# **Recent Development: Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits\*, \* An earlier version of this article was presented as a paper at the 17th Annual Admiralty and Maritime Law Conference sponsored by the Office of Continuing Legal Education of the University of Texas Law School on October 24, 2008, in Houston, Texas.**

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**Author:** David W. Robertson+ and Michael F. Sturley\*\*

+ W. Page Keeton Chair in Tort Law, University Distinguished Teaching Professor, University of Texas Law School.

\*\* Stanley D. and Sandra J. Rosenberg Centennial Professor, University of Texas Law School.

**Text**

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I. Introduction

This is the eighth article in a series of annual reports on U.S. admiralty and maritime law and practice. [[1]](#footnote-2)1 In these articles we try to call attention to the principal national-level developments that bear on the work of admiralty judges, lawyers, and scholars, and we look more closely at the relevant work of the United States Courts of Appeals for the Fifth and Eleventh Circuits. We do not warrant full coverage, although with respect to the Fifth and Eleventh Circuit, we try to be fairly thorough. [[2]](#footnote-3)2

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II. Miscellaneous Developments at the National Level

A. Jones Act Venue Provision Repealed

When Congress enacted the 2006 recodification [[3]](#footnote-4)3 of the Jones Act as 46 U.S.C. § 30104, it included a subsection (b) that provided:

An action under this section shall be brought in the judicial district in which the employer resides or the employer's principal office is located. [[4]](#footnote-5)4

Congress has now deleted this venue provision. [[5]](#footnote-6)5 The deletion is declared to "be effective as if included in the enactment of Public Law 109-304," the 2006 recodification. [[6]](#footnote-7)6 In its entirety, [[7]](#footnote-8)7 therefore, the Jones Act now reads:

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section. [[8]](#footnote-9)8

The repeal of the recodification's venue provision was intended to confirm the traditional understanding of the Jones Act, [[9]](#footnote-10)9 as the accompanying House Judiciary Committee Report explained:

This subsection is being repealed to make clearer that the prior law regarding venue, including the holding of Pure ***Oil*** Co. v. Suarez, 384 U.S. 202 (1966) and cases following it, remains in effect … . Because the codified provision could be read to be inconsistent with that holding, the Committee believes it should be repealed, retroactive to the date of codification, to ensure that the codification has not inadvertently resulted, even temporarily, in a substantive change. [[10]](#footnote-11)10

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B. UNCITRAL's Proposed New Transport Law Convention

Almost seven years ago, the United Nations Commission on International Trade Law (UNCITRAL) reconvened its Working Group III on Transport Law to negotiate a new international convention to replace the Hague, Hague-Visby, and Hamburg Rules. [[11]](#footnote-12)11 Since then, the Working Group has met regularly (generally for two-week sessions) each spring at U.N. Headquarters in New York and each fall at UNCITRAL Headquarters in Vienna. [[12]](#footnote-13)12 It met for the final time in January 2008 to complete the third reading of the proposed new convention and agree on its final substantive provisions. [[13]](#footnote-14)13 The most significant compromise achieved at this meeting was the final agreement on the limitation amounts - 875 SDRs (approximately $ 1300) per package and 3 SDRs per kilogram (approximately $ 2 per pound), which represent a significant increase over the $ 500-per-package limitation under current U.S. law. [[14]](#footnote-15)14

Once the Working Group's draft was complete, the project moved up the chain in the U.N. system. In June 2008, the full Commission reviewed the draft during two weeks of its annual session. [[15]](#footnote-16)15 A number of minor changes were made in the drafting, including the deletion of two articles from the proposed convention. [[16]](#footnote-17)16 With these minor changes, the Commission approved the draft and forwarded it to the General Assembly. [[17]](#footnote-18)17 The General Assembly referred the proposed convention to its Sixth Committee, which is responsible for legal affairs. [[18]](#footnote-19)18 The Sixth Committee discussed the subject (along with the rest of UNCITRAL's work) on October 20. [[19]](#footnote-20)19 In light of the Sixth Committee's approval of the **[\*388]** draft, final approval from the General Assembly should come in November or December 2008. [[20]](#footnote-21)20

The final steps in the process will be the formal signing and ratification. During the Commission meeting in June, the Dutch government extended an invitation to hold the signing ceremony in Rotterdam in September 2009 (which would result in the popular name for the new convention being the "Rotterdam Rules"). [[21]](#footnote-22)21 The official U.N. ceremony will be coordinated with a Comite Maritime International colloquium to discuss the new convention. [[22]](#footnote-23)22 The new convention would then enter into force one year after twenty countries have ratified it. [[23]](#footnote-24)23

C. The United States Coast Guard Withdraws Its Proposed Requirements for Avoiding Recreational Houseboat Propeller Injuries

On October 18, 2007, the Coast Guard issued a notice saying it is withdrawing its proposed requirements for propeller guards, etc., on recreational houseboats. [[24]](#footnote-25)24

D. December 1, 2007, Changes to the Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Appellate Procedure (FRAP)

As we forecast in last year's article, [[25]](#footnote-26)25 a new FRCP Rule 5.2 went into effect on December 1, 2007. It addresses internet access to court records. [[26]](#footnote-27)26 Related changes were made to FRAP 25(a)(5). [[27]](#footnote-28)27

Also, the Style Project was implemented on December 1, 2007. [[28]](#footnote-29)28 FRCP Rules 1 through 86 and Civil Forms 1 through 82 have been rewritten using plain-English style conventions. [[29]](#footnote-30)29 These amendments are supposed to make no substantive changes. [[30]](#footnote-31)30

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E. Proposed Amendment to the Death on the High Seas Act (DOHSA)

During the summer of 2008, identical bills were introduced in the Senate [[31]](#footnote-32)31 and House of Representatives. [[32]](#footnote-33)32 These bills, aimed at enacting the "Cruise Vessel Security and Safety Act," include provisions (with applicability far beyond the cruise ship context) that would make DOHSA inapplicable to accidents within 12 nautical miles (thus moving the DOHSA/territorial waters line out from 3 to 12 nautical miles) and would add loss of society and pre-death pain and suffering to the categories of damages available in actions under DOHSA. [[33]](#footnote-34)33 The bills were not enacted. Presumably they will be reintroduced in January when the new Congress convenes.

III. The Work of the United States Supreme Court

A. The Exxon Valdez Punitive Damages Case

In Exxon Shipping Co. v. Baker, [[34]](#footnote-35)34 the Court created a new maritime law rule that punitive damages may not exceed compensatory damages in cases in which the defendant's conduct, while sufficiently blameworthy to deserve civil punishment, was not actuated by avarice or the purpose of inflicting injury. The Court indicated that this limit might not apply when compensatory damages were small or the defendant's conduct was calculated to escape detection. [[35]](#footnote-36)35 The Court's new rule meant that the $ 2.5 billion punitive damages award against Exxon arising from the 1989 EXXON VALDEZ ***oil*** spill was reduced to $ 507.5 million. [[36]](#footnote-37)36 Justice Souter wrote the opinion for the Court, which was joined in full by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas. Justices Stevens, Ginsburg, and Breyer each dissented on this issue, giving various reasons for their view that the award should not have been disturbed. [[37]](#footnote-38)37 Justice Alito did not participate. [[38]](#footnote-39)38

Exxon and its supporting amici argued that the Clean Water Act's water pollution penalties [[39]](#footnote-40)39 preempted punitive-damages awards in **[\*390]** maritime spill cases. [[40]](#footnote-41)40 The Court explained its rejection of the preemption argument as follows:

There are two ways to construe Exxon's argument that the CWA's penalties for water pollution … preempt the common law[su'['] [[41]](#footnote-42)41[su']'] punitive-damages remedy at issue here. The company could be saying that any tort action predicated on an ***oil*** spill is preempted unless § 1321 expressly preserves it. Section 1321(b) protects "the navigable waters of the United States, adjoining shorelines, … [and] natural resources" of the United States, subject to a saving clause reserving "obligations … under any provision of law for damages to any publicly owned or privately owned property resulting from a discharge of any ***oil***," § 1321(o). Exxon could be arguing that, because the saving clause makes no mention of preserving punitive damages for economic loss,[su'['] [[42]](#footnote-43)42[su']'] they are preempted. But so, of course, would a number of other categories of damages awards that Exxon did not claim were preempted. If Exxon were correct here, there would be preemption of provisions for compensatory damages for thwarting economic activity or, for that matter, compensatory damages for physical, personal injury from ***oil*** spills or other water pollution. But we find it too hard to conclude that a statute expressly geared to protecting "water," "shorelines," and "natural resources" was intended to eliminate sub silentio ***oil*** companies' common law duties to refrain from injuring the bodies and livelihoods of private individuals.

Perhaps on account of its overbreadth, Exxon disclaims taking this position, admitting that the CWA does not displace compensatory remedies for consequences of water pollution, even those for economic harms. This concession, however, leaves Exxon with the equally untenable claim that the CWA somehow preempts punitive damages, but not compensatory damages, for economic loss. But nothing in the statutory text points to fragmenting the recovery scheme this way, and we have rejected similar attempts to sever remedies from their causes of action. All in all, we see no clear indication of congressional intent to occupy the entire field of pollution remedies … ; nor for that matter do we perceive that punitive damages for private harm will have any frustrating effect on the CWA remedial scheme, which would point to preemption. [[43]](#footnote-44)43

Exxon v. Baker also presented another important maritime law issue, one that the Court was unable to resolve: whether a corporate employer can be held vicariously liable for punitive damages based on **[\*391]** the conduct of a "managerial agent" (here, the captain of the ship). [[44]](#footnote-45)44 Because the Court divided 4-4 on this issue, the United States Court of Appeals for the Ninth Circuit's affirmative answer to the question was left undisturbed, with the caveat that the Court's decision "is not precedential on the derivative liability question." [[45]](#footnote-46)45

Exxon v. Baker is a dramatic decision for several reasons. Among its more important features is the Court's strong affirmation of the federal admiralty courts' authority to decide substantive issues of maritime law "in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." [[46]](#footnote-47)46 No member of the Court expressed any disagreement with this proposition. [[47]](#footnote-48)47

B. What Is the Standard of Causation in Jones Act and Federal Employers Liability Act (FELA) Cases?

Last year's article described the Supreme Court's decision in Norfolk Southern Railway Co. v. Sorrell, [[48]](#footnote-49)48 which rejected Missouri's rule that FELA defendants are liable if their negligent conduct played even a slight causal role in the accident, whereas FELA plaintiffs are inculpated only if their negligent conduct was a direct cause of the accident. [[49]](#footnote-50)49 The Court held that the causation standard must be the same respecting the defendant's and plaintiff's conduct, but it did not say what the standard should be. [[50]](#footnote-51)50 Justice Souter (joined by Justices Scalia and Alito) wrote separately to suggest the standard should be ""the familiar proximate cause standard'" of common law. [[51]](#footnote-52)51 Justice Ginsburg wrote separately to urge that it must be the "slight" cause standard. [[52]](#footnote-53)52 At least two lower courts - including the Missouri Supreme Court on remand in Sorrell - have indicated their agreement with Justice Ginsburg. [[53]](#footnote-54)53

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C. Selected Nonmaritime Decisions: Preemption

February 20, 2008, has been called "Preemption Day" because of three decisions issued that day striking down state laws. Riegel v. Metronic, Inc., [[54]](#footnote-55)54 held that the Food and Drug Administration's (FDA) premarket approval of a medical device preempts state common law tort claims for injuries caused by the device. Rowe v. New Hampshire Motor Transport Ass'n [[55]](#footnote-56)55 held that the Federal Aviation Administration Authorization Act preempted state laws requiring shippers of tobacco to take precautions against delivering the product to minors. Preston v. Ferrer [[56]](#footnote-57)56 held that when parties agree to arbitrate all questions arising under a contract, the Federal Arbitration Act supersedes state laws lodging primary jurisdiction in another forum.

In other preemption decisions, the Court held in Chamber of Commerce of the United States v. Brown [[57]](#footnote-58)57 that the National Labor Relations Act preempts a California law barring employers receiving state grants of program funds from using the funds to promote or deter union organizing. In Warner-Lambert Co. v. Kent, [[58]](#footnote-59)58 Chief Justice Roberts' nonparticipation left the Court divided 4-4 over the correctness of the United States Court of Appeals for the Second Circuit's holding that the Federal Food, Drug, and Cosmetic Act does not preempt product liability claims under Michigan law against drug manufacturers that allegedly defrauded the FDA. The Court has granted certiorari in Levine v. Wyeth, [[59]](#footnote-60)59 which some analysts believe may again bring the Court's attention to the putative "fraud on the FDA" exception to preemption. The question in Wyeth is whether FDA approval of a drug label preempts state product-liability claims alleging deficiencies in the label. [[60]](#footnote-61)60 Also slated for decision next term is Good v. Altria Group Inc., [[61]](#footnote-62)61 in which the United States Court of Appeals for the First Circuit held that the Federal Cigarette Labeling and Advertising Act does not preempt smokers' state law claims alleging unfair and deceptive practices by tobacco companies in the marketing of "light" cigarettes.

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IV. Selected Decisions from Around the Country [[62]](#footnote-63)62

A. Admiralty Jurisdiction in Tort Cases: Treatments of the Grubart Test

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co. lays down the following three-element test for admiralty tort jurisdiction:

[A] party seeking to invoke federal admiralty jurisdiction pursuant to 28 U.S.C. § 1333(1) over a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water.[su'['] [[63]](#footnote-64)63[su']'] The connection test raises two issues. A court, first, must assess the general features of the type of incident involved, to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general charactor [sic] of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity. [[64]](#footnote-65)64

In In re Aramark Leisure Services, [[65]](#footnote-66)65 the United States Court of Appeals for the Tenth Circuit applied the Grubart test to uphold admiralty jurisdiction over a Limitation of Liability complaint filed by a lessor of pleasure boats on Lake Powell, which lies mostly in Utah but extends across the border into Arizona. [[66]](#footnote-67)66 The litigation arose from a boat lessee's allision with a cliff. [[67]](#footnote-68)67 Perhaps reflecting the scarcity of admiralty jurisprudence in the Tenth Circuit, the court's opinion complained that "neither party provides any analysis of the issue [of admiralty jurisdiction] - or even the correct citation to the statutory provision **[\*394]** granting federal subject-matter jurisdiction over admiralty disputes." [[68]](#footnote-69)68 The court then proceeded to conclude that the case met the three Grubart requirements. [[69]](#footnote-70)69 The "location test" was satisfied because the boat was on navigable water when it struck the cliff. [[70]](#footnote-71)70 The "potential disruption" requirement was met because a "boating collision" on navigable water will always potentially disrupt navigational activities. [[71]](#footnote-72)71 The "substantial relationship" requirement was satisfied because "navigation of boats in navigable waters" is self-evidently related to traditional maritime activities. [[72]](#footnote-73)72 (This treatment of the "substantial relationship" element was probably wrongly focused; Grubart requires focus on the tortfeasor's activity - here, the lessor's - and not the victim's. [[73]](#footnote-74)73 But the putative mistake made no difference, because leasing boats for use on navigable water is just as obviously related to traditional maritime activities as is operating the boats.)

Most courts have held that product liability claims by shipyard workers against manufacturers of asbestos are nonmaritime. [[74]](#footnote-75)74 In John Crane, Inc. v. Jones, [[75]](#footnote-76)75 the Virginia Supreme Court disagreed. Garland Jones worked as an outside machinist at Newport News Shipbuilding & Dry Dock Company from 1963 to 1967. [[76]](#footnote-77)76 In 2005, Jones was diagnosed with malignant mesothelioma, a fatal cancer that is caused only by exposure to asbestos dust or fibers. [[77]](#footnote-78)77 His and his family's action alleged that John Crane, Inc., manufactured or sold asbestos-containing products to Jones's employers and that Jones was exposed to these products while building and repairing various vessels. [[78]](#footnote-79)78 In upholding admiralty jurisdiction (and thus the applicability of federal maritime law [[79]](#footnote-80)79) to the case, the Virginia Supreme Court took a notably broad-brush approach to two of the three Grubart requirements:

**[\*395]**

. "As the parties recognize, the location prong of the test is met in this case because [Jones'] inhalation of asbestos occurred while [he was] repairing and constructing ships at the Newport News Shipyards in the James River." [[80]](#footnote-81)80 The court did not discuss whether the ships were afloat at the time, evidently presuming that all or most of them were.

. "Garland Jones' inhalation of asbestos fibers while engaged in the repair and construction of vessels on navigable waters had the potential to disrupt maritime commerce. Injury to Garland Jones that occurred during these activities could potentially slow or frustrate the work being done on the vessel. Such a result could, in turn, have a disruptive impact on maritime commerce." [[81]](#footnote-82)81

In a footnote, the court said that an injury to a ship construction worker would not satisfy the "potential disruption" requirement, but that this did not matter because some of Jones' exposure occurred during vessel-repair work. [[82]](#footnote-83)82

The John Crane court's treatment of the third Grubart requirement - the requirement that the tortfeasor's activity bear a substantial relationship to traditional maritime activity - was more tightly focused: [[83]](#footnote-84)83

[Crane's] manufacture and sale of asbestos-containing products into the stream of commerce is [not] too far removed from traditional maritime activities to create the necessary [substantial] relationship [because] Crane marketed gaskets and packing material directly for the maritime industry and advertised its products for "marine engine and general ship use." [[84]](#footnote-85)84

Last year's article [[85]](#footnote-86)85 was somewhat critical of the decision in Denoux v. Vessel Management Services, Inc., [[86]](#footnote-87)86 in which the plaintiffs sued a paint manufacturer for paint-fumes injuries allegedly incurred while painting inside a casino boat that was tied up at the dock for repairs. In the course of holding that the claims were time-barred under state law, the court ruled against admiralty jurisdiction, stating:

**[\*396]**

[The plaintiffs] were injured while the Belle of Orleans was moored to the shore. The boat did not cruise while they worked on the "Inner Bottom Project." The [plaintiffs] were injured while improving the aesthetics of the casino. Therefore, the [plaintiffs'] injuries neither disrupted maritime commerce, nor was there a substantial relationship between the painting and chipping of the casino and traditional maritime activity. [[87]](#footnote-88)87

When the case reached the Louisiana Supreme Court, at least two justices disagreed with the lower court's jurisdiction analysis, but the court affirmed the time-bar ruling on the view that the plaintiffs had waived their argument for the applicability of the admiralty statute of limitations. [[88]](#footnote-89)88

Crawford v. Electric Boat Corp. [[89]](#footnote-90)89 was an action alleging that a marine engineer and his family contracted a serious staph infection as a result of the engineer's exposure to unsanitary conditions while working aboard the U.S.S. JIMMY CARTER for eleven days during the vessel's final sea trial. The court indicated that the existence of admiralty jurisdiction was virtually self-evident respecting the engineer's injuries, which were sustained at sea. [[90]](#footnote-91)90 Respecting the injuries to the engineer's wife and children, the court looked to the Admiralty Extension Act [[91]](#footnote-92)91 and held that admiralty jurisdiction existed because the injuries were "caused by a vessel on navigable waters." [[92]](#footnote-93)92 The court determined that the JIMMY CARTER was clearly a vessel under 1 U.S.C. § 3 and Stewart v. Dutra Construction Co., [[93]](#footnote-94)93 despite the fact that it had not yet completed its final sea trial. [[94]](#footnote-95)94 (As we will see, infra Part V.E.1, the United States Court of Appeals for the Fifth Circuit has recently taken a different view of the vessel-status point.)

B. Admiralty Jurisdiction in Contract Cases

1. Contracts for the Sale of a Vessel

Professor Charles Black famously criticized the rules for admiralty contract jurisdiction with the observation that they have "about as much **[\*397]** "principle' as there is in a list of irregular verbs." [[95]](#footnote-96)95 The practical solution, he explained, was that "the contracts involved tend to fall into a not-too-great number of stereotypes, the proper placing of which can be learned, like irregular verbs, and errors in grammar thus avoided." [[96]](#footnote-97)96 Thus the Gilmore and Black treatise provides a useful list "of causes that might be thought to be included [within the admiralty jurisdiction], but actually are not." [[97]](#footnote-98)97 The first item on the list is "suits on contracts for the building and sale of vessels." [[98]](#footnote-99)98

Much has changed since the final edition of the treatise was published a third of a century ago, and even more has changed since Professor Black's famous article was published another quarter century before the treatise. In particular, the Supreme Court has expanded admiralty contract jurisdiction on virtually every opportunity in recent years. In Exxon Corp. v. Central Gulf Lines, Inc., [[99]](#footnote-100)99 for example, the Court overruled Minturn v. Maynard, [[100]](#footnote-101)100 and held that an agency contract was within the admiralty jurisdiction. Similarly, in Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd., [[101]](#footnote-102)101 the Court brushed away over a century of precedents to bring a mixed contract into the admiralty jurisdiction. The rule on contracts for the sale of a vessel nevertheless seemed settled. In the second edition of our own casebook, published earlier this year, we wrote that "it is well established in the lower courts that contracts to sell a vessel are non-maritime." [[102]](#footnote-103)102

Kalafrana Shipping Ltd. v. Sea Gull Shipping Co. [[103]](#footnote-104)103 now challenges the traditional rule and holds that a contract to sell a vessel is maritime and a dispute arising out of that contract is therefore within the admiralty jurisdiction. Kalafrana contracted to purchase a vessel from Sea Gull. [[104]](#footnote-105)104 Under the contract, Sea Gull was required to make certain repairs prior to delivery, but Kalafrana claimed that Sea Gull failed to perform some of its obligations. [[105]](#footnote-106)105 London arbitrators awarded Kalafrana over $ 600,000 **[\*398]** (plus interest and fees) on the claim, and Kalafrana sought to enforce the award in New York by attaching some of Sea Gull's property under Supplemental Rule B. [[106]](#footnote-107)106 Sea Gull moved to vacate the attachment on the ground that the district court would not have admiralty jurisdiction over Kalafrana's claim under the vessel sales contract. [[107]](#footnote-108)107

The district court recognized that "it has long been the rule in the Second Circuit that a contract for the sale of a vessel is not a maritime contract," [[108]](#footnote-109)108 and the same rule applies in other circuits. [[109]](#footnote-110)109 Indeed, the leading case in the Second Circuit - The Ada [[110]](#footnote-111)110 - is ninety years old. But the court concluded that the Supreme Court's "broad language" in Kirby, [[111]](#footnote-112)111 which the Second Circuit applied even more broadly in Folksamerica Reinsurance Co. v. Clean Water of New York, Inc., [[112]](#footnote-113)112 justified a reconsideration of the traditional rule. [[113]](#footnote-114)113 Folksamerica explained that Kirby requires a court to focus "on whether the principal objective of the contract is maritime commerce." [[114]](#footnote-115)114 Here the contract was for the sale of a ship that had already been launched and "that had been plying the seas for some time." [[115]](#footnote-116)115 It thus had a much more salty flavor than, for example, a shipbuilding contract (which the court conceded would not be maritime). [[116]](#footnote-117)116 Thus "the rule of The Ada is no longer viable." [[117]](#footnote-118)117

Perhaps concerned with the potential fate on appeal of its bold conclusion, the district court also offered an alternative ground for its holding. Even if Kirby and Folksamerica are properly limited to the context of "mixed contracts," the contract here involved both the sale and the repair of the vessel. [[118]](#footnote-119)118 Because a repair contract would clearly be maritime, after Kirby and Folksamerica a court is free to decide that an action on the mixed contract is also within admiralty jurisdiction. [[119]](#footnote-120)119

**[\*399]** The traditional rule that contracts for the sale of a vessel are nonmaritime has long been criticized, [[120]](#footnote-121)120 and a clear rule to the contrary would be welcome. Unfortunately, a district court is in no position to provide that clarity. As we have argued elsewhere, [[121]](#footnote-122)121 and many have recognized before us, [[122]](#footnote-123)122 jurisdictional rules should be clear and easy to apply. The one thing worse than having to rely on "a list of irregular verbs" [[123]](#footnote-124)123 is having irregular verbs without a list on which to rely. At the moment, it is difficult to predict what will happen the next time a district court is asked to assert admiralty jurisdiction over a dispute arising out of the sale of a vessel. Even within the Second Circuit, few could safely say whether another court will follow the earlier decision of the court of appeals or the subsequent decision of a lower court that challenges it. In the Fifth Circuit, for example, where there is also a line of appellate authority for the traditional rule, [[124]](#footnote-125)124 it would be even riskier to assume that the rule has changed. The maritime community can only hope that Kalafrana Shipping will be appealed, preferably all the way to the Supreme Court. [[125]](#footnote-126)125

In Vrita Marine Co. v. Seagulf Trading LLC, [[126]](#footnote-127)126 another judge in the same district followed the traditional rule that "contracts for the sale of a vessel are not maritime in nature." [[127]](#footnote-128)127

2. Treasure Salvage Contracts

In Williamson v. Recovery Limited Partnership, [[128]](#footnote-129)128 most of the plaintiffs were individuals who contracted to participate in both the **[\*400]** search for the S.S. CENTRAL AMERICA, which sank in an 1857 hurricane off the coast of Cape Hatteras with a cargo of California gold, [[129]](#footnote-130)129 and the subsequent efforts to recover the treasure and other historical artifacts that had been carried on board. When Tommy Thompson, the well-known treasure salvor who led the expedition, failed to pay plaintiffs any share of the recovery, they filed suit to recover the amounts that they believed they were due under their contracts. [[130]](#footnote-131)130 The first issue for the court was whether the contracts at issue were "maritime." [[131]](#footnote-132)131 Applying the "conceptual analysis" required by Kirby and Folksamerica, the court easily concluded that the "nature and character" of the contracts here was maritime. [[132]](#footnote-133)132

C. Preemption or Displacement of State Law by Federal Maritime Law

1. Cases in Which Federal Maritime Law Preempted State Law

Matheney v. Tennessee Valley Authority [[133]](#footnote-134)133 was an admiralty action resulting from an accident in which a Tennessee Valley Authority (TVA) tugboat's wake swamped a recreational fishing boat on the Cumberland River, killing one fisherman and injuring another. In holding that federal maritime law displaced the Tennessee Recreational Use Statute - which would have required the plaintiffs to prove gross negligence - the court provided the following analysis of the Supreme Court's "most recent line" of federal maritime preemption cases, [[134]](#footnote-135)134 stating:

Admiralty jurisdiction "does not result in automatic displacement of state law." However, admiralty law does require displacement of state law in a great many contexts… . State law is to be applied where it "fills gaps" or provides relief that otherwise would not be available under admiralty law; but, where state law would supersede or limit clearly defined maritime causes of action, it cannot be applied… . If the court were to apply the Tennessee Recreational Use Statute, the … plaintiffs would be barred from pursuing federal maritime causes of action for negligence… . Accordingly, the court finds that the Tennessee Recreational Use Statute cannot apply in this federal admiralty case. [[135]](#footnote-136)135

**[\*401]** The court ended its analysis by mentioning (and disagreeing with) a contrary unpublished decision by another federal district court in Tennessee. [[136]](#footnote-137)136

Section 8A of the Restatement (Second) of Torts defines the term "intent" as follows: "The word "intent' is used throughout the Restatement … to denote that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it." [[137]](#footnote-138)137 It is sometimes useful to distinguish the two types of "intent" as "specific intent" and "substantial-certainty intent." The court in Talik v. Federal Marine Terminals, Inc., [[138]](#footnote-139)138 interpreted the Longshore and Harbor Workers' Compensation Act (LHWCA) [[139]](#footnote-140)139 to allow a worker to sue the employer in tort for injuries resulting from "a specific, deliberate intent by the employer to injure [the] employee" but not for injuries in the substantial-certainty category. [[140]](#footnote-141)140 It further held that the LHWCA preempts state law causes of action for injuries in the substantial-certainty category. [[141]](#footnote-142)141

Ostrowiecki v. Aggressor Fleet, Ltd. [[142]](#footnote-143)142 held that DOHSA [[143]](#footnote-144)143 preempted state law claims for damages resulting from the deaths of two recreational divers in an accident in the waters of the Cocos Islands, about 300 miles off the coast of Costa Rica. Plaintiffs' action against the operators of the diving trip sought to plead around DOHSA's "pecuniary loss" restriction [[144]](#footnote-145)144 by asserting breach of contract and misrepresentation claims, but the court said "there is clear authority" that DOHSA preempts state law fatal-injury remedies regardless of the theory of liability. [[145]](#footnote-146)145 The court further held intentional infliction of emotional distress claims arising from the defendants' conduct after the fatal **[\*402]** accident were unaffected by DOHSA and were not otherwise preempted by maritime law. [[146]](#footnote-147)146

The most difficult issue in Ostrowiecki was whether a provision in the contract between the divers and the operators - stating that all claims arising from the trip "shall be determined according to the laws of Louisiana" - provided the plaintiffs with a way around the DOHSA restriction. [[147]](#footnote-148)147 The court held no on the interesting ground that "Louisiana law necessarily incorporates federal law." [[148]](#footnote-149)148

In Pacific Merchant Shipping Ass'n v. Goldstene, [[149]](#footnote-150)149 the Ninth Circuit held that the Clean Air Act [[150]](#footnote-151)150 preempted regulations promulgated by the California Air Resources Board limiting emissions from the auxiliary diesel engines of oceangoing vessels within twenty-four miles of California's coast.

2. Cases in Which State Law Was Applied or Upheld

In a characteristically colorful opinion that analogizes Mississippi River barges to "motorized hippopotamuses," Judge Posner held for the United States Court of Appeals for the Seventh Circuit in Robinson v. Alter Barge Line, Inc., [[151]](#footnote-152)151 that federal maritime law does not preempt state common law causes of action for the retaliatory firing of a seaman. The context was an action by a barge deckhand alleging that he was fired for repeatedly complaining that his fellow workers were using illegal drugs while on duty. [[152]](#footnote-153)152 Judge Posner's discussion of the preemption point began by noting a circuit split on the question [[153]](#footnote-154)153 and then launched into a thorough analysis that made the following points:

**[\*403]**

. "The "savings [sic] to suitors' provision of 28 U.S.C. § 1333(1) … precludes automatic preemption of state remedies by admiralty law … . [State laws] have been accepted as rules of decision in admiralty cases, even, at times, when they conflicted with a rule of maritime law which did not require uniformity. All that is preempted are provisions of state law that would, if applicable to maritime disputes, undermine admiralty law." [[154]](#footnote-155)154

. "Accidents due to drunken and cocaine-snorting seamen pose … a great[] risk to maritime safety in U.S. waters in the twenty-first century; and it is a risk that tort liability for firing a seaman who reports such carryings-on to his captain or to the management of the barge company is likely to reduce." [[155]](#footnote-156)155

. "Interstate barge companies would prefer to have a uniform rule rather than have to comply with the tort laws of each of the states through which their barges pass. But if the desire for a uniform rule were enough to preempt the application of state law to maritime activities, the "savings [sic] to suitors' provision would be empty and the legion of state laws that have been held not preempted by maritime law … would be inexplicable." [[156]](#footnote-157)156

. "When the state interest in regulating some aspect of maritime activity is very weak, the interest in uniformity might well override it and thus justify preempting state law. But safety is an important state interest… .

A state's interest in maritime safety would not cut much ice were the state trying to impose a tort principle that was contrary to established admiralty law … . But liability for retaliating for an employee's complaints about safety is unlikely to interfere with safety-related rules of admiralty law … . [Thus] the result [of preempting state tort liability] will be to undermine maritime safety, with only a slightly offsetting gain in reducing the burden on boat owners of having to familiarize themselves with liability for retaliatory discharge in the states that their vessels traverse. Subjecting them to such liability does not seem unduly burdensome on maritime activities." [[157]](#footnote-158)157

. "The potential damage from [the giant barges that ply the Mississippi River] is enormous, and employees should be encouraged to voice their concerns about safety. This is not to suggest that everyone who files a suit alleging retaliatory discharge actually is a victim of retaliation. Many such suits are based on misunderstandings (the **[\*404]** plaintiff can't believe there was a good reason for his having been sacked, so he imputes a bad one to the employer), and some are strategic. One effect of allowing such suits will be to raise the cost of discharging bad seamen - which might reduce maritime safety. But when evaluating a claim of conflict preemption, we assume that state law does more good than harm." [[158]](#footnote-159)158

In addition to its informative treatment of the maritime law preemption issue, Judge Posner's Robinson opinion made two other noteworthy points. (1) The federal retaliatory discharge statute [[159]](#footnote-160)159 (which did not help Robinson because it covers only complaints to the Coast Guard and other authorities) clearly was not intended to preempt state tort law. [[160]](#footnote-161)160 (2) There probably ought to be "a judge-made [federal] admiralty tort for firing [a seaman] for raising safety concerns." [[161]](#footnote-162)161 Indeed, "there is some case support for the existence of such a tort [citing cases]," but here the plaintiff forfeited the point by not raising it in the district court and making only a cursory stab at it in the appellate court. [[162]](#footnote-163)162

UFO Chuting of Hawaii, Inc. v. Smith [[163]](#footnote-164)163 held that a commercial parasailing outfit's right to operate vessels under a Coast Guard coastwise trade license did not preempt Hawaiian legislation prohibiting parasailing off Maui during the five-month period each year (between December 15 and May 15) when humpback whales are mating, bearing calves, and caring for their young.

Southern Pacific Co. v. Jensen [[164]](#footnote-165)164 held that a state workers' compensation statute could not constitutionally be applied on behalf of a longshoreman hurt aboard a vessel in the course of loading or unloading the vessel on navigable water. In Wellsville Terminals Co. v. Workmen's **[\*405]** Compensation Appeal Board (Zacharias), [[165]](#footnote-166)165 the Pennsylvania Supreme Court held that Jensen precluded the availability of state workers' compensation benefits to a worker who was hurt while repairing a floating barge moored to the shore. McElheney v. Workers' Compensation Appeal Board (Kvaerner Philadelphia Shipyard) [[166]](#footnote-167)166 interprets Wellsville to mean that state workers' compensation law could not apply to injuries incurred on a vessel being worked on in a floating dry dock but goes on to hold that McElheney's injury - incurred while working on a ship in a "graven" dry dock - was not beyond the reach of state law. The McElheney court referred to "Justice Harold Burton's often cited description of the three different types of dry docks" [[167]](#footnote-168)167 and quoted that description:

There are three kinds of dry docks. (1) A floating dry dock, as its name makes clear, floats on the water, the vessel resting on the bottom of the dry dock after the water has been removed. (2) A graven dry dock is dug into the land. The vessel floats in but rests on land once the water has been pumped out. (3) Finally there is the marine railway, on which the vessel is drawn out of the water, instead of the water being drawn away from the vessel. [[168]](#footnote-169)168

D. Seaman Status [[169]](#footnote-170)169

The Supreme Court has set forth the elements of Jones Act seaman status in the form of a three-requirement test as follows:

- a work assignment to a vessel [or to an "identifiable fleet" of vessels]; [[170]](#footnote-171)170

- duties that contributed to the vessel's function or mission [[171]](#footnote-172)171

- a "connection to the vessel [that] was substantial both in nature and duration." [[172]](#footnote-173)172

**[\*406]** All three requirements are intermittently litigious.

1. The Vessel Requirement

Earlier articles in this series have discussed the status of workers on casino boats that stopped cruising once state legislatures began allowing gaming on stationary craft. [[173]](#footnote-174)173 When the casino boat is attached to the shore or water bottom in such a way as to render its use for further transportation physically impracticable, it is generally agreed that it has lost its vessel status, and that its workers therefore cannot have the status of seamen. [[174]](#footnote-175)174 But there is disagreement over whether a boat that is physically capable of sailing within a relatively short time can lose vessel status on the basis of the owner's announced (and completely believable) intention to sail no more. [[175]](#footnote-176)175 Three recent district court decisions have taken the position that vessel status is lost in such circumstances. [[176]](#footnote-177)176

2. The Contribution-to-Vessel's-Mission Requirement

The district court in Belcher v. Sundad, Inc., [[177]](#footnote-178)177 held that a fisheries observer, whose presence on a trawler was legally required for the vessel to operate, was not a seaman because she "did not contribute to the function of the vessel." In previous articles we have criticized similar reasoning. [[178]](#footnote-179)178

3. The Substantial Connection Requirements

The "duration" and "nature" requirements probably do their best work when taken separately, but the courts often blend them, yielding a gestalt-like approach to the question of seaman status. This seems to happen fairly often in marine construction cases in which seaman status is asserted respecting workers with both land and water duties and with some kind of ongoing connection to a barge. [[179]](#footnote-180)179

**[\*407]**

E. The Rights of Seamen: Maintenance and Cure

1. Maintenance Rate Issues

Maintenance is meant to provide for the cost of food and lodging comparable to what the seaman would have had on the ship. [[180]](#footnote-181)180 In the 1940s and 50s courts "[fell] into the habit" of awarding $ 8 a day. [[181]](#footnote-182)181 Nowadays, union contracts (collective bargaining agreements) often specify a maintenance rate, usually a relatively low one. [[182]](#footnote-183)182 All but one of the circuits uphold the validity of such contracts. The outlier is the United States Court of Appeals for the Third Circuit's decision in Barnes v. Andover Co. [[183]](#footnote-184)183

In Skowronek v. American Steamship Co., [[184]](#footnote-185)184 the United States Court of Appeals for the Sixth Circuit reiterated its agreement with the majority view. [[185]](#footnote-186)185 The collective bargaining agreement (CBA) at issue set a weekly rate of $ 56 for ill seamen and $ 300 for injured seamen. [[186]](#footnote-187)186 Skowronek apparently conceded that the heart attack he suffered at sea was an illness rather than an injury, but he argued that the CBA impermissibly discriminated against ill crew members. [[187]](#footnote-188)187 The panel majority rejected Skowronek's discrimination argument, stating:

Our precedent, like that of our sister circuits, affords a presumption of negotiation to a rate of maintenance specified in a [CBA] and recognizes that it is not appropriate for courts to engage in legislation of dollar figures in connection with privately negotiated maintenance rates. Because Skowronek has failed to produce any evidence demonstrating that the CBA was not a legitimately negotiated agreement, that his interests were not adequately represented in the negotiation process, or that the agreement as a whole is unfair, he has not rebutted the presumption of negotiation. Accordingly, our precedent requires us to give binding effect to the maintenance rate at issue. We refuse to examine it in isolation, as it is but one of many terms of the CBA. [[188]](#footnote-189)188

**[\*408]** Judge Clay dissented at length. [[189]](#footnote-190)189

In Aguilera v. Alaska Juris F/V, [[190]](#footnote-191)190 a seaman brought an action for additional maintenance payments, alleging that the employer improperly withheld $ 10 toward a child support order from the $ 20 a day to which he was entitled. (The seaman's Alaskan employer had received a child support order from Texas. [[191]](#footnote-192)191) In rejecting the seaman's argument, the Ninth Circuit held that "maintenance and cure payments are subject to withholding for child support obligations, so long as those payments constitute income under relevant state law." [[192]](#footnote-193)192 The court cited 28 U.S.C. § 1738B(h)(2) - for the proposition that state law controls the interpretation of child support orders - and 46 U.S.C. § 11109(a) for the proposition that seamen's wages are subject to withholding for child support obligations. [[193]](#footnote-194)193 It also cited several provisions of the Texas Family Code [[194]](#footnote-195)194 to show that maintenance payments were properly regarded as income for child-support purposes. [[195]](#footnote-196)195

In cases not controlled by union-contract maintenance rates, courts will receive evidence of the costs of food and lodging. [[196]](#footnote-197)196 Amounts vary widely. In Diggs v. New York Marine Towing, [[197]](#footnote-198)197 a magistrate judge in the Eastern District of New York calculated the lodging costs of a seaman who lived in rural Virginia at $ 45 per day for a period when he owned a house and had mortgage and utility payments, and at $ 21 per day for the ensuing period when he lived in rented premises after he lost the house. To these amounts the court added $ 9.65 per day for food costs, based on the U.S. Department of Agriculture food plan. [[198]](#footnote-199)198 In sharp contrast, a federal judge in Massachusetts in Fuller v. Calico Lobster Co. [[199]](#footnote-200)199 upheld a jury award that included the full amount of the seaman's mortgage payments [[200]](#footnote-201)200 plus $ 58 per day for other expenses, stating:

**[\*409]**

Although $ 58 per day in addition to mortgage payments … seems to be a generous award in the absence of other specific evidence regarding the plaintiff's living expenses, it is not beyond the realm of reasonableness such that the Court should disturb it. The plaintiff resides in Plymouth, Massachusetts, on the South Shore, an area from which jurors for this Court are drawn. Greater Boston is a comparatively expensive place to live, especially during the winter, when the plaintiff was recuperating … . [[201]](#footnote-202)201

2. Maximum Medical Improvement

The Supreme Court's decisions in Farrell v. United States [[202]](#footnote-203)202 and Vella v. Ford Motor Co. [[203]](#footnote-204)203 stand for the proposition that a seaman's employer's ""maintenance and cure [obligation] continues until such time as the [seaman's] incapacity is [medically] declared to be [cured or] permanent.'" [[204]](#footnote-205)204 In previous articles in this series we have discussed this recurrently litigious maximum medical improvement (MMI) issue. [[205]](#footnote-206)205 In the course of holding that the MMI point had not yet been reached, the district court in Nicholson v. Great Lakes Towing Co. [[206]](#footnote-207)206 provided a cogent and very useful summary:

The employer of an injured seaman must continue to pay maintenance and cure until the seaman reaches MMI. MMI can be reached in three ways. First, a seaman may fully recover from his injuries. Second, his injuries have been diagnosed as permanent. In the case of permanent injury, maintenance and cure must continue until the seaman's incapacity is diagnosed as permanent. Third, the injured seaman has not fully recovered, but his functional ability cannot be improved. In other words, where future treatment will merely relieve pain and suffering but not otherwise improve the seaman's physical condition, it is proper to declare that the point of maximum cure has been achieved.

