arise out of the same incident and the same circumstances, they were not usually regarded as “separate and independent.” As a result, the presence of a non-removable Jones Act usually meant
that none of the case could be removed to federal court, because the “separate and independent” requirement of the old §1441(c) was not satisfied.

However, the “separate but independent” requirement was removed from §1441(c) with effect from January 2012. That has led some courts to conclude that the non-removable Jones Act claim can be severed from the general maritime law claims and remanded to state court, while the federal court keeps the removed general maritime law claims: see, e.g., *Wells v. Abe’s Boat Rentals, Inc.*, 2013 AMC 2208, 2212 (E.D. La 2013); *Harrold v. Liberty Ins. Underwriters, Inc.*, Nos 13-762-JJB-SCR, 13-831-JJB-SCR, 2014 WL 688984 (M.D. La, Feb. 20, 2014). Here, too, other district courts disagree, holding that even under the new, post-2011, version of §1441(c) there cannot be removal of general maritime law claims joined with a Jones Act claim. See, e.g., *Freeman v. Phillips 66 Co.*, Nos. 14-311, 14-624, 2014 WL 1379786 (E.D. La, Apr. 8, 2014); *Tilley v. Am. Tugs, Inc.*, No. 13-6104 Section N(5), 2014 U.S. Dist. Lexis 95478 (E.D. La, May 16, 2014); *Unterberg v. Exxon Mobil Corp.*, No. 14-00181, 2014 U.S. Dist. Lexis 94009 (D. Haw., July 10, 2014). Courts taking the latter view point out that the threshold requirement of the new §1441(c) is the presence of a “federal question” claim, which *Romero* long ago concluded does not include general maritime law claims, so that even the new §1441(c) prevents removal of general maritime law claims, even if they would otherwise be removable, if they are joined with a non-removable Jones Act claim: *ibid.*

Where the plaintiff joins a Jones Act claim in state court with claims under the Outer Continental Shelf Lands Act (OCSLA), an extra twist is added. Here, the threshold requirement of the new §1441(c) apparently is satisfied, as OCSLA claims are
“federal question” claims because they are conferred by a federal statute. That has led some district courts to conclude that the OCSLA claim may be severed and removed to federal court, while the non-removable Jones Act claim is remanded to state court: see, e.g., Wells v. Abe’s Boat Rentals, Inc., 2013 AMC 2208 (E.D. La 2013); Landerman v. Tarpon Operating and Development, L.L.C., --- F.Supp 2d. --- (E.D. La, 2014).

Appendix


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