… [A] physician need not use magic words such as "permanent" or "incapable of being improved" in a diagnosis, as such a rule would elevate form over substance. It is a medical, not judicial determination of permanency that terminates a right to maintenance and cure. Such a determination should be unequivocal to terminate the right to maintenance and cure. [[207]](#footnote-208)207

**[\*410]**

3. Defenses to the Maintenance and Cure Obligation

The 1939 Shipowners' Liability Convention - which the Supreme Court has said reflects U.S. maintenance and cure law [[208]](#footnote-209)208 - sets forth "wilful act, default, or misbehaviour" in incurring the illness or injury and "sickness or infirmity intentionally concealed" when the seaman was hired [[209]](#footnote-210)209 as defenses the employer may invoke to avoid responsibility for maintenance and cure. [[210]](#footnote-211)210 A district court in Indiana recently held that a seaman's undergoing a five-minute "lap dance" by a 130-pound female dancer at a topless bar was "not the type of culpable conduct that will relieve the employer of the responsibility to pay maintenance and cure." [[211]](#footnote-212)211 A magistrate judge in Washington has put a questionable spin on the intentional concealment defense, stating that because "intentional concealment should not be rewarded, … an award of attorneys' fees [to the employer] is meritorious and should be granted." [[212]](#footnote-213)212

4. Penalizing Employers Who Flout Their Maintenance and Cure Obligations

Kopacz v. Delaware River and Bay Authority [[213]](#footnote-214)213 was an "unpub-lished" decision in which Judge Roth wrote for the panel:

We have not yet directly addressed whether Miles [v. Apex Marine Corp., 498 U.S. 19 (1990),] proscribes recovery of punitive damages for failure to provide maintenance and cure. We have previously recognized, however, … that the majority of courts do not allow punitive damages for even arbitrary and willful refusal to pay maintenance and cure. O'Connell v. Interocean Mgmt. Corp., 90 F.3d 82, 84 (3d Cir. 1996)… . Accordingly, we will follow the majority of courts and hold that punitive damages are not recoverable for the Delaware River and Bay Authority's failure to provide maintenance and cure. [[214]](#footnote-215)214

**[\*411]** The courts that have read Miles to eliminate the punitive damages penalty against employers who culpably dishonor their maintenance and cure obligations have held that attorneys' fees are a (partial) substitute. [[215]](#footnote-216)215 Ostensibly the same "showing of egregious fault" is necessary for securing an attorneys' fees award as had been required for punitive damages. [[216]](#footnote-217)216 But it may be that the drastic reduction in the penalty has led the courts toward a tacit relaxation of the fault requirement. In Kopacz, Judge Roth quoted O'Connell [[217]](#footnote-218)217 for the proposition that "if the shipowner unreasonably refuses to pay a marine employee's claim for maintenance and cure," attorneys' fees are awardable. [[218]](#footnote-219)218 In Cagle v. Harrah's Lake Charles, L.L.C., [[219]](#footnote-220)219 a state court in Louisiana held that an employer's failure to honor the maxim "that any ambiguities and doubts are to be resolved in favor of the payment of maintenance and cure" was sufficiently blameworthy to justify awarding attorneys' fees.

F. The Rights of Seamen: Unseaworthiness Litigation

Whereas the maintenance and cure and Jones Act duties run against the employer of the injured seamen, it is generally understood that a seaman can maintain an unseaworthiness action against a shipowner or operator without claiming that the defendant is the seaman's employer. [[220]](#footnote-221)220 But it is less clear whether the seaman asserting an unseaworthiness claim must show that he was a member of the crew of the vessel whose unseaworthiness is at stake. In a much-criticized decision in Smith v. Harbor Towing & Fleeting, Inc., [[221]](#footnote-222)221 the Fifth Circuit held that crew member status is required. Two years ago we discussed a thoughtful district court decision declining to follow Smith and holding that a tugboat crew member who was hurt while temporarily working on an unfit barge had a cause of action against the barge and its owner for **[\*412]** unseaworthiness. [[222]](#footnote-223)222 Another district court in Jenkins v. Fitzgerald Marine & Repair, Inc., [[223]](#footnote-224)223 likewise found Smith unconvincing and held that a worker who is a seaman by virtue of his work connection with Vessel A while temporarily engaged aboard Vessel B is owed a duty of seaworthiness by Vessel B. The court explained:

The Supreme Court in [Seas Shipping Co. v. Sieracki, 328 U.S. 84 (1946)] made clear that the duty to maintain a seaworthy vessel extends beyond the crew of the particular vessel, and is owed to anyone who performs services for the vessel with the consent of the owner… . Although [in the 1972 amendments to the LHWCA] Congress invalidated the holding in Sieracki as it applies to longshoremen, nothing in the LHWCA amendments implies that an unseaworthiness claim cannot be brought by crew members of other vessels. [[224]](#footnote-225)224

G. The Rights of Seamen: Jones Act Issues

In a previous article [[225]](#footnote-226)225 we discussed the Ninth Circuit's decision in MacDonald v. Kahikolu Ltd., [[226]](#footnote-227)226 in which the court applied the rule in Kernan v. American Dredging Co. [[227]](#footnote-228)227 and held that the breach-of-duty issue under the Jones Act is satisfied when the plaintiff shows that the defendant violated a safety statute, regardless of whether the statute was designed to protect the plaintiff's class of persons or to guard against the type of accident that occurred. (The safety statutes violated in McDonald were Coast Guard regulations requiring a scuba-diving tour boat to carry a scuba-diving operations manual. The regulations were not aimed at protecting the plaintiff, a deckhand who was injured during one of the periodic free dives - i.e., without scuba gear - he performed to retrieve mooring lines. [[228]](#footnote-229)228) The case went back to the trial court for further proceedings. [[229]](#footnote-230)229 In MacDonald v. Kahikolu, Ltd., [[230]](#footnote-231)230 the trial court gave judgment for the defendant, concluding that the plaintiff had failed to show factual causation because the evidence showed that "Defendant's failure to comply with the applicable Coast Guard regulations did not play any part, not even the slightest, in producing Plaintiff's injuries." [[231]](#footnote-232)231 **[\*413]** The court rejected the plaintiff's Pennsylvania Rule argument, [[232]](#footnote-233)232 indicating that the rule might not apply in Jones Act cases, citing Mathes v. The Clipper Fleet [[233]](#footnote-234)233 for the proposition that the Pennsylvania Rule does not apply when "there is no conceivable causal connection between the violation and the injury," and stating that even if the rule applied, the defendant had met its burden of negating causation. [[234]](#footnote-235)234

In a previous article, [[235]](#footnote-236)235 we treated the Fifth Circuit's decision in Withhart v. Otto Candies, L.L.C., [[236]](#footnote-237)236 holding that a Jones Act employer can counterclaim against a Jones Act plaintiff for property damage and for indemnity for sums the Jones Act employer has to pay to others resulting from the accident in which the Jones Act plaintiff is injured. A federal district court in California in Great Lakes Dredge & Dock v. Campbell [[237]](#footnote-238)237 noted that in parallel state court litigation the Alameda County Superior Court viewed the matter differently from the Withhart court, concluding that counterclaims by Jones Act employers for property damage are prohibited by 45 U.S.C.§§55 and 60, given the negative effect that such counterclaims would have on the policy of the Jones Act and FELA of fully compensating seamen for injuries negligently inflicted by their employers.

In an earlier article we discussed the conflicting jurisprudence on whether section 10 of FELA [[238]](#footnote-239)238 overrides legal-ethics rules prohibiting plaintiffs' lawyers from contacting employees of a defendant without the awareness of defense counsel. [[239]](#footnote-240)239 (Section 10 provides in pertinent part: "Any contract, rule, regulation, or device whatsoever, the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to facts incident to the injury or death of any employee, shall be void." [[240]](#footnote-241)240) The court in Hornick v. American Commercial Barge Line [[241]](#footnote-242)241 analyzed the conflicting jurisprudence before concluding that the ethics rules prohibition should prevail.

**[\*414]** In the course of upholding judgment on a jury verdict awarding damages to a railroad worker, the Second Circuit's unpublished decision in Rivenburgh v. CSX Transportation [[242]](#footnote-243)242 relied on "a relaxed standard for [proving employer] negligence as well as causation" in FELA cases. [[243]](#footnote-244)243 Respecting negligence, this statement indicates that the Second Circuit is at odds with the Fifth Circuit's rule that a Jones Act plaintiff must prove that the employer failed to use ordinary or reasonable care. [[244]](#footnote-245)244 Respecting causation, the Rivenburgh court's statement implicates the confusion that may be growing in the wake of the Supreme Court's Sorrell decision. [[245]](#footnote-246)245 A petition for certiorari is pending [[246]](#footnote-247)246 and will be considered by the Supreme Court at its conference on October 31, 2008 (meaning that an announcement is likely on November 3). [[247]](#footnote-248)247

H. The Rights of Seamen: Other Issues

1. Arbitration Clauses

In last year's article, [[248]](#footnote-249)248 we discussed Barbieri v. K-Sea Transportation Corp., [[249]](#footnote-250)249 in which the district court held that a post-injury arbitration agreement was presumptively enforceable because it was not included in a seaman's employment contract within the meaning of section 1 of the Federal Arbitration Act (FAA). [[250]](#footnote-251)250 But the court did not compel arbitration because of unresolved fact issues concerning the seaman's allegations of fraud in the inducement, duress, and unconscionability. [[251]](#footnote-252)251 In Barbieri v. K-Sea Transportation Corp., [[252]](#footnote-253)252 the court resolved these fact issues in the employer's favor and compelled arbitration. In the process, it held that the "ward of the admiralty" doctrine [[253]](#footnote-254)253 does not shift the burden to the employer to prove that the arbitration agreement was fair to the seaman and untainted by fraud, **[\*415]** duress, and unconscionability. [[254]](#footnote-255)254 Arbitration is not a penalty imposed on a seaman. [[255]](#footnote-256)255 "The availability of arbitration only expands the avenues of redress open to the "ward of the admiralty.'" [[256]](#footnote-257)256

In reaching its conclusion, the Barbieri court relied heavily on a comparable state court decision, Schreiber v. K-Sea Transportation Corp., [[257]](#footnote-258)257 in which New York's highest court reviewed substantially the same arbitration agreement in essentially the same context and similarly concluded that the "ward of the admiralty" doctrine does not shift the burden to the employer.

2. Protection Against Retaliatory Discharge

In Part IV.C.2, we discuss the Seventh Circuit's Robinson decision, in which Judge Posner addressed the retaliatory discharge statute and the question of whether there is a general maritime cause of action on behalf of seamen who are fired for unacceptable reasons.

I. Limitation of Liability

The Limitation of Liability Act entitles a shipowner who can prove that an accident did not result from its "privity or knowledge" to a damages cap, generally the value of the vessel after the accident. [[258]](#footnote-259)258 When (in October 2003) the assistant captain who was alone in the pilothouse of New York City's Staten Island ferry "lost consciousness or situational awareness" and crashed into a pier, killing ten passengers and injuring scores of others, the City petitioned for limitation of liability, despite the fact that its Director of Ferry Operations had been sentenced to a year and a day in prison after pleading guilty to "seaman's manslaughter for allowing the ferries to be operated in a criminally negligent manner by not enforcing the City's internal "two-pilot rule.'" [[259]](#footnote-260)259 Affirming the district court's denial of the City's petition to limit liability, the Second Circuit explained:

The Limitation of Liability Act … alters the normal rules of vicarious liability. Instead of being vicariously liable for the full extent of any injuries caused by the negligence of the captain or crew employed to operate the ship, the owner's liability is limited to the value of the ship unless the owner himself had "privity or knowledge" of the negligent acts. **[\*416]** Where the owner of a ship is a corporation, the corporation is not entitled to limit its liability "where the negligence is that of an executive officer, manager or superintendent whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred. Coryell v. Phipps, 317 U.S. 406, 410, 1943 AMC 18, 21 (1943)." [[260]](#footnote-261)260

The court went on to find that it was obvious that the Director of Ferry Operations' "admitted failure to enforce [the two-pilot rule] constituted negligence that was causally connected to the crash." [[261]](#footnote-262)261

Under 46 U.S.C. § 30511(c) and Federal Rules of Civil Procedure Supplemental Rule F(3), a shipowner who properly files a petition for limitation of liability is entitled to an injunction against proceedings against it in any other forum. [[262]](#footnote-263)262 But under certain circumstances, persons with claims against the shipowner can get the injunction lifted so as to permit them to litigate liability and damages issues elsewhere, subject to the limitation court's reservation of the limitation of liability to itself. The controlling Supreme Court cases are Lewis v. Lewis & Clark Marine, Inc., [[263]](#footnote-264)263 Lake Tankers Corp. v. Henn, [[264]](#footnote-265)264 and Langnes v. Green. [[265]](#footnote-266)265 In In re Illinois Marine Towing Inc., [[266]](#footnote-267)266 the five claimants against the shipowner (for injuries arising from an Illinois River collision between its tugboat and a pleasure boat)

stipulated to a potential pro rata distribution, … conceded that the district court has exclusive jurisdiction over all limitation of liability issues, agreed to waive any claims of res judicata respecting any limitation of liability issues, promised not to seek any amount in excess of the fund in the event that limitation is held appropriate, and conceded that the district court has exclusive jurisdiction to determine the value of the limitation fund.

The Seventh Circuit held that these stipulations were more than adequate to justify the district court's decision to lift the injunction and allow the claimants to proceed with state court actions, adding that the "pro rata distribution stipulation [may have been unnecessary] since Rule F(8) already requires pro rata distribution if the district court limits liability." [[267]](#footnote-268)267 In discussing the applicable law, the court noted that "the Second, Fifth, and Eighth Circuits have all allowed multiple claimants to proceed in **[\*417]** state court where the claimants have" made stipulations similar to those in this case. [[268]](#footnote-269)268

J. Carriage of Goods

1. The Application of COGSA: COGSA versus the Hague-Visby Rules

In recent years, we have discussed the recurring issue of the applicability of the Carriage of Goods by Sea Act (COGSA) [[269]](#footnote-270)269 beyond the strict limits established by the statutory text. [[270]](#footnote-271)270 This year, we begin **[\*418]** our discussion of the cargo cases by examining three different aspects of that problem. In Royal Insurance Co. of America v. Orient Overseas Container Line Ltd., [[271]](#footnote-272)271 the Sixth Circuit - a court that does not (yet) have a reputation for innovative decisions in the law governing the international carriage of goods by sea - announced the most innovative lower court decision on the subject in years.

The defendant carrier had agreed to transport thousands of Ford automobile transmissions loaded on racks and stuffed into containers from Blanquefort, France, to various inland cities in the United States. [[272]](#footnote-273)272 The transmissions were generally carried by land from Blanquefort to the French port of Le Havre, by sea from Le Havre to the Canadian port of Montreal, and finally by land from Montreal to their ultimate U.S. destinations. [[273]](#footnote-274)273 On the voyage in question, however, "stormy weather … washed some of the containers overboard and flooded others, damaging their contents." [[274]](#footnote-275)274 Plaintiffs Ford Motor Co. and its subrogated cargo underwriter claimed just over $ 5.7 million for the full value of over 5000 transmissions that were lost or damaged. [[275]](#footnote-276)275 The carrier moved for partial summary judgment limiting its liability to $ 500 per rack under COGSA § 4(5). [[276]](#footnote-277)276 Plaintiffs responded that the Hague-Visby Rules, not COGSA, covered the ocean voyage on which the cargo was lost or damaged and that each transmission, not each rack, was a "package" for Hague-Visby or COGSA purposes. [[277]](#footnote-278)277 The district court granted the carrier's motion to limit liability to $ 500 per rack. [[278]](#footnote-279)278 The Sixth Circuit accepted an interlocutory appeal under 28 U.S.C. § 1292(b) and reversed. [[279]](#footnote-280)279

The focus of the appeal was the choice of governing law between COGSA (the domestic enactment in the United States of the international convention popularly known as the Hague Rules) and the Hague-Visby Rules (the amended version of the Hague Rules now in force for the majority of world trade). [[280]](#footnote-281)280 In the days before multimodal contracts were common (which includes the time when the Hague and Hague-Visby Rules were negotiated), that would have been an easy issue. **[\*419]** The sea voyage from Le Havre to Montreal would have been governed by a separate contract with no U.S. connection. Because France and Canada are both parties to the Hague-Visby Rules, no doubt the Hague-Visby Rules would have applied. [[281]](#footnote-282)281 And because the loss occurred during the ocean voyage, that would presumably have been the end of the story. But because this case involved a multimodal contract calling for an ultimate destination in the United States, and because U.S. law (unlike most [[282]](#footnote-283)282 other legal systems) applies COGSA to inbound as well as outbound shipments, the carrier argued that COGSA should govern the loss in this case. [[283]](#footnote-284)283

Because COGSA § 1(e), like article 1(e) of the Hague-Visby Rules, limits the application of its regime to the so-called "tackle-to-tackle" period - from the time of loading at the port of origin to the time of unloading at the port of destination - it is hard to see why actions (or, in this case, intended actions) falling completely outside the scope of the regime should affect its compulsory applicability. The Sixth Circuit's analysis did not consider this anomaly. It instead rejected the carrier's ""ultimate destination' theory" in favor of "the plain language of the statute." [[284]](#footnote-285)284 COGSA's enacting clause defines the scope of the statute by reference to "carriage of goods by sea to or from ports of the United States, in foreign trade." [[285]](#footnote-286)285 Section 13 similarly refers to "carriage of goods by sea to or from ports of the United States in foreign trade." [[286]](#footnote-287)286 And section 13 defines "foreign trade" as "the transportation of goods **[\*420]** between the ports of the United States and ports of foreign countries." [[287]](#footnote-288)287 Montreal is not a port "of the United States." The inland U.S. cities for which the goods were destined are not "ports" in the relevant sense (and even if they were "ports," the goods were not carried to them by sea). Thus COGSA did not apply ex proprio vigore (by its own force) to the carriage at issue. [[288]](#footnote-289)288

Once the court of appeals held that "the Hague-Visby Rules apply ex proprio vigore to the voyage" [[289]](#footnote-290)289 and COGSA does not, [[290]](#footnote-291)290 it might seem that the choice-of-law analysis was done. But this opinion has as many plot twists as a spy thriller. The Sixth Circuit explains that even though COGSA does not apply by its own force, and even though the Hague-Visby Rules do apply by their own force, COGSA nevertheless applies to the shipment from France to Canada as a matter of "federal common law." [[291]](#footnote-292)291 The court cites back to Jensen [[292]](#footnote-293)292 for the proposition that "in the absence of a federal statute, courts may apply federal common law" [[293]](#footnote-294)293 and concludes that "because neither COGSA nor any other United States federal statute applies by its own terms to the ocean voyage between Le Havre and Montreal, we must apply federal common law to decide the case." [[294]](#footnote-295)294

The Sixth Circuit finds further support for its analysis in the broad reasoning of Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd., [[295]](#footnote-296)295 which "affirms the broader principle that courts should evaluate maritime contracts in their entirety rather than treating each of the multiple stages in multimodal transportation as subject to separate legal regimes." [[296]](#footnote-297)296

When the court of appeals held that COGSA applied as a matter of general maritime law, it might once again seem that the choice-of-law analysis was done, but yet one more plot twist remained. Even though COGSA applied as a matter of law, the parties still had the freedom under COGSA to contract for higher limits of liability - and the Sixth Circuit concluded that, as a matter of contract interpretation, the parties **[\*421]** had indeed chosen to apply the Hague-Visby Rules. [[297]](#footnote-298)297 Under well-established authority in the lower courts, this conclusion is plainly correct. [[298]](#footnote-299)298 The relevant portion of the clause paramount clearly provides that the Hague-Visby Rules should apply on these facts. [[299]](#footnote-300)299 The Sixth Circuit, however, discovered latent ambiguities in the language and reached its conclusion only under the contra proferentum doctrine, which requires ambiguities to be construed against the drafter of an ambiguous contract. [[300]](#footnote-301)300

Once it was settled that the Hague-Visby Rules applied, the court still needed to consider what was a "package or unit" under the Rules. [[301]](#footnote-302)301 We address that issue below. [[302]](#footnote-303)302

2. The Application of COGSA: COGSA versus the Carmack Amendment

For the last two years, the most controversial topic in U.S. cargo law has been the potential applicability of the Carmack Amendment to the inland portion of multimodal shipments under through bills of lading calling for the door-to-door application of COGSA. [[303]](#footnote-304)303 In Sompo Japan Insurance Co. of America v. Union Pacific Railroad Co., [[304]](#footnote-305)304 the Second Circuit held that the Carmack Amendment applied with the force of law in a cargo claimant's action against the railroad that damaged the goods, and that a contractual extension of COGSA (and its $ 500-per-package limitation) could not override the governing federal statute. Shortly thereafter, in Altadis USA, Inc. v. Sea Star Line, LLC, [[305]](#footnote-306)305 the Supreme Court granted certiorari to address the applicability of the Carmack **[\*422]** Amendment in this context, but certiorari was dismissed under the Court's Rule 46 when the parties settled the case. [[306]](#footnote-307)306

The original Sompo case is still working its way through the court system. On remand from the Second Circuit, the district court held that the railroad had not satisfied the Carmack Amendment's requirements for reducing its liability and thus the railroad was fully liable for the damage that it had caused. [[307]](#footnote-308)307 That decision is now on appeal to the Second Circuit, which appears bound to affirm (based on its earlier decision in the case). Presumably, the railroad will then seek certiorari, relying heavily on the Supreme Court's implicit conclusion (in Altadis) that at least one issue in the case is cert-worthy. [[308]](#footnote-309)308

In addition to the original Sompo case, a veritable gaggle of similar and related cases are requiring the district courts to address issues that the Second Circuit did not resolve. Sompo Japan Insurance of America v. Union Pacific Railroad Co. [[309]](#footnote-310)309 involves the same parties as the original Sompo case, but different shipments (with different ocean carriers and different bills of lading). The final result, however, was the same. [[310]](#footnote-311)310 The district court held that the Carmack Amendment applies, the railroad had not satisfied the requirements for reducing its liability thereunder, and thus the railroad was fully liable for the damage that it caused. [[311]](#footnote-312)311 Simply offering the shipper the opportunity to declare the full value of the cargo (which is sufficient to avoid the package limitation under COGSA § 4(5)) is not the same as offering the shipper full Carmack liability. [[312]](#footnote-313)312

In Sompo Japan Insurance Co. of America v. Norfolk Southern Railway Co., [[313]](#footnote-314)313 the basic facts were essentially the same as in the prior cases: Cargo owners entered into contracts for the multimodal carriage of goods with various non-vessel-operating common carriers (NVOCCs), which issued through bills of lading and sub-contracted for the inland rail carriage. When the goods were damaged, the responsible railroad argued **[\*423]** that it was not subject to the Carmack Amendment because its contracts with the NVOCCs were "exempt contracts" under 49 U.S.C. § 10502 or 49 U.S.C. § 10709. [[314]](#footnote-315)314 The court rejected the § 10502 argument because the railroad never offered the underlying cargo owners the benefit of full Carmack liability; making that offer to the NVOCCs was not enough. [[315]](#footnote-316)315 The court rejected the § 10709 argument because no evidence supported the argument that the contracts had been concluded under § 10709. [[316]](#footnote-317)316 Moreover, the court concluded that the railroad's contracts with the NVOCCs "should be read as § 10502 and not § 10709 contracts," thus requiring full Carmack liability to be offered to the underlying cargo owners in any event. [[317]](#footnote-318)317

In Swiss National Insurance Co. v. Blue Anchor Line, [[318]](#footnote-319)318 the subrogated insurer brought its claim against the NVOCC with which the cargo owner had contracted (rather than the responsible inland carrier, as in the prior cases discussed here). The NVOCC, relying on Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., [[319]](#footnote-320)319 argued that it was not subject to the Carmack Amendment. [[320]](#footnote-321)320 In Rexroth Hydraudyne, the district court had asserted without analysis that Sompo applies only to the liability of an inland carrier and that the Carmack Amendment is irrelevant when determining the liability of an NVOCC that sub-contracted with a railroad for inland carriage. [[321]](#footnote-322)321 The Swiss National court purported to distinguish Rexroth Hydraudyne (although its basis for doing so was questionable at best) and concluded (also without any relevant analysis) that the Carmack Amendment governed the NVOCC's liability. [[322]](#footnote-323)322

**[\*424]** Royal & Sun Alliance Insurance PLC v. Ocean World Lines, Inc., [[323]](#footnote-324)323 involved an action against both an NVOCC and a motor carrier. The district court, following Rexroth Hydraudyne, held that the NVOCC could limit its liability to $ 500 per package under the contractual extension of COGSA because the Carmack Amendment does not govern NVOCCs. [[324]](#footnote-325)324 The court then inexplicably held that the motor carrier could also limit its liability under the contractual extension of COGSA. [[325]](#footnote-326)325 Although the Second Circuit, in the original Sompo case, had considered the potential applicability of Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd., [[326]](#footnote-327)326 and explicitly held that Kirby did not address the Carmack issue, [[327]](#footnote-328)327 the district court reconsidered the issue and reached the opposite conclusion. [[328]](#footnote-329)328 It is not often that one sees a district court explicitly defying the court of appeals that reviews its judgments, but the Royal & Sun Alliance court declared that "Kirby is the higher authority, and I believe I should follow it." [[329]](#footnote-330)329

In Mitsui Sumitomo Insurance Co. v. Evergreen Marine Corp., [[330]](#footnote-331)330 the district court was required to decide several of these same issues when a subrogated insurer sought to recover from the ocean carrier that had issued a through bill of lading for a door-to-door multimodal shipment and from the railroad that had damaged the cargo during the inland leg. On the railroad's argument that it was entitled to limit liability, the district court recognized that it was bound by the Second Circuit's decision in Sompo and that the Sompo court had rejected the Kirby argument on which the railroad (like the motor carrier in Royal & Sun Alliance) attempted to rely. [[331]](#footnote-332)331 The railroad also argued (as had the railroad in Sompo Japan Insurance Co. of America v. Norfolk Southern Railway Co.) that the Carmack Amendment did not apply because its contract with the ocean carrier was exempt under 49 U.S.C. § 10709. [[332]](#footnote-333)332 The **[\*425]** district court rejected that argument. [[333]](#footnote-334)333 Although that contract explicitly stated that § 10709 governed (a sharp distinction from the contract in Sompo), that statement did not affect the underlying shipper. [[334]](#footnote-335)334 Nothing in the cargo owner's contract with the ocean carrier warned the shipper of an exempt contract for inland carriage. [[335]](#footnote-336)335

On the ocean carrier's argument that it was entitled to limit liability, the district court held that the Carmack Amendment also governed that claim. [[336]](#footnote-337)336 As in Rexroth Hydraudyne, Swiss National, and Royal & Sun Alliance, the principal issue was whether the Carmack Amendment extended beyond the inland carrier that had damaged the cargo to the contracting carrier that had dealt directly with the shipper (here an ocean carrier rather than an NVOCC). [[337]](#footnote-338)337 The district court held that the ocean carrier's liability for inland damage caused by a subcontractor should be determined under the Carmack Amendment (rather than the contractual extension of COGSA) for two reasons. [[338]](#footnote-339)338 First, the ocean carrier qualified as a "rail carrier" under the definition relevant for the Carmack Amendment because it operated "four loading tracks, five storage railtracks, … and a dedicated railtrack for switching between loading and storage tracks" in the port of Los Angeles. [[339]](#footnote-340)339 Second, it qualified as a "rail carrier" under the relevant definition because it "provided common carrier railroad transportation for compensation" through its subcontracts with companies such as its co-defendant, the Union Pacific Railroad. [[340]](#footnote-341)340

Finally, Sompo Japan Insurance Co. of America v. Yang Ming Transport Corp., [[341]](#footnote-342)341 a related case arising out of the same facts as Sompo Japan Insurance Co. of America v. Norfolk Southern Railway Co., also considered whether an NVOCC is subject to the Carmack Amendment. Following similar reasoning to Mitsui Sumitomo Insurance Co. v. Evergreen Marine Corp., the district court held that the NVOCC qualified as a railroad under the relevant definition because it "provided common carrier railroad transportation for compensation" through its **[\*426]** subcontract with Norfolk Southern. [[342]](#footnote-343)342 This holding then became irrelevant, however, when the suit was dismissed for improper venue. [[343]](#footnote-344)343

3. The Application of COGSA: COGSA Versus State Law

Continental Insurance Co. v. Kawasaki Kisen Kasha, Ltd., [[344]](#footnote-345)344 illustrates another aspect of the broader issue: It explores the circumstances under which COGSA applies in preference to state law. Plaintiff's insured shipped a large quantity of plums with defendant-carrier from Oakland, California, to Hong Kong under four bills of lading. [[345]](#footnote-346)345 When the plums spoiled during shipment, plaintiff-insurer paid the claim and brought the present action in state court asserting only state law claims. [[346]](#footnote-347)346 The carrier removed the action to federal court under 28 U.S.C. § 1441 on the ground that the plaintiff's claim actually arose under federal law - more specifically COGSA. [[347]](#footnote-348)347 The plaintiff then moved to remand the case to state court. [[348]](#footnote-349)348

To determine whether removal was proper, the district court considered whether COGSA completely preempts state law. [[349]](#footnote-350)349 Although citing two district court decisions that had held against complete preemption, [[350]](#footnote-351)350 the court followed an Eleventh Circuit decision "holding that COGSA provides an exclusive remedy." [[351]](#footnote-352)351 That conclusion was based in part on the statutory text, in part on the comprehensive scheme that COGSA establishes, and in part on the Supreme Court's decision in Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd. [[352]](#footnote-353)352 In what appears to be an alternative holding, the court also argued that even if "gaps do exist under COGSA, the Supreme Court made clear in Kirby that federal maritime law, not state law, would fill those gaps." [[353]](#footnote-354)353

Although the district court may well have been right in its implicit assumption that cases arising under COGSA are properly removable, that **[\*427]** conclusion is not so clear as the district court appeared to believe. Most authorities support the view that COGSA provides a basis for federal question jurisdiction with the result that COGSA cases are removable. [[354]](#footnote-355)354 But some thoughtful opinions argue that Romero v. International Terminal Operating Co. [[355]](#footnote-356)355 precludes a claim of federal question jurisdiction based on COGSA or the Harter Act. [[356]](#footnote-357)356 The Continental Insurance court did not mention the issue.

Even more troublesome is the court's alternate holding. It is no doubt true after Kirby that general maritime law (i.e., judge-made federal maritime law), not state law, governs most maritime cargo disputes when COGSA or another federal statute does not. But Romero plainly establishes that general maritime law does not confer federal question jurisdiction on the district court, and thus does not justify removal. [[357]](#footnote-358)357 To justify the removal in Continental Insurance, the court needed more than federal law. It needed to conclude that the claim was governed by the right kind of federal law. Its alternate holding based on the general maritime law is inadequate.

The Continental Insurance decision is at least somewhat suspect now because the Ninth Circuit reached a different conclusion in Moore v. Young Brothers, Ltd. [[358]](#footnote-359)358 Although the court does not give a full statement of facts in its memorandum opinion, the plaintiff apparently filed suit in state court alleging both state law contract claims for the carrier's failure to deliver goods carried by sea from the U.S. mainland to Hawaii and also state law tort claims for the carrier's negligent storage of the goods after they had arrived in Hawaii. [[359]](#footnote-360)359 The carrier removed the case to **[\*428]** federal district court, which assumed admiralty jurisdiction under 28 U.S.C. § 1333 and ruled for the carrier. [[360]](#footnote-361)360

The court of appeals did not see any problem with the carrier's removing the case into admiralty. [[361]](#footnote-362)361 It instead rejected the district court's conclusion that this was a maritime case (by a two to one vote). [[362]](#footnote-363)362 The appellate court even more vehemently rejected the carrier's argument that federal question jurisdiction existed on the ground that COGSA completely preempted the state law claims. [[363]](#footnote-364)363 Indeed, the case was not even subject to COGSA because it was a domestic shipment, and thus subject instead to the Harter Act. [[364]](#footnote-365)364 (The court also held that the Harter Act did not preempt the state law claims. [[365]](#footnote-366)365)

4. The Shipper's Liability for Dangerous Goods

Two years ago, we discussed two cases from within the Second Circuit involving PPG Industries' shipment of containerized drums of calcium hypochlorite, a heat-sensitive cargo regulated by the Department of Transportation's Hazardous Materials Regulations and the International Maritime Dangerous Goods (IMDG) Code. [[366]](#footnote-367)366 In Contship Containerlines, Ltd. v. PPG Industries, Inc., [[367]](#footnote-368)367 the Second Circuit held that the shipper was not responsible under section 4(6) of COGSA, which imposes strict liability on those who ship dangerous goods without the carrier's knowing consent, [[368]](#footnote-369)368 when the carrier knew that the goods were flammable (even though it argued that it did not know how flammable they were). Rejecting the carrier's argument, the court of appeals explained that a "binary analysis" was appropriate: "[A] party either will know that such [an exothermic] reaction is possible or it will **[\*429]** not; the calibrated likelihood of an exothermic reaction under a variety of heat circumstances is not considered." [[369]](#footnote-370)369

In the second case, however, a district court had reached the opposite conclusion, and ruled that the shipper was responsible under section 4(6) because "the [carrier's] consent to carrying the [calcium hypochlorite] was given without knowledge of the full risks and dangers presented … . The [carrier was] not properly warned of the extent of the hazards presented. [It] consented, but [its] consent was not informed." [[370]](#footnote-371)370 We confidently predicted that "this error [would] presumably be corrected in the pending appeal." [[371]](#footnote-372)371 That prediction has now been fulfilled. In In re M/V DG Harmony, [[372]](#footnote-373)372 the Second Circuit reaffirmed its Contship rule and held that "knowing consent" under section 4(6) did not require the level of information that the district court had required. [[373]](#footnote-374)373

The strict liability ruling did not end the case. As in Contship, the plaintiffs had argued that the shipper was in any event liable in negligence for its failure to warn the carrier that calcium hypochlorite was more dangerous than generally recognized. [[374]](#footnote-375)374 Although the Contship court had rejected this argument (on the basis of the facts found by the district court in that case), the DG Harmony court (reviewing remarkably different conclusions from the district court) held that the shipper might be liable under the negligent-failure-to-warn theory. [[375]](#footnote-376)375 The court of appeals agreed that the shipper had breached a duty to warn, noting that the standard was very different in this context than in the section 4(6) context. [[376]](#footnote-377)376 But it ultimately remanded the case so that the district court could determine whether the plaintiffs had shown "that the absent warning, if given, would have affected the carrier's stowage decision and thus prevented the explosion." [[377]](#footnote-378)377

Two years ago, we noted that the district court had erroneously held that other shippers whose cargo had been damaged by the explosion of the calcium hypochlorite had a cause of action under COGSA directly **[\*430]** against the shipper of the dangerous goods. [[378]](#footnote-379)378 We explained: "It is one of COGSA's most basic principles … that the statute governs only relationships between the shipper (or those who succeed to the shipper's interests) and the carrier. One shipper is not liable to another shipper under COGSA." [[379]](#footnote-380)379 We went on to predict, however, that the "mistake should prove irrelevant" because "there is no basis for strict liability to anyone after Contship Containerlines." [[380]](#footnote-381)380 Unfortunately, the Second Circuit did not correct the district court's error, but at least it did not perpetuate it either. The court of appeals noted that it had "not yet determined whether third parties may bring claims under COGSA," so it assumed for purposes of the appeal that they could, but then rejected those claims on the basis that there can be no strict liability under section 4(6) when the carrier has given the necessary "knowing consent." [[381]](#footnote-382)381

5. The Package Limitation

Under section 4(5) of COGSA, a carrier's liability is limited to $ 500 per "package" or "customary freight unit." [[382]](#footnote-383)382 Unfortunately, COGSA defines neither of these key terms, and thus the courts have frequently needed to address the definitional issue. [[383]](#footnote-384)383

An inter-circuit conflict on the package definition has existed for many years. In one of the first appellate cases to analyze the issue, the Second Circuit held that "packaged goods" constituted "a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods." [[384]](#footnote-385)384 Under this definition, a three-ton press bolted to a skid was a "package." Six years later, however, the Ninth Circuit rejected that analysis and held that an eighteen-ton transformer bolted to a skid was not a "package." [[385]](#footnote-386)385 Over the years, the Second Circuit approach has **[\*431]** become the dominant rule. [[386]](#footnote-387)386 With Maersk Line, Ltd. v. United States, [[387]](#footnote-388)387 the United States Court of Appeals for the Fourth Circuit officially joins the trend. [[388]](#footnote-389)388

Maersk had agreed to carry seven Halvorsen aircraft loaders, or "K-Loaders," which are 15-ton "wheeled vehicles with an adjustable deck that is used to load cargo onto aircrafts," from Charleston, South Carolina, to Thumrait, Oman. [[389]](#footnote-390)389 When one was damaged in shipment and the government pursued a claim, Maersk asserted the $ 500-per-package limitation. [[390]](#footnote-391)390 The Fourth Circuit, affirming the district court's summary judgment, agreed with Maersk. [[391]](#footnote-392)391 When the K-Loader was placed onto a flat rack, which "was the only way for Maersk to realistically lift the immobilized K-Loader onto the ship," that facilitated handling. [[392]](#footnote-393)392 Furthermore, the shipping documents treated each K-Loader as a "package." [[393]](#footnote-394)393

Earlier in this Part, [[394]](#footnote-395)394 we discuss the Sixth Circuit's decision in Royal Insurance Co. of America v. Orient Overseas Container Line, Ltd. [[395]](#footnote-396)395 to apply the Hague-Visby Rules rather than COGSA to the loss or damage of over 5000 automobile transmissions. Having reached that conclusion, the court still needed to decide whether each "rack" of transmissions or each individual transmission was a "package or unit" under the Hague-Visby Rules. [[396]](#footnote-397)396 With surprisingly little analysis (in an otherwise exhaustively analyzed opinion), the court held that the controlling factor would be the description of the goods in the bill of lading: "as a matter of law, the total number of units … listed [in the bill of lading] will constitute the number of packages or units to be used to assess the limits set by the Hague-Visby Rules." [[397]](#footnote-398)397 As a result, each individual transmission was a "package or unit." [[398]](#footnote-399)398

**[\*432]** Despite the court's relative lack of analysis on this issue, the conclusion seems correct under the so-called "container clause" of the Hague-Visby Rules. [[399]](#footnote-400)399 This clause provides:

Where a container, pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as aforesaid such article of transport shall be considered the package or unit. [[400]](#footnote-401)400

To the extent that the racks were "used to consolidate" the auto transmissions, therefore, each transmission would be a package or unit if enumerated in the bill of lading.

The substance of the container clause has largely been incorporated into COGSA jurisprudence with respect to enumerated items in containers, [[401]](#footnote-402)401 but COGSA cases have not generally followed the same rationale for smaller "articles of transport … used to consolidate goods," such as pallets [[402]](#footnote-403)402 (which are explicitly mentioned in the container clause) or the racks at issue in Royal Insurance. [[403]](#footnote-404)403 If COGSA had applied, therefore, the carrier might well have had not only a lower package limitation ($ 500 instead of 666.67 SDRs) but also a more favorable package definition (the racks instead of the transmissions). On the facts here, the second difference has much greater practical significance.

6. The One-Year Time-for-Suit Provision

Under section 3(6) of COGSA, [[404]](#footnote-405)404 cargo claims are barred one year after the delivery of the goods. Most of the disputes under the one-year time-for-suit provision involve questions about when "delivery" occurred, but Ansell Healthcare, Inc. v. Maersk Line [[405]](#footnote-406)405 illustrates one of the potential problems on the other end. The cargo claimant filed the complaint less than a year after delivery, but did not serve process on all **[\*433]** of the defendants within the one-year period. [[406]](#footnote-407)406 It is well-settled that filing the complaint is generally sufficient to satisfy section 3(6), [[407]](#footnote-408)407 but the defendant sought to rely on a bill of lading provision that required service of process within the year. [[408]](#footnote-409)408 A line of cases has enforced such provisions, [[409]](#footnote-410)409 but (as the Ansell Healthcare court noted) these were cases in which COGSA applied only as a matter of contract. [[410]](#footnote-411)410 In this case, when COGSA applied with the force of law, the carrier could not modify the statutory requirements with a bill of lading provision. [[411]](#footnote-412)411

7. Himalaya Clauses

Many aspects of the Supreme Court's Kirby [[412]](#footnote-413)412 decision are problematic. In the Court's treatment of Himalaya clauses, for example, the status of the Herd rule of strict construction [[413]](#footnote-414)413 is ambiguous. [[414]](#footnote-415)414 The Kirby Court declined to apply that venerable rule, but it also quoted Herd's statement of the rule and claimed that it was simply applying Herd. [[415]](#footnote-416)415 To further confuse matters, Kirby now instructs the lower courts to follow the ordinary rules of contract interpretation, with no "special rule for Himalaya Clauses." [[416]](#footnote-417)416 That might suggest an end to the rule of strict construction, which has long been viewed as a special part of Himalaya clause jurisprudence, but in fact, Herd's rule of strict construction was derived from the ordinary rules of contract interpretation that Kirby endorses. [[417]](#footnote-418)417

**[\*434]** In Mazda Motors of America, Inc. v. M/V Cougar Ace, [[418]](#footnote-419)418 the district court had no difficulty resolving the ambiguity. (Indeed, it did not appear to recognize any ambiguity.) The court simply declared that the claimant was "mistaken" to "contend that Himalaya clauses are to be strictly construed and limited to intended beneficiaries" because the Kirby Court rejected this notion. [[419]](#footnote-420)419

8. Deviation

In most circuits, a carrier loses the benefit of the COGSA package limitation [[420]](#footnote-421)420 if it commits a geographic "deviation" or a "quasi-deviation." [[421]](#footnote-422)421 But the deviation doctrine has been heavily criticized, [[422]](#footnote-423)422 and most courts have cut back on its scope - particularly by limiting the actions that qualify as "quasi-deviations." [[423]](#footnote-424)423 In M-Cubed, LLC v. Maersk, Inc., [[424]](#footnote-425)424 the district court announced a particularly restrictive view of quasi-deviations, saying that "only "a carrier's intentional destruction of the very goods it contracts to transport'" constitutes a quasi-deviation. [[425]](#footnote-426)425 It would probably be unwise, however, to place much reliance on this announcement. It was certainly dictum, and most likely ill-considered dictum that would not be followed in a case involving deck carriage, for example.

Amazon Produce Network, LLC v. M/V Lykes Osprey, [[426]](#footnote-427)426 is at the opposite end of the spectrum. A shipment of mangoes was spoiled when a series of shipping delays postponed their delivery in Houston by several weeks. Prior to COGSA, several cases had held that a delay could constitute a quasi-deviation, [[427]](#footnote-428)427 but now it is generally thought that quasi-deviations are defined more narrowly. [[428]](#footnote-429)428 The Amazon Produce Network **[\*435]** court, however, suggested in dicta that a delay could still constitute a deviation. [[429]](#footnote-430)429

9. Forum Selection and Arbitration Clauses

In previous articles, [[430]](#footnote-431)430 we have discussed a number of post-Sky Reefer [[431]](#footnote-432)431 cases in which U.S. courts have enforced forum selection or arbitration clauses in cargo cases. This trend continues unabated. In Salis v. American Export Lines, [[432]](#footnote-433)432 the court enforced a Norwegian forum selection clause on a $ 75,000 claim for failing to deliver a used motorhome on a shipment from New York to Lagos, Nigeria. In Safic Alcan & Cie v. M/T Kasco, [[433]](#footnote-434)433 the court enforced a charterparty clause requiring London arbitration.

If anything, it appears that defendants are becoming more aggressive in enforcing forum selection and arbitration clauses. In A.P. Moller-Maersk A/S v. Ocean Express Miami, [[434]](#footnote-435)434 the bill of lading contained a U.S. forum selection clause but the cargo interests filed actions in Panama and Guatemala. The carrier instituted a U.S. action seeking an antisuit injunction (to enjoin the Central American actions) and a declaration of nonliability. [[435]](#footnote-436)435 The cargo interests moved to dismiss but the district court held that they had not carried the strong burden necessary to overcome the presumptive validity of the forum selection clause. [[436]](#footnote-437)436

K. Marine Insurance

1. Wilburn Boat

In Lloyd's of London v. Pagan-Sanchez, [[437]](#footnote-438)437 the First Circuit addresses issues similar to those before the Supreme Court in Wilburn Boat Co. v. Fireman's Fund Insurance Co., [[438]](#footnote-439)438 but with remarkably different results. In Pagan-Sanchez, insurers sought a declaratory judgment that they were **[\*436]** not liable on a marine insurance policy covering a 43-foot pleasure boat, the GABRIELLA, which had sunk when an exhaust hose came loose and the vessel took on water through the exhaust system. [[439]](#footnote-440)439 The insurers claimed that the vessel's owner had breached a promissory warranty to maintain the fire extinguishing equipment in good working order and that this breach permitted them to avoid the policy - even though the breach had no causal connection with the loss. [[440]](#footnote-441)440

The district court had applied Puerto Rican law. [[441]](#footnote-442)441 Because Puerto Rico's Insurance Code does not apply to marine insurance contracts (due to an explicit exclusion), the district court concluded that under the general Puerto Rico Civil Code the breach of the warranty would not excuse payment in the absence of a causal connection with the loss. [[442]](#footnote-443)442

On appeal, the First Circuit explained that Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd. [[443]](#footnote-444)443 "clarified the Supreme Court's earlier choice of law analysis for maritime insurance contracts set forth in Wilburn Boat." [[444]](#footnote-445)444 In particular, the Kirby Court's "general rule that "when a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation'" [[445]](#footnote-446)445 was held to apply in the marine insurance context. Nothing suggested that the dispute here was "inherently local." [[446]](#footnote-447)446 Indeed, Puerto Rico had shown no interest in regulating marine insurance contracts (having explicitly excluded them from the Insurance Code). [[447]](#footnote-448)447 The court therefore followed "the prevailing view, under federal law and the law of most states, … that a breach of a promissory warranty in a maritime insurance contract excuses the insurer from coverage." [[448]](#footnote-449)448

2. Utmost Good Faith (Uberrimae Fidei)

Although the Fifth Circuit has famously declared that the venerable marine insurance doctrine of utmost good faith (uberrimae fidei) is "entrenched no more," [[449]](#footnote-450)449 the view is very different in the rest of the country. So far this year, the Ninth Circuit has twice reaffirmed the **[\*437]** doctrine. In New Hampshire Insurance Co. v. C'Est Moi, Inc., [[450]](#footnote-451)450 the court held that an insurer could rescind the policy covering a yacht (which had since been lost) because in the application for insurance the insured had misrepresented both the yacht's purchase price and the yacht's then-current insurance status. The court summarized the status of the doctrine as follows:

Uberrimae fidei is a "long-standing federal maritime doctrine" that "applies to marine insurance contracts." … Uberrimae fidei "imposes a duty of utmost good faith," … so "an applicant for a marine insurance policy is bound to reveal every fact within his knowledge that is material to the risk." … If an insured fails to do so, the insurer may rescind the policy, even if the material misrepresentation wasn't intentional. [[451]](#footnote-452)451 … Uberrimae fidei is a well-entrenched doctrine that protects not merely the insurer but also the integrity of the risk pool. [[452]](#footnote-453)452

Earlier in the year, in Certain Underwriters at Lloyds, London v. Inlet Fisheries, Inc., [[453]](#footnote-454)453 the Ninth Circuit similarly held that the doctrine of utmost good faith (uberrimae fidei) applies to vessel pollution policies covering statutory environmental liabilities. When the defendant's vessel pollution policy was cancelled (following several incidents but for the stated reason that the defendant had failed to conduct a survey of its vessels and failed to pay premiums), the defendant sought new coverage from the plaintiff insurer without disclosing the condition of its vessels, its financial condition, or any information about the cancellation of its prior policy. [[454]](#footnote-455)454 In addition, the defendant falsely claimed that it had no pollution loss history. [[455]](#footnote-456)455

When one of the defendant's vessels had another incident and the plaintiff investigated, the insurer filed the present declaratory judgment action seeking the right to void the policy ab initio under the uberrimae fidei doctrine. [[456]](#footnote-457)456 The defendant counterclaimed, argued that Alaskan law applied, and contended that the insurer had never asked for the information that it now considers material. [[457]](#footnote-458)457 The district court ruled for the insurer. [[458]](#footnote-459)458 On appeal, the Ninth Circuit agreed. [[459]](#footnote-460)459 Considering and **[\*438]** rejecting the Fifth Circuit's analysis in Albany Insurance Co. v. Anh Thi Kieu, [[460]](#footnote-461)460 the court ruled that federal law applied: that the uberrimae fidei doctrine requires material disclosures even if the insurer does not specifically request the information, that the defendant had breached the doctrine here, and that the insurer was accordingly entitled to avoid the policy. [[461]](#footnote-462)461

L. Longshore and Harbor Workers' Compensation Act (LHWCA)

1. Negligence Actions Against "Vessels" Under Section 5(b)

LHWCA § 2(21) [[462]](#footnote-463)462 provides that

the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member.

Section 5(b) [[463]](#footnote-464)463 deals with two types of tort actions brought by LHWCA-covered workers against "vessels." It permits an injured LHWCA worker (or his family if the injury was fatal) to sue a third-party (nonemployer) "vessel" for negligence. [[464]](#footnote-465)464 And (except for shipyard workers) it authorizes a negligence action against an injured LHWCA worker's employer if the employer functioned in the dual capacity of employer and "vessel" and the conduct giving rise to the injury emanated from the defendant's "vessel" capacity. [[465]](#footnote-466)465

In its Scindia Steam Navigation Co. v. De Los Santos [[466]](#footnote-467)466 and Howlett v. Birkdale Shipping Co. [[467]](#footnote-468)467 decisions, the Supreme Court has given specialized meaning to the term "negligence" in section 5(b) by specifying "the three general duties [that] shipowners owe to longshoremen." [[468]](#footnote-469)468

The first, which courts have come to call the "turnover duty," relates to the condition of the ship upon the commencement of stevedoring operations. The second duty, applicable once stevedoring operations have begun, **[\*439]** provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "active control of the vessel." The third duty, called the "duty to intervene," concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore. [[469]](#footnote-470)469

Most section 5(b) actions seem to fail. Of those that succeed, most are based on violations of the turnover duty. For example, Patalano v. American President Lines [[470]](#footnote-471)470 was a summary order affirming a judgment on a jury verdict in favor of two longshoremen who were injured by a damaged cargo container. The defendant, a third-party (nonemployer) vessel, knew that the damage had occurred during the voyage but took no steps to warn the longshoremen or otherwise to guard against the danger. [[471]](#footnote-472)471 Its principal defensive argument was a so-called "repair doctrine" - the defendant apparently found this in New York law - to the effect that one hired to repair a dangerous condition cannot recover for injuries caused by that condition. [[472]](#footnote-473)472 The Second Circuit agreed with the trial court that the evidence supported the jury's determination that the two plaintiffs were not engaged in repairing the container when their injuries occurred. [[473]](#footnote-474)473

Abruska v. Northland Vessel Leasing Co. [[474]](#footnote-475)474 was another "unpub-lished" section 5(b) decision involving the turnover duty. The trial court granted summary judgment for the defendant. [[475]](#footnote-476)475 Reversing and remanding, the panel majority [[476]](#footnote-477)476 held that the third-party vessel defendant was negligent per se for violating a Coast Guard regulation requiring three-course guard rails. [[477]](#footnote-478)477 (The injuries in suit were sustained when the plaintiff longshoreman fell overboard.) [[478]](#footnote-479)478

Turning from section 5(b) cases against third-party vessels to cases against "dual capacity" (employer/vessel) defendants, we should begin by noting that unless the dual capacity defendant is a **[\*440]** company with well-defined and distinct vessel-operating and stevedoring (or harbor work) divisions, the three Scindia/Howlett duties can be difficult to assess in dual capacity cases. [[479]](#footnote-480)479 (In Abruska, [[480]](#footnote-481)480 one of the defendants was a dual-capacity entity, but the court gave no explanation of why that defendant was responsible for the condition of the vessel's railing.) [[481]](#footnote-482)481 What the plaintiff in a "dual capacity" case must do, usually, is (1) show a breach of one of the three Scindia/Howlett duties and (2) tie that breach to the defendant in its "vessel" capacity rather than in its "employer" capacity. [[482]](#footnote-483)482 The plaintiff in Bentley v. L & M Lignos Enterprise [[483]](#footnote-484)483 could not make the requisite showing. Plaintiff's decedent - a bridge-repair worker - drowned while attempting to use a small motor boat to depart from a work barge and journey to the shore. [[484]](#footnote-485)484 The court gave summary judgment for the defendant, stating without explanation that defendant's duty to provide the worker with a reasonably safe means of "egress from the barge to the boat" was owed in defendant's employer capacity rather than its barge-owner capacity. [[485]](#footnote-486)485

2. Can LHWCA Workers Sue Their Employers in Tort for Intentional Injury? [[486]](#footnote-487)486

We have discussed this issue in several earlier articles. [[487]](#footnote-488)487 As we saw, [[488]](#footnote-489)488 the state court in Talik took the view that LHWCA employers can be sued for purposive or deliberate injuries to employees, but not for injuries that might be termed "intentional" under the Restatement (Second) of Torts because they were substantially certain to follow from the defendant's conduct. [[489]](#footnote-490)489

**[\*441]**

3. Workers' Compensation Nuts and Bolts: Attorneys' Fees Issues

The attorneys' fees provision of LHWCA § 28 [[490]](#footnote-491)490 seems to be litigated fairly frequently. Tahara v. Matson Terminals, Inc., [[491]](#footnote-492)491 dealt with an unanswered question in the Ninth Circuit: whether section 28 authorizes attorneys' fees for work a lawyer performs to secure a late payment award under section 14(f). [[492]](#footnote-493)492 The court answered yes. [[493]](#footnote-494)493 The question turns on whether such an award counts as "compensation" under section 28(a), which authorizes attorneys' fees to a claimant who is successful in a dispute over "compensation." [[494]](#footnote-495)494 The Second Circuit treats a late payment award under section 14(f) as a "penalty," not compensation. [[495]](#footnote-496)495 The Fourth Circuit holds that late payment awards under section 14(f) are compensation, so that attorneys' fees for successful late-payment award work are authorized. [[496]](#footnote-497)496 In Tahara, the Ninth Circuit sides with the Fourth Circuit. [[497]](#footnote-498)497

The context in which the question arose in Tahara was interesting. An administrative law judge (ALJ) awarded Tahara about $ 104,000 in compensation. [[498]](#footnote-499)498 Under section 14(f), [[499]](#footnote-500)499 the employer had ten days to pay. [[500]](#footnote-501)500 On the sixth day, the employer delivered the check to Tahara's lawyer, who returned it by mail, stating that he was not authorized to accept it. [[501]](#footnote-502)501 The employer then paid Tahara on the seventeenth day. [[502]](#footnote-503)502 Tahara requested and got from the District Director a supplementary order declaring that under section 14(f) Tahara was entitled to a late payment award equaling twenty percent of the initial compensation. [[503]](#footnote-504)503 Tahara filed a district court action (under 33 U.S.C. § 918(a)) to enforce the District Director's supplementary order, and the employer haled Tahara's lawyer before the Hawaii Office of Disciplinary Counsel (ODC), claiming that the lawyer had committed ethical violations in **[\*442]** going after the late-payment award. [[504]](#footnote-505)504 In the district court, Tahara sought $ 31,500 in attorneys' fees; over $ 20,000 of that was for the lawyer's work defending himself before the ODC. [[505]](#footnote-506)505 The district court awarded fees of $ 6060. In agreeing with the district court that the lawyer's work before the ODC could not be included, the Ninth Circuit noted that "by its plain language, § 928(c) precludes fees for work not done "before' the court awarding fees." [[506]](#footnote-507)506

Day v. James Marine, Inc., [[507]](#footnote-508)507 addressed a different aspect of section 28(a), which provides in pertinent part as follows:

If the employer or carrier declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim … and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded, in addition to the award of compensation, … a reasonable attorney's fee… . [[508]](#footnote-509)508

The point at which the employer declines to pay can be called the "controversion point." [[509]](#footnote-510)509 In Day, the panel majority emphasized the statutory word thereafter and held that this provision does not authorize attorneys' fees for work done before the controversion point. [[510]](#footnote-511)510 Judge Rogers, dissenting, argued as follows: "The "thereafter' clause … makes the post-controversion use of legal services … a precondition to fee shifting. The "thereafter' clause does not, however, by its terms act to limit the services for which fees may shift." [[511]](#footnote-512)511

M. Collision and Allision

Last year, [[512]](#footnote-513)512 we discussed the Second Circuit's decision in Otal Investments Ltd. v. M.V. Clary, [[513]](#footnote-514)513 which reviewed an English Channel collision involving three different vessels (two of which collided with each other and one of which sank). Although the district court had originally found that one ship was solely at fault (because the court had considered only causative fault), the court of appeals thought that the other two ships had at least some fault that needed to be included in the calculation (even if one ship was primarily - perhaps even **[\*443]** overwhelmingly - at fault). [[514]](#footnote-515)514 It therefore remanded the case to the district court for a new calculation that would give greater weight to culpability and recognize that all three ships bore at least some causative fault. [[515]](#footnote-516)515

Otal Investments Ltd. v. M.V. Clary [[516]](#footnote-517)516 is the district court's decision on remand. Following the Second Circuit's instructions, it separately calculated "the relative culpability of each vessel and the relative extent to which the culpability of each [vessel] caused the collision." [[517]](#footnote-518)517 For the KARIBA, the ship that the district court had originally held to be solely at fault, the district court on remand held that the proportion of culpability was forty percent and that proportion of causative fault was eighty-six percent. [[518]](#footnote-519)518 (Thus the district court "remained convinced that the Kariba played by far the most causative role." [[519]](#footnote-520)519) For the TRICOLOR, the ship that sank, the relative culpability was twenty-four percent and the relative causation was ten percent. [[520]](#footnote-521)520 For the CLARY, the ship that was not directly involved in the collision, the respective figures were thirty-six percent and four percent. [[521]](#footnote-522)521

Although the court of appeals had required the lower court to consider both culpability and causative fault, it had not given any guidance on the relative weights that should be assigned to each. [[522]](#footnote-523)522 Thus the district court simply averaged the two figures for each vessel to determine the final allocation of liability. [[523]](#footnote-524)523 The KARIBA, which had previously been fully responsible for the accident, accordingly saw its liability reduced to sixty-three percent. [[524]](#footnote-525)524 For the TRICOLOR and the CLARY, their proportion of the liability rose to seventeen percent and twenty percent, respectively. [[525]](#footnote-526)525 Presumably the Second Circuit will soon have another opportunity to determine whether this new method of calculation was appropriate.

**[\*444]**

N. Maritime Liens

The United States is one of the few countries in the world that recognizes a maritime lien for necessaries and also one of the few that permits an unauthorized charterer to incur a lien on a vessel. In Trans-Tec Asia v. M/V Harmony Container, [[526]](#footnote-527)526 the Ninth Circuit exacerbated the international conflict by enforcing a U.S. maritime lien in a transaction with no physical connection to the United States, and further confused what the court itself recognized as "the tangled web of American case law that bears on this issue." [[527]](#footnote-528)527

The plaintiff, a Singaporean entity, sold 1150 metric tons of bunker fuel on credit to the Taiwanese charterer of a Malaysian owned and flagged vessel. [[528]](#footnote-529)528 The fuel was delivered to the vessel in Busan, Korea. [[529]](#footnote-530)529 The vessel then consumed that fuel on a voyage to Mexico, Panama, South America, and back to Asia. [[530]](#footnote-531)530 The sales contract between the Singaporean supplier and the Taiwanese charterer, concluded through a series of faxes and e-mail messages, incorporated the supplier's standard terms and conditions by reference. [[531]](#footnote-532)531 These standard terms and conditions, in turn, contained lien and U.S. choice-of-law provisions. [[532]](#footnote-533)532 The charterparty between the vessel's Malaysian owner and the Taiwanese charterer included an English choice-of-law clause and a provision prohibiting the charterer from permitting liens to be imposed on the vessel. [[533]](#footnote-534)533

Three months after the transaction, the charterer - never having paid for the fuel - declared bankruptcy. [[534]](#footnote-535)534 The vessel was subsequently chartered to another company. [[535]](#footnote-536)535 The new charterer then directed the vessel to call at a U.S. port for the first time since the transaction. [[536]](#footnote-537)536 The **[\*445]** supplier there asserted a lien and sued both the vessel in rem and the Malaysian owner in personam. [[537]](#footnote-538)537

The district court, applying the analysis mandated by Lauritzen v. Larsen, [[538]](#footnote-539)538 initially determined that Malaysian law governed the dispute. But it applied U.S. law to hold that the U.S. choice-of-law clause had not been incorporated into the contract (because it had not been sufficiently called to the charterer's attention under the "battle of the forms" analysis familiar to any first-year law student). [[539]](#footnote-540)539 On reconsideration, however, the district court applied Malaysian law to hold that the U.S. choice-of-law clause had been incorporated into the contract. [[540]](#footnote-541)540 Applying U.S. substantive law, the district court nevertheless granted summary judgment for the owner because it determined that no maritime lien arose under the Federal Maritime Lien Act (FMLA). [[541]](#footnote-542)541 Although the FMLA does not explicitly require a connection with the United States, statutes are presumed not to apply extraterritorially in the absence of some explicit indication that they should. [[542]](#footnote-543)542

On appeal, the Ninth Circuit framed the issue as "whether a foreign supplier, by supplying fuel to a foreign-flagged vessel in a foreign port under an agreement that United States law applied to the transaction, may obtain a maritime lien under the [FMLA] on the vessel docked in an American port." [[543]](#footnote-544)543 The court answered that question affirmatively "based on the plain language of the statute, coupled with an enforceable choice of law clause." [[544]](#footnote-545)544 In reaching its conclusion, the Ninth Circuit followed the Fifth Circuit's decision in Liverpool & London Steamship Protection & Indemnity Ass'n v. Queen of Leman MV [[545]](#footnote-546)545 and distinguished decisions of the First, [[546]](#footnote-547)546 Second, [[547]](#footnote-548)547 and Eleventh [[548]](#footnote-549)548 Circuits. In rejecting the district court's conclusion that extending the FMLA to govern this case would result in an extraterritorial application of U.S. law to a wholly foreign transaction, the Ninth Circuit simply declared that **[\*446]** "hardly any area of law could be viewed as more extraterritorial than admiralty law." [[549]](#footnote-550)549

The Trans-Tec Asia court seems to have been motivated to a considerable degree by its desire to recognize party autonomy and to give effect to what the panel viewed as the free choice of the parties to the transaction. [[550]](#footnote-551)550 This motivation is perhaps the most basic problem with the decision. It is fundamental that maritime liens cannot be created by agreement of the parties. [[551]](#footnote-552)551 The entire point of a maritime lien, after all, is to have an impact beyond the immediate parties to a transaction - to bind the interests of third parties, be they subsequent owners of the encumbered property or other creditors that would otherwise have a higher priority when enforcing their claims.

When a debtor is in a position to meet all of its obligations, the existence of a lien is relatively less important; the creditor will be paid with or without the lien (although the existence of a lien could well simplify the process). When a debtor cannot meet its obligations in full, on the other hand, liens become most important. And their impact is to ensure that those with liens (or with higher priority liens) are paid in preference to those without liens (or with lower priority liens). It is precisely because liens are most significant when they affect the rights of third parties that they cannot be created by agreement of the parties. Maritime liens arise automatically, by operation of law, based on the nature of the parties' transaction (e.g., supplying necessaries), not on the terms of their contract.

Trans-Tec Asia provides a good illustration of these points. The bunker fuel sales transaction, which created the maritime lien under the Ninth Circuit's analysis, was between the supplier and the charterer. [[552]](#footnote-553)552 But the lien proved irrelevant to the charterer. It did not own the vessel subject to the lien and its bankruptcy ensured that it bore none of the consequences of permitting the lien to arise (in breach of its obligations under the charterparty). The vessel's owner suffered from the creation of **[\*447]** the lien. But the owner was not a party to the charterer's contract with the supplier and it did not consent to the U.S. choice-of-law clause on which the case turned. [[553]](#footnote-554)553

There can be no doubt that the lien in Trans-Tec Asia would not have arisen in the absence of the U.S. choice-of-law clause in the sales contract. [[554]](#footnote-555)554 But for that clause, Malaysian law would have governed, and Malaysian law does not recognize a lien for necessaries. [[555]](#footnote-556)555 It is also well-established that in the absence of the choice-of-law clause, the parties could not have imposed a lien by an explicit lien clause purporting to create one (whether U.S. or Malaysian law governed). [[556]](#footnote-557)556 The Ninth Circuit has, therefore, permitted the parties to do indirectly what they would not have been permitted to do directly. While a clause that straight-forwardly attempted what the parties (or at least the supplier) hoped to achieve would have been invalid, another clause in the same contract achieved the same goal by disguising its purpose.

A petition for certiorari is pending [[557]](#footnote-558)557 and will probably be considered by the Supreme Court at a conference in late 2008. [[558]](#footnote-559)558

In sharp contrast with Trans-Tec Asia, the district court in Triton Marine Fuels Ltd., S.A. v. M/V Pacific Chukotka [[559]](#footnote-560)559 held in very similar circumstances that the FMLA did not create a lien. In Triton Marine Fuels, a Panamanian supplier sold bunker fuel to the Cayman Islands charterer of a Maltese-flagged vessel that was owned by a Norwegian company but bareboat chartered to a Russian company. [[560]](#footnote-561)560 The bunker fuel was delivered in Odessa, Ukraine, under a sales contract that included U.S. choice-of-law and jurisdiction clauses. [[561]](#footnote-562)561 When the charterer became insolvent without having paid for the fuel, the supplier arrested the vessel in a U.S. port and began the present in rem action. [[562]](#footnote-563)562

**[\*448]** The Norwegian owner, appearing to defend the vessel, moved for summary judgment on the grounds that (1) it was not a party to the sales contract and therefore not bound by the U.S. choice-of-law clause, or (2) even if U.S. law applied, the FMLA did not create a maritime lien when "bunkers are delivered to a foreign ship by a foreign supplier in a foreign port." [[563]](#footnote-564)563 The district court, recognizing the conflicting results in prior U.S. cases and the conflicting policies behind each line of cases, agreed that the FMLA should not be applied extraterritorially to create a lien in these circumstances. [[564]](#footnote-565)564

The supplier appealed the case to the Fourth Circuit, and that appeal is now pending. [[565]](#footnote-566)565

O. Cruise Ship Cases

The passage contract in Oltman v. Holland America Line, Inc., [[566]](#footnote-567)566 included a forum selection clause specifying federal court in Washington and a one-year statute of limitations. Within the year, the passengers (alleging serious gastrointestinal illness) sued in a Washington state court. [[567]](#footnote-568)567 When that court dismissed the action on the basis of the forum selection clause, the plaintiffs filed in the specified federal court. [[568]](#footnote-569)568 They did this on the same day the state court dismissed the action, but this was beyond the one-year limitations period. [[569]](#footnote-570)569 The court of appeals rejected plaintiffs' argument that the limitations clause was invalid but held that the limitations period was equitably tolled during the pendency of the state court action. [[570]](#footnote-571)570

P. General Maritime Tort Law

In In re City of New York, [[571]](#footnote-572)571 the Second Circuit applied the rule of Kermarec v. Compagnie Generale Transatlantique [[572]](#footnote-573)572 that a shipowner owes all persons lawfully on board a duty of reasonable care under the circumstances and analyzed the issue of the City's negligent conduct in operating the Staten Island ferry at some length. The question was whether the City should have guarded against the risk of the pilot's **[\*449]** sudden incapacitation by requiring another qualified person to be in or near the wheelhouse while the ferry was under way. [[573]](#footnote-574)573 The court's affirmative conclusion was reached on the basis of the famous Learned Hand negligence "formula," which posits that the omission of a precaution is negligent if the cost of the precaution is less than the product of the probability and gravity of the threatened injury; [[574]](#footnote-575)574 industry custom; [[575]](#footnote-576)575 and a Coast Guard regulation requiring vessels of over 100 tons that carry more than twelve passengers for hire to have a second person "on watch in or near the pilothouse." [[576]](#footnote-577)576 The regulation did not apply in the present case, because this was a free ferry - it did not carry passengers "for hire" - but the court said it was nevertheless powerful evidence of the proper standard of care:

While we, as a court exercising common-law judgment, may have difficulty drawing the line between small vessels that can safely be operated by a single person and large passenger vessels whose size and complexity require more than one person attuned to the navigational situation for safe operation, the Coast Guard has the resources and expertise to make such a determination. [[577]](#footnote-578)577

Q. Eleventh Amendment Immunity

In 2003 the Alaska legislature revoked the state's waiver of sovereign immunity for Jones Act suits by state-employed seamen and relegated these seamen to the state's workers' compensation system. [[578]](#footnote-579)578 Glover v. State, Department of Transportation, Alaska Marine Highway System [[579]](#footnote-580)579 involved a declaratory action challenging the validity of the 2003 statute on multiple grounds, including an argument that the Jones Act preempts the state's authority to restrict seamen's rights. The Alaska Supreme Court upheld the statute. [[580]](#footnote-581)580 It explained its rejection of the plaintiff's Jones Act-preemption argument by describing Welch v. Texas **[\*450]** Department of Highways and Public Transportation [[581]](#footnote-582)581 as holding that state-employed seamen cannot bring federal-court Jones Act suits against their state without the state's consent, and by citing Alden v. Maine [[582]](#footnote-583)582 as having made clear that states are entitled to assert sovereign immunity against suits in their own courts. [[583]](#footnote-584)583 The court indicated that Hilton v. South Carolina Public Railways Commission [[584]](#footnote-585)584 - which at one time stood for the proposition that states may constructively consent to Jones Act suits by deciding to employ seamen - is no longer good law. [[585]](#footnote-586)585

Northern Insurance Co. of New York v. Chatham County, Georgia [[586]](#footnote-587)586 stands for the proposition that counties and other local-governmental entities are not entitled to sovereign immunity unless they qualify as "arms of the state." [[587]](#footnote-588)587 In Puerto Rico Ports Authority v. Federal Maritime Commission, [[588]](#footnote-589)588 the court held that the Puerto Rico Ports Authority functions as an "arm of the state" and thus has Eleventh Amendment immunity in Federal Maritime Commission (FMC) proceedings brought against the Authority by private marine terminal operators. The district court in Brennan v. Casco Bay Island Transit District [[589]](#footnote-590)589 held that a state-created commercial ferry operation was not an arm of the state for Eleventh Amendment purposes.

R. Procedural Issues

1. Personal Jurisdiction

Porina v. Marward Shipping Co. [[590]](#footnote-591)590 arose from an accident in May 2004 in which a Latvian fishing vessel was allegedly rammed and sunk in Swedish waters by a cargo ship, the VLADIMIR, owned by defendant Marward, a Cypriot corporation. Marward bought the VLADIMIR in March 2004, six weeks before the collision. [[591]](#footnote-592)591 During the period between April 2000 and Marward's acquisition of the ship, the VLADIMIR had regularly traveled between Russia and the United States, docking in the United States sixty times. [[592]](#footnote-593)592 This regular trade continued after Marward's **[\*451]** acquisition. [[593]](#footnote-594)593 After calling at Baltimore between April 16 and April 27, 2004, the ship was headed back to Russia when the May 10, 2004, collision allegedly occurred. [[594]](#footnote-595)594 The Second Circuit affirmed the Southern District of New York's dismissal of the Latvian victims' action for lack of personal jurisdiction. [[595]](#footnote-596)595

The Porina plaintiffs did not claim that the defendant had any contacts with New York. [[596]](#footnote-597)596 They relied on the VLADIMIR's contacts with the United States as a whole, invoking Federal Rule of Civil Procedure 4(k)(2):

For a claim that arises under federal law [general maritime law qualifies], serving a summons or filing a waiver of service establishes personal jurisdiction over a defendant if:

(A) the defendant is not subject to jurisdiction in any state's courts of general jurisdiction; and

(B) exercising jurisdiction is consistent with the United States Constitution and laws. [[597]](#footnote-598)597

Judge Calabresi's opinion for the court concluded that the plaintiffs could not satisfy requirement (B) because the exercise of jurisdiction would violate Fifth Amendment Due Process. [[598]](#footnote-599)598 The gist of Judge Calabresi's explanation was this:

The constitutional minimum contacts inquiry … requires us to distinguish between two forms of [personal] jurisdiction. Specific jurisdiction exists where a forum exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum. A court's general jurisdiction over a non-resident, on the other hand, is based on a defendant's general business contacts with the forum, and permits a court to exercise its power in a case where the subject matter of the suit is unrelated to those contacts.

Plaintiffs make no serious attempt to show that their suit either arises out of, or is related to, Marward's contacts with the United States. Accordingly, plaintiffs must satisfy the more stringent minimum contacts test for general jurisdiction cases, by showing that Marward had continuous and systematic general business contacts with the United States.

In general jurisdiction cases, we examine a defendant's contacts with the forum state over a period that is reasonable under the circumstances - up to and including the date the suit was filed. In building their case that **[\*452]** Marward had continuous and systematic contacts with the United States, plaintiffs rely primarily on the VLADIMIR's repeated visits to various ports on the Eastern Seaboard and the Gulf Coast … . But the Supreme Court has read the Constitution to require … "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum." Hanson v. Denkla, 357 U.S. 235, 253 (1958) … . The difficulty with plaintiffs' reliance on the VLADIMIR's American port visits is that none of the visits were made at Marward's direction. The decision to bring the VLADIMIR to the United States was made, in each case, by the ship's charterers, who were free under the charters to take the ship to any safe port in the world… .

Plaintiffs … maintain that Marward purposefully availed itself of the advantages of doing business in the United States [because Marward] bought the VLADIMIR in the knowledge that the ship had visited, and was likely to continue visiting, the United States… . [But] that Marward foresaw that the VLADIMIR would visit the United States does not, without more, establish that Marward purposefully engaged in the continuous and systematic business contacts with this country that are needed to support general personal jurisdiction… .

In a similar vein, plaintiffs note that the financial benefits of the charterers' course of business in the United States accrued to the ship's owner. By the terms of the charters, however, Marward was entitled to receive the same financial benefit regardless of where the charterers directed the vessel. The fact that the ship's charterers repeatedly made money from business in the United States does not suffice as a basis for a finding of continuous and systematic contacts on Marward's part. [[599]](#footnote-600)599

2. The Right to Jury Trial in Maritime Cases

In re Lockheed Martin Corp. [[600]](#footnote-601)600 involved the Fourth Circuit in the recurrent tension that is generated when an admiralty plaintiff invokes its right to a bench trial under Federal Rule of Civil Procedure 9(h) and another party to the case asserts a nonadmiralty basis for subject matter jurisdiction and insists on the jury trial right set forth in the Seventh Amendment. When Lockheed's ship was damaged, Lockheed made a $ 2.6 million claim against National Casualty Company, a first-party insurer. [[601]](#footnote-602)601 National resisted paying the claim and won the race to the courthouse, filing an admiralty action - designating it as such under Rule 9(h) - seeking a declaratory judgment that the claim was time barred and in the alternative that the amount of the loss was much less than **[\*453]** Lockheed was claiming. [[602]](#footnote-603)602 Lockheed responded with a counterclaim for damages for breach of contract, invoking the court's diversity jurisdiction and demanding a jury trial. [[603]](#footnote-604)603 The trial court held that National's 9(h) right to bench trial trumped Lockheed's jury demand. [[604]](#footnote-605)604 In reversing, the Fourth Circuit discussed two arguments for Lockheed's position. [[605]](#footnote-606)605 First, Lockheed maintained that a defendant who asserts a compulsory counterclaim within the court's diversity jurisdiction is self-evidently entitled to demand a jury trial of the counterclaim. [[606]](#footnote-607)606 Second, Lockheed relied on the Supreme Court's nonmaritime decision in Beacon Theatres, Inc. v. Westover [[607]](#footnote-608)607 for the proposition that "the right to a jury trial in a declaratory action judgment depends on whether there would have been a right to a jury trial had the action proceeded without the declaratory judgment vehicle." [[608]](#footnote-609)608 The Fourth Circuit held for Lockheed on the basis of the second argument. [[609]](#footnote-610)609

That seems right to us, but the first argument seems even stronger.

3. Standard of Appellate Review of a Bench-Trial Determination of Negligence

The Second Circuit's opinion in In re City of New York [[610]](#footnote-611)610 (the Staten Island ferry case) includes a discussion of the peculiar Second Circuit rule that "we review a district court's [bench-trial] factual findings for clear error, but we review its ultimate conclusion of negligence de novo." [[611]](#footnote-612)611 The court went on to note that it is under recurrent pressure to depart from this peculiarity and join the rest of the country - which treats a determination of negligence as a finding of fact that is reversible only if clearly erroneous - but decided that this was not the right case "because we would affirm the district court's finding of negligence [against the City's Director of Ferry Operations] on either a de novo or clear error standard of review." [[612]](#footnote-613)612

**[\*454]**

4. Laches

Three years ago, [[613]](#footnote-614)613 we discussed the First Circuit's decision in Doyle v. Huntress, Inc., [[614]](#footnote-615)614 which held that lay-share fishermen were entitled to damages under 46 U.S.C. § 11107 because their employer had violated 46 U.S.C. § 10601 by failing to provide each fisherman with "a fishing agreement in writing" before each trip. The court of appeals remanded the case to the district court to consider the employer's defenses, including the argument that the fishermen's older claims were barred by the doctrine of laches. [[615]](#footnote-616)615 On remand, the district court held that Rhode Island's three-year limitations period for unpaid wage claims was the most analogous period to use for laches analysis, that the seamen had not carried their burden to show that they should be allowed to pursue claims that were older than three years, and that the employer had not carried its burden to show that more recent claims should also be barred. [[616]](#footnote-617)616 The court accordingly also barred claims that were over three years old (at the time the suit was filed) and awarded damages on the more recent claims. [[617]](#footnote-618)617

In Doyle v. Huntress, Inc., [[618]](#footnote-619)618 the court of appeals affirmed the district court's ruling. It rejected the fishermen's argument that the most analogous statute was Rhode Island's catch-all ten-year limitations period for civil actions and the employer's "more serious" argument that it should be the federal Fair Labor Standards Act's [[619]](#footnote-620)619 two-year statute of limitations. [[620]](#footnote-621)620 Particularly noteworthy was the court's reliance on the presumption of liberal treatment afforded to seamen. [[621]](#footnote-622)621

S. Miscellaneous Cases

The Maritime Drug Law Enforcement Act [[622]](#footnote-623)622 asserts U.S. authority to punish drug trafficking in international waters. Its coverage turns on its definition of vessels that are "subject to the jurisdiction of the United States." [[623]](#footnote-624)623 In 1996, Congress added a provision to the Act stating, "Jurisdiction of the United States with respect to a vessel subject to this **[\*455]** chapter is not an element of an offense. Jurisdictional issues arising under this chapter are preliminary questions of law to be determined solely by the trial judge." [[624]](#footnote-625)624 The Ninth Circuit has held this provision unconstitutional because it takes away an accused's Fifth and Sixth Amendment rights to have every element of a criminal offense decided by a jury beyond a reasonable doubt. [[625]](#footnote-626)625 The Eleventh Circuit has upheld the provision. [[626]](#footnote-627)626 In United States v. Vilches-Navarrette, [[627]](#footnote-628)627 a divided First Circuit panel sided with the Eleventh Circuit. Judge Torruella dissented on the ground that the constitutional issue was not properly before the court in the present case. [[628]](#footnote-629)628

In Northwest Environmental Advocates v. United States Environmental Protection Agency, [[629]](#footnote-630)629 the court held that the EPA exceeded its authority in issuing a Clean Water Act rule exempting ship ballast water from the Act's National Pollutant Discharge Elimination System permit program.

V. The Work of the Courts in the Fifth and Eleventh Circuits

A. Admiralty Jurisdiction in Tort Cases

Last year's article was critical of the panel decision in De La Rosa v. St. Charles Gaming Co. [[630]](#footnote-631)630 for holding (1) that an indefinitely moored casino boat - indefinitely moored by virtue of the owner's stated intentions but physically capable of sailing within a very short time - had lost its vessel status and (2) that the lack of vessel status automatically precluded admiralty jurisdiction over a casino patron's premises liability action. [[631]](#footnote-632)631 We also criticized the district court decision in Board of Commissioners of the Orleans Levee District v. M/V Belle of Orleans [[632]](#footnote-633)632 for its reliance on De La Rosa. [[633]](#footnote-634)633 In the appeal in that case, [[634]](#footnote-635)634 the Eleventh Circuit has likewise disagreed with De La Rosa.

In reversing the district court's rejection of admiralty jurisdiction in an action for property damage against the owner of an operational (but indefinitely moored) casino boat that broke loose from its moorings **[\*456]** during Hurricane Katrina, the Eleventh Circuit in Board of Commissioners emphasized that the casino boat was indefinitely moored only because the owner wanted it to be. [[635]](#footnote-636)635 The court pointed to the Supreme Court's holding in Stewart v. Dutra Construction Co. [[636]](#footnote-637)636 that under 1 U.S.C. § 3 "a "vessel' is any watercraft practically capable of maritime transportation, regardless of its primary purpose," and went on to note that "the owner's intentions with regard to a boat are analogous to the boat's "purpose.'" [[637]](#footnote-638)637

The Eleventh Circuit also urged that the maritime law's strong need for "uniformity within admiralty jurisdiction" cuts against the De La Rosa reasoning. [[638]](#footnote-639)638 The court explained:

Under … De La Rosa, a boat may enter and leave admiralty jurisdiction on the basis of state law [regarding whether gaming is permitted on stationary craft] and the individual thoughts of the boat owner as to what use of the boat is most desirable. As the Louisiana legislature demonstrated by its actions in 2001 [rescinding a requirement that casino boats be in motion while conducting gaming activities] state law can change. Further, if legal navigability is the test for vessel status, any ship with an expired Coast Guard certification becomes a non-vessel, and those working upon it and around it lose their protection under the Jones Act or the LHWCA. Such a result is clearly not what the Supreme Court intended. See Stewart, 543 U.S. at 494 (noting that seamen do not lose their protection under the Jones Act due to minor changes in ship location). Also, an owner's intentions may change in ways never anticipated. We need look no further than the Star of India for an example. In 1973, the Southern District of California rejected the Coast Guard's designation of the Star of India as permanently moored and her owner's statement that he did not intend to sail her again, and declared her subject to admiralty jurisdiction. Luna v. Star of India, 356 F. Supp. 59, 66 (S.D. Cal. 1973) ("The fact that the Star currently rests at dockside detracts not at all from her colorful past nor her future capacities."). A mere three years later, the Star of India was put to sea for the first time in fifty years, and she continues to sail annually. [[639]](#footnote-640)639

**[\*457]** The casino boat cases call for particularly close scrutiny of the Stewart Court's discussion of how watercraft may lose vessel status. [[640]](#footnote-641)640 Here is the key Stewart passage:

Simply put, a watercraft is not "capable of being used" for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement.

This distinction is sensible: A ship and her crew do not move in and out of Jones Act coverage depending on whether the ship is at anchor, docked for loading or unloading, or berthed for minor repairs, in the same way that ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again. See Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560, 570[,1995 AMC 2038, 2047] ([5th Cir.] 1995) (floating casino was no longer a vessel where it "was moored to the shore in a semipermanent or indefinite manner"); Kathriner v. UNISEA, Inc., 975 F.2d 657, 660[, 1994 AMC 2787, 2790] ([9th Cir.] 1992) (floating processing plant was no longer a vessel where a "large opening [had been] cut into her hull," rendering her incapable of moving over the water). [[641]](#footnote-642)641

In Tagliere v. Harrah's Illinois Corp., the Seventh Circuit read the Stewart passage to mean that a casino boat that has been "moored indefinitely" retains vessel status whereas one that has been "permanently moored in the [Stewart] Court's sense (disabled from sailing)" has lost vessel status. [[642]](#footnote-643)642

We think the Tagliere court read Stewart correctly. The Stewart Court's treatment of Pavone cannot sensibly be taken to mean that a shipowner can take a watercraft out of vessel status merely by announcing that it is henceforth to be deemed "indefinitely" moored. Taking a watercraft out of vessel status requires the creation of some significant physical impediment to sailing. [[643]](#footnote-644)643 Here is the Pavone court's description of the nonvessel involved in that case:

In preparation for its use as a dockside floating casino, the BILOXI BELLE was moored to shore by lines tied to sunken steel pylons that were filled with concrete. The first level of the BILOXI BELLE was connected to the pier by steel ramps, and the second level was joined to a shore-side building. In addition, numerous shore-side utility lines - telephone, electric, gas, sewer, domestic fire and water, cable TV, and computer - were **[\*458]** connected permanently (or at least indefinitely) to the BILOXI BELLE. Only by removing steel pins from the ramps and letting loose all lines and cables could the BILOXI BELLE be disconnected from the shore… .

… .

… Even though the barge floats on navigable waters, its quite substantial dockside attachment to land is indefinite, if not permanent, save only for its ability to be unmoored and towed to sheltered waters in advance of approaching hurricanes or other violent weather. The BILOXI BELLE employs no navigational or nautical crew; all workers thereon are employed solely in connection with the casino operation. [[644]](#footnote-645)644

Under the Pavone reasoning, the structure involved in In re Silver Slipper Casino Venture LLC, [[645]](#footnote-646)645 was clearly no longer a vessel. Judge Elrod's opinion for the Silver Slipper panel explained:

Silver Slipper owned the President Casino-Broadwater, a casino barge that was permanently moored in the Broadwater Beach Marina in Biloxi, Mississippi. The marina was almost completely surrounded by a land mass occupied by a parking lot, except for an opening about equal to the width of the casino that provided a means of ingress and egress for yachts moored in the marina. The casino was mounted on a steel barge moored to six steel dolphins using heavy "H" beams and received water and electricity from land-based sources. It was three stories tall and contained gaming facilities, restaurants, and other entertainment facilities. [[646]](#footnote-647)646

This structure was carried by Hurricane Katrina across a highway and collided with a hotel. [[647]](#footnote-648)647 The structure's owner petitioned for shipowners' limitation of liability. [[648]](#footnote-649)648 In upholding the trial court's denial of admiralty jurisdiction, Judge Elrod's opinion for the panel correctly determined that the physical situation of the structure kept it from being a vessel. [[649]](#footnote-650)649 As Judge Elrod explained, Stewart and Pavone provided clear guidance: the Silver Slipper casino was even more tightly tied down and land-bound than the casino involved in Pavone. [[650]](#footnote-651)650 (Judge Elrod also cited De la Rosa, which we regret, because we continue to believe that De la Rosa was wrongly decided. [[651]](#footnote-652)651)

**[\*459]** In a previous article, we treated a district court decision concluding there was no admiralty jurisdiction over an injury to a longshoreman when the crane he was "walking" along the dock at a time when no vessels were present fell from the dock into the Houston Ship Channel. [[652]](#footnote-653)652 We noted that the decision was sustainable on the ground that the case failed the Grubart "substantial relationship with traditional maritime activity" requirement. [[653]](#footnote-654)653 We also noted that the trial court's statement that the case satisfied the Grubart "location" requirement may have been wrong. [[654]](#footnote-655)654 Abt v. Dickson Co. of Texas [[655]](#footnote-656)655 affirmed the district court's decision on "substantial relationship" grounds while suggesting that the district court's "location" reasoning was questionable.

We remain convinced that the decision in Doe v. Celebrity Cruises, Inc., [[656]](#footnote-657)656 was wrong. [[657]](#footnote-658)657 The decision - upholding admiralty jurisdiction over a cruise line passenger's action alleging that a crew member raped her during an excursion ashore - may be sustainable on policy grounds, but it cannot be reconciled with Grubart's "location" requirement, [[658]](#footnote-659)658 and it is causing confusion. In John Morrell & Co. v. Royal Caribbean Cruises, Ltd., [[659]](#footnote-660)659 the court took Celebrity Cruises to mean there was admiralty jurisdiction over an action arising from a dune buggy-moped collision ashore, but then had to struggle for a while before reaching the correct conclusion that the case should be governed by state law.

The law is not very clear on whether admiralty jurisdiction exists when the manufacturer of a generic product - one not aimed particularly at maritime uses or markets - is sued for products liability for an injury on a boat or ship. [[660]](#footnote-661)660 In Harris v. Flow International Corp., [[661]](#footnote-662)661 the magistrate judge held against admiralty jurisdiction in that situation, noting plausibly that the activities of "the manufacturer of an industrial strength pressure washer … do not appear to be substantially related to a traditional maritime activity." In reaching this conclusion, the magistrate judge made the useful (and sometimes overlooked) observation that the **[\*460]** Grubart "substantial relationship" inquiry focuses on the "activities of the alleged tortfeasor" and not those of the plaintiff. [[662]](#footnote-663)662

But the magistrate judge in Harris also said two things about admiralty jurisdiction that are incorrect. First, he said that a plaintiff who seeks the application of federal substantive maritime law must plead the case as an admiralty case and make the Rule 9(h) designation. [[663]](#footnote-664)663 This is quite wrong. The 9(h) designation controls procedure, not substance; cases that meet the criteria for admiralty jurisdiction are maritime for substantive law purposes regardless of whether they are brought in admiralty, on the "law side" of federal court, or in a state court. Second, he said that when there is admiralty jurisdiction over one of several defendants, there is admiralty jurisdiction over all of them. [[664]](#footnote-665)664 We have frequently explained how Grubart has led some lower courts and analysts to make this mistake, while emphasizing that the idea is ultimately demonstrably implausible.

B. Admiralty Jurisdiction in Contract Cases

The issue in F.W.F., Inc. v. Detroit Diesel Corp. [[665]](#footnote-666)665 turned on whether maritime law or some other substantive law governed the enforcement of a settlement agreement, but - as is so often the case - the answer to that question depended on whether the particular claim was within the admiralty jurisdiction. The original contract in the case was for the purchase of a sixty-five-foot yacht with diesel engines manufactured by the defendant. [[666]](#footnote-667)666 When the purchaser alleged that the engines did not meet the power and torque specifications warranted by the defendant manufacturer, it began a four-year process to correct the problem (which included rebuilding the port engine five times). [[667]](#footnote-668)667

The purchaser eventually sued the manufacturer and asserted admiralty jurisdiction. [[668]](#footnote-669)668 After the suit was filed, the manufacturer finally identified the problem with the port engine and the parties settled the case. [[669]](#footnote-670)669 Unfortunately, relations between the parties broke down again, and the current dispute was over the enforcement of the settlement agreement. [[670]](#footnote-671)670 As part of this action, the purchaser sought remedies under **[\*461]** the federal Magnuson-Moss Warranty Act and the Florida Deceptive and Unfair Trade Practices Act, both of which would be preempted if the general maritime law governed. [[671]](#footnote-672)671

The district court did not discuss whether the purchaser's claim was based on the warranty in the original contract for the sale of the vessel, which is traditionally held not to be a maritime contract, [[672]](#footnote-673)672 or on a contract to repair the vessel, which is traditionally held to be maritime (and thus within admiralty jurisdiction). [[673]](#footnote-674)673 The court announced that the settlement agreement was a maritime contract because (1) it was "a contract to abandon claims that are cognizable only in admiralty," and (2) its "primary purpose … [was] to repair the [vessel's] port engine." [[674]](#footnote-675)674

Four months later, another Florida district court addressed a very similar issue with the opposite result. In Lady Di Fishing Team, LLC v. Brunswick Corp., [[675]](#footnote-676)675 the original contract was for the purchase of a sixty-four-foot vessel. This one had problems with the starboard engine, and the parties spent less than a year trying to resolve the problems before the purchaser filed the present diversity action seeking nonmaritime remedies, including those available under the Magnuson-Moss Warranty Act. [[676]](#footnote-677)676 The district court carefully considered whether the purchaser's claim was based on the original contract for the sale of the vessel or a subsequent contract to repair the original defects in the vessel. [[677]](#footnote-678)677 On these facts, the court concluded that the claim was based on the nonmaritime sales contract, and thus the purchaser could invoke the Magnuson-Moss Warranty Act (and other nonmaritime remedies). [[678]](#footnote-679)678

C. Jurisdiction and Choice of Law on the Outer Continental Shelf

1. The Application of Adjacent-State Law Under § 1333(a)(2)(A)

The Outer Continental Shelf Lands Act (OCSLA) makes it reasonably clear that state law cannot apply of its own force to events on **[\*462]** the Outer Continental Shelf (OCS). [[679]](#footnote-680)679 While there is some outlier jurisprudence on the point, [[680]](#footnote-681)680 the three cases treated just below reflect the correct view that state law can apply to an OCS matter only as surrogate federal law under the provisions of 43 U.S.C. § 1333(a)(2)(A).

Fuselier v. Sea Boat Rentals, Inc., [[681]](#footnote-682)681 arose from an injury sustained by an OCS platform worker when he tripped on baggage aboard the M/V SEA BREEZE while being transported to the platform. The issue before the court was whether Louisiana law - arguably applicable by virtue of 43 U.S.C. § 1333(a)(2)(A) - affected contractual indemnity obligations among the vessel operator, the platform operator, and the worker's employer. [[682]](#footnote-683)682 On its face, § 1333(a)(2)(A) does not apply to controversies arising from events on vessels afloat on the waters over the OCS. [[683]](#footnote-684)683 It states in pertinent part:

To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws … , the civil and criminal laws of each adjacent State … are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward … . [[684]](#footnote-685)684

The court in Fuselier had to labor through a confusing thicket of Fifth Circuit OCSLA jurisprudence, [[685]](#footnote-686)685 but it arrived at the answer that § 1333(a)(2)(A) calls for: state law must yield to federal maritime law respecting the activities and operations of vessels afloat over the OCS. [[686]](#footnote-687)686

Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, [[687]](#footnote-688)687 presented the Fifth Circuit with a virtually identical controversy, and the court agreed with the result in Fuselier. [[688]](#footnote-689)688 Here the OCS worker was hurt in a fall aboard the M/V SEA HORSE IV while being transported from the OCS platform where he worked to a residential platform containing his living **[\*463]** quarters. [[689]](#footnote-690)689 Once again the question was whether Louisiana law applied (by virtue of § 1333(a)(2)(A)) to indemnity obligations among the vessel operator, the work platform operator, and the worker's employer. [[690]](#footnote-691)690 The district court held that Louisiana law did apply, reasoning that the case satisfied OCSLA's situs requirements (subsoil, seabed, and structures erected thereon) because the accident happened while the vessel was arriving at (but not yet touching) the residential platform. [[691]](#footnote-692)691 The Fifth Circuit vacated that ruling, holding that § 1333(a)(2)(A) did not make Louisiana law applicable because "the OCSLA situs requirement is not met in this case." [[692]](#footnote-693)692 The Fifth Circuit explained:

The accident here occurred in close proximity to an offshore platform. However, there is no suggestion that [the injured worker] was in actual physical contact with the platform at the time of his accident. This is significant in light of our precedent indicating that an accident involving a plaintiff on a vessel who was nevertheless in physical contact with a platform may be deemed to have occurred on an OCSLA situs. [The court here distinguished two cases in which workers were hurt in the process of moving between platforms and immediately adjacent vessels. It then approvingly discussed the Fuselier decision.] In this case, it is likewise apparent [as was true in Fuselier] that the SEA HORSE IV does not qualify as an OCSLA situs… . [[693]](#footnote-694)693

The court sought to soften its disagreement with the district judge's reasoning by acknowledging that "the district court faced a difficult task" because the Fifth Circuit's OCSLA jurisprudence is a tangled mess. [[694]](#footnote-695)694

The Grand Isle court's indication that "actual physical contact" with a platform brings an incident into the coverage of § 1333(a)(2)(A) is borne out by Smith v. Seacor Marine LLC. [[695]](#footnote-696)695 A platform worker was hurt during a personnel basket transfer from a vessel to the platform, and once again the lawsuit centered on contractual indemnity obligations of the platform operator, the vessel operator, and the injured worker's **[\*464]** employer. [[696]](#footnote-697)696 The court held that the case fell within the coverage of § 1333(a)(2)(A). [[697]](#footnote-698)697

The fact that a matter is covered by § 1333(a)(2)(A) does not automatically make adjacent state law applicable. By the terms of the provision, adjacent-state law can apply only if it is "not inconsistent" with federal maritime law. [[698]](#footnote-699)698 There are good arguments for treating all disputes arising from the use of vessels to transport OCS platform workers as maritime matters, to be governed by federal maritime law rather than adjacent-state law. [[699]](#footnote-700)699 But the Smith v. Seacor Marine LLC court treated the case as turning on a nonmaritime contract between the platform operator and the plaintiff's employer (a contractor who provided labor services to the platform). [[700]](#footnote-701)700 This nonmaritime characterization of the dispute defeated the applicability of federal maritime law and led to the application of the Louisiana Oilfield Indemnity Act to invalidate the indemnity contract. [[701]](#footnote-702)701

2. Federal Courts' Subject Matter Jurisdiction Under § 1349(b)(1)

The unsatisfactory state of the Fifth Circuit's OCSLA jurisprudence is strongly illustrated by Golden v. Omni Energy Services Corp., [[702]](#footnote-703)702 holding that an action by an OCS worker against the operator of a helicopter that crashed on land while ferrying the worker to an OCS platform was not within the district court's subject matter jurisdiction under 43 U.S.C. § 1349(b)(1). Section 1349(b)(1) gives the federal district courts jurisdiction over "cases and controversies arising out of, or in connection with … any [minerals-exploitation] operation conducted on the outer Continental Shelf." [[703]](#footnote-704)703 The Fifth Circuit has often empha-sized the provision's breadth of coverage. [[704]](#footnote-705)704 It includes no requirement that the incident in suit occur on the OCS, and the opinion in Golden provides no policy reasoning and cites no authority that supports reading such a situs requirement into § 1349(b)(1). [[705]](#footnote-706)705

**[\*465]**

3. The Right to Jury Trial in OCSLA Cases

Many situations that fall within the coverage of 43 U.S.C. § 1349(b)(1) also meet the criteria for admiralty or maritime jurisdiction under 28 U.S.C. § 1333(1). Federal Rule of Civil Procedure 9(h) enables the plaintiff in such a case to decide which jurisdictional ground to invoke. [[706]](#footnote-707)706 Invoking § 1349(b)(1) makes the case a "suit at common law" under the Seventh Amendment and thus gives both parties the right to demand a jury trial. [[707]](#footnote-708)707 On the other hand, by using Rule 9(h) to invoke admiralty jurisdiction, the plaintiff can establish a right to a bench trial.

There are unfortunate dicta in a few cases from within the Fifth Circuit suggesting that in the OCS context, a Rule 9(h) suit must be tried to the jury if the eventual applicable substantive law will be nonmaritime law. [[708]](#footnote-709)708 These suggestions are unworkable because in many cases of admiralty jurisdiction, the ultimate source-of-governing-law determination must await inquiry into the merits. [[709]](#footnote-710)709 Henson v. Odyssea Vessels, Inc., includes such a suggestion. [[710]](#footnote-711)710 But the way the Henson court handled the case exemplifies the standard view.

The Henson suit arose from an injury to an OCS platform worker who was being lowered in a personnel basket by a platform crane onto the deck of a vessel waiting to take the worker ashore. [[711]](#footnote-712)711 The seas were rough, and the operation caused the worker to be slammed to the vessel's deck. [[712]](#footnote-713)712 The plaintiff sought to bring a Rule 9(h) admiralty action against both the vessel operator and the crane operator. [[713]](#footnote-714)713 The court determined that there was admiralty jurisdiction in the suit against the vessel operator, so that action had to be tried to the bench. [[714]](#footnote-715)714 But the action against the crane operator, in the court's view, fell outside admiralty jurisdiction (because the defendant's activity, the court thought, lacked a substantial connection to traditional maritime activity). [[715]](#footnote-716)715 That action was, therefore, before the court only on some nonadmiralty basis - e.g., diversity jurisdiction, supplemental jurisdiction, or § 1349(b)(1) jurisdiction - and thus entitled the defendant to demand a jury. [[716]](#footnote-717)716 (The **[\*466]** court contemplated a simultaneous trial of the two actions with the jury deemed advisory-only in the admiralty action. [[717]](#footnote-718)717)

D. Vertical (Federal-State) Choice of Law

1. Cases in Which Federal Maritime Law Preempted State Law

Augman v. Seacor Marine, L.L.C., [[718]](#footnote-719)718 was a Jones Act suit in which the court held that Louisiana's seat belt gag rule was inapplicable. Augman's Jones Act suit alleged that he was hurt in a one-car wreck while being driven by his employer to join the vessel to which he was assigned. [[719]](#footnote-720)719 Augman was a back-seat passenger. [[720]](#footnote-721)720 The driver's negligence seemed plain. [[721]](#footnote-722)721 The only seriously contested issue was whether Augman's recovery should be diminished for having failed to wear a seat belt. [[722]](#footnote-723)722 In the course of granting partial summary judgment for Augman that the defendant was 100% to blame, the court said that it would not apply the Louisiana provision that failure to wear a seat belt "shall not be considered evidence of comparative negligence," [[723]](#footnote-724)723 because since "the states are split on whether seatbelt use can be introduced as evidence … , the principal of uniformity would be compromised" by applying the state law rule. [[724]](#footnote-725)724 But the court forgave Augman's seat belt failure anyway, determining that "defendant has cited no record evidence **[\*467]** that plaintiff's failure to wear a seatbelt contributed either to the accident or to his injuries." [[725]](#footnote-726)725

In Frazier v. Carnival Corp., [[726]](#footnote-727)726 plaintiff Wyatt Ann Frazier was a New Orleans police officer being housed on a Carnival cruise ship in the aftermath of Hurricane Katrina. She was hurt on a gangway while going from the ship to the dock. [[727]](#footnote-728)727 The City of New Orleans paid workers' compensation benefits and intervened in Frazier's tort suit against Carnival. [[728]](#footnote-729)728 Carnival then filed a cross claim for contribution against the City and against CCMSI, the administrator of the City's workers' compensation program, alleging that the City's and CCMSI's failure to timely approve essential medical treatments had exacerbated Frazier's injuries. [[729]](#footnote-730)729 The City and CCMSI moved to dismiss, asserting their immunity from tort liability under Louisiana's workers' compensation laws. [[730]](#footnote-731)730 The court denied these motions, concluding that federal maritime law displaced state law under the circumstances shown. [[731]](#footnote-732)731 The court acknowledged that Brockington v. Certified Electric, Inc., [[732]](#footnote-733)732 was closely on point and to the contrary. [[733]](#footnote-734)733 However, it felt bound to follow the pointers laid down in three Fifth Circuit decisions. [[734]](#footnote-735)734 (1) In Thibodaux v. Atlantic Richfield Co., [[735]](#footnote-736)735 the Fifth Circuit indicated that state workers' compensation immunity must yield to the federal general maritime law remedy recognized in Moragne v. States Marine Lines, Inc. [[736]](#footnote-737)736 (2) In Roberts v. City of Plantation, [[737]](#footnote-738)737 the court held that state workers' compensation law had no bearing on a Jones Act suit. [[738]](#footnote-739)738 (3) In Green v. Vermilion Corp., [[739]](#footnote-740)739 the court held that the general maritime law cause of action for unseaworthiness trumped state workers' compensation law. [[740]](#footnote-741)740 The Frazier court thought these three Fifth Circuit decisions were technically distinguishable from the present case, because each of them involved "unique admiralty claims" whereas the present case was a **[\*468]** garden variety negligence suit. [[741]](#footnote-742)741 But "neither party has cited any reason why this personal injury claim for failure to provide safe ingress or egress from a vessel should be any different than those unique admiralty claims." [[742]](#footnote-743)742

2. State Law Applied

Tassinari v. Key West Water Tours, L.C., [[743]](#footnote-744)743 was a limitation of liability proceeding brought by a personal watercraft rental/tour guide company in response to an accident during a guided tour of the waters surrounding Key West conducted by the company. The accident occurred when one of the tourists rammed his personal watercraft into another's. [[744]](#footnote-745)744 In seeking to prove the company's negligence, the victims invoked the Pennsylvania Rule, which creates a presumption of causation against a shipowner or operator who violates a marine safety statute. [[745]](#footnote-746)745 The statutes to which the victims pointed were Florida boating-safety laws. [[746]](#footnote-747)746 The court agreed that these statutes could be used to supplement federal maritime law, stating:

The Seventh Circuit recognized that "several courts have applied the Pennsylvania rule to the violation of state statutes or local ordinances." Complaint of Wasson, 495 F.2d 571, 583 (7th Cir. 1974) (citations omitted); see also Protectus Alpha Nav. Co., Ltd. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1382-83 (9th Cir. 1985) (violation of Washington State statute would support negligence per se).

Further, State law has been applied in admiralty cases where there is no direct conflict with established federal maritime law… .

In the present case, Plaintiffs cite to several Florida statutes that were enacted, in part, in response to an act of Congress intended to "encourage greater State participation and uniformity in boating safety efforts, and particularly to permit the States to assume the greater share of boating safety education, assistance, and enforcement activities." 46 U.S.C. § 13102 (2007). The Court is not persuaded that statutes enacted in response to Congress's stated purpose of permitting the states to assume more responsibility in regulation of recreational boat safety are inapplicable merely because they were enacted by a state government.

Further, Defendant has not pointed to any established federal maritime law directly conflicting with and preempting these State **[\*469]** statutes… . The Florida statutes at issue were not designed to circumvent federal maritime law or substitute a stricter standard of care in negligence cases; rather, they were designed to help regulate recreational boating safety. The Pennsylvania rule is an established principle of federal maritime law, which may be applied to violations of Florida State statutes; this application does not, in and of itself, conflict with federal maritime law. [[747]](#footnote-748)747

E. Seaman Status Under the Jones Act [[748]](#footnote-749)748

1. The Vessel Requirement

In several previous articles we have discussed the vessel status of the CAJUN EXPRESS - a technologically advanced semi-submersible drilling rig that was built and put through sea trials in Singapore and then towed to the Gulf of Mexico for final construction before becoming fully operational - during the final construction phase. [[749]](#footnote-750)749 In a surprising decision by a divided panel in Cain v. Transocean Offshore USA, Inc., [[750]](#footnote-751)750 the Fifth Circuit held that the CAJUN EXPRESS lacked vessel status until it was "complete and ready for duty upon the sea." This holding entailed the denial of seaman status to a man who worked on the rig in Singapore, sailed with it across the ocean to the Gulf of Mexico, and continued to work on it throughout the final construction phase, during which he was injured. [[751]](#footnote-752)751 Judge Owen dissented, agreeing with the careful district court opinion in that case that the Supreme Court's decision in Stewart v. Dutra Construction Co. [[752]](#footnote-753)752 required according vessel status to the CAJUN EXPRESS. [[753]](#footnote-754)753 We think Judge Owen was right. But the Fifth Circuit has denied both rehearing and rehearing in banc. [[754]](#footnote-755)754 Certiorari has been denied. [[755]](#footnote-756)755

**[\*470]** Last year's article discussed a district court determination that an apparatus called a "tension leg platform" that was attached to the seabed with an elaborate system of tendon pilings, pipelines, and production risers was a Jones Act vessel. [[756]](#footnote-757)756 After hearing additional evidence, the district court changed its mind, ruling in Jordan v. Shell ***Oil*** Co. [[757]](#footnote-758)757 that the Jones Act defendant was entitled to summary judgment denying seaman status to a worker assigned to the apparatus. In holding that the apparatus did not meet the Stewart criteria for vessel status, the court emphasized that "any contemplated movement of this monstrous facility would be a massive engineering feat requiring up to two years of engineering and deconstruction." [[758]](#footnote-759)758

In re Two-J Ranch, Inc., [[759]](#footnote-760)759 was a limitation of liability proceeding that included a Jones Act claim by the widow of an assistant deckhand on a Mississippi River towboat who drowned when he slipped from a barge in tow. In a careful and thorough opinion, the court ruled that the deceased worker was a Jones Act seaman as a matter of law. [[760]](#footnote-761)760 The towboat was obviously a Jones Act vessel. [[761]](#footnote-762)761 The court went further and ruled that a dry dock and spud barge assembly on which the decedent frequently worked was also a Jones Act vessel, explaining:

About once a year, depending on the river level, the drydock and spud barge would be moved up and down the river bank as much as several hundred feet along the property line … . Far more frequently, the drydock and spud barge would be moved a short distance toward and away from the river bank. This movement shows that not only were the dry dock and spud barge capable of being used for maritime transport, they actually were used for that purpose. That in itself is sufficient to place the watercraft within the definition of "vessel" in 1 U.S.C. § 3… . As Stewart [[762]](#footnote-763)762 and Holmes [[763]](#footnote-764)763 reveal, even structures that lack many traditional characteristics of vessels are now vessel under 1 U.S.C. § 3 provided they are not "permanently moored."

To drive the point completely home, we emphasize that the drydock in this case is unlike the drydock in Cope. [[764]](#footnote-765)764 In Cope, the drydock "had **[\*471]** been put in position by being permanently moored by means of large chains" to the river bank, and the drydock's only movement occurred in place, closer or further from the riverbed by means of pumps. Cope, 119 U.S. at 622. Clearly, the drydock here does not fit that description. [[765]](#footnote-766)765

In its approach to Jones Act vessel status, Case v. Omega Natchiq, Inc., [[766]](#footnote-767)766 is at the opposite end of the spectrum from Two-J Ranch. In Case, an OCS worker brought a Jones Act action in state court and defendants removed it on the basis of federal question jurisdiction. [[767]](#footnote-768)767 The plaintiff sought remand to state court under the rule that Jones Act cases are not removable. [[768]](#footnote-769)768 The court denied the remand motion on the ground that Jones Act seaman status was "improperly pleaded." [[769]](#footnote-770)769 The plaintiff's injury was sustained on board the ROWAN MIDLAND, which the court described as "a mobile offshore drilling rig in the process of final conversion to a semisubmersible floating production facility." [[770]](#footnote-771)770 In ruling that the ROWAN MIDLAND was not a Jones Act vessel, the court relied on Cain and did not discuss Stewart. [[771]](#footnote-772)771

2. The Fleet Requirement

Harbor Tug & Barge Co. v. Papai [[772]](#footnote-773)772 stands for the proposition that a worker who cannot establish seaman status on the basis of a substantial work connection with a single vessel may be able to do so by showing a substantial work connection with a fleet of vessels, defined as "an identifiable group of vessels [subject to] common ownership or control." Southwest Marine, Inc. v. Gizoni [[773]](#footnote-774)773 held that a worker whose job is listed as a category of work covered by LHWCA § 2(3) [[774]](#footnote-775)774 may nevertheless be a seaman if he is a member of a crew of a vessel. These two rules worked in conjunction in Phelps v. Bulk III Inc., [[775]](#footnote-776)775 leading the court to conclude that a man doing traditional longshoring work on his employer's fleet of barges was entitled to go to the jury with his claim of seaman status. The court noted that the defendant employer "does not **[\*472]** dispute that its barges are an identifiable fleet under common ownership or control." [[776]](#footnote-777)776

Phelps illustrates that a Jones Act plaintiff can readily satisfy the fleet requirement when the common owner or controller of the group of vessels is the plaintiff's employer. In another illustration of the point, the court in Hebert v. Weeks Marine, Inc., [[777]](#footnote-778)777 upheld summary judgment that a welder, injured while working in a shipyard, was a Jones Act seaman as a matter of law because he was assigned to and spent about seventy-five percent of his time working on "a number of vessels owned and operated by" his employer.

But there is no requirement that the plaintiff's employer be the owner or operator of the fleet. Two recent district court decisions have explicitly rejected Jones Act defendants' arguments to that effect. [[778]](#footnote-779)778 These courts cited Coats v. Penrod Drilling Corp. [[779]](#footnote-780)779 and Bertrand v. International Mooring & Marine, Inc., [[780]](#footnote-781)780 for the proposition that "the employer need not be the owner or operator of the group of vessels." [[781]](#footnote-782)781 The court in Van Norman v. Baker Hughes, Inc., suggested that the outcome would have been different if the plaintiff could have shown that the fifteen rigs were owned by the same company, albeit not his employer. [[782]](#footnote-783)782

Bertrand [[783]](#footnote-784)783 has sometimes been interpreted as allowing seafarers who are undebatably exposed to quintessential seamen's hazards on a regular basis to establish seaman status without satisfying the vessel or fleet requirement. This idea is often called "the "classical seaman's work' exception." [[784]](#footnote-785)784 The "unpublished" decision in Willis v. Fugro Chance, Inc., [[785]](#footnote-786)785 suggests that there is no such exception. The per curiam opinion in Willis cites Roberts v. Cardinal Services, Inc., [[786]](#footnote-787)786 and Buras v. **[\*473]** Commercial Testing & Engineering Co., [[787]](#footnote-788)787 as showing that "we have limited our holding in Bertrand to the facts of that case." [[788]](#footnote-789)788

Like the Willis panel, the court in Woods v. Deep Marine Technology, Inc., [[789]](#footnote-790)789 took a notably conservative view of the fleet rule. The plaintiff was hurt while working on the deck of a boat attending pumps and assisting a diver engaged in digging trenches in the seabed with a high-pressure water hose. [[790]](#footnote-791)790 The plaintiff's employer performed such services for offshore ***oil*** and gas companies. [[791]](#footnote-792)791 The employer did not own any work boats but chartered them as needed. [[792]](#footnote-793)792 The court held that the worker could not be a seaman because "chartering a ship as needed is certainly not a fleet; nor does it constitute common control of the ships. [Plaintiff's employer] charters boats as it needs them from different sources." [[793]](#footnote-794)793 The workers who were awarded seaman status in Bertrand [[794]](#footnote-795)794 were in much the same situation as the plaintiff in Woods. The Woods court did not mention Bertrand. [[795]](#footnote-796)795

3. The Contribution Requirement

In Chauvin v. Furgo-Geoteam SA, [[796]](#footnote-797)796 the Jones Act plaintiff was hurt working on a seismic research vessel where her duties were solely those of a Marine Mammal Observer (MMO), "recording the locations and descriptions of certain marine mammals and warning the crew if these mammals were in range" of the vessel. In granting summary judgment for defendant, the court noted defendant's argument that the plaintiff lacked seaman status because her work did not contribute to the vessel's mission or function, [[797]](#footnote-798)797 but it based its denial of seaman status on the **[\*474]** Oceanic Research Vessel Act, [[798]](#footnote-799)798 which defines "seaman" for purposes of that Act as excluding "scientific personnel." [[799]](#footnote-800)799

4. The Substantial Connection Requirements

As we noted in Part IV.D.3, courts often blend the substantial-in-duration and substantial-in-nature requirements without giving any account of why they do that. Mudrick v. Cross Equipment Ltd. [[800]](#footnote-801)800 is thus a bit unusual in adverting to the matter, stating that "the nature and duration inquiries, while distinct, are not unrelated." The holding in Mudrick upheld summary judgment that the plaintiffs' decedent, an ***oil*** spill technician, was a Jones Act seaman because time sheets showed that he spent thirty-two percent of his time during the year preceding his fatal injury working aboard his employer's vessels. [[801]](#footnote-802)801 The Mudrick court took note of the Supreme Court's approval in Chandris, Inc. v. Latsis [[802]](#footnote-803)802 of the rule of thumb that thirty percent of a workers' duties need to be vessel-related for seaman status to be established, and it acknowledged that this measurement ordinarily addresses the worker's entire period of employment with the current employer. [[803]](#footnote-804)803 But it deemed this a "flexible" requirement, stating that "one year's time sheets are sufficient to satisfy the flexible requirement that we examine the Decedent's entire employment history to determine his status as a Jones Act seaman." [[804]](#footnote-805)804

The substantial-in-duration requirement can be satisfied by a very short period of vessel work. In Grothe v. Central Boat Rentals, Inc., [[805]](#footnote-806)805 the plaintiff was hired as a deckhand and worked only one day before breaking his ankle. He brought a state court Jones Act suit, which defendant removed. [[806]](#footnote-807)806 In granting plaintiff's motion to remand the case on the ground that Jones Act cases are not removable [[807]](#footnote-808)807 the court determined that plaintiff's pleadings established a jury case for Jones Act seaman status, explaining:

The Third Circuit in Foulk v. Donjon Marine Co., Inc., 144 F.3d 252 (1998), reversed a district court's award of summary judgment for an **[\*475]** employer, and held that a plaintiff who was hired to work aboard a vessel for a ten-day job but was injured on the first day (and, in fact, only a few hours into the first day), could still obtain seaman status. Id. at 259-60. "Under the "no snap-shot doctrine, articulated in Chandris, a court does not evaluate a worker's connection to a vessel or fleet at the moment of injury. Instead, the court must consider his intended relationship, as if he had completed his mission uninjured." Id. at 259 (citing Chandris, 115 S. Ct. at 2187) (emphasis added). Accordingly, the court held that because an uninjured plaintiff would have spent nearly all of his ten days aboard the vessel, the district court's grant of summary judgment was improper: "A jury could reasonably find that an employee's connections to a vessel are substantial in both duration and nature even if the duration contemplated is 10 days." Id. at 260.

Several other courts, including courts within this circuit, have applied the "no snapshot doctrine," and reached similar conclusions. See Phelps v. Bulk III Inc., Nos. 06-0833, 05-2148, 2007 WL 3244723 at \*3 (E.D. La. Nov. 1, 2007) (refusing to deny the plaintiff seaman status as a matter of law because plaintiff, who was injured five days after being hired, spent ninety percent of his employment in a vessel's service); Stewart v. J.E. Borries, Inc., No. 06-187, 2007 WL 2915033, at \*5 (S.D. Miss. Oct. 4, 2007) (holding that a plaintiff who was injured of his first day on the job could nevertheless satisfy the substantial duration test, and, thus, still qualify as a Jones Act seaman); LaCount v. Southport Ent., No. 05-5761, 2007 WL 18892097, at \*4-5 (D.N.J. June 29, 2007) (holding that even though plaintiff had worked aboard the vessel for only three days before his injury, and had announced that he would resign after the third day, plaintiff was not precluded as a matter of law from satisfying the substantial duration test) … . [[808]](#footnote-809)808

… . If a court followed the reasoning of Foulk and Phelps … , Grothe could satisfy the substantial duration test, and, thus, qualify as a seaman notwithstanding the brevity of his work aboard the M/V MR. SID or his employment with CBR. Under these authorities the fact that Grothe may have worked on the M/V MR. SID for only one day is not, without more, determinative of his status as a seaman. [[809]](#footnote-810)809

The court went on to discuss conflicting authorities from the Second Circuit:

See, e.g., Sologub v. City of New York, 202 F.3d 175, 180 (2d Cir. 2000) (eight hours aboard a vessel is "hardly enough" to satisfy the substantial duration test); Fisher v. Nichols, 81 F.3d 319, 323 (2d Cir. 1996) (one day aboard a vessel "is best characterized as insubstantial in nature"). [[810]](#footnote-811)810

**[\*476]** But the court chose to follow the Foulk-Phelps line of cases. [[811]](#footnote-812)811

The district judge in Brown v. Trinity Catering, Inc., [[812]](#footnote-813)812 took a diametrically opposing view of the substantial-in-duration requirement, holding against seaman status as a matter of law for a galley hand who had worked two two-week hitches on the vessel when he was injured and consequently laid off. The linchpin of the decision seems to have been the fact that the plaintiff's employer was a catering company whose employees served on hundreds of vessels owned and operated by hundreds of different companies. [[813]](#footnote-814)813 This fact would have properly defeated an effort by the plaintiff to establish seaman status under the fleet doctrine, but it has no obvious bearing on why the plaintiff was not at least entitled to reach the jury with his claim to be a member of the crew of the vessel where he had been working for about a month when he got hurt.

In Borque v. D. Huston Charter Services, Inc., [[814]](#footnote-815)814 the court rejected a seaman status claim by a retired land-based worker who was engaged by his friend to help out on an emergency basis by serving as a deckhand on a vessel on one trip to make a fuel delivery to a distressed vessel. The intended duration of the trip was about two-and-a-half hours, and the retiree was hurt during the first part of it, when the fuel-delivering vessel allided with the South Jetty on Galveston Island. [[815]](#footnote-816)815 The court cited no authority for its conclusion that, as a matter of law, the retiree's case failed the substantial-in-duration requirement, stating:

Borque was not a maritime worker prior to the date of the accident nor was his employment intended to continue beyond the short voyage during which he was injured. This single trip, to take place over the course of a few hours, is not one that exposed him to the perils of the sea with any degree of regularity and continuity. The nature of the Jones Act and its underlying policy compel the conclusion that Borque is not a seaman. [[816]](#footnote-817)816

The italicized sentence is debatable.

5. The Change-of-Assignment Doctrine

As we saw in Part V.E.4, normally the thirty percent inquiry addresses the worker's entire period of employment with the current employer. But the Supreme Court said in Chandris that the thirty percent **[\*477]** clock is effectively restarted when the "worker's basic assignment changes." [[817]](#footnote-818)817 In Hebert, [[818]](#footnote-819)818 the defendant argued unsuccessfully that the offshore welder's work in the shipyard where he was hurt was a change of assignment that would defeat his seaman status. The per curiam panel opinion explained the court's rejection of the employer's change-of-assignment argument as follows:

Hebert … alleges that working in shipyards while awaiting an offshore deployment was common practice at Weeks-Atlantic… . It is uncontested that Hebert was physically working in the Houma shipyard at the time of his injury; however, Hebert introduced evidence establishing that approximately 75% of his time was spent on vessels in navigable waters during his tenure at Weeks-Atlantic. Further, Weeks-Atlantic's contention that Hebert had a new assignment with new duties at the time of his injury is not supported by the undisputed facts in this case. The Status Change forms submitted by both Weeks-Atlantic and Hebert indicate that Hebert was transferred from one vessel to another vessel, the R.S. Weeks to the BTD-2, not from a vessel to a land-based job … . In addition, these forms also show that Hebert was a welder on both the R.S. Weeks and the BTD-2, and thus, there was no change in his duties from his old assignment to his new one. The deposition testimony of two Weeks-Atlantic employees further establish [sic] that at the time of Hebert's injury, he was assigned to the BTD-2 dredging division. Weeks-Atlantic has therefore not succeeded in proving that Hebert was reassigned and given a new assignment with new duties. As the law does not favor seamen "walking into and out of [Jones Act] coverage in the course of [their] regular duties," Chandris, 515 U.S. at 363, we conclude that the district court did not err in granting summary judgment in favor of Hebert on the issue of seaman status. [[819]](#footnote-820)819

We think some of the lower courts may be taking a more limited view of the change-of-assignment doctrine than was intended by the Supreme Court in Chandris. [[820]](#footnote-821)820 In Zertuche v. Great Lakes Dredge & Dock Co., [[821]](#footnote-822)821 a "Dump Foreman" on a dredging project was temporarily reassigned to deckhand duties on the dredge. He was injured during the **[\*478]** deckhand assignment, which lasted for about two months. [[822]](#footnote-823)822 Rejecting the worker's claim of seaman status, the court emphasized that during the reassignment the worker continued to be paid at the higher Dump Foreman rate rather than the deckhand rate and that the reassignment was concededly not "permanent[]." [[823]](#footnote-824)823 We do not believe there is any permanency requirement in the Chandris change-of-assignment doctrine.

6. Additional Points

Ordinarily the proponent of seaman status is a Jones Act plaintiff. But increasingly we see defendants urging seaman status against plaintiffs who resist it. In Mudrick, [[824]](#footnote-825)824 the decedent's seaman status meant that the defendant in the seaman's parents' products liability lawsuit did not owe the plaintiffs any damages for loss of society. In Henderson v. Director, Office of Worker's Compensation Programs, U.S. Department of Labor, [[825]](#footnote-826)825 the worker's assignment as a member of the drilling crew on a jack-up rig kept him from receiving the LHWCA benefits he sought.

F. The Rights of Seamen: Maintenance and Cure

1. Service of the Ship

Maintenance and cure is not owed unless the injury or illness that disabled the seaman occurred or manifested itself while the seaman was in the service of the ship. [[826]](#footnote-827)826 Warren v. United States [[827]](#footnote-828)827 held that sailors remain in the ship's service while on shore leave. (This rule was in play in Olson, the "lap dance" case treated in Part IV.E.3). The rule that shore leave is in the service of the ship creates problems in litigation involving "brownwater" seamen, [[828]](#footnote-829)828 such as roustabouts and roughnecks on jack-up rigs and other floatable ***oil*** drilling apparatus. Typically these workers serve on the rig for a week or two and then go home for several days. The Fifth Circuit has determined that their time ashore is not to be **[\*479]** analogized to shore leave. [[829]](#footnote-830)829 But employer-provided land transportation may be in the ship's service. [[830]](#footnote-831)830

The injured seaman in Bilozur v. Edison Chouest Offshore LLC [[831]](#footnote-832)831 disembarked from his ship in Galliano, Louisiana, on June 7, 2005. He was not due to report back until June 21, so he was told he could go home. [[832]](#footnote-833)832 But he lived in Florida, and instead of going home he decided to stay in Louisiana, where he took advantage of free housing that was available for his employer's workers at a nearby dormitory while taking a Coast-Guard-required training class at the employer's facility. [[833]](#footnote-834)833 The class was conducted from June 7 through June 10. [[834]](#footnote-835)834 After the last class, Bilozur went to a bar, where he was "struck in the neck by an unidentified assailant and rendered a paraplegic." [[835]](#footnote-836)835 The court upheld the district court's summary judgment that the employer owed no maintenance and cure, stating:

A seaman may be found to be in the service of his ship even if he is on land on his own personal time if he is subject to the call of duty as a seaman and is earning wages as such… . At the time of his injury, Bilozur was on his "off hitch" time and was free to do as he pleased … . Bilozur was not being paid while off the ship, and he was not scheduled to return until June 21, 2005. Although Bilozur may have considered himself to be "on call" and may have been willing to return to duty if called, the defendant presented evidence that it had no on call system for off-duty mariners and that an off-duty mariner called to replace a missing crewman was under no obligation to report. The evidence shows that Bilozur was never explicitly told that he was required to stay at the company dormitory, and Bilozur was not required to take the training class at the time and location that he did. The defendant also presented unrebutted evidence that Bilozur was not on a waiting list for any further training classes immediately following June 10, 2005, and there was evidence that the company never paid Bilozur for travel expenses. In short, at the time of his injury Bilozur was not serving any direct or indirect interest of his employer, and there were no "reciprocal obligations" by Bilozur that rendered him in the service of the ship. [[836]](#footnote-837)836

**[\*480]**

2. Maximum Medical Improvement (MMI)

In Lejeune v. Transocean Offshore Deepwater Drilling Inc., [[837]](#footnote-838)837 the district court determined that the seaman had not reached the MMI point and included in its judgment a requirement that defendant "provide for Lejeune's physical therapy and psychological treatment … until Lejeune can make no further improvement or he no longer requires treatment to prevent his condition from deteriorating." [[838]](#footnote-839)838 The Fifth Circuit held that this was not error, explaining:

This court has acknowledged that maintenance and cure amounts may vary because they depend upon future developments. So, it is not error for the district court to obligate TODDI to pay an uncertain amount. Nor is it error for the district court to obligate TODDI for an uncertain period of time, so long as the end point is ascertainable.

That Lejeune had not yet reached maximum medical improvement is well-established in the record… . Since Lejeune's incapacity was still not diagnosed as permanent at the time of trial, the court's award of the continued cure obligation was proper. While it is not known when Lejeune will reach maximum medical improvement, it is a point that can be definitely ascertained. [[839]](#footnote-840)839

3. Procedural Issues in Maintenance and Cure Litigation

In earlier articles we have noted that employers fairly often seek federal-court declaratory judgment on their maintenance and cure obligations, and that the federal courts are inclined to dismiss these in deference to seamen's ongoing or contemplated state court lawsuits. [[840]](#footnote-841)840 In Cenac Towing Co. v. Ray, [[841]](#footnote-842)841 the employer's declaratory action was filed on June 29, 2007, and the worker's state court action on July 12. The court granted the worker's motion to dismiss the declaratory action. [[842]](#footnote-843)842 (The employer argued that the state court suit was likely to abort because of a forum selection clause in the worker's employment contract, but the court said, in effect, "we don't know that.")

Maintenance and cure are supposed to be furnished promptly, to aid in the seaman's recuperation. [[843]](#footnote-844)843 In several recent district court cases, **[\*481]** seamen have sought expedited hearings in pursuit of this goal. [[844]](#footnote-845)844 In Dinet v. Rene J. Cheramie & Sons, Inc., [[845]](#footnote-846)845 and Leija v. Penn Maritime, Inc., [[846]](#footnote-847)846 the seamen's motions were granted. (The Dinet plaintiff was appearing pro se.) [[847]](#footnote-848)847 In Raffield v. Y&S Marine, Inc., [[848]](#footnote-849)848 the court refused to sever the maintenance and cure claim from the rest of the case, noting that a jury trial was scheduled three months out and that discovery was ongoing.

4. The McCorpen Defense to Maintenance and Cure [[849]](#footnote-850)849

Under McCorpen v. Central Gulf Steamship Corp., [[850]](#footnote-851)850 a seaman who procures employment by lying about his medical history risks forfeiture of maintenance and cure. In Parker v. Jackup Boat Service, LLC, [[851]](#footnote-852)851 the court enumerated the elements of the McCorpen defense as follows:

(1) The claimant intentionally misrepresented or concealed medical facts;

(2) the non-disclosed facts were material to the employer's decision to hire the claimant; and

(3) [there was a connection] between the withheld information and the injury complained of in the lawsuit. [[852]](#footnote-853)852

The court found that the first two elements were satisfied. But the third was not:

In establishing the requisite causal relation, "there is no requirement that a present injury be identical to a previous injury. All that is required is a causal link between the pre-existing disability that was concealed and the disability incurred during the voyage."

… Defendants argue that Trinity has established the causal link between the concealed information and the accident which forms the basis of this suit because "plaintiff's prior injury was an injury to the neck" and "in the instant matter, he is claiming neck injuries as well." The Court **[\*482]** does not consider this sufficient to establish a causal connection. Defendants offer no medical testimony to augment their argument of causality. … No evidence exists in the record that Plaintiff's neck was re-injured due to the accident or that the previous injury contributed to his accident. [[853]](#footnote-854)853

5. Medicare

The national jurisprudence is divided on whether a seaman's attainment of eligibility for Medicare payments relieves the employer of responsibility for further cure. [[854]](#footnote-855)854 The district court in In re McKinney Inland, L.L.C., [[855]](#footnote-856)855 answered no.

6. Penalizing Employers Who Flout the Maintenance and Cure Obligation

More than a decade ago, the Fifth Circuit's en banc decision in Guevara v. Maritime Overseas Corp. [[856]](#footnote-857)856 jettisoned the traditional remedy of punitive damages against employers who dishonor their maintenance and cure obligations. [[857]](#footnote-858)857 In Atlantic Sounding Co. v. Townsend, [[858]](#footnote-859)858 a panel of the Eleventh Circuit did not follow Guevara; instead, it declared itself bound by Eleventh Circuit precedent to hold that an award of punitive damages may be decreed "upon a showing of a shipowner's willful and arbitrary refusal to pay maintenance and cure." A concurring judge invited the employers to seek rehearing en banc. [[859]](#footnote-860)859 Somewhat surprisingly, the court denied rehearing. [[860]](#footnote-861)860 Certiorari was granted, [[861]](#footnote-862)861 and the Townsend case was argued to the Supreme Court on March 2, 2009. [[862]](#footnote-863)862

**[\*483]**

G. The Rights of Seamen: Jones Act and Unseaworthiness Litigation

1. Negligence of Jones Act Employers

Cortes v. Baltimore Insular Lines [[863]](#footnote-864)863 held that a seaman who had been injured by his employer's failure to furnish reasonable medical assistance has the option of litigating the claim as a straight maintenance and cure action or under the Jones Act. In Stiward v. United States, [[864]](#footnote-865)864 a merchant seaman who suffered a diabetic attack at sea won a Jones Act bench trial by showing that the ship's officers were negligent in (a) failing to stock the ship's medicine chest with insulin and (b) not calling MAS doctors to seek a diagnosis when plaintiff's attack occurred. [[865]](#footnote-866)865

In the course of denying the employer's motion to dismiss the action in Bessard v. Omega Protein, Inc., [[866]](#footnote-867)866 the court held that a Jones Act employer who requires a potential employee to undergo a pre-employment medical examination must use reasonable care "to determine whether [the] potential employee is fit for the intended employment."

2. Contributory Negligence in Jones Act Cases

The McCorpen defense is not frontally applicable in Jones Act litigation. [[867]](#footnote-868)867 In last year's article we discussed Johnson v. Cenac Towing, Inc., [[868]](#footnote-869)868 in which the court rejected defendant's attempt to use the McCorpen defense in a Jones Act case. The Johnson defendant argued that the plaintiff "was contributorily negligent for willfully concealing his previous injuries during Cenac Towing's employment application process." [[869]](#footnote-870)869 The court rejected this argument because of the clear jurisprudence that McCorpen does not affect Jones Act claims and also because the plaintiff's concealment of his previous injuries was not a proximate cause of the accident in suit. [[870]](#footnote-871)870

The Fifth Circuit has now vacated that decision and remanded the matter for further consideration of the contributory negligence issue. [[871]](#footnote-872)871 **[\*484]** In Johnson v. Cenac Towing, Inc., [[872]](#footnote-873)872 the court said "the district court correctly concluded that McCorpen does not bar a Jones Act claim," but it went on to determine that the district court's proximate cause thinking might have been wrong:

It is likely true, as the court found, that Johnson's [preexisting] weakened back did not cause [the accident producing the back injury in suit]. But it also seems likely that Johnson would never have been employed by Cenac had he revealed the previous injuries, and, having misrepresented himself onto the payroll, he set himself up for the sort of aggravating injury found by the district court.

… .

… Contributory negligence may be found where a seaman has concealed material information about a pre-existing injury or physical condition from his employer; exposes his body to a risk of reinjury or aggravation of the condition and then suffers reinjury or aggravation injury. In this case, we are unsure whether the court fully analyzed the potential for contributory negligence … . We do not instruct how the court should ultimately rule on whether Cenac has proved Johnson's causative contributory negligence in deliberately exposing himself to heavy labor with a weakened back, but we must remand for the court to reevaluate its findings on this issue. [[873]](#footnote-874)873

Note that the court does not appear to be holding that the concealment might have been a legal cause of Johnson's injury, but rather that Johnson might have been negligent by undertaking a task that he should have known his back could not handle. It is unlikely that pre-employment conduct as such can properly be deemed a legal cause of an injury during the employment. [[874]](#footnote-875)874

**[\*485]**

3. Causation in Jones Act Cases

As we saw in Part III.B, the Supreme Court's new Sorrell decision has stirred up contention about the causation issue in Jones Act cases: The Court made it clear that the causation standard is the same for the plaintiff, seeking to inculpate the employer's conduct, as for the defendant, seeking to inculpate the injured seaman's conduct. But what is the standard? Must the proponent of a causation finding make the kind of showing entailed in the general law of proximate (legal) causation (the Souter view) or is it enough to show bare but-for factual causation (perhaps this is the Ginsburg view)? Or is there some in-between standard? In Johnson v. Cenac Towing, Inc., [[875]](#footnote-876)875 the Fifth Circuit's discussion of the point seems to contemplate all three possibilities:

The standard of causation in Jones Act cases is not demanding. "The Supreme Court has used the term "slightest' to describe the reduced standard of causation … ." To establish causation, an employer must show that a seaman's negligence "played any part, even the slightest, in producing the injury." Even under the Jones Act, however, a party must establish more than mere "but for" causation. The negligence must be a "legal cause" of the injury.

In Sorrell, Justice Souter, joined by Justices Scalia and Alito, argues in a concurring opinion that the standard of causation in FELA cases, and thus Jones Act cases, is not more "relaxed" than in tort litigation generally. He contends that the "relaxed" causation standard stems from a misunderstanding of Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 506 (1957). To correct that misunderstanding, Justice Souter provides a detailed analysis of Rogers and related cases showing that it was not intended "to water down the common law requirement of proximate cause" in FELA cases. [[876]](#footnote-877)876

In O'Neill v. Seariver Maritime, Inc., [[877]](#footnote-878)877 the court states that "the standard for causation in Jones Act cases is "very light,'" and holds:

**[\*486]**

We cannot say that under the Jones Act's lenient standard for causation and the highly deferential clear error standard, the district court clearly erred in concluding that a greater than 200 ppm existed when O'Neill was exposed to the hydrogen sulfide and that it was the cause of his injuries. [[878]](#footnote-879)878

The O'Neill opinion does not mention Sorrell.

In Hancock v. Diamond Offshore Drilling, Inc., [[879]](#footnote-880)879 the plaintiff brought a Jones Act suit claiming that the defendant employer failed to provide prompt and adequate medical care, causing him serious injuries. [[880]](#footnote-881)880 Apparently concerned that the medical evidence would not support the claim that proper conduct by the defendant would have avoided his injuries, the plaintiff argued that the defendant should be held liable under the so-called "lost opportunity" or "loss of chance" doctrine for having caused plaintiff's chances of a successful medical outcome to be reduced. [[881]](#footnote-882)881 The court rejected plaintiff's argument and ruled the "lost opportunity" doctrine out of the case, relying on Bach v. Trident Steamship Co., [[882]](#footnote-883)882 a general maritime negligence action in which the Fifth Circuit rejected the lost opportunity doctrine. [[883]](#footnote-884)883 The Hancock court acknowledged that a Jones Act plaintiff's burden on the causation issue might be less demanding than a general maritime negligence plaintiff's, but looked to Miles v. Apex Marine Corp. [[884]](#footnote-885)884 for the proposition that "the tendency in the jurisprudence has been to harmonize the two bodies of law." [[885]](#footnote-886)885

4. Unseaworthiness Issues

Under Smith v. Harbor Towing & Fleeting, Inc., [[886]](#footnote-887)886 a true seaman who is hurt while working aboard a ship other than his own cannot sue that ship or its owner unless he was there for long enough to become a member of its crew. But a "Sieracki seaman" (an amphibious worker who is neither a seaman nor under the coverage of the LHWCA) can sue a ship or its owner for unseaworthiness without showing or even claiming crew member status. [[887]](#footnote-888)887 These two decisions seem irreconcilable. Both of **[\*487]** them cannot be right (indeed, probably both are wrong). As we suggested in Part IV.F, Smith is particularly indefensible. But of course it binds the Fifth Circuit's district courts. In Tabor v. Gaubert ***Oil*** Co., [[888]](#footnote-889)888 the Smith rule meant that a barge deckhand could not assert the unseaworthiness of the towboat that had charge of the barge. In In re Two-J Ranch, Inc., [[889]](#footnote-890)889 it meant that a towboat deckhand was owed no duty of seaworthiness by the barge from which he fell and drowned.

The Smith rule was in play in a tricky way in In re Sanco Holding AS, [[890]](#footnote-891)890 although the opinion does not cite the Smith case. The M/V SANCO SEA (SANCO SEA) departed Galveston with compulsory pilot ***Kern*** aboard. [[891]](#footnote-892)891 When the SANCO SEA cleared the ship channel jetties, the pilot boat, operated by pilot Frazier, came alongside and ***Kern*** transferred from the SANCO SEA to the pilot boat. [[892]](#footnote-893)892 The pilot boat then capsized, apparently as a result of the wake of the SANCO SEA. [[893]](#footnote-894)893 ***Kern*** was injured and Frazier drowned. [[894]](#footnote-895)894 The court held that the SANCO SEA owed no duty of seaworthiness to Frazier, because Frazier, a seaman by virtue of his connection to the pilot boat, clearly "was not a seaman on the SANCO SEA." [[895]](#footnote-896)895 But the court said that the SANCO SEA might owe a seaworthiness duty to ***Kern***, evidently on the view that ***Kern***'s service to the SANCO SEA might have been enough to constitute him a member of its crew. [[896]](#footnote-897)896

Mitchell v. Trawler Racer, Inc., [[897]](#footnote-898)897 held that a condition of a vessel or its appurtenances that makes the vessel less than reasonably fit for its intended service constitutes actionable "transitory unseaworthiness," regardless of how short-lived the condition may have been. Usner v. Luckenbach Overseas Corp. [[898]](#footnote-899)898 qualified the Mitchell rule by holding that a single isolated act of negligence does not constitute a condition. In Florida Marine Transporters, Inc., [[899]](#footnote-900)899 a towboat's tow ran aground, and the towboat's bumper was dislodged during the effort to refloat the barge. A member of the towboat's crew hurt his back trying to retrieve the **[\*488]** bumper. [[900]](#footnote-901)900 The court upheld judgment on a jury verdict that the towboat was not unseaworthy. [[901]](#footnote-902)901 The opinion does not mention Mitchell or the transitory unseaworthiness doctrine, and there is no indication that the plaintiff requested a jury instruction on transitory unseaworthiness.

5. Arbitration Clauses

In previous articles, [[902]](#footnote-903)902 we have noted that the courts in the Fifth and Eleventh Circuits have become very hospitable to forum selection and arbitration clauses in seamen's employment contracts. Cases enforcing such clauses continue to be reported regularly, despite having become routine. Koda v. Carnival Corp., [[903]](#footnote-904)903 Vacaru v. Royal Caribbean Cruises, Ltd., [[904]](#footnote-905)904 and Del Orbe v. Royal Caribbean Cruises, Ltd., [[905]](#footnote-906)905 are all similar to many of the cases that we have addressed over the years. Each involved an employer's effort to enforce an arbitration clause in a foreign seaman's contract of employment to bar a Jones Act case in a U.S. court. [[906]](#footnote-907)906 The district court in each case followed binding circuit precedent to enforce the arbitration clause. [[907]](#footnote-908)907

Azevedo v. Carnival Corp. [[908]](#footnote-909)908 is the one case that is somewhat out of the ordinary. Perhaps emboldened by the general success that employers have had during recent years in enforcing arbitration clauses in foreign seamen's employment contracts, the employer here sought to enforce an arbitration clause to bar a Jones Act case for an injury that had occurred two years before the arbitration clause had been included in the employment contract. [[909]](#footnote-910)909 The district court held that the arbitration clause did not apply retroactively and refused to enforce it. [[910]](#footnote-911)910

6. Other Issues in Seamen's Litigation

Florida Marine Transporters, Inc. v. Sanford [[911]](#footnote-912)911 is also interesting for its treatment of the Pennsylvania Rule. The plaintiff tried to invoke the **[\*489]** rule - which requires one who violates a marine safety statute to negate causation - on the basis of the towboat's violation of a Coast Guard regulation forbidding the operation of the boat by an unlicensed deckhand. [[912]](#footnote-913)912 On one occasion, the rule had been violated, but at the time of the accident in suit the towboat was operated by a properly licensed operator. [[913]](#footnote-914)913 The court rejected plaintiff's Pennsylvania Rule argument on the ground that the rule does not apply "where establishing a causal connection between the statutory violation and the resulting injury was implausible." [[914]](#footnote-915)914 This sounds like saying that the rule is available only to those who do not need it. The court might better have said that the defendant had satisfied the Pennsylvania Rule burden by showing that the statutory violation "could not have been" a cause of the accident. [[915]](#footnote-916)915

One of the issues in Johnson was whether the employer, Cenac, was entitled to an offset to reflect Blue Cross/Blue Shield group health benefits that were paid to the disabled seaman. [[916]](#footnote-917)916 The Fifth Circuit's conclusion - agreeing with the district court - was no. [[917]](#footnote-918)917 The court's reasoning was complex.

In Jones v. Tidewater Marine, LLC, [[918]](#footnote-919)918 the court held that a Jones Act/maintenance and cure action was time-barred when filed twenty-six years after the alleged accident. The court rejected the plaintiff's plea for equitable tolling on the basis of amnesia, stating that "Jones has not created a genuine issue of material fact as to whether he suffered from selective amnesia beginning in 1978-79 that blocked the NORTH TIDE accident from his mind for twenty-plus years." [[919]](#footnote-920)919

The burden of proving the validity of a seaman's release is on the employer/shipowner, who must show that the release "was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights." [[920]](#footnote-921)920 In last year's article we discussed Transocean Offshore USA, Inc. v. Catrette. [[921]](#footnote-922)921 The employer hired a lawyer to explain the release contract to the seaman; the explanation consisted of reading the contract to the seaman in front of a court reporter and periodically stopping to ask the seaman if he understood. [[922]](#footnote-923)922 **[\*490]** In holding that the release was invalid, the district court said that there was "no fraud, coercion, or overreaching" but that the seaman lacked an adequate understanding of both the medical situation and his legal rights. [[923]](#footnote-924)923 The Fifth Circuit has now affirmed. [[924]](#footnote-925)924

In Steverson v. GlobalSantaFe Corp., [[925]](#footnote-926)925 the plaintiff, a derrickman on a semisubmersible drilling rig, was badly hurt when he fell fifteen to twenty-five feet from the rig's cantilever deck to the main deck. He hired an experienced attorney, who began working up the case with the help of a relatively inexperienced associate. [[926]](#footnote-927)926 When the experienced attorney died, the young associate kept the case. [[927]](#footnote-928)927 The lawyer filed a Jones Act suit. [[928]](#footnote-929)928 Eventually a settlement conference was held before a magistrate judge, who guided the parties to a $ 350,000 settlement and entered an order of dismissal. [[929]](#footnote-930)929 No record of the settlement was taken by the court. [[930]](#footnote-931)930 Eight days later the plaintiff fired his lawyer, repudiated the settlement - he said he had not authorized his lawyer to accept it and believed he had been given thirty days to decide whether to accept - and filed an FRCP 60(b) [[931]](#footnote-932)931 motion to vacate the judgment of dismissal together with a motion for an evidentiary hearing. [[932]](#footnote-933)932 The district court denied the plaintiff's motions. [[933]](#footnote-934)933 The Fifth Circuit vacated the judgment and remanded the case for an evidentiary hearing. [[934]](#footnote-935)934 Judge Benavides's opinion noted that seamen are "wards of admiralty" and that seamen's releases are necessarily "subject to careful scrutiny." [[935]](#footnote-936)935 He indicated that the settlement agreement should not be enforced unless the evidence shows that the plaintiff agreed to it with a full understanding and appreciation of its consequences. [[936]](#footnote-937)936

In Durley v. Offshore Drilling Co., [[937]](#footnote-938)937 the appellate court vacated the district court's order setting aside a release of an injured seaman's claims for $ 3000 on the grounds of mutual mistake as to the extent and nature of the injuries. The court stated that "the doctrine of mutual mistake is **[\*491]** unavailable" when the settlement agreement expressly covers unknown events and exposures and future damages both known and unknown. [[938]](#footnote-939)938 The case was remanded for the district court to consider whether there were other grounds - lack of representation, overreaching, economic duress, or the low amount paid for the settlement - that would justify setting the release aside. [[939]](#footnote-940)939

H. Limitation of Liability

1. Privity or Knowledge

When a thirteen-year-old operating a ninety-horsepower motorboat drove over and killed a six-year-old snorkeler, the victim's family sued the motorboat's owner in state court, alleging negligent entrustment and negligent supervision. [[940]](#footnote-941)940 The boat owner countered with a petition for limitation of liability in the Southern District of Florida. [[941]](#footnote-942)941 A vessel owner can get limitation of liability only by proving that the accident was "without the privity or knowledge of the owner." [[942]](#footnote-943)942 Relying on Joyce v. Joyce, [[943]](#footnote-944)943 the Ruiz court dismissed the limitation petition for lack of subject matter jurisdiction, holding that claims against a vessel owner for negligent entrustment and negligent supervision are by their very nature taken out of the Limitation Act by the "privity or knowledge" clause. [[944]](#footnote-945)944

2. Dissolving the Antisuit Injunction

As we saw in Part IV.I, under 46 U.S.C. § 30511(c) and Federal Rules of Civil Procedure Supplement Rule F(3), a shipowner who properly files a petition for limitation of liability is entitled to an injunction against proceedings against it in any other forum. [[945]](#footnote-946)945 But under certain circumstances, persons with claims against the shipowner can get the injunction lifted so as to permit them to litigate liability and damages issues elsewhere, subject to the limitation court's reservation of the limitation-of-liability issue to itself. [[946]](#footnote-947)946 Recent district court decisions in which claimants succeeded in getting the injunction lifted include **[\*492]** Hilcorp Energy Co. v. Kennison, [[947]](#footnote-948)947 a single-claimant case in which the court gave a good summary of current law:

Claimant stipulates that the district court retain exclusive jurisdiction over Plaintiff's right to limit liability. However, Plaintiff contends Claimant should further stipulate exclusive federal jurisdiction as to Plaintiff's exoneration from liability. The law does not require Claimant to make such a stipulation before the Court can remand the case to state court. [Here the court cites Lewis v. Lewis & Clark Marine, Inc., 531 U.S. 438, 455 (2001), In re Tetra Applied Techs. L.P., 362 F.3d 338, 341 (5th Cir. 2004), [[948]](#footnote-949)948 and In re Tidewater, 249 F.3d 342, 347 (5th Cir. 2001). [[949]](#footnote-950)949]

When there are multiple claimants in a limitation proceeding, a court can lift a stay of a state court suit so long as all the claimants stipulate that the district court retains exclusive jurisdiction to decide limitation issues and they will not enforce any state judgment in excess of the limitation fund. A co-defendant who makes a cross claim for costs and attorney's fees becomes a claimant and must stipulate together with other claimants. A district court should determine whether there are other potential claimants who must stipulate before it lifts a stay. However, a district court should not delay remand on the mere speculation of potential claimants.

Kennison is the only claimant in the limitation proceeding … . However, Plaintiff alleges that Claimant's prayers for attorney's fees and costs create "multiple and competing claims to the limitation fund" which necessitate concursus in this Court… .

Claimant's requests for attorney's fees and costs do not compete with his personal injury claim. Said claims are not supplemental and do not create an additional claimant which could require the Court to retain exclusive jurisdiction. [[950]](#footnote-951)950

Popich v. Shell Pipeline Co. [[951]](#footnote-952)951 was a multiple-claimant case in which the court lifted the injunction, setting forth the same view of the controlling law as the court in Hilcorp. [[952]](#footnote-953)952

Two district courts recently decided they could not lift the injunction, because the claimants in the limitation proceedings in both cases included cotortfeasors of the limitation petitioner who were making cross-claims for contribution and attorneys' fees, and these claimants had not joined in the necessary injunction-lifting stipulations. [[953]](#footnote-954)953

**[\*493]**

3. Voyage Rule/Distinct Occasions Provision

In a garden-variety limitation of liability proceeding in which the shipowner successfully negates its "privity or knowledge," "a single limitation fund consisting of the value of the vessel and its pending freight at the end of the voyage is shared pro rata by all claimants from all casualties or occasions that occur during any one voyage." [[954]](#footnote-955)954 But the "Loss of Life Amendments" that were added to the Limitation of Liability Act in 1936 provide that "seagoing vessels" that cause death or personal injury must come up with a fund at least equal to $ 420 times the vessel's tonnage, [[955]](#footnote-956)955 and that when "claims for personal injury or death arise on distinct occasions" on a voyage, [[956]](#footnote-957)956 there must be separate limitation funds for each occasion. The court in In re King Fisher determined that only one fund was required there, when during a voyage of a dredge, two seamen were hurt on separate occasions. [[957]](#footnote-958)957 The court determined that the dredge was not a "seagoing vessel" within the meaning of 46 U.S.C. § 30506(a). [[958]](#footnote-959)958 The court cited In re Talbott Big Foot, Inc., [[959]](#footnote-960)959 as defining "seagoing vessel" for these purposes as "a vessel that is either intended to navigate or does navigate beyond twelve nautical miles from the Coast of the United States." [[960]](#footnote-961)960

4. U.S. Government's Wreck Act Claims

In re Southern Scrap Material Co. [[961]](#footnote-962)961 held that a claim by the United States under the Wreck Act was not subject to limitation of liability. [[962]](#footnote-963)962 University of Texas Medical Branch at Galveston v. United States [[963]](#footnote-964)963 held that government claims for the costs of removing negligent wrecks are not subject to limitation of liability. The Southern Scrap court determined that the 1986 amendments to the Wreck Act meant that **[\*494]** wreck-removal claims against nonnegligent vessel owners are likewise outside the Limitation Act's protections. [[964]](#footnote-965)964

I. Carriage of Goods

1. Arbitration Clauses in Charterparties

The Rice Co. (Suisse), S.A. v. Precious Flowers Ltd. [[965]](#footnote-966)965 illustrates the problems that can arise when the arbitration clause in a subcharter does not match the arbitration clause in the head charter. The vessel owner time-chartered the vessel under a charterparty containing a London arbitration clause. [[966]](#footnote-967)966 The time charterer then entered into a voyage charter with the plaintiff shipper under a charterparty containing a New York arbitration clause. [[967]](#footnote-968)967 When the shipper's rice cargo was damaged (allegedly because of the vessel's unseaworthy hatch covers), the shipper attempted to bring the vessel in rem, the vessel owner, and the time charterer into a single arbitration proceeding in New York. [[968]](#footnote-969)968 But only the time charterer was bound by the New York arbitration clause. [[969]](#footnote-970)969 This not only limited the shipper's options, it also meant that the time charterer could not seek recourse against the vessel owner (except in London arbitration after the conclusion of the New York arbitration). [[970]](#footnote-971)970

2. Perils of the Sea

Under U.S. law, it is notoriously difficult for a carrier to avoid liability for cargo loss or damage under section 4(2)(c) of COGSA, [[971]](#footnote-972)971 the "peril of the sea" defense. [[972]](#footnote-973)972 The most frequently applied legal standard, which pre-dates COGSA, declares that "perils of the sea" are "those perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence." [[973]](#footnote-974)973 Although a range of factors go into the decision, **[\*495]** foreseeability has become the most important: "[Courts'] ultimate conclusions should turn on whether the weather conditions were foreseeable, given the location and time of the year." [[974]](#footnote-975)974 Thus the Second Circuit has held that even the weather conditions associated with an "ultra bomb" (an extra-tropical cyclone) did not constitute a peril of the sea because they "were not unusual in the North Atlantic in the wintertime." [[975]](#footnote-976)975

Corus UK Ltd. v. Waterman Steamship Co. [[976]](#footnote-977)976 represents one of the rare instances in which a U.S. court upheld a "perils of the sea" defense. The Fifth Circuit quoted the well-established legal standard, but accepted the district court's finding "that the speed and severity of this particular storm was not foreseeable." [[977]](#footnote-978)977 On that basis, the carrier was entitled to escape liability. [[978]](#footnote-979)978

J. Marine Insurance

Although a warranty of seaworthiness is implied in a hull policy, an insurer that fails to assert the warranty (or otherwise protect its interests) in time will lose its benefit. In North American Specialty Insurance Co. v. Debis Financial Services, Inc., [[979]](#footnote-980)979 the insurer issued a hull policy to the owner of a jack-up barge. The barge's mortgagee was a loss payee on the policy. [[980]](#footnote-981)980 When the barge sank, the insurer was aware of allegations that the owner had ordered the captain "to commence the [final] voyage in the face of knowledge that the vessel's jacking system was known to be malfunctioning," but it paid the full amount of the hull policy without investigating the allegations or issuing a reservation-of-rights letter. [[981]](#footnote-982)981 When it thereafter sought to recover the payments from the owner and the mortgagee, the action failed (under Louisiana law) because the insurer had waived all coverage and policy defenses. [[982]](#footnote-983)982

**[\*496]**

K. Longshore and Harbor Workers' Compensation Act (LHWCA)

1. The Act's Coverage

In Romero v. Cajun Stabilizing Boats, Inc., [[983]](#footnote-984)983 a welder was hurt aboard a jack-up service vessel that had been dry-docked for a Coast Guard inspection. Plaintiff's counsel tried to argue out of LHWCA coverage by citing Herb's Welding, Inc. v. Gray, [[984]](#footnote-985)984 for the broad proposition that welders do not satisfy the LHWCA § 2(3)'s [[985]](#footnote-986)985 status requirement. [[986]](#footnote-987)986 The court reminded counsel that Herb's Welding stands for the much narrower proposition that ***oil*** pipeline work on a fixed platform in state waters is outside LHWCA coverage. [[987]](#footnote-988)987 It went on to scold counsel for making the Herb's Welding argument. [[988]](#footnote-989)988

2. Negligence Actions Under LHWCA § 5(b) (33 U.S.C. § 905(b))

a. Preemption of State Law Claims

Last year's article [[989]](#footnote-990)989 was critical of the district court's decision in McLaurin v. Noble Drilling (U.S.) Inc., [[990]](#footnote-991)990 in which the court relied on the Fifth Circuit's decisions in Richendollar v. Diamond M Drilling Co. [[991]](#footnote-992)991 and May v. Transworld Drilling Co. [[992]](#footnote-993)992 for the proposition that to state a cause of action under section 5(b), the plaintiff "must show that the tort occurred on or in navigable waters, bringing it within the Court's admiralty jurisdiction." McLaurin could not do that, because he was hurt building a ship on land. [[993]](#footnote-994)993 The court said that McLaurin's state law negligence action was nevertheless "preempted by" section 5(b). [[994]](#footnote-995)994 The Fifth Circuit reversed, holding that section 5(b) does not preempt state law claims for injuries that fall outside admiralty jurisdiction. [[995]](#footnote-996)995

Some of the McLaurin court's language is probably broader than its intended meaning. Wrapping up its discussion, the court stated:

**[\*497]**

The McLaurins cannot recover from Noble Drilling as a vessel owner because they cannot state a cognizable claim for vessel negligence under [section 5(b)], so the language of [section 5(b)] does not preempt their state-law claim against Noble Drilling as a third-party tortfeasor. The plain language of [section 33, 33 U.S.C. § 933,] clearly contemplates and preserves a maritime worker's ability to pursue separate claims against third parties, including vessel owners allegedly responsible for the injury. [[996]](#footnote-997)996

On its face, the quoted statement suggests that LHWCA workers can pursue state law tort claims against shipowners under any circumstances in which section 5(b) does not provide a remedy. The court can hardly have meant to say that. Taken together with May and Richendollar, what the McLaurin decision means is simply that section 5(b) does not apply - either to grant a remedy or to preclude a state remedy - unless the injury falls within admiralty jurisdiction. (In the recent decision in In re Donjon Marine Co., [[997]](#footnote-998)997 a district court in the Second Circuit correctly read McLaurin to mean "if an injured employee's tort claims against a vessel owner fall under the federal courts' admiralty jurisdiction, section 905(b) preempts state claims against the vessel owner.")

b. Merits Issues in Section 5(b) Cases

As we saw in Part IV.L.1, section 5(b) affords LHWCA workers a limited negligence remedy against nonemployer "vessels." [[998]](#footnote-999)998 It also affords most types of LHWCA workers that same remedy against dual capacity vessel/employers. [[999]](#footnote-1000)999 In both types of actions, the three fairly limited Scindia/Howlett duties are normally dispositive. [[1000]](#footnote-1001)1000

i. Cases Against Nonemployer "Vessel" Defendants

A potential broadening of the duty section 5(b) imposes on "vessels" is suggested by language in Scindia indicating that "contract provision, positive law, or custom" can expand the three shipowner duties. [[1001]](#footnote-1002)1001 Attending to that language, the court in Robinson v. Orient Marine Co. [[1002]](#footnote-1003)1002 - in which a longshoreman contended that his injury resulted from the dangerous way in which cargo he was unloading was **[\*498]** stowed - denied the defendant time charterer's [[1003]](#footnote-1004)1003 motion for summary judgment because Clause 8 of the contract between the time charterer and the shipowner said that "Charterers are to Perform all cargo handling at their risk and expense." Reversing and holding that the time charterer owed only the three Scindia/Howlett duties, the Fifth Circuit noted that "both the Second and the Ninth Circuits have held that language virtually identical to that found in Clause 8 acts as an indemnification clause between the owner and the time charterer and does not affect the duties owed to longshoremen." [[1004]](#footnote-1005)1004 The court cited Carpenter v. Universal Star Shipping, SA [[1005]](#footnote-1006)1005 and Fernandez v. Chios Shipping Co. [[1006]](#footnote-1007)1006

The three Scindia/Howlett duties operate to impose most of the responsibility for safety of longshoring and shipyard operations on the workers' employers rather than the "vessels" the workers service. For example, last year's article [[1007]](#footnote-1008)1007 discussed Kirksey v. P & O Ports Texas, Inc., [[1008]](#footnote-1009)1008 in which an 8000-pound steel coil fell on a longshoreman engaged in unloading operations. After a bench trial, the district court found that the vessel defendants breached the turnover duty by improperly stowing the cargo and failing to warn the stevedoring company that the vessel had encountered Beaufort Scale Force 9 winds during the voyage, causing the cargo to shift. [[1009]](#footnote-1010)1009 The court found that the plaintiff was ten percent contributorily negligent, but that he was not barred from recovery by the frequently successful "open and obvious" defense, stating:

That the condition is "open and obvious" is not a complete defense to the longshoreman's suit. Harris v. Flota Mercante Grancolombiana, 730 F.2d 296, 299 (5th Cir. 1984). "A longshoreman's own knowledge of shipboard hazards will not negate a shipowner's duty of care which would otherwise exist." Stass v. American Commercial Lines, Inc., 720 F.2d 879, 882 (5th Cir. 1983), quoting Comment, 56 Tul. L. Rev. 1421, 1432 (1982). See also Morris v. Compagnie Maritime des Chargeurs Reunis, S.A., 832 F.2d 67, 70 (5th Cir. 1987) (accord). [[1010]](#footnote-1011)1010

**[\*499]** In Kirksey v. Tonghai Maritime, [[1011]](#footnote-1012)1011 the Fifth Circuit reversed and rendered judgment for defendant, determining that the district court's approach to the "open and obvious" doctrine was precluded by Howlett v. Birkdale Shipping Co., SA. [[1012]](#footnote-1013)1012

The "open and obvious" doctrine also defeated the plaintiff's section 5(b) case in Romero v. Cajun Stabilizing Boats, Inc.:

In sum, because it is reasonable to expect that an experienced maritime employee would be aware of the danger posed by the common presence of slippery anti-corrosive material on a vessel, and because any hazard posed would be open and obvious to workers aboard the vessel, defendant did not violate its turnover duty. [[1013]](#footnote-1014)1013

In Cooper v. Faith Shipping, [[1014]](#footnote-1015)1014 a longshoreman was rendered a paraplegic when cargo fell on him. Apparently this was the injured man's first day working as a longshoreman; and he "had never been on a vessel before." [[1015]](#footnote-1016)1015 The court granted summary judgment on the grounds that the "turnover" duty was not violated because the dangerous condition of the stow was "open and obvious" (to the plaintiff's employer, not necessarily to him). [[1016]](#footnote-1017)1016 It also granted summary judgment that the "intervention" duty was not violated because plaintiff's employer "had been unloading the cargo carefully and without incident for days." [[1017]](#footnote-1018)1017 But the court denied the vessel defendants' motion for summary judgment in regard to the "active control" duty, noting evidence that the ship might have listed during cargo operations, stating:

As there are issues of fact as to whether the vessel was listing at all, whether remedying the alleged list was within the vessel's exclusive control, and whether the alleged list was significant enough to affect the discharge operations and the stability of the cargo, summary judgment is not appropriate. [[1018]](#footnote-1019)1018

**[\*500]**

ii. Cases Against "Dual Capacity" (Employer/Vessel) Defendants

In Short v. Manson Gulf, L.L.C., [[1019]](#footnote-1020)1019 Manson Gulf engaged a company called ICU to work on the construction of a fixed OCS platform. Short, a welder working for ICU, was hurt when he fell from a ladder on a materials barge being used in the operation. [[1020]](#footnote-1021)1020 Plaintiff claimed the ladder slipped because the crew member who was supposed to be holding it spoke only Spanish and hence did not understand instructions in English and also because the deck was slippery. [[1021]](#footnote-1022)1021 Short's section 5(b) action against Manson was a dual capacity case because the plaintiff conceded that he was the defendant's borrowed employee. [[1022]](#footnote-1023)1022 The court granted Manson's motion for summary judgment on multiple grounds. First, noting that Manson did not own the materials barge, the court cited a leading Fifth Circuit "dual capacity" case, Levene v. Pintail Enterprises Inc., [[1023]](#footnote-1024)1023 for the proposition that "we cannot find in Scindia any mandate for extending the duty of a shipowner to protection against hazards on another ship." [[1024]](#footnote-1025)1024 Second, the court cited Prestenbach v. Global International Marine Inc. [[1025]](#footnote-1026)1025 as holding that a vessel does not violate any of the Scindia/Howlett duties by having Spanish-only crew members. [[1026]](#footnote-1027)1026 Third, plaintiff knew the deck was slippery. [[1027]](#footnote-1028)1027 Fourth, plaintiff presented no evidence that Manson had operational control of the materials barge. [[1028]](#footnote-1029)1028 Fifth - this being a dual capacity case - any negligence of Manson would have been employer fault, not vessel operator fault. [[1029]](#footnote-1030)1029

**[\*501]**

3. Can LHWCA Workers Sue Their Employers in Tort for Intentional Injury? [[1030]](#footnote-1031)1030

Lane v. Halliburton [[1031]](#footnote-1032)1031 is an important nonmaritime case addressing whether tort claims by civilian truck drivers injured while working for federal contractors in Iraq are blocked by the political question doctrine. In footnote three, the court indicates that it is expressing no opinion on whether the Defense Base Act [[1032]](#footnote-1033)1032 (which incorporates the LHWCA) immunizes the contractors from tort liability. [[1033]](#footnote-1034)1033 (We think some of these plaintiffs may be claiming intentional injury; some of them were hurt while driving in "decoy" convoys, used to divert enemy fire from the real convoys.)

4. Workers' Compensation Law Nuts and Bolts

Grant v. Director, Office of Worker's Compensation Programs [[1034]](#footnote-1035)1034 held that the Benefits Review Board (BRB) was wrong when it dismissed a worker's appeal as untimely. The Administrative Law Judge (ALJ) dismissed Grant's claim on December 13, 2005. [[1035]](#footnote-1036)1035 The dismissal order was sent by express mail to the District Director, who received it on December 14. [[1036]](#footnote-1037)1036 The District Director, however, "did not formally date and file the order, nor did he serve it on the parties, all contrary to 20 C.F.R. § 702.349." [[1037]](#footnote-1038)1037 Grant filed an appeal with the BRB on January 18. [[1038]](#footnote-1039)1038 The BRB dismissed the appeal as untimely on the view that the thirty-day appeal clock started running on December 14. [[1039]](#footnote-1040)1039 The Fifth Circuit held this was wrong because under 33 U.S.C. § 921(a) and the BRB's Rules of Practice and Procedure, the appeal clock does not start running until the District Director formally dates and files the ALJ's order; mere receipt is not enough. [[1040]](#footnote-1041)1040 The court sent the case back to the BRB with instructions to require the District Director to file the ALJ's order of dismissal so the appeal clock could begin to run. [[1041]](#footnote-1042)1041

**[\*502]** In M & M Project Staffing v. Director, Office of Worker's Compensation Programs, [[1042]](#footnote-1043)1042 the court sent the case back to the ALJ for recalculation of the worker's average weekly wage. Mar-Con/Thunder Crane, Inc. v. Nelson [[1043]](#footnote-1044)1043 upheld the ALJ's average weekly wage calculation.

Lake Charles Food Products, L.L.C. v. Broussard [[1044]](#footnote-1045)1044 upheld the ALJ's and BRB's decision that a May 2004 car wreck was not a "supervening cause" that could cut off the employer's obligation to pay compensation for an October 2003 workplace injury.

Berry Bros. General Contractors Inc. v. Director, Office of Worker's Compensation Programs [[1045]](#footnote-1046)1045 involved the recurrent issue of which employer is responsible for compensation when a disability is the result of cumulative traumas. Here the first employer was held responsible. [[1046]](#footnote-1047)1046

Section 20 [[1047]](#footnote-1048)1047 provides in pertinent part that "in any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary [that] the claim comes within the provisions of this chapter." The courts have read this to mean that there is

a presumption that the injury is causally related to the worker's employment if the worker makes a prima facie showing of causation. A prima facie showing of causation consists of evidence that "(1) an injury was suffered, and (2) the injury occurred in the course of employment or was caused, aggravated, or accelerated by conditions at the work place." Once an employee makes a prima facie case, it is the employer's burden to rebut it by substantial evidence to the contrary. [[1048]](#footnote-1049)1048

In Franks [[1049]](#footnote-1050)1049 and in Nabors Offshore Drilling Inc. v. Smoot, [[1050]](#footnote-1051)1050 workers succeeded in making the prima facie showing and the employers failed to rebut it.

**[\*503]**

L. Cruise Lines

We have frequently discussed the issue of whether shipowners are subject to vicarious liability for medical negligence by shipboard physicians and medical personnel. [[1051]](#footnote-1052)1051 Hajtman v. NCL (Bahamas) Ltd. [[1052]](#footnote-1053)1052 says it is "well established" that the answer is no. We disagree, believing that the issue is currently in ferment. [[1053]](#footnote-1054)1053

In Booth v. Carnival Corp., [[1054]](#footnote-1055)1054 a cruise ship passenger died in a scuba-diving accident. The passage ticket included a forum selection clause limiting litigation to the United States District Court for the Southern District of Florida and a one-year limitations provision. [[1055]](#footnote-1056)1055 Within the year, the plaintiffs filed a state court suit. [[1056]](#footnote-1057)1056 A few months later - after the one-year period had expired - they filed in the specified federal court. [[1057]](#footnote-1058)1057 The federal court administratively closed the federal action pending the outcome of the state lawsuit. [[1058]](#footnote-1059)1058 The state trial court refused to uphold the forum selection clause, but this was reversed on appeal and the case thrown out of state court. [[1059]](#footnote-1060)1059 The federal court then held that the timely filing in state court had tolled the one-year contractual limitations period. [[1060]](#footnote-1061)1060 The Eleventh Circuit agreed, stating:

Because the state court possessed subject matter jurisdiction over Booth's claim, and because the state court dismissed the claim merely on grounds of improper venue, we hold that Booth's filing and diligent prosecution of his state-court suit suffices to equitably toll the contractual limitation period in his identical federal suit. [[1061]](#footnote-1062)1061

M. General Maritime Law

The rule of East River Steamship Corp. v. Transamerica Delaval, Inc., [[1062]](#footnote-1063)1062 is that the manufacturer/seller of a defective product is not liable in tort when the defect injures only the product itself, because the damage to the product itself is not characterized as physical property damage but as "pure economic loss." The rule applies to both negligence **[\*504]** actions and strict products liability actions. [[1063]](#footnote-1064)1063 Turbomeca, S.A. v. Era Helicopters LLC [[1064]](#footnote-1065)1064 arose when a helicopter operated by Era suffered an engine failure, causing it to make an emergency landing and sink in the Gulf of Mexico. The court rejected plaintiff's effort to hold the helicopter and helicopter engine manufacturers liable for "post-sale" negligence in failing to warn of pre-sale defects, holding that there is no "post-sale negligence exception to East River." [[1065]](#footnote-1066)1065

Butterfly Transportation Corp. v. Bertucci Industrial Services LLC [[1066]](#footnote-1067)1066 was a breach-of-contract suit by a shipowner against a company (Bertucci) that allegedly had not fulfilled its obligations to properly clean the ship's tanks. The cleaning was good enough to get the ship the United States Department of Agriculture (USDA) loading pass it sought so that it could transport soybeans, but it was not good enough to keep the soybeans from being ruined, costing the shipowner a substantial outlay for cargo damage liability. [[1067]](#footnote-1068)1067 The trial court interpreted the contract to require Bertucci to clean the ship sufficiently to get a USDA loading pass and granted summary judgment for Bertucci. [[1068]](#footnote-1069)1068 Reversing and remanding, the Fifth Circuit thought the contract might well require Bertucci to actually clean the tanks. [[1069]](#footnote-1070)1069

The Butterfly court also addressed the shipowner's separate count for damages for breach of an implied warranty of workmanlike performance (WWLP). [[1070]](#footnote-1071)1070 The WWLP doctrine originated in Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp., [[1071]](#footnote-1072)1071 which held that when a shipowner is held strictly liable to a longshoreman injured by unseaworthiness resulting from stevedoring operations, the shipowner can in turn recover only from the stevedore on the basis of an implied WWLP. Subsequently the Ryan-derived WWLP was expanded to other litigation contexts. The 1972 amendments to the LHWCA took away longshoremen's rights to sue shipowners for unseaworthiness and accordingly cut the basis from beneath Ryan. But the Fifth Circuit has been saying that there is still something left of the Ryan-originated WWLP. [[1072]](#footnote-1073)1072 Here is the Butterfly court's explanation:

**[\*505]**

In 1972, Congress amended the [LHWCA] to abrogate the Ryan doctrine as it applied to those covered by the Act. These amendments do not apply to workers not covered by the LHWCA's provisions. Nonetheless, based on these amendments, the Fifth Circuit began a gradual narrowing of the Ryan doctrine as it applied to property damage cases that were not covered directly by the LHWCA amendments. Accordingly, while a WWLP still exists for cases involving damage to cargo, it is now judged by comparative fault principles… .

The district court legally erred in not considering whether Bertucci breached its WWLP. This kind of liability exists under current Fifth Circuit law, although liability is no longer judged by the strict liability principles of Ryan; instead, fault must be apportioned comparatively. [[1073]](#footnote-1074)1073

The court did not explain how a comparative-fault based WWLP action differs from a negligence action. The difference is not apparent. In cases like Butterfly, the present-day version of the WWLP seems to enable contracting parties to sue one another for the tort of negligent breach of contract. It thus operates in some tension with the complex of "pure economic loss" rules (of which East River is a part) that generally operate to preclude negligence actions for nonphysical harm.

John W. Stone ***Oil*** Distributor, L.L.C. v. Bollinger Shipyards, Inc., [[1074]](#footnote-1075)1074 arose when a "permanently moored" dry dock broke away from defendant's facility during Hurricane Katrina and damaged the plaintiff's property. The court held that the dry dock was not a vessel while moored, but that once it broke loose and began traveling across the water, it became a vessel for purposes of the rule of The Louisiana [[1075]](#footnote-1076)1075 "that when a drifting vessel causes damage to a stationary object, there is a presumption that the moving ship is at fault." [[1076]](#footnote-1077)1076

N. Collision and Allision

It is fundamental that liability in collision and allision cases is based on fault. Certain well-established presumptions may assist in establish-ing fault, but at the end of the day there is no liability without proven or presumed fault. In Fischer v. S/Y Neraida, [[1077]](#footnote-1078)1077 the owner of a dock that had been seriously damaged when a sixty-five-foot yacht allided with it during Hurricane Frances sued the yacht's owner. Under the Louisiana Rule, [[1078]](#footnote-1079)1078 when a vessel moving or drifting due to an external force allides **[\*506]** with a stationary object, the vessel is presumed to be at fault and must affirmatively show its lack of fault to escape liability. The Fischer court recognized the presumption but held that the yacht's owner had overcome it and shown that he had been without fault. [[1079]](#footnote-1080)1079 Thus the dock owner could not recover. [[1080]](#footnote-1081)1080

O. Salvage

Three basic requirements must be satisfied to justify a salvage award: (1) the existence of a maritime peril, (2) the would-be salvor's voluntary act, and (3) a successful effort to save the property that was in peril. [[1081]](#footnote-1082)1081 In Cape Ann Towing v. M/Y "Universal Lady," [[1082]](#footnote-1083)1082 the towing company voluntarily and successfully towed the defendant yacht to safety, but it did not show that the yacht had been "in peril." It thus received a quantum meruit award for the value of its towing services rather than the much-larger salvage award that it sought. [[1083]](#footnote-1084)1083

P. Economic Loss Rule

Last year, [[1084]](#footnote-1085)1084 we discussed the economic loss rule [[1085]](#footnote-1086)1085 in the context of a cargo claim. In Pemeno Shipping Co. v. Louis Dreyfus Corp., [[1086]](#footnote-1087)1086 the Fifth Circuit in an "unpublished" opinion reiterated and applied the rule to bar a carrier's claim for serious delays and other expenses that arose when a cargo of wheat was infested with insects. The rule barred the claim because the carrier had no proprietary interest in the damaged wheat (and no exceptions to the rule applied). [[1087]](#footnote-1088)1087

Perhaps the Fifth Circuit was concerned that no one heard the message. In Norwegian Bulk Transport A/S v. International Marine Terminals Partnership, [[1088]](#footnote-1089)1088 it again reiterated and applied the rule but this time it issued a "published" opinion. [[1089]](#footnote-1090)1089 The facts were remarkably **[\*507]** similar to those in the Supreme Court's seminal decision in Robins Dry Dock. [[1090]](#footnote-1091)1090 A time charterer claimed that it was forced to incur additional expenses as the result of its loss of use of a vessel during the time that it had to be repaired following damages caused by the defendant marine terminal. [[1091]](#footnote-1092)1091 As in Robins Dry Dock, the time charterer had no claim against the responsible marine terminal. [[1092]](#footnote-1093)1092 It had no proprietary interest in the damaged vessel and no contract with the defendant. [[1093]](#footnote-1094)1093

Q. Damages in Fatal-Injury Actions

1. Commercial Aviation Accidents

In the summer of 1996, TWA flight 800 crashed about eight miles off the shore of Long Island, killing all 230 persons on board, including a number of children from a high school in Pennsylvania. [[1094]](#footnote-1095)1094 Under the DOHSA regime as it stood at that time, the parents of these children were entitled to little or no recovery aside from funeral expenses. [[1095]](#footnote-1096)1095 It is worth pausing to review why this was so. DOHSA § 3 [[1096]](#footnote-1097)1096 restricted recovery in wrongful death actions arising from fatal accidents occurring beyond three nautical miles from the shores of the United States to "pecuniary loss," which the courts have defined to include loss of support, loss of services, and funeral expenses and to exclude loss of society, companionship, consortium and the like. Nowadays minor children rarely make any significant contributions of support or services to their parents. [[1097]](#footnote-1098)1097 The Supreme Court has held that when DOHSA applies, there can be no other wrongful death remedy under general **[\*508]** maritime law. [[1098]](#footnote-1099)1098 The Supreme Court has further interpreted DOHSA to foreclose the availability of any general maritime survival action (seeking recovery for the decedent's conscious pain and suffering incurred in the fatal accident) for accidents beyond three nautical miles from shore. [[1099]](#footnote-1100)1099

In response to the 1996 TWA 800 disaster, in 2000 Congress amended DOHSA retroactively to the date of the TWA disaster by adding the "commercial aviation amendments." [[1100]](#footnote-1101)1100 These amendments are now codified as 46 U.S.C. § 30307:

§ 30307. Commercial aviation accidents

(a) Definition - In this section, the term "nonpecuniary damages" means damages for loss of care, comfort, and companionship.

(b) Beyond 12 Nautical Miles - In an action under this chapter, if the death resulted from a commercial aviation accident occurring on the high seas beyond 12 nautical miles from the shore of the United States, additional compensation is recoverable for nonpecuniary damages, but punitive damages are not recoverable.

(c) Within 12 Nautical Miles - This chapter [i.e., DOHSA] does not apply if the death resulted from a commercial aviation accident occurring on the high seas 12 nautical miles or less from the shore of the United States. [[1101]](#footnote-1102)1101

The effect of this legislation is to authorize parties situated like the TWA 800 parents - bereaved by virtue of an airliner accident within twelve miles - to seek recovery under general maritime law or state law of damages for the decedents' predeath pain and suffering, of damages for loss of society, and conceivably even of punitive damages. The legislation was less generous to otherwise identical plaintiffs in cases involving airliner accidents beyond twelve miles, but it did give them something. [[1102]](#footnote-1103)1102

The legislation did nothing at all for victims of vessel-related deaths. Hence the amendments to DOHSA that are periodically offered. [[1103]](#footnote-1104)1103

In enacting the commercial aviation amendments, Congress was thinking about airliner crashes. But helicopters and small aircraft that **[\*509]** make money from ferrying OCS ***oil*** and gas workers back and forth also fall "within the plain meaning" of § 30307. [[1104]](#footnote-1105)1104 In addressing the effects of the commercial aviation amendments on crashes of OCS "crewboat" helicopters, two district courts have made statements indicating that the amendments did not take effect until 2006. [[1105]](#footnote-1106)1105 But as noted above, the aviation amendments were enacted in 2000 and made retroactive to accidents occurring after July 16, 1996. [[1106]](#footnote-1107)1106

2. Peculiar Restrictions on Seamen's Families' Fatal-Injury Actions

Miles v. Apex Marine Corp. [[1107]](#footnote-1108)1107 held that seamen's families cannot recover for loss of society in fatal-injury actions against the seamen's employers. Scarborough v. Clemco Industries [[1108]](#footnote-1109)1108 expanded the Miles rule to apply to all fatal-injury actions by seamen's families, i.e., to actions against employers and nonemployers alike. LHWCA workers' families are better off in this respect; in section 5(b) actions against nonemployer vessels and against "dual capacity" (employer/vessel) defendants for fatal accidents within three nautical miles, they can recover for loss of society (provided they can show some financial dependency on the decedent). [[1109]](#footnote-1110)1109 This is a weird regime, but it is present law. [[1110]](#footnote-1111)1110

R. Procedural Issues

1. Personal Jurisdiction

Here is what we said last year [[1111]](#footnote-1112)1111 about the district court's decision in De Leon v. Shih Wei Navigation Co. [[1112]](#footnote-1113)1112 The plaintiffs were residents of the Dominican Republic who (or whose decedents) stowed away on a **[\*510]** Chinese ship (Chinese owned and operated, Panama flagged) headed for Houston. [[1113]](#footnote-1114)1113 When the crew discovered the five stowaways while the ship was on the high seas, they allegedly put three of the men adrift on a raft and threw two overboard. [[1114]](#footnote-1115)1114 These two men died. [[1115]](#footnote-1116)1115 In the ensuing personal injury/wrongful death actions, the court held that it lacked personal jurisdiction over the Chinese shipowners/operators. [[1116]](#footnote-1117)1116 The court said there was no "specific" general jurisdiction because the defendants had not "had any purposeful contact with Texas that can be directly linked to the alleged tort," [[1117]](#footnote-1118)1117 and no "general" jurisdiction because:

Plaintiffs do not present any evidence that Shih Wei or Dong Lien had any contacts with the United States other than the port calls made by vessels with which they were affiliated and the essential services performed in connection with these port calls. These port calls were, for the most part, made at the discretion of the charterers - not Shih Wei or Dong Lien, and they were not continuous and systematic. Accordingly, neither Shi Wei nor Dong Lien has sufficient contacts with the United States to justify the exercise of in personam jurisdiction. [[1118]](#footnote-1119)1118

The case was appealed to the Fifth Circuit. [[1119]](#footnote-1120)1119 Last year we predicted that in the appeal the Fifth Circuit's attention might be centered on the argument that under Federal Rule of Civil Procedure 4(k)(2) - which provides for personal jurisdiction in federal law cases on the basis of the defendant's contacts with the United States as a whole - there was "purposeful contact" with the United States as a whole because the defendants' motive for abandoning the stowaways was to avoid the substantial penalties imposed by U.S. law for bringing in illegal immigrants. [[1120]](#footnote-1121)1120 If that argument were to be successfully asserted, the result would be to establish specific personal jurisdiction, i.e., jurisdiction over an action arising out of or related to the defendant's contacts in the forum.

The Fifth Circuit's decision in DeLeon v. Shih Wei Navigation Co. [[1121]](#footnote-1122)1121 does not bear out our prediction. In a short opinion affirming the district court's ruling against jurisdiction, the court indicated that this was **[\*511]** solely a general personal jurisdiction case, so that the plaintiff was required to show that the defendant had continuous and systematic contacts with the United States. [[1122]](#footnote-1123)1122 The court said that "Plaintiffs-Appellants do not contest the district court's conclusion that it could not exercise specific jurisdiction over Defendants-Appellees." [[1123]](#footnote-1124)1123

Like the Second Circuit's Porina [[1124]](#footnote-1125)1124 decision, DeLeon illustrates the notable difficulty of establishing general personal jurisdiction under what seems to be a prevalent conservative judicial attitude to the matter. [[1125]](#footnote-1126)1125 Stutzman v. Rainbow Yacht Adventures Ltd. [[1126]](#footnote-1127)1126 is yet another example. Here the court held that a British Virgin Islands company whose commercial sailing vessel seemingly did a considerable amount of business in the United States - and whose director and controlling shareholder was a U.S. citizen - was not subject to general personal jurisdiction in the United States under Federal Rule of Civil Procedure 4(k)(2) on the view that the company's U.S. contacts were "too tenuous to meet the difficult continuous and systematic contacts test for general personal jurisdiction." [[1127]](#footnote-1128)1127

Perhaps because establishing general personal jurisdiction has been made so tough, courts sometimes embrace specific personal jurisdiction with something like enthusiasm. In Shipley v. Excell Marine Co., [[1128]](#footnote-1129)1128 the plaintiff brought a Jones Act suit in federal court in New Orleans seeking damages for an injury while working for a towboat company that operated on the Ohio River between Ohio and West Virginia. The court explained its holding that specific personal jurisdiction existed by stating:

Here, the Defendant specifically targeted the Plaintiff and made a recruiting call to the Plaintiff while he was residing within Louisiana. Apparently, the Plaintiff was employed with another company and the Defendant, through its recruiting call, convinced the Plaintiff to leave his employment and accept the offer of employment extended by the Defendant. This direct and targeted recruitment by the Defendant is such that the Defendant should have reasonably anticipated being sued in the forum state. [[1129]](#footnote-1130)1129

**[\*512]**

2. Interlocutory Appeals

In In re Ingram Barge Co., [[1130]](#footnote-1131)1130 the court held that it lacked jurisdiction under 28 U.S.C. § 1292(a)(3) to hear an interlocutory appeal from the district court's grant of defendant's motion to strike the plaintiffs' class action allegations and jury demand.

S. Miscellaneous Cases

In an important nonmaritime case, In re Volkswagen of America, Inc., [[1131]](#footnote-1132)1131 the Fifth Circuit split 10-7 in issuing a writ of mandamus ordering the federal district judge at Marshall, Texas, to grant the defendant's motion for a 28 U.S.C. § 1404(a) transfer of a products liability action to the federal district court in Dallas. The sharp division within the court is worth careful study in its bearing on the judges' judicial and govern-mental philosophies. Judge Jolly wrote for the majority, Judge King for the dissenters. [[1132]](#footnote-1133)1132

In Capt. Chance, Inc. v. United States, [[1133]](#footnote-1134)1133 the court issued a one-sentence affirmance of the district court's decision that Coast Guard negligence in locating, marking, and notifying mariners of a submerged channel marker was excluded from the waiver of sovereign immunity in the Suits in Admiralty Act (SAA) [[1134]](#footnote-1135)1134 by the discretionary function provision of the Federal Tort Claims Act (FTCA). [[1135]](#footnote-1136)1135 The district judge cited no authority for reading the FTCA provision into the SAA, seemingly regarding the matter as completely settled. [[1136]](#footnote-1137)1136

United States ex rel. Marcy v. Rowan Cos. [[1137]](#footnote-1138)1137 held that a maritime worker's allegations that his employer failed to report illegal discharges of ***oil*** failed to state a cause of action under the False Claim Act.

In Parm v. Shumate, [[1138]](#footnote-1139)1138 the court held that neither the federal navigational servitude nor Louisiana law creates a right to fish on private riparian land.

United States v. Haun [[1139]](#footnote-1140)1139 affirmed a bench trial conviction of the crime of knowingly and willfully making a false distress call to the Coast **[\*513]** Guard or causing the Coast Guard to attempt rescue unnecessarily under 14 U.S.C. § 88(c). It was an issue of first impression in the Eleventh Circuit whether § 88(c) defines a general intent crime or a specific intent crime. [[1140]](#footnote-1141)1140 The court decided it was general intent and held the defendant inculpated for staging his own disappearance at sea under circumstances that were almost certain to lead his friends to notify the Coast Guard. [[1141]](#footnote-1142)1141

United States v. Jho [[1142]](#footnote-1143)1142 is a significant treatment of the applicability of the Act to Prevent Pollution from Ships [[1143]](#footnote-1144)1143 to foreign-flag vessels.

The court in Admiral Cruise Services, Inc. v. M/V St. Tropez [[1144]](#footnote-1145)1144 held that tips (wages) earned by crew members while a cruise vessel was being operated by a bankruptcy trustee are maritime liens, reasoning that the custodia legis point did not kick in until the vessel was arrested. In the alternative, the court said even if the vessel were deemed in custodia legis when the wages were earned, it would give the claims priority on equitable grounds. [[1145]](#footnote-1146)1145

In Rowan Cos. V. Houston Helicopters, Inc., [[1146]](#footnote-1147)1146 the wives of (nonfatally) injured seamen sought to support their claims for loss of consortium by invoking the "commercial aviation" amendments to DOHSA. The court held that someone has to die before that statute can come into play. [[1147]](#footnote-1148)1147

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1. 1 The preceding seven articles are David W. Robertson & Michael F. Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 32 Tul. Mar. L.J. 493 (2008) [hereinafter 2007 Recent Developments]; David W. Robertson & Michael F. Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 31 Tul. Mar. L.J. 463 (2007) [hereinafter 2006 Recent Developments]; David W. Robertson & Michael F. Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 30 Tul. Mar. L.J. 195 (2006) [hereinafter 2005 Recent Developments]; David W. Robertson & Michael F. Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 29 Tul. Mar. L.J. 369 (2005) [hereinafter 2004 Recent Developments]; David W. Robertson & Michael F. Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits., 16 U.S.F. Mar. L.J. 147 (2004) [hereinafter 2003 Recent Developments]; David W. Robertson & Michael F. Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 27 Tul. Mar. L.J. 495 (2003) [hereinafter 2002 Recent Developments]; David W. Robertson & Michael F. Sturley, Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits, 26 Tul. Mar. L.J. 193 (2001) [hereinafter 2001 Recent Developments]. [↑](#footnote-ref-2)
2. 2 We include selected district court decisions for their information value. But remember that "[a] decision by a federal district judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." 18 Moore's Federal Practice § 134.02[1][d], at 138-24.1 (3d ed. 2007); see also Fishman & Tobin, Inc. v. Tropical Shipping & Constr. Co., 240 F.3d. 956, 965-66 & n.14, 2001 AMC 1663, 1674 n.14 (11th Cir. 2001) (emphasizing that federal district court decisions have "no precedential value" and stating that "the only courts [the Southern District of Florida] must be obedient to are this Circuit and the Supreme Court"). [↑](#footnote-ref-3)
3. 3 See 2007 Recent Developments, supra note 1, at 500. [↑](#footnote-ref-4)
4. 4 46 U.S.C.A. § 30104(b) (West 2006) (repealed 2008, effective 2006). [↑](#footnote-ref-5)
5. 5 National Defense Authorization Act for fiscal year 2008, Pub. L. No. 110-181, § 3521(b), 122 Stat. 3, 596 (2008). [↑](#footnote-ref-6)
6. 6 Id. [↑](#footnote-ref-7)
7. 7 Sometimes 46 U.S.C. § 30105 is misleadingly cited as part of the Jones Act. This is misleading because the effect of § 30105 is to make the U.S. maritime law doctrines that protect injured workers - including but not limited to the Jones Act - inapplicable to most foreign offshore ***oil*** and gas workers regardless of whether the workers are seamen. [↑](#footnote-ref-8)
8. 8 46 U.S.C. § 30104(a) (2006). [↑](#footnote-ref-9)
9. 9 For a more detailed discussion of the postrecodification efforts to clarify the meaning of the Jones Act, see Michael F. Sturley, Admiralty's Greatest Hits: Panama Railroad Co. v. Johnson, 39 J. Mar. L. & Com. 43, 54-62 (2008). [↑](#footnote-ref-10)
10. 10 Update and Improve the Codification of Title 46, United States Code, H.R. Rep. No. 110-437, 110th Cong., 1st Sess. 5 (2007). [↑](#footnote-ref-11)
11. 11 In the United States, the Hague Rules were enacted in 1936 as the Carriage of Goods by Sea Act (COGSA). See sources cited infra note 269. For a discussion of the background to this project, including the preliminary work of the Comite Maritime International, see Michael F. Sturley, The United Nations Commission on International Trade Law's Transport Law Project: An Interim View of a Work in Progress, 39 Tex. Int'l L.J. 65, 68-75 (2003). [↑](#footnote-ref-12)
12. 12 The UNCITRAL Web site (www.uncitral.org) contains - in the six official U.N. languages - the formal reports of each meeting, each draft of the proposed convention, and all of the other formal documents that have been filed with UNCITRAL. [↑](#footnote-ref-13)
13. 13 Report of Working Group III (Transport Law) on the Work of Its Twenty-First Session, January 14-25, 2008, Vienna, Austria, U.N. Doc. A/CN.9/645 (June 16-July 11, 2008). [↑](#footnote-ref-14)
14. 14 Id. PP 196-203. [↑](#footnote-ref-15)
15. 15 Report of the United Nations Commission on International Trade Law [UNCITRAL], U.N. Doc. A/63/17 (June 16-July 3, 2008). [↑](#footnote-ref-16)
16. 16 Id. PP 53, 110. [↑](#footnote-ref-17)
17. 17 Id. P 298. [↑](#footnote-ref-18)
18. 18 Report of the United Nations Commission on International Trade Law [UNCITRAL], Sixth Committee, U.N. Doc. A/63/438 (Nov. 17, 2008). [↑](#footnote-ref-19)
19. 19 Id. P 2. [↑](#footnote-ref-20)
20. 20 While this Article was going to press, the General Assembly approved the new convention on December 11, 2008. G.A. Res. 63/122, U.N. Doc. A/RES/63/122 (Dec. 11, 2008). [↑](#footnote-ref-21)
21. 21 Id. [↑](#footnote-ref-22)
22. 22 The Rotterdam Rules Signature Event, 20-23 September 2009, http://www.rotterdamrules2009.com (last visited Apr. 21, 2009). [↑](#footnote-ref-23)
23. 23 Rotterdam Rules art. 94(1), annexed to G.A. Res. 63/122, supra note 20. [↑](#footnote-ref-24)
24. 24 72 Fed. Reg. 59,064 (Oct. 18, 2007). [↑](#footnote-ref-25)
25. 25 See 2007 Recent Developments, supra note 1, at 498. [↑](#footnote-ref-26)
26. 26 Id. [↑](#footnote-ref-27)
27. 27 Id. [↑](#footnote-ref-28)
28. 28 Id. [↑](#footnote-ref-29)
29. 29 Id. [↑](#footnote-ref-30)
30. 30 Id. [↑](#footnote-ref-31)
31. 31 Cruise Vessel Security and Safety Act of 2008, S. 3204, 110th Cong. (2008). [↑](#footnote-ref-32)
32. 32 Cruise Vessel Security and Safety Act of 2008, H.R. 6408, 110th Cong. (2008). [↑](#footnote-ref-33)
33. 33 Cruise Vessel Security and Safety Act of 2008, S. 3204, § 6, 110th Cong. (2008). [↑](#footnote-ref-34)
34. 34 128 S. Ct. 2605, 2008 AMC 1521 (2008). [↑](#footnote-ref-35)
35. 35 Id. at 2622, 2008 AMC at 1536. [↑](#footnote-ref-36)
36. 36 Id. at 2634, 2008 AMC at 1551. [↑](#footnote-ref-37)
37. 37 Id. at 2634-41, 2008 AMC at 1552-60. [↑](#footnote-ref-38)
38. 38 Id. at 2605, 2008 AMC at 1521. [↑](#footnote-ref-39)
39. 39 33 U.S.C. § 1321 (2006). [↑](#footnote-ref-40)
40. 40 Id. § 1321(b)(7)(F). [↑](#footnote-ref-41)
41. 41 Throughout the opinion the Court referred to the general (nonstatutory) federal maritime law as "common law." [↑](#footnote-ref-42)
42. 42 Exxon, 128 S. Ct. at 2611, 2008 AMC at 1522. Most of the plaintiffs in Exxon Shipping Co. v. Baker were commercial and subsistence fishermen who claimed for loss of livelihood; they suffered no physical personal injury or property damage from the spill. Id. [↑](#footnote-ref-43)
43. 43 Id. at 2618-19, 2008 AMC at 1531-32 (citations and footnote omitted). [↑](#footnote-ref-44)
44. 44 See David W. Robertson, Punitive Damages in American Maritime Law, 28 J. Mar. L. & Com. 73, 119-28 (1997). [↑](#footnote-ref-45)
45. 45 Exxon, 128 S. Ct. at 2616, 2008 AMC at 1529. [↑](#footnote-ref-46)
46. 46 Id. at 2619, 2008 AMC at 1532-33. [↑](#footnote-ref-47)
47. 47 For a more detailed discussion of this aspect of the decision, see Michael F. Sturley, The Supreme Court Embraces Its Role as the High Court of Admiralty, 6 Benedict's Mar. Bull. 71 (2008). [↑](#footnote-ref-48)
48. 48 549 U.S. 158, 2007 AMC 192 (2007). [↑](#footnote-ref-49)
49. 49 See 2007 Recent Developments, supra note 1, at 502-03. [↑](#footnote-ref-50)
50. 50 Id. at 502. [↑](#footnote-ref-51)
51. 51 Id. at 502-03. [↑](#footnote-ref-52)
52. 52 Id. at 503. [↑](#footnote-ref-53)
53. 53 See Sorrell v. Norfolk S. Ry. Co., 249 S.W.3d 207, 209 (Mo. 2008) (announcing its approval of new pattern jury instructions incorporating the Ginsburg view); Montgomery v. CSX Transp., Inc., 656 S.E.2d 20, 27-28 & n.6 (S.C. 2008). [↑](#footnote-ref-54)
54. 54 128 S. Ct. 999 (2008). [↑](#footnote-ref-55)
55. 55 128 S. Ct. 989 (2008). [↑](#footnote-ref-56)
56. 56 128 S. Ct. 978 (2008). [↑](#footnote-ref-57)
57. 57 128 S. Ct. 2408 (2008). [↑](#footnote-ref-58)
58. 58 128 S. Ct. 1168 (2008) (Mem). [↑](#footnote-ref-59)
59. 59 944 A.2d 179 (Vt. 2006), cert. granted, 128 S. Ct. 1118 (Jan. 18, 2008) (No. 06-1249). [↑](#footnote-ref-60)
60. 60 Id. at 183-84. [↑](#footnote-ref-61)
61. 61 501 F.3d 29 (1st Cir. 2007), cert. granted, 128 S. Ct. 1119 (Jan. 18, 2008) (No. 07-562). [↑](#footnote-ref-62)
62. 62 We include state court decisions from within the Fifth and Eleventh Circuits in this section in recognition of the rule that state courts' interpretations of federal maritime law are not bound by the views of the local federal courts. See, e.g., Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993); see also 2007 Recent Developments, supra note 1, at 513 n.99. [↑](#footnote-ref-63)
63. 63 Here the Court cited the Admiralty Extension Act, 46 U.S.C. § 30101. Previously, we reported that some courts see this Act as an independent grant of admiralty jurisdiction. See 2006 Recent Developments, supra note 1, at 478-79. [↑](#footnote-ref-64)
64. 64 513 U.S. 527, 534, 1995 AMC 913, 918 (1995) (citations and internal quotation marks omitted). The Grubart decision is exhaustively analyzed in David W. Robertson, Admiralty Jurisdiction over One Co-Tortfeasor Cannot Effectuate Admiralty Jurisdiction over Another, 37 J. Mar. L. & Com. 161 (2006). [↑](#footnote-ref-65)
65. 65 523 F.3d 1169, 2008 AMC 1447 (10th Cir. 2008) (AMC reporter summarizing case). [↑](#footnote-ref-66)
66. 66 If the lake were landlocked entirely in Utah, admiralty jurisdiction would clearly be lacking. See, e.g., LeBlanc v. Cleveland, 198 F.3d 353, 2000 AMC 609 (2d Cir. 1999) (teaching that a body of water is not navigable for admiralty jurisdiction purposes unless a vessel can travel thence to another state or the sea) The Aramark court's opinion paid no attention to the "navigable waters" requirement and did not describe Lake Powell. Presumably the court assumed that all of its readers would know the geography of Lake Powell. [↑](#footnote-ref-67)
67. 67 Aramark, 523 F.3d at 1171. [↑](#footnote-ref-68)
68. 68 Id. at 1173. [↑](#footnote-ref-69)
69. 69 Id. at 1174-75. [↑](#footnote-ref-70)
70. 70 Id. at 1174. [↑](#footnote-ref-71)
71. 71 Id. at 1174-75. [↑](#footnote-ref-72)
72. 72 Id. at 1175. [↑](#footnote-ref-73)
73. 73 See 2006 Recent Developments, supra note 1, at 484. [↑](#footnote-ref-74)
74. 74 E.g., Eagle-Picher Indus., Inc. v. United States, 846 F.2d 888, 1988 AMC 2058 (3d Cir. 1988). [↑](#footnote-ref-75)
75. 75 650 S.E.2d 851 (Va. 2007), cert. denied, 128 S. Ct. 1257 (Feb. 19, 2008) (No. 07-792). [↑](#footnote-ref-76)
76. 76 Id. [↑](#footnote-ref-77)
77. 77 Id. [↑](#footnote-ref-78)
78. 78 Id. at 852-53. [↑](#footnote-ref-79)
79. 79 The court's explanation of the maritime-versus-state-law point was this: "Under general maritime law, the Estate was allowed to recover damages for pain and suffering in addition to the damages authorized by [Virginia] Code § 801-52 in a wrongful death action. Sea-Land Servs. v. Gaudet, 414 U.S. 573, 583 (1974)." Id. at 853 n.3 (parallel citation omitted). [↑](#footnote-ref-80)
80. 80 Id. at 853-54. [↑](#footnote-ref-81)
81. 81 Id. [↑](#footnote-ref-82)
82. 82 Id. [↑](#footnote-ref-83)
83. 83 Introducing the "substantial relationship" discussion, the court made an unimportant mistake by interpreting Grubart to say that "this inquiry is guided by principles of proximate causation." Id. at 854 (citing Grubart, 513 U.S. at 538). This was a mistaken reading of Grubart, in which the proximate cause discussion was confined to the operation of the Admiralty Extension Act, 46 U.S.C. § 30101, and had no apparent reference to the "substantial relationship" requirement. [↑](#footnote-ref-84)
84. 84 Id. at 854-55. [↑](#footnote-ref-85)
85. 85 See 2007 Recent Developments, supra note 1, at 508. [↑](#footnote-ref-86)
86. 86 964 So. 2d 1081 (La. App. Ct. 2007). [↑](#footnote-ref-87)
87. 87 Id. at 1086. [↑](#footnote-ref-88)
88. 88 Denoux v. Vessel Mgmt. Serv. Inc., 983 So. 2d 84 (La. 2008). [↑](#footnote-ref-89)
89. 89 515 F. Supp. 2d 282, 2007 AMC 2409 (D. Conn. 2007). [↑](#footnote-ref-90)
90. 90 Id. at 288, 2007 AMC at 2415. [↑](#footnote-ref-91)
91. 91 46 U.S.C. § 30101(a) (2006). [↑](#footnote-ref-92)
92. 92 Crawford, 515 F. Supp. 2d at 289, 2007 AMC at 2416. [↑](#footnote-ref-93)
93. 93 543 U.S. 481, 2005 AMC 609 (2005). See generally David W. Robertson, How the Supreme Court's New Definition of "Vessel" Is Affecting Seaman Status, Admiralty Jurisdiction, and Other Areas of Maritime Law, 39 J. Mar. L. & Com. 115 (2008). [↑](#footnote-ref-94)
94. 94 Crawford, 515 F. Supp. 2d at 290-91, 2007 AMC at 2416-19. [↑](#footnote-ref-95)
95. 95 Charles L. Black, Jr., Admiralty Jurisdiction: Critique and Suggestions, 50 Colum. L. Rev. 259, 264 (1950). [↑](#footnote-ref-96)
96. 96 Id. [↑](#footnote-ref-97)
97. 97 Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty § 1-10, at 26 (2d ed. 1975). [↑](#footnote-ref-98)
98. 98 Id. (footnotes omitted). [↑](#footnote-ref-99)
99. 99 500 U.S. 603, 1991 AMC 1817 (1991). [↑](#footnote-ref-100)
100. 100 58 U.S. 477 (1854). [↑](#footnote-ref-101)
101. 101 543 U.S. 14, 2004 AMC 2705 (2004). [↑](#footnote-ref-102)
102. 102 David W. Robertson, Steven F. Friedell & Michael F. Sturley, Admiralty and Maritime Law in the United States 52 (2d ed. 2008). [↑](#footnote-ref-103)
103. 103 No. 08 Civ. 5299 (SAS), 2008 WL 4489790 (S.D.N.Y. Oct. 4, 2008). [↑](#footnote-ref-104)
104. 104 Id. at 1. [↑](#footnote-ref-105)
105. 105 Id. [↑](#footnote-ref-106)
106. 106 Id. [↑](#footnote-ref-107)
107. 107 Id. [↑](#footnote-ref-108)
108. 108 Id. at 2 (citing cases). [↑](#footnote-ref-109)
109. 109 Id. (citing cases). [↑](#footnote-ref-110)
110. 110 250 F. 194 (2d Cir. 1918). [↑](#footnote-ref-111)
111. 111 The relevant aspect of Kirby is discussed at 2005 Recent Developments, supra note 1, at 206-07. [↑](#footnote-ref-112)
112. 112 413 F.3d 307, 2005 AMC 1747 (2d Cir. 2005). Folksamerica is discussed at 2005 Recent Developments, supra note 1, at 222. [↑](#footnote-ref-113)
113. 113 Kalafrana, No. 08 Civ. 5299 (SAS), 2008 WL 4489790, at 3 (S.D.N.Y. Oct. 4, 2008). [↑](#footnote-ref-114)
114. 114 Id. (internal quotations omitted). [↑](#footnote-ref-115)
115. 115 Id. [↑](#footnote-ref-116)
116. 116 Id. [↑](#footnote-ref-117)
117. 117 Id. at 4. [↑](#footnote-ref-118)
118. 118 Id. [↑](#footnote-ref-119)
119. 119 Id. Indeed, to the extent that it appears that Kalafrana's claim was primarily that Sea Gull failed to make the repairs that it was required to make, the mixed contract doctrine might have permitted the claim to go forward in admiralty even before Kirby (at least to the extent that the repair obligations were a "separable" part of the contract). [↑](#footnote-ref-120)
120. 120 See, e.g., Jack Neilson, Inc. v. Tug Peggy, 428 F.2d 54, 58, 1970 AMC 1490, 1494-95 (5th Cir. 1970) (Wisdom, J.) ("The petrified rule that ship-sale contracts are not within admiralty jurisdiction … "arose as an analogy to a case which is inconsistent with basic principles governing the admiralty jurisdiction of United States courts.'" (quoting Note, Admiralty Jurisdiction and Ship-Sale Contracts, 6 Stan. L. Rev. 540, 540 (1954) (footnote omitted))). [↑](#footnote-ref-121)
121. 121 See David W. Robertson & Michael F. Sturley, The Admiralty Extension Act Solution, 34 J. Mar. L. & Com. 209, 240-41 (2003). [↑](#footnote-ref-122)
122. 122 See, e.g., Zechariah Chafee, Jr., Some Problems of Equity 312 (1950). [↑](#footnote-ref-123)
123. 123 Black, supra note 95, at 264. [↑](#footnote-ref-124)
124. 124 See Lynnhaven Dolphin Corp. v. E.L.O. Enters., Inc., 776 F.2d 538, 541, 1986 AMC 2659, 2662-63 (5th Cir. 1985); Jones v. One Fifty Foot Gulfstar Motor Sailing Yacht, Hull No. 01, 625 F.2d 44, 47, 1981 AMC 1005, 1008 (5th Cir. 1980); Atl. Lines, Ltd. v. Narwhal, Ltd., 514 F.2d 726, 731, 1976 AMC 642, 649-50 (5th Cir. 1975); Richard Bertram & Co. v. Yacht, Wanda, 447 F.2d 966, 967, 1971 AMC 1841, 1842 (5th Cir. 1971) (per curiam). [↑](#footnote-ref-125)
125. 125 While this Article was in press, we were informed by counsel for Sea Gull that no appeal to the Second Circuit will be filed. [↑](#footnote-ref-126)
126. 126 572 F. Supp. 2d 411 (S.D.N.Y. 2008). [↑](#footnote-ref-127)
127. 127 Id. [↑](#footnote-ref-128)
128. 128 542 F.3d 43, 2008 AMC 2054 (2d Cir. 2008). [↑](#footnote-ref-129)
129. 129 See generally Gary Kinder, Ship of Gold in the Deep Blue Sea: The History and Discovery of America's Richest Shipwreck (1998). [↑](#footnote-ref-130)
130. 130 Williamson, 542 F.3d at 47, 2008 AMC at 2056. [↑](#footnote-ref-131)
131. 131 Id. at 48, 2008 AMC at 2057. [↑](#footnote-ref-132)
132. 132 Id. at 49, 2008 AMC at 2059. [↑](#footnote-ref-133)
133. 133 503 F. Supp. 2d 917, 2008 AMC 769 (M.D. Tenn. 2007). [↑](#footnote-ref-134)
134. 134 Id. at 922, 2008 AMC at 774. [↑](#footnote-ref-135)
135. 135 Id. at 922-24, 2008 AMC at 773-77 (citations and internal quotation marks omitted). [↑](#footnote-ref-136)
136. 136 Id. at 924 n.2, 2008 AMC at 777 n.2. [↑](#footnote-ref-137)
137. 137 Restatement (Second) of Torts § 8A (1977). [↑](#footnote-ref-138)
138. 138 885 N.E.2d 204, 211, 2008 AMC 809, 817-18 (Ohio 2008). [↑](#footnote-ref-139)
139. 139 33 U.S.C. §§901-950 (2006). [↑](#footnote-ref-140)
140. 140 Talik, 885 N.E.2d at 211, 2008 AMC at 818. This seems to be an accurate characterization of the LHWCA jurisprudence. See, e.g., 2007 Recent Developments, supra note 1, at 533-34; 2006 Recent Developments, supra note 1, at 531-32, 596-96; 2001 Recent Developments, supra note 1, at 239. [↑](#footnote-ref-141)
141. 141 Talik, 885 N.E.2d at 205, 2008 AMC at 819. [↑](#footnote-ref-142)
142. 142 965 So. 2d 527, 2007 AMC 2581 (La. Ct. App. 2007). [↑](#footnote-ref-143)
143. 143 46 U.S.C. § 30303-30308 (2006). [↑](#footnote-ref-144)
144. 144 Id. § 30303. [↑](#footnote-ref-145)
145. 145 Ostrowiecki, 965 So. 2d at 533, 2007 AMC at 2586. The court cited Montgomery v. Goodyear Tire & Rubber Co., 231 F. Supp. 447, 1965 AMC 1622 (S.D.N.Y. 1964), Middlleton v. United Aircraft Corp., 204 F. Supp. 856, 1962 AMC 1789 (S.D.N.Y. 1960), and Heath v. Am. Sail Training Ass'n, 644 F. Supp. 1459, 1988 AMC 2963 (D.R.I. 1986). [↑](#footnote-ref-146)
146. 146 Ostrowiecki, 965 So. 2d at 539, 2007 AMC at 2593-94. [↑](#footnote-ref-147)
147. 147 Id. at 531, 2007 AMC at 2582. [↑](#footnote-ref-148)
148. 148 Id. at 536, 2007 AMC at 2590. In related litigation, the court in Ostrowiecki v. Aggressor Fleet, Ltd., No. 07-6598, 2008 WL 2951972, at 2 (E.D. La. July 25, 2008), held that an underwater liability insurance policy covering "damages for bodily injury" did not cover wrongful death claims under DOHSA: "Any of plaintiffs' pecuniary losses under DOHSA would not fall within the scope of the Bodily Injury definition. Those losses might include funeral expenses, loss of income, or loss of services, none of which are implicated by the definition of Bodily Injury in the Policy." [↑](#footnote-ref-149)
149. 149 517 F.3d 1108, 2008 AMC 626 (9th Cir. 2008). [↑](#footnote-ref-150)
150. 150 42 U.S.C. §§7401-7671q (2006). [↑](#footnote-ref-151)
151. 151 513 F.3d 668, 674, 2008 AMC 297, 303 (7th Cir. 2008). [↑](#footnote-ref-152)
152. 152 Id. at 668, 2008 AMC at 297. [↑](#footnote-ref-153)
153. 153 Meaige v. Hartley Marine Corp., 925 F.2d 700, 1991 AMC 1467 (4th Cir. 1991), held that state law was preempted. Zbylut v. Harvey's Iowa Mgmt. Co., 361 F.3d 1094, 2004 AMC 725 (8th Cir. 2004), Clements v. Gamblers Supply Mgmt. Co., 610 N.W.2d 847, 2000 AMC 2812 (Iowa 2000), and Baiton v. Carnival Cruise Lines Inc., 661 So. 2d 313, 1996 AMC 107 (Fla. Dist. Ct. App. 1995), held to the contrary. Judge Posner's opinion goes on to align the Seventh Circuit with the Zbylut line of cases. [↑](#footnote-ref-154)
154. 154 Robinson, 513 F.3d at 672, 2008 AMC at 300 (citations and internal quotation marks omitted). [↑](#footnote-ref-155)
155. 155 Id. at 673, 2008 AMC at 301. [↑](#footnote-ref-156)
156. 156 Id., 2008 AMC at 301-02. [↑](#footnote-ref-157)
157. 157 Id. at 673-74, 2008 AMC at 302 (citations and internal quotation marks omitted). [↑](#footnote-ref-158)
158. 158 Id. at 674, 2008 AMC at 303. [↑](#footnote-ref-159)
159. 159 46 U.S.C. § 2114 (2006). [↑](#footnote-ref-160)
160. 160 See Robinson, 513 F.3d at 671, 2008 AMC at 298. [↑](#footnote-ref-161)
161. 161 Id. at 674, 2008 AMC at 300. [↑](#footnote-ref-162)
162. 162 Id. at 674-75, 2008 AMC at 303. The Robinson opinion also includes a pair of remarkable misstatements about admiralty and maritime law. First, it asserts that U.S. maritime law includes a "rule of divided damages in collision cases" that is different from comparative negligence. Id. at 673, 2008 AMC at 302. The Supreme Court abolished that rule in United States v. Reliable Transfer Co., 421 U.S. 397, 1975 AMC 541 (1975). Second, it says that a federal maritime judge-made tort action for retaliatory discharge of a seaman "would not be entirely to the liking of plaintiffs because there is no jury in admiralty unless Congress creates a right to a jury." 513 F.3d at 674, 2008 AMC at 303-04. This overlooks the truism that federal maritime causes of action can be pursued in state court and on the "law side" of federal court when diversity jurisdiction is present. See, e.g., Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 1954 AMC 1 (1953). [↑](#footnote-ref-163)
163. 163 508 F.3d 1189, 2007 AMC 2823 (9th Cir. 2007). [↑](#footnote-ref-164)
164. 164 244 U.S. 205, 1996 AMC 2076 (1917). [↑](#footnote-ref-165)
165. 165 632 A.2d 1305, 1994 AMC 742 (Pa. 1993). [↑](#footnote-ref-166)
166. 166 940 A.2d 351 (Pa. 2008). [↑](#footnote-ref-167)
167. 167 Id. at 353 n.1. [↑](#footnote-ref-168)
168. 168 Id. (quoting Avondale Marine Ways v. Henderson, 346 U.S. 366, 367, 1953 AMC 1990, 1991 (1953) (Burton, J., concurring)). [↑](#footnote-ref-169)
169. 169 The Jones Act, 46 U.S.C. § 30104 (2006), grants a negligence remedy to "a seaman" without defining the term. The judiciary's efforts over the decades to define "seaman" have typically involved plaintiffs' seeking the Jones Act remedy. But it is generally accepted that the same definition of "seaman" also obtains in cases in which the plaintiff invokes the general maritime law remedies of unseaworthiness or maintenance and cure. See, e.g., Scheuring v. Traylor Bros. Inc., 476 F.3d 781, 784 n.3, 2007 AMC 386, 388-89 n.3 (9th Cir. 2007); Knight v. Longaker, No. C05-03481 SBA, 2007 WL 1864870, at 4 (N.D. Cal. June 28, 2007). It also obtains when an employer claims that an injured worker is excluded from the LHWCA or a state workers' compensation statute because of his seaman status. [↑](#footnote-ref-170)
170. 170 Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 556, 1997 AMC 1817, 1825 (1997). [↑](#footnote-ref-171)
171. 171 Chandris, Inc. v. Latsis, 515 U.S. 347, 1995 AMC 1840 (1995). [↑](#footnote-ref-172)
172. 172 Stewart v. Dutra Constr. Co., 543 U.S. 481, 494-95, 2005 AMC 609, 618 (2005). [↑](#footnote-ref-173)
173. 173 See, e.g., 2006 Recent Developments, supra note 1, at 496-98. [↑](#footnote-ref-174)
174. 174 Id. at 497-98. [↑](#footnote-ref-175)
175. 175 Cases on both sides of this question are discussed in Robertson, supra note 93, at 133-39. [↑](#footnote-ref-176)
176. 176 In re Am. Milling Co., No. 4:98CV575SNL, 2008 WL 2727257 (E.D. Mo. July 10, 2008); Ford v. Argosy Casino Lawrenceburg, No. 4:07-cv-0017-DFH-WGH, 2008 WL 817113 (S.D. Ind. Mar. 24, 2008); Wire v. Showboat Marina Casino P'ship, No. 06 C 6139, 2008 WL 818310 (N.D. Ill. Mar. 20, 2008). [↑](#footnote-ref-177)
177. 177 No. 07-346-HO, 2008 WL 2937258, at 2 (D. Or. July 18, 2008). [↑](#footnote-ref-178)
178. 178 See Robertson, supra note 93, at 128 n.60. [↑](#footnote-ref-179)
179. 179 For a recent example of the blending approach, see Bentley v. L & M Lignos Enterprise, No. 1:06 CV 1832, 2007 WL 2780897 (N.D. Ohio Sept. 24, 2007) (granting summary judgment against the seaman status of a carpenter foreman on a bridge repair project who traveled daily or more often by motor boat to a barge and then used the barge as a transfer point to the scaffolding on the bridge pier). [↑](#footnote-ref-180)
180. 180 Incandela v. Am. Dredging Co., 659 F.2d 11, 14, 1981 AMC 2401, 2404 (2d Cir. 1981). [↑](#footnote-ref-181)
181. 181 Id. [↑](#footnote-ref-182)
182. 182 Hall v. Noble Drilling (U.S.) Inc., 242 F.3d 582, 590, 2001 AMC 1099, 1108 (5th Cir. 2001). [↑](#footnote-ref-183)
183. 183 900 F.2d 630, 1990 AMC 1265 (3d Cir. 1990). [↑](#footnote-ref-184)
184. 184 505 F.3d 482, 2007 AMC 2466 (6th Cir. 2007), cert. dismissed, 129 S. Ct. 7 (2008). [↑](#footnote-ref-185)
185. 185 See also Al-Zawkari v. Am. S.S. Co., 871 F.2d 585, 1990 AMC 1312 (6th Cir. 1989). [↑](#footnote-ref-186)
186. 186 Skowronek, 505 F.3d at 483, 2007 AMC at 2467. [↑](#footnote-ref-187)
187. 187 Id. at 484, 2007 AMC at 2468. [↑](#footnote-ref-188)
188. 188 Id. at 489, 2007 AMC at 2474-75 (citations omitted). [↑](#footnote-ref-189)
189. 189 Id. at 489-98, 2007 AMC at 2475-88. [↑](#footnote-ref-190)
190. 190 535 F.3d 1007, 2008 AMC 1845 (9th Cir. 2008). [↑](#footnote-ref-191)
191. 191 Id. at 1008, 2008 AMC at 1846. [↑](#footnote-ref-192)
192. 192 Id. [↑](#footnote-ref-193)
193. 193 Id. at 1009-10, 2008 AMC at 1846-47. [↑](#footnote-ref-194)
194. 194 Tex. Fam. Code Ann. § 154.062(a). [↑](#footnote-ref-195)
195. 195 Aguilera, 535 F.3d at 1009-10, 2008 AMC at 1846-47. [↑](#footnote-ref-196)
196. 196 Incandela v. Am. Dredging Co., 659 F.2d 11, 14, 1981 AMC 2401, 2404 (2d Cir. 1981). [↑](#footnote-ref-197)
197. 197 No. CV07-4430 (DRH)(WDW), 2008 WL 2916281 (E.D.N.Y. July 24, 2008). [↑](#footnote-ref-198)
198. 198 Id. at 4. [↑](#footnote-ref-199)
199. 199 527 F. Supp. 2d 184 (D. Mass. 2007). [↑](#footnote-ref-200)
200. 200 At page 187 of its opinion, the court - noting that the Fifth Circuit is "particularly conversant with maritime law" - cited Hall v. Noble Drilling (U.S.) Inc., 242 F.3d 582, 2001 AMC 1099 (5th Cir. 2001), for the proposition that "[a] seaman who owns a family home is entitled to recovery of the full amount of his mortgage payments, otherwise his ownership would be jeopardized." For our treatment of Hall, see 2001 Recent Developments, supra note 1, at 255. [↑](#footnote-ref-201)
201. 201 Fuller, 527 F. Supp. 2d at 187. [↑](#footnote-ref-202)
202. 202 336 U.S. 511, 1949 AMC 613 (1949). [↑](#footnote-ref-203)
203. 203 421 U.S. 1, 1975 AMC 563 (1975). [↑](#footnote-ref-204)
204. 204 Id. at 5, 1975 AMC at 564. [↑](#footnote-ref-205)
205. 205 See, e.g., 2005 Recent Developments, supra note 1, at 230; 2004 Recent Developments, supra note 1, at 395-96. [↑](#footnote-ref-206)
206. 206 No. 07-11134, 2008 WL 3200025 (E.D. Mich. Aug. 6, 2008). [↑](#footnote-ref-207)
207. 207 Id. at 2 (citations and some internal quotation marks omitted). [↑](#footnote-ref-208)
208. 208 Warren v. United States, 340 U.S. 523, 1951 AMC 416 (1951). [↑](#footnote-ref-209)
209. 209 For treatments of the intentional concealment defense, see 2007 Recent Developments, supra note 1, at 557; 2006 Recent Developments, supra note 1, at 576-80; 2005 Recent Developments, supra note 1, at 230-31, 279-80; 2003 Recent Developments, supra note 1, at 211; 2002 Recent Developments, supra note 1, at 511. [↑](#footnote-ref-210)
210. 210 Shipowners' Liability Convention, art. 2, Oct. 24, 1936, 54 Stat. 1693, T.W. No. 951. [↑](#footnote-ref-211)
211. 211 Olson v. HMS Westpac Express, Inc., No 4:06-cv-154-SEB-WGH, 2008 WL 424644, at 4 (S.D. Ind. Feb. 13, 2008). [↑](#footnote-ref-212)
212. 212 Galvez v. Icicle Seafoods, Inc., No. CO6-1540-MJB, 2008 WL 375100, at 7 (W.D. Wash. Feb. 11, 2008). [↑](#footnote-ref-213)
213. 213 248 F. App'x 319, 2007 AMC 2403 (3d Cir. 2007). [↑](#footnote-ref-214)
214. 214 Id. at 323, 2007 AMC at 2406. [↑](#footnote-ref-215)
215. 215 See, e.g., Guevara v. Maritime Overseas Corp., 59 F.3d 1496, 1995 AMC 2409 (5th Cir. 1995) (en banc). For the full story, see David W. Robertson, The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death, 31 J. Mar. L. & Com. 293 (2000) (presenting a detailed criticism of the Guevara decision); Robertson, supra note 44; David W. Robertson, Court-Awarded Attorneys' Fees in Maritime Cases: The "American Rule" in Admiralty, 27 J. Mar. L. & Com. 507 (1996). In Kopacz, attorneys' fees were not awarded because "no reasonable jury could have found that the Delaware River and Bay Authority unreasonably withheld maintenance and cure." Kopacz, 248 F. App'x at 322, 2007 AMC at 2404. [↑](#footnote-ref-216)
216. 216 Guevara, 59 F.3d at 1513, 1995 AMC at 243. [↑](#footnote-ref-217)
217. 217 O'Connell v. Interocean Mgmt. Corp., 90 F.3d 82, 84, 1996 AMC 2500, 2503 (3d Cir. 1996). [↑](#footnote-ref-218)
218. 218 Kopacz, 248 F. App'x at 322, 2007 AMC at 2404. [↑](#footnote-ref-219)
219. 219 974 So.2d 34, 44 (La. Ct. App. 3d Cir. 2007). [↑](#footnote-ref-220)
220. 220 See, e.g., Mahramas v. Am. Export Isbrandtsen Lines Inc., 475 F.2d 165, 1973 AMC 587 (2d Cir. 1973). [↑](#footnote-ref-221)
221. 221 910 F.2d 312, 1991 AMC 986 (5th Cir. 1990). [↑](#footnote-ref-222)
222. 222 See 2006 Recent Developments, supra note 1, at 508 (discussing Turner v. Midland Enters., Inc., No. Civ.A. 03-208-DLB, 2006 WL 527006 (E.D. Ky. Mar. 3, 2006)). [↑](#footnote-ref-223)
223. 223 No. 1:07CV123 CDP, 2007 WL 4290705 (E.D. Mo. Dec. 4, 2007). [↑](#footnote-ref-224)
224. 224 Id. at 3. [↑](#footnote-ref-225)
225. 225 2006 Recent Developments, supra note 1, at 501. [↑](#footnote-ref-226)
226. 226 442 F.3d 1199, 2006 AMC 739 (9th Cir. 2006). [↑](#footnote-ref-227)
227. 227 355 U.S. 426, 1958 AMC 251 (1958). [↑](#footnote-ref-228)
228. 228 MacDonald, 442 F.3d at 1201-02, 2006 AMC at 742. [↑](#footnote-ref-229)
229. 229 Id. at 1203, 2006 AMC at 744. [↑](#footnote-ref-230)
230. 230 No. 02-00084 LEK, 2007 WL 4547552 (D. Haw. Dec. 26, 2007). [↑](#footnote-ref-231)
231. 231 Id. at 5 (emphasis in original). [↑](#footnote-ref-232)
232. 232 For discussions of the Pennsylvania Rule, see 2005 Recent Developments, supra note 1, at 235-37, 304; 2004 Recent Developments, supra note 1, at 397-98; 2002 Recent Developments, supra note 1, at 546-47. [↑](#footnote-ref-233)
233. 233 774 F.2d 980 (9th Cir. 1985). [↑](#footnote-ref-234)
234. 234 Id. at 983. [↑](#footnote-ref-235)
235. 235 2006 Recent Developments, supra note 1, at 582-84. [↑](#footnote-ref-236)
236. 236 431 F.3d 840, 2006 AMC 58 (5th Cir. 2005). [↑](#footnote-ref-237)
237. 237 No. C07-01694 MJJ, 2007 WL 3023126, at 1 (N.D. Cal. Oct. 15, 2007). [↑](#footnote-ref-238)
238. 238 45 U.S.C. § 60 (2006). [↑](#footnote-ref-239)
239. 239 See 2005 Recent Developments, supra note 1, at 237-38. [↑](#footnote-ref-240)
240. 240 45 U.S.C. § 60. [↑](#footnote-ref-241)
241. 241 No. 5:07CV-140R, 2008 WL 2168893 (W.D. Ky. May 23, 2008). [↑](#footnote-ref-242)
242. 242 280 F. App'x 61 (2d Cir. 2008) (summary order). [↑](#footnote-ref-243)
243. 243 Id. at 63 (internal quotation marks and citation omitted). [↑](#footnote-ref-244)
244. 244 Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331, 1997 AMC 1521 (5th Cir. 1997) (en banc). [↑](#footnote-ref-245)
245. 245 See supra Part III.B. [↑](#footnote-ref-246)
246. 246 77 U.S.L.W. 3107 (No. 08-269) (Aug. 28, 2008). [↑](#footnote-ref-247)
247. 247 While this Article was in press, the Supreme Court denied certiorari on November 3, 2008. CSX Transp. Inc. v. Rivenburgh, 129 S. Ct. 497 (2008) (denying certiorari to Rivenburgh, 280 F. App'x 61). [↑](#footnote-ref-248)
248. 248 See 2007 Recent Developments, supra note 1, at 522. [↑](#footnote-ref-249)
249. 249 No. 1:05-CV-049590, 2006 WL 3751215, 2007 AMC 339 (E.D.N.Y. Dec. 19, 2006). [↑](#footnote-ref-250)
250. 250 9 U.S.C. § 1 (2006). [↑](#footnote-ref-251)
251. 251 Barbieri, 2006 WL 3751215, at 9, 2007 AMC at 352. [↑](#footnote-ref-252)
252. 252 566 F. Supp. 2d 187, 2008 AMC 2176 (E.D.N.Y. 2008). [↑](#footnote-ref-253)
253. 253 See Robertson, Friedell & Sturley, supra note 102, at 164-65. [↑](#footnote-ref-254)
254. 254 See Barbieri, 566 F. Supp. 2d at 191-92, 2008 AMC at 2128. [↑](#footnote-ref-255)
255. 255 Id. at 192, 2008 AMC at 2128. [↑](#footnote-ref-256)
256. 256 Id. (emphasis in original). [↑](#footnote-ref-257)
257. 257 879 N.E.2d 733, 2007 AMC 2926 (N.Y. 2007). [↑](#footnote-ref-258)
258. 258 46 U.S.C. § 30505(b) (2006). [↑](#footnote-ref-259)
259. 259 In re City of New York, 522 F.3d 279, 281, 2008 AMC 1389, 1391 (2d Cir. 2008). [↑](#footnote-ref-260)
260. 260 Id. at 283, 2008 AMC at 1394 (some citations omitted). [↑](#footnote-ref-261)
261. 261 Id. [↑](#footnote-ref-262)
262. 262 46 U.S.C. § 30511(c). [↑](#footnote-ref-263)
263. 263 531 U.S. 438, 2001 AMC 913 (2001). [↑](#footnote-ref-264)
264. 264 354 U.S. 147, 1957 AMC 1165 (1957). [↑](#footnote-ref-265)
265. 265 282 U.S. 531, 1931 AMC 511 (1931); see also 2007 Recent Developments, supra note 1, at 570. [↑](#footnote-ref-266)
266. 266 498 F.3d 645, 652, 2007 AMC 2128, 2135 (7th Cir. 2007). [↑](#footnote-ref-267)
267. 267 Id. at 652 n.2, 2007 AMC at 2131-32 n.2. [↑](#footnote-ref-268)
268. 268 Id. at 651, 2007 AMC at 2134. The court cited Odeco ***Oil*** & Gas Co., Drilling Div. v. Bonnette (Odeco I), 4 F.3d 401, 1994 AMC 506 (5th Cir. 1993); In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V., 836 F.2d 750, 1988 AMC 1674 (2d Cir. 1988), and Jefferson Barracks Marine Serv. Inc. v. Casey, 763 F.2d 1007, 1986 AMC 374 (8th Cir. 1985). It added that the Sixth Circuit was probably also in agreement, citing S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co., 678 F.2d 636, 1982 AMC 2359 (6th Cir. 1982). [↑](#footnote-ref-269)
269. 269 Ch. 229, 49 Stat. 1207 (1936), reprinted in 46 U.S.C. § 30701 statutory note (2006) (previously codified at 46 U.S.C. app.§§1300-1315 (2000)). U.S. courts have for years had difficulty citing COGSA correctly. See, e.g., Michael F. Sturley, Reflections on the Recodification of Title 46, 2 Benedict's Mar. Bull. 209, 209 & n.2 (2004). It seems that the 2006 recodification of Title 46 - which left COGSA out of the United States Code entirely, see 2007 Recent Developments, supra note 1, at 500 & n.9; 2006 Recent Developments, supra note 1, at 472 & nn.15-16 - has not fully solved the problem. The statutory authority for COGSA is (as it always has been) the 1936 enactment, which is recorded in the Statutes at Large. See 49 Stat. 1207 (1936). Thus COGSA should be cited according to its original section numbers. For convenience, the compilers of the United States Code (not Congress) reprinted COGSA in a note following 46 U.S.C. § 30701, which is the first section of the newly recodified Harter Act (previously codified at 46 U.S.C. app. §§190-196). But COGSA's appearance in a note following § 30701 does not make § 30701 a part of COGSA; it is not. And the subsequent sections of the United States Code are also part of the Harter Act, not COGSA. See 46 U.S.C.§§30701-30707 (2006) (comprising the Harter Act). Thus the Sixth Circuit is simply wrong to say that the "current version [of COGSA is] at 46 U.S.C.§§30701 et seq." Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd., 525 F.3d at 409, 413, 2008 AMC 1776, 1778 (6th Cir. 2008). And it falls even further into error when it cites COGSA § 1(e) as "46 U.S.C. § 30701(1)(e)," see id. at 416, 2008 AMC at 1782, or COGSA § 4(5) as "46 U.S.C. § 30701(4)(5)," see Royal Ins., 525 F.3d at 421. Title 46 does not contain either a section 30701(1)(e) or a section 30701(4)(5). We hasten to add that the Royal Insurance court is not unique in its mistakes; it is simply the first COGSA decision that we discuss this year. See also, e.g., Maersk Line, Ltd. v. United States, 513 F.3d 418, 421, 2008 AMC 278, 280-81 (4th Cir. 2008) (citing COGSA § 13 as "46 U.S.C. § 30701(13)"); id. at 422, 2008 AMC at 281 (citing COGSA § 4(5) as "46 U.S.C. § 30701(4)(5)"). We discuss the substance of Maersk below. See infra notes 384-388 and accompanying text. [↑](#footnote-ref-270)
270. 270 See, e.g., 2007 Recent Developments, supra note 1, at 526-28 (discussing several cases involving the possible inland application of COGSA); 2006 Recent Developments, supra note 1, at 510-13 (discussing Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54, 2006 AMC 1817 (2d Cir. 2006) (considering whether COGSA or the Carmack Amendment applies to the inland leg of a multimodal shipment)); 2006 Recent Developments, supra note 1, at 588-90 (discussing Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC, 458 F.3d 1288, 2006 AMC 1846 (11th Cir. 2006) (considering whether COGSA or the Carmack Amendment applies to the inland leg of a multimodal shipment), cert. dismissed, 127 S. Ct. 1209 (2007)). [↑](#footnote-ref-271)
271. 271 525 F.3d 409, 2008 AMC 1776 (6th Cir.), cert. denied, 129 S. Ct. 299 (2008). [↑](#footnote-ref-272)
272. 272 Id. at 412, 2008 AMC at 1777. [↑](#footnote-ref-273)
273. 273 Id. at 412-13, 2008 AMC at 1777-78. [↑](#footnote-ref-274)
274. 274 Id. at 413, 2008 AMC at 1778. [↑](#footnote-ref-275)
275. 275 Id. [↑](#footnote-ref-276)
276. 276 Id., 2008 AMC at 1778-79. [↑](#footnote-ref-277)
277. 277 Id., 2008 AMC at 1779. [↑](#footnote-ref-278)
278. 278 Id. at 413-14, 2008 AMC at 1779. [↑](#footnote-ref-279)
279. 279 Id. at 414, 2008 AMC at 1779. [↑](#footnote-ref-280)
280. 280 Id. [↑](#footnote-ref-281)
281. 281 See International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924 (Hague Rules), 51 Stat. 233, 120 U.N.T.S. 155, amended by Protocol To Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Visby Amendments) art. 10(b), Feb. 23, 1968, 1412 U.N.T.S. 127. Under the Hague-Visby Rules themselves, Canada's status as a Hague-Visby country would have been irrelevant. The Rules would have applied because the carriage was from a French port and France is a Hague-Visby country. See Hague-Visby Rules, art. 10(b). (It is also likely that the bill of lading would have been issued in France, thus providing an independent basis for the application of the Hague-Visby Rules. See Hague-Visby Rules, art. 10(a).) But Canada's Hague-Visby status does mean that a Canadian court would respect the Hague-Visby choice-of-law rule. If the shipment had been from Le Havre to New York, in contrast, the Hague-Visby Rules by their own terms would still apply, but the United States follows a different choice-of-law rule. COGSA, by its terms, applies compulsorily to shipments to or from U.S. ports. See COGSA enacting clause (previously codified at 46 U.S.C. app. § 1300); id. § 13 (previously codified at 46 U.S.C. app. § 1312). Thus a U.S. court would be obliged to apply COGSA to a shipment from Le Havre to New York, notwithstanding article 10(b) of the Hague-Visby Rules. [↑](#footnote-ref-282)
282. 282 The Hamburg Rules also apply to both inbound and outbound shipments, see Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.J.L. 608, art. 2(1)(a)-(b), but very few major maritime nations have ratified the Hamburg Rules. [↑](#footnote-ref-283)
283. 283 Royal Ins., 525 F.3d at 416, 2008 AMC at 1782. [↑](#footnote-ref-284)
284. 284 Id. at 421, 2001 AMC at 1778. [↑](#footnote-ref-285)
285. 285 COGSA enacting clause (previously codified at 46 U.S.C. app. § 1300). [↑](#footnote-ref-286)
286. 286 COGSA § 13 (previously codified at 46 U.S.C. app. § 1312). [↑](#footnote-ref-287)
287. 287 Id. [↑](#footnote-ref-288)
288. 288 Royal Ins., 525 F.3d at 414, 2008 AMC at 1779. [↑](#footnote-ref-289)
289. 289 Id. at 416, 2008 AMC at 1779. [↑](#footnote-ref-290)
290. 290 Id. at 416-18, 2008 AMC at 1779. [↑](#footnote-ref-291)
291. 291 Id. at 419, 2008 AMC at 1780. Like the Supreme Court in Exxon Shipping Co. v. Baker, see supra note 41 and accompanying text, the Sixth Circuit refers to the non-statutory general maritime law as "federal common law." [↑](#footnote-ref-292)
292. 292 S. Pac. R.R. Co. v. Jensen, 244 U.S. 205, 1996 AMC 2076 (1917). [↑](#footnote-ref-293)
293. 293 Id. [↑](#footnote-ref-294)
294. 294 Royal Ins., 525 F.3d at 418, 2008 AMC at 1786. [↑](#footnote-ref-295)
295. 295 543 U.S. 14, 2004 AMC 2705 (2004). [↑](#footnote-ref-296)
296. 296 Royal Ins., 525 F.3d at 419, 2008 AMC at 1786. [↑](#footnote-ref-297)
297. 297 See id. at 420-29. [↑](#footnote-ref-298)
298. 298 See generally, e.g., Michael F. Sturley, Bill of Lading Provisions Calling for the Application of Legal Regimes Other Than the Carriage of Goods by Sea Act, 2A Benedict on Admiralty § 46 (7th rev. ed. 2007). [↑](#footnote-ref-299)
299. 299 Royal Ins., 525 F.3d at 426, 2008 AMC at 1789-90. [↑](#footnote-ref-300)
300. 300 See id. at 423-24, 426, 2008 AMC at 1800. [↑](#footnote-ref-301)
301. 301 Id. at 429, 2008 AMC at 1791-93. [↑](#footnote-ref-302)
302. 302 See infra notes 394-403 and accompanying text. [↑](#footnote-ref-303)
303. 303 See, e.g., 2007 Recent Developments, supra note 1, at 526-28 (discussing several cases involving the possible inland application of COGSA); 2006 Recent Developments, supra note 1, at 510-13 (discussing Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co., 456 F.3d 54, 2006 AMC 1817 (2d Cir. 2006) (considering whether COGSA or the Carmack Amendment applies to the inland leg of a multimodal shipment)); 2006 Recent Developments, supra note 1, at 588-90 (discussing Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC, 458 F.3d 1288, 2006 AMC 1846 (11th Cir. 2006) (considering whether COGSA or the Carmack Amendment applies to the inland leg of a multimodal shipment), cert. dismissed, 127 S. Ct. 1209 (2007)). [↑](#footnote-ref-304)
304. 304 456 F.3d 54, 2006 AMC 1817 (2d Cir. 2006); see 2006 Recent Developments, supra note 1, at 510-13 (discussing Sompo). [↑](#footnote-ref-305)
305. 305 549 U.S. 1106 (2007) (Mem.). [↑](#footnote-ref-306)
306. 306 Altadis USA, Inc. v. Sea Star Line, LLC, 549 U.S. 1189 (2007); see 2007 Recent Developments, supra note 1, at 506 (discussing Altadis). [↑](#footnote-ref-307)
307. 307 Sompo Japan Ins. Co. v. Union Pac. R.R. Co., No. 03-CIV.1604, 2007 WL 2230091, 2007 AMC 2218 (S.D.N.Y. Aug. 2, 2007); see 2007 Recent Developments, supra note 1, at 527-28 (discussing district court's Sompo decision on remand). [↑](#footnote-ref-308)
308. 308 There is, of course, no guarantee that the Supreme Court will grant certiorari in Sompo. Because Sompo raises additional issues on which the circuits are not in conflict, it is not so good a vehicle as Altadis was for resolving the inter-circuit conflict. The Court may prefer to wait for a case that presents the central issue more cleanly. [↑](#footnote-ref-309)
309. 309 No. 02 Civ. 9523 (DAB), 2007 WL 4859462 (S.D.N.Y. Sept. 26, 2007). [↑](#footnote-ref-310)
310. 310 Id. at 2-3. [↑](#footnote-ref-311)
311. 311 Id. at 6. [↑](#footnote-ref-312)
312. 312 Id. [↑](#footnote-ref-313)
313. 313 540 F. Supp. 2d 486, 2008 AMC 1217 (S.D.N.Y. 2008). [↑](#footnote-ref-314)
314. 314 Id. at 494-98, 2008 AMC at 1225-31. [↑](#footnote-ref-315)
315. 315 Id. at 501, 2008 AMC at 1235. [↑](#footnote-ref-316)
316. 316 Id. at 497-98, 2008 AMC 1229. [↑](#footnote-ref-317)
317. 317 Id. at 498, 2008 AMC at 1229-30. The district court recognized the practical difficulty a railroad would face in trying to offer full Carmack liability to every underlying cargo owner, but suggested that the railroad's solution was to seek recourse from the NVOCCs with which it dealt (and which dealt directly with the cargo owners). See id. at 500-01, 2008 AMC at 1233-35. [↑](#footnote-ref-318)
318. 318 No. 07 Civ 9423 (LBS), 2008 WL 2434124, 2008 AMC 2231 (S.D.N.Y. June, 10, 2008). [↑](#footnote-ref-319)
319. 319 No. 07-1207-CV, 2007 WL 541958, 2007 AMC 791 (S.D.N.Y. Feb. 14, 2007); see also 2007 Recent Developments, supra note 1, at 528 (discussing Rexroth Hydraudyne). While this Article was going to press, the Second Circuit affirmed the district court's judgment. See Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc., 547 F.3d 351 (2d Cir. 2008). Next year's article will discuss the circuit court's decision in Rexroth Hydraudyne. [↑](#footnote-ref-320)
320. 320 Swiss Nat'l Ins. Co., 2008 WL 2434124, at 3-4, 2008 AMC at 2232-33. [↑](#footnote-ref-321)
321. 321 Rexroth, 2007 WL 541958, at 2, 2007 AMC at 794. [↑](#footnote-ref-322)
322. 322 Swiss Nat'l Ins. Co., 2008 WL 2434124, at 9-10, 2008 AMC at 2235. [↑](#footnote-ref-323)
323. 323 572 F. Supp. 2d 379, 2008 AMC 2237 (S.D.N.Y. 2008). [↑](#footnote-ref-324)
324. 324 Id. at 382, 2008 AMC at 2254. [↑](#footnote-ref-325)
325. 325 Id., 2008 AMC at 2254-55. [↑](#footnote-ref-326)
326. 326 543 U.S. 14, 2004 AMC 2705 (2004). [↑](#footnote-ref-327)
327. 327 Sompo Japan Ins. Co. of Am. v. Union Pac. R.R., 456 F.3d 54, 73-75, 2006 AMC 1817, 1843 (2d Cir. 2006). [↑](#footnote-ref-328)
328. 328 Sompo Japan Ins. Co. v. Norfolk S. R.R. Co., 540 F. Supp. 2d 486, 501, 2008 AMC 1217 (S.D.N.Y. 2008). [↑](#footnote-ref-329)
329. 329 Royal & Sun Alliance, 572 F. Supp. 2d at 400, 2008 AMC at 2235. The district court was not only wrong to defy its circuit court but also wrong to conclude that the Kirby Court had implicitly addressed the Carmack issue. The Kirby cargo interests had waived the Carmack argument by failing to raise it in the district court. [↑](#footnote-ref-330)
330. 330 578 F. Supp. 2d 575, 2008 AMC 2265 (S.D.N.Y. 2008). [↑](#footnote-ref-331)
331. 331 Id. at 580, 2008 AMC at 2271. [↑](#footnote-ref-332)
332. 332 Id. at 579, 2008 AMC at 2269. [↑](#footnote-ref-333)
333. 333 Id. at 582, 2008 AMC at 2272-73. [↑](#footnote-ref-334)
334. 334 Id. at 583, 2008 AMC at 2273-74. [↑](#footnote-ref-335)
335. 335 Id., 2008 AMC at 2274. [↑](#footnote-ref-336)
336. 336 Id., 2008 AMC at 2275. [↑](#footnote-ref-337)
337. 337 Id. at 579, 2008 AMC at 2268. [↑](#footnote-ref-338)
338. 338 Id. at 584, 2008 AMC at 2275. [↑](#footnote-ref-339)
339. 339 Id. [↑](#footnote-ref-340)
340. 340 Id. [↑](#footnote-ref-341)
341. 341 578 F. Supp. 2d 584, 2008 AMC 2277 (S.D.N.Y. 2008). [↑](#footnote-ref-342)
342. 342 Id. at 589, 593, 2008 AMC at 2281, 2287. [↑](#footnote-ref-343)
343. 343 Id. at 598, 2008 AMC at 2292. [↑](#footnote-ref-344)
344. 344 542 F. Supp. 2d 1031, 2008 AMC 946 (N.D. Cal. 2008). [↑](#footnote-ref-345)
345. 345 Id. at 1032-33, 2008 AMC at 946. [↑](#footnote-ref-346)
346. 346 Id. at 1033, 2008 AMC at 946-47. [↑](#footnote-ref-347)
347. 347 Id., 2008 AMC at 947. [↑](#footnote-ref-348)
348. 348 Id., 2008 AMC at 946. [↑](#footnote-ref-349)
349. 349 Id. at 1034, 2008 AMC at 948-49. [↑](#footnote-ref-350)
350. 350 Id. (citing Hemphill v. Transfresh Corp., No. C-98-0899-VRW, 1998 WL 320840 (N.D. Cal. June 11, 1998); Greenidge v. Mundo Shipping Corp., 41 F. Supp. 2d 354, 358 (E.D.N.Y. 1999)). [↑](#footnote-ref-351)
351. 351 Id. (citing Polo Ralph Lauren, L.P. v. Tropical Shipping & Constr. Co., 215 F.3d 1217, 1220, 2000 AMC 2129, 2131 (11th Cir. 2000)). [↑](#footnote-ref-352)
352. 352 Id.; 543 U.S. 14, 2004 AMC 2705 (2004). [↑](#footnote-ref-353)
353. 353 Continental, 542 F. Supp. 2d at 1036. [↑](#footnote-ref-354)
354. 354 See, e.g., Asarco, Inc. v. Glenara, Ltd., 912 F.2d 784, 787, 1993 AMC 2609, 2614 (5th Cir. 1990) (offering dictum that COGSA claims arise under 28 U.S.C. § 1337); Crispin Co. v. Lykes Bros. S.S. Co., 134 F. Supp. 704, 1955 AMC 1613 (S.D. Tex. 1955) (holding that COGSA cases are removable on the basis of federal question jurisdiction). [↑](#footnote-ref-355)
355. 355 358 U.S. 354, 1959 AMC 832 (1959). [↑](#footnote-ref-356)
356. 356 See, e.g., JVC Americas Corp. v. CSX Intermodal Inc., 292 F. Supp. 2d 586, 2003 AMC 2184 (D.N.J. 2003) (remanding COGSA case); Superior Fish Co. v. Royal Globe Ins. Co., 521 F. Supp. 437, 440-41 & n.6, 1982 AMC 710, 715 & n.6 (E.D. Pa. 1981) (citing dictum that COGSA cases do not support federal question jurisdiction to justify removal); Pac. Agencies, Inc. v. Colon & Villalon, Inc., 372 F. Supp. 62, 65 (D.P.R. 1973) (discussing dictum that the removability of COGSA claims is questionable after Romero). [↑](#footnote-ref-357)
357. 357 Romero v. Int'l Terminal Operating Co., 358 U.S. 354, 363, 1959 AMC 832, 839 (1959). [↑](#footnote-ref-358)
358. 358 No. 06-16884, 2008 WL 2649601 (9th Cir. July 7, 2008) (Mem.). Because Moore is an "unpublished" decision, it cannot be said to have overruled Continental Insurance. In any event, the cases are distinguishable on their facts. [↑](#footnote-ref-359)
359. 359 Id. at 1. [↑](#footnote-ref-360)
360. 360 Id. [↑](#footnote-ref-361)
361. 361 Id. [↑](#footnote-ref-362)
362. 362 See id. at 1-2. [↑](#footnote-ref-363)
363. 363 Id. at 1. [↑](#footnote-ref-364)
364. 364 Id. [↑](#footnote-ref-365)
365. 365 Id. [↑](#footnote-ref-366)
366. 366 See 2006 Recent Developments, supra note 1, at 518-22. [↑](#footnote-ref-367)
367. 367 442 F.3d 74, 2006 AMC 686 (2d Cir. 2006). [↑](#footnote-ref-368)
368. 368 Section 4(6) of COGSA first gives the carrier certain rights with respect to "goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character." It then continues with the strict liability rule at issue here: "The shipper of such goods [i.e., the "goods of an inflammable, explosive, or dangerous nature' that have been shipped without the carrier's knowing consent] shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment… ." COGSA § 4(6) (previously codified at 46 U.S.C. app. § 1304(6)). [↑](#footnote-ref-369)
369. 369 Contship Containerlines, 442 F.3d at 77, 2006 AMC at 689. [↑](#footnote-ref-370)
370. 370 In re M/V DG Harmony, 394 F. Supp. 2d 649, 672, 2005 AMC 2528, 2555 (S.D.N.Y. 2005), rev'd in relevant part, 533 F.3d 83, 2008 AMC 1848 (2d Cir. 2008). [↑](#footnote-ref-371)
371. 371 2006 Recent Developments, supra note 1, at 522. Our prediction was nevertheless incorrect in one respect. We assumed that we would need to wait only one year to report on the Second Circuit's decision, see id. at 521 n.333, but the case was pending on appeal much longer than we had anticipated. [↑](#footnote-ref-372)
372. 372 533 F.3d 83, 2008 AMC 1848 (2d Cir. 2008). [↑](#footnote-ref-373)
373. 373 Id. at 92-94, 2008 AMC at 1858. [↑](#footnote-ref-374)
374. 374 Id. at 92, 2008 AMC at 1857. [↑](#footnote-ref-375)
375. 375 Id. at 97, 2008 AMC at 1860-61. [↑](#footnote-ref-376)
376. 376 Id. at 95-96, 2008 AMC at 1862-64. [↑](#footnote-ref-377)
377. 377 Id. at 97, 2008 AMC at 1865. [↑](#footnote-ref-378)
378. 378 See 394 F. Supp. 2d at 672, 2005 AMC at 2555. [↑](#footnote-ref-379)
379. 379 2006 Recent Developments, supra note 1, at 521 n.335. [↑](#footnote-ref-380)
380. 380 Id. [↑](#footnote-ref-381)
381. 381 DG Harmony, 533 F.3d at 93-94, 2008 AMC at 1859-60. [↑](#footnote-ref-382)
382. 382 COGSA § 4(5) (previously codified at 46 U.S.C. app. § 1304(5) (2000)). [↑](#footnote-ref-383)
383. 383 See, e.g., 2006 Recent Developments, supra note 1, at 591 (discussing Interflow (Tank Container Sys.) Ltd. v. Burlington N. Santa Fe Ry. Co., No.-H-04-2871, 2005 WL 3234360, 2005 AMC 2894 (S.D. Tex. Nov. 29, 2005)). [↑](#footnote-ref-384)
384. 384 Aluminios Pozuelo Ltd. v. S.S. Navigator, 407 F.2d 152, 155, 1968 AMC 2532, 2535-36 (2d Cir. 1968). [↑](#footnote-ref-385)
385. 385 Hartford Fire Ins. Co. v. Pac. Far E. Line, 491 F.2d 960, 965, 1974 AMC 1475, 1482 (9th Cir. 1974). [↑](#footnote-ref-386)
386. 386 See, e.g., Fireman's Fund Ins. Co. v. Tropical Shipping & Constr. Co., 254 F.3d 987, 996-97, 2001 AMC 2474, 2483-84 (11th Cir. 2001). [↑](#footnote-ref-387)
387. 387 513 F.3d 418, 2008 AMC 278 (4th Cir. 2008). [↑](#footnote-ref-388)
388. 388 See id. at 422, 2008 AMC at 281 ("We now … adopt the Second Circuit's definition."). [↑](#footnote-ref-389)
389. 389 Id. at 420 & n.1, 2008 AMC at 279 & n.1. [↑](#footnote-ref-390)
390. 390 Id. at 420-21, 2008 AMC at 279. [↑](#footnote-ref-391)
391. 391 Id. at 423, 2008 AMC at 283. [↑](#footnote-ref-392)
392. 392 Id. at 422, 2008 AMC at 282. [↑](#footnote-ref-393)
393. 393 Id. at 422-23, 2008 AMC at 282. [↑](#footnote-ref-394)
394. 394 See supra Part IV.J.1. [↑](#footnote-ref-395)
395. 395 525 F.3d 409, 2008 AMC 1776 (6th Cir.), cert. denied, 129 S. Ct. 299 (2008). [↑](#footnote-ref-396)
396. 396 Id. at 429-30, 2008 AMC at 1800-01. [↑](#footnote-ref-397)
397. 397 Id. at 430, 2008 AMC at 1801. [↑](#footnote-ref-398)
398. 398 Id. [↑](#footnote-ref-399)
399. 399 Id. at 429-30, 2008 AMC at 1801-02. [↑](#footnote-ref-400)
400. 400 Hague-Visby Rules art. 4(5)(c). [↑](#footnote-ref-401)
401. 401 See, e.g., Mitsui & Co. v. Am. Export Lines, 636 F.2d 807, 821, 1981 AMC 331, 351 (2d Cir. 1981). [↑](#footnote-ref-402)
402. 402 See, e.g., Standard Electrica, S.A. v. Hamburg Sudamerikanische Dampfschifffahrts-Gesellschaft, 375 F.2d 943, 1967 AMC 881 (2d Cir. 1967). [↑](#footnote-ref-403)
403. 403 See generally, e.g., Michael F. Sturley, Packages, 2A Benedict on Admiralty, supra note 298, § 167. [↑](#footnote-ref-404)
404. 404 COGSA § 3(6) (previously codified at 46 U.S.C. app. § 1303(6) (2000)). [↑](#footnote-ref-405)
405. 405 545 F. Supp. 2d 339, 2008 AMC 1884 (S.D.N.Y. 2008). [↑](#footnote-ref-406)
406. 406 Id. at 341, 2008 AMC at 1885. [↑](#footnote-ref-407)
407. 407 See, e.g., Michael F. Sturley, Time for Suit Provisions, 2A Benedict on Admiralty, supra note 298, § 163. [↑](#footnote-ref-408)
408. 408 Ansell Healthcare, 545 F. Supp. 2d at 344, 2008 AMC at 1888. [↑](#footnote-ref-409)
409. 409 See id. [↑](#footnote-ref-410)
410. 410 Id. at 345. [↑](#footnote-ref-411)
411. 411 Id. [↑](#footnote-ref-412)
412. 412 Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd., 543 U.S. 14, 2004 AMC 2705 (2004). [↑](#footnote-ref-413)
413. 413 In Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 1959 AMC 879 (1959), the Court had declared:

     Contracts purporting to grant immunity from, or limitation of, liability must be strictly construed and limited to intended beneficiaries, for they "are not to be applied to alter familiar rules visiting liability upon a tortfeasor for the consequences of his negligence, unless the clarity of the language used expresses such to be the understanding of the contracting parties."

     Id. at 305, 1959 AMC at 885 (quoting Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 123-24, 1955 AMC 927, 928-29 (1955) (Frankfurter, J., concurring)). [↑](#footnote-ref-414)
414. 414 Kirby, 543 U.S. at 30-32, 2004 AMC at 2716-17. [↑](#footnote-ref-415)
415. 415 Id. [↑](#footnote-ref-416)
416. 416 Id. [↑](#footnote-ref-417)
417. 417 Id. [↑](#footnote-ref-418)
418. 418 No. 07-62-HU, 2007 WL 2344934, 2007 AMC 2233 (D. Or. Aug. 15, 2007). [↑](#footnote-ref-419)
419. 419 Id. at 5, 2007 AMC at 2233. [↑](#footnote-ref-420)
420. 420 See COGSA § 4(5) (previously codified at 46 U.S.C. app. § 1304(5) (2000)). [↑](#footnote-ref-421)
421. 421 See generally Michael F. Sturley, Deviation, 2A Benedict on Admiralty, supra note 298, ch. 12. [↑](#footnote-ref-422)
422. 422 See, e.g., Gilmore & Black, supra note 97, at 182-83. [↑](#footnote-ref-423)
423. 423 See, e.g., Sedco, Inc. v. S.S. Strathewe, 800 F.2d 27, 1986 AMC 2801 (2d Cir. 1986). [↑](#footnote-ref-424)
424. 424 No. C06-1403, 2007 WL 4246178, 2008 AMC 9 (W.D. Wash. Nov. 29, 2007). [↑](#footnote-ref-425)
425. 425 Id. at 4, 2008 AMC at 13-14 (quoting Vision Air Flight Serv., Inc. v. M/V Nat'l Pride, 155 F.3d 1165, 1175, 1999 AMC 1168, 1171 (9th Cir. 1998) (emphasis added)). [↑](#footnote-ref-426)
426. 426 553 F. Supp. 2d 502 (E.D. Pa. 2008). [↑](#footnote-ref-427)
427. 427 See, e.g., The Hermosa, 57 F.2d 20 (9th Cir. 1932); Kemsley, Millbourn & Co. v. United States, 19 F.2d 441, 442, 1927 AMC 920, 922 (2d Cir. 1927) (per curiam); The St. Paul, 277 F. 99, 107-08 (S.D.N.Y. 1921); The Indrapura, 171 F. 929, 931-32 (D. Or. 1909). [↑](#footnote-ref-428)
428. 428 M-Cubed, 2007 WL 4246178, at 4, 2008 AMC at 14. [↑](#footnote-ref-429)
429. 429 553 F. Supp. 2d at 510. The court quoted SPM Corp. v. M/V Ming Moon, 965 F.2d 1297, 1303, 1992 AMC 2409, 2416 (3d Cir. 1992), in support of its dictum, but the SPM court itself was simply quoting a pre-COGSA decision; SPM did not involve a delay claim. [↑](#footnote-ref-430)
430. 430 See, e.g., 2007 Recent Developments, supra note 1, at 525-26, 571-72. [↑](#footnote-ref-431)
431. 431 Vimar Sequros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 1995 AMC 1817 (1995). [↑](#footnote-ref-432)
432. 432 566 F. Supp. 2d 216, 2008 AMC 1255 (S.D.N.Y. 2008). [↑](#footnote-ref-433)
433. 433 565 F. Supp. 2d 519 (S.D.N.Y. 2008). [↑](#footnote-ref-434)
434. 434 550 F. Supp. 2d 454, 2008 AMC 1236 (S.D.N.Y. 2008). [↑](#footnote-ref-435)
435. 435 Id. at 457, 2008 AMC at 1237. [↑](#footnote-ref-436)
436. 436 Id. [↑](#footnote-ref-437)
437. 437 539 F.3d 19, 2008 AMC 1990 (1st Cir. 2008). [↑](#footnote-ref-438)
438. 438 348 U.S. 310, 1955 AMC 467 (1955). [↑](#footnote-ref-439)
439. 439 539 F.3d at 21, 2008 AMC at 1991. [↑](#footnote-ref-440)
440. 440 Id. [↑](#footnote-ref-441)
441. 441 Id. at 26, 2008 AMC at 1994. [↑](#footnote-ref-442)
442. 442 Id. at 23, 2008 AMC at 1994. [↑](#footnote-ref-443)
443. 443 543 U.S. 14, 2004 AMC 2705 (2004). [↑](#footnote-ref-444)
444. 444 Pagan-Sanchez, 539 F.3d at 24, 2008 AMC at 1994-95. [↑](#footnote-ref-445)
445. 445 Id. (quoting Kirby, 543 U.S. at 22-23). [↑](#footnote-ref-446)
446. 446 Id. at 24, 2008 AMC at 1996. [↑](#footnote-ref-447)
447. 447 Id. at 25, 2008 AMC at 1996. [↑](#footnote-ref-448)
448. 448 Id., 2008 AMC at 1995. [↑](#footnote-ref-449)
449. 449 Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991). [↑](#footnote-ref-450)
450. 450 519 F.3d 937, 2008 AMC 931 (9th Cir. 2008). [↑](#footnote-ref-451)
451. 451 Id. at 938, 2008 AMC at 932 (quoting Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc., 518 F.3d 645, 654, 2008 AMC 305, 309 (9th Cir. 2008); Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 420, 1999 AMC 1, 11 (9th Cir. 1998)). [↑](#footnote-ref-452)
452. 452 Id. at 939. [↑](#footnote-ref-453)
453. 453 518 F.3d 645, 2008 AMC 305 (9th Cir. 2008). [↑](#footnote-ref-454)
454. 454 Id. at 647-48, 2008 AMC at 307-09. [↑](#footnote-ref-455)
455. 455 Id. [↑](#footnote-ref-456)
456. 456 Id. at 649, 2008 AMC at 310. [↑](#footnote-ref-457)
457. 457 Id. [↑](#footnote-ref-458)
458. 458 Id. [↑](#footnote-ref-459)
459. 459 Id. at 656, 2008 AMC at 320. [↑](#footnote-ref-460)
460. 460 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991). [↑](#footnote-ref-461)
461. 461 Inlet Fisheries, 518 F.3d at 650, 2008 AMC at 311-12. [↑](#footnote-ref-462)
462. 462 33 U.S.C. § 902(21) (2006). [↑](#footnote-ref-463)
463. 463 Id. § 905(b). [↑](#footnote-ref-464)
464. 464 See id. § 905(b) (first, fourth, and fifth sentences). [↑](#footnote-ref-465)
465. 465 See id. (second and third sentences); Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 531 & n.6, 1983 AMC 1881, 1886 & n.6 (1983). [↑](#footnote-ref-466)
466. 466 451 U.S. 165, 1981 AMC 601 (1981). [↑](#footnote-ref-467)
467. 467 512 U.S. 92, 1994 AMC 1817 (1994). [↑](#footnote-ref-468)
468. 468 Id. at 98, 1994 AMC at 1821. [↑](#footnote-ref-469)
469. 469 Id. (citations omitted). The three-duty schema emanates from Scindia, 451 U.S. 156, 1981 AMC 601. [↑](#footnote-ref-470)
470. 470 250 F. App'x 425 (2d Cir. 2007). [↑](#footnote-ref-471)
471. 471 See the trial court opinion, Patalano v. American President Lines, Inc., 322 F. Supp. 2d 293, 297 (E.D.N.Y. 2004). [↑](#footnote-ref-472)
472. 472 Id. at 296. [↑](#footnote-ref-473)
473. 473 Patalano, 250 F. App'x at 426. [↑](#footnote-ref-474)
474. 474 258 F. App'x 158, 2008 AMC 1453 (9th Cir. 2007). [↑](#footnote-ref-475)
475. 475 Id. at 159, 2008 AMC at 1454. [↑](#footnote-ref-476)
476. 476 Id. at 162-63, 2008 AMC at 1458-59 (Wallace, J., dissenting) (arguing that the Coast Guard regulation had not been violated and that the plaintiff failed to produce evidence that the condition of the ship's railing was dangerous to "an expert and experienced" longshoreman). [↑](#footnote-ref-477)
477. 477 Id. at 162, 2008 AMC at 1458. [↑](#footnote-ref-478)
478. 478 Id. at 159, 2008 AMC at 1454. [↑](#footnote-ref-479)
479. 479 See 2007 Recent Developments, supra note 1, at 532-33; 2006 Recent Developments, supra note 1, at 530-31; 2005 Recent Developments, supra note 1, at 250-51; 2004 Recent Developments, supra note 1, at 413. [↑](#footnote-ref-480)
480. 480 258 F. App'x 158, 2008 AMC at 1453. [↑](#footnote-ref-481)
481. 481 Id. at 159, 2008 AMC at 1454. [↑](#footnote-ref-482)
482. 482 Id. at 161, 2008 AMC at 1456-57. [↑](#footnote-ref-483)
483. 483 No. 1:06 CV 1832, 2007 WL 2780897 (N.D. Ohio Sept. 24, 2007). [↑](#footnote-ref-484)
484. 484 Id. at 1. [↑](#footnote-ref-485)
485. 485 Id. at 4-5. [↑](#footnote-ref-486)
486. 486 See also infra note 1030 and following text. [↑](#footnote-ref-487)
487. 487 See, e.g., 2007 Recent Developments, supra note 1, at 533-34. [↑](#footnote-ref-488)
488. 488 See supra note 1 and accompanying text. [↑](#footnote-ref-489)
489. 489 Talik v. Fed. Marine Terminals, Inc., 885 N.E.2d 204, 207-09, 2008 AMC 809 (Ohio 2008). [↑](#footnote-ref-490)
490. 490 33 U.S.C. § 928 (2006). [↑](#footnote-ref-491)
491. 491 511 F.3d 950 (9th Cir. 2007). [↑](#footnote-ref-492)
492. 492 33 U.S.C. § 914(f). [↑](#footnote-ref-493)
493. 493 Tahara, 511 F.3d at 951. [↑](#footnote-ref-494)
494. 494 Id. at 953. [↑](#footnote-ref-495)
495. 495 Id. at 954 (citing Burgo v. Gen. Dynamics Corp., 122 F.3d 140 (2d Cir. 1997)). [↑](#footnote-ref-496)
496. 496 Id. at 953 (citing Newport News Shipbuilding & Dry Dock Co. v. Brown, 376 F.3d 245, 2004 AMC 2343 (4th Cir. 2004)). [↑](#footnote-ref-497)
497. 497 Id. [↑](#footnote-ref-498)
498. 498 Id. at 952. [↑](#footnote-ref-499)
499. 499 Id. [↑](#footnote-ref-500)
500. 500 Id. [↑](#footnote-ref-501)
501. 501 Id. [↑](#footnote-ref-502)
502. 502 Id. [↑](#footnote-ref-503)
503. 503 Id. [↑](#footnote-ref-504)
504. 504 Id. [↑](#footnote-ref-505)
505. 505 Id. [↑](#footnote-ref-506)
506. 506 Id. at 955. [↑](#footnote-ref-507)
507. 507 518 F.3d 411, 2008 AMC 1600 (6th Cir. 2008). [↑](#footnote-ref-508)
508. 508 Id. at 414, 2008 AMC at 1602 (emphasis added). [↑](#footnote-ref-509)
509. 509 Id. at 420, 2008 AMC at 1609-10. [↑](#footnote-ref-510)
510. 510 Id. at 415, 421, 2008 AMC at 1603-04, 1610-11. [↑](#footnote-ref-511)
511. 511 Id. at 421-22, 2008 AMC at 1612. [↑](#footnote-ref-512)
512. 512 See 2007 Recent Developments, supra note 1, at 539. [↑](#footnote-ref-513)
513. 513 494 F.3d 40, 2007 AMC 1817 (2d Cir. 2007). [↑](#footnote-ref-514)
514. 514 Id. at 59-62, 2007 AMC at 1837-42. [↑](#footnote-ref-515)
515. 515 Id. at 63, 2007 AMC at 1843. [↑](#footnote-ref-516)
516. 516 Otal Invs., Ltd. v. M/V Clary, No. 03 Civ. 4304 (HB), 2008 WL 2844019, 2008 AMC 1561 (S.D.N.Y. June 23, 2008). [↑](#footnote-ref-517)
517. 517 Id. at 4, 2008 AMC at 1566 (quoting Otal Invs., 494 F.3d at 63, 2007 AMC at 1842). [↑](#footnote-ref-518)
518. 518 Id. at 10-13, 2008 AMC at 1576-79. [↑](#footnote-ref-519)
519. 519 Id. at 12, 2008 AMC at 1579. [↑](#footnote-ref-520)
520. 520 Id. [↑](#footnote-ref-521)
521. 521 Id. [↑](#footnote-ref-522)
522. 522 Otal Invs., 494 F.3d at 63, 2007 AMC at 1842-43. [↑](#footnote-ref-523)
523. 523 Otal Invs., 2008 WL 2844019, at 11-14, 2008 AMC at 1576-80. [↑](#footnote-ref-524)
524. 524 Id. at 20, 2008 AMC at 1579. [↑](#footnote-ref-525)
525. 525 Id. [↑](#footnote-ref-526)
526. 526 518 F.3d 1120, 2008 AMC 684 (9th Cir. 2008). [↑](#footnote-ref-527)
527. 527 Id. at 1132, 2008 AMC at 699 (footnote omitted). [↑](#footnote-ref-528)
528. 528 Id. at 1122, 2008 AMC at 685. [↑](#footnote-ref-529)
529. 529 Id., 2008 AMC at 686. [↑](#footnote-ref-530)
530. 530 Id., 2008 AMC at 685. [↑](#footnote-ref-531)
531. 531 Id., 2008 AMC at 685-86. [↑](#footnote-ref-532)
532. 532 Id. at 1126, 2008 AMC at 690-91. Perhaps the U.S. choice-of-law clause was included because the supplier's ultimate parent company (going through at least two levels of the corporate structure) was a U.S. company. Or perhaps it was included because U.S. law is one of the few in the world that would recognize a lien on the vessel to secure the charterer's obligation to pay for the bunker fuel. [↑](#footnote-ref-533)
533. 533 Id. at 1125-26, 2008 AMC at 689-91. [↑](#footnote-ref-534)
534. 534 Id. at 1122, 2008 AMC at 686. [↑](#footnote-ref-535)
535. 535 Id. [↑](#footnote-ref-536)
536. 536 Id. [↑](#footnote-ref-537)
537. 537 Id. at 1123, 2008 AMC at 686-87. [↑](#footnote-ref-538)
538. 538 345 U.S. 571, 1953 AMC 1210 (1953). [↑](#footnote-ref-539)
539. 539 Trans-Tec, 518 F.3d at 1123, 2008 AMC at 686-87. [↑](#footnote-ref-540)
540. 540 Id. [↑](#footnote-ref-541)
541. 541 46 U.S.C. §§31301-31343 (2006). [↑](#footnote-ref-542)
542. 542 Trans-Tec Asia v. M/V Harmony Container, 437 F. Supp. 2d 1124, 1134, 2006 AMC 1011, 1023 (C.D. Cal. 2006). [↑](#footnote-ref-543)
543. 543 Trans-Tec, 518 F.3d at 1121, 2008 AMC at 685. [↑](#footnote-ref-544)
544. 544 Id. at 1121-22, 2008 AMC at 685. [↑](#footnote-ref-545)
545. 545 296 F.3d 350, 2002 AMC 1521 (5th Cir. 2002). [↑](#footnote-ref-546)
546. 546 Tramp ***Oil*** & Marine, Ltd. v. M/V Mermaid I, 805 F.2d 42, 1987 AMC 866 (1st Cir. 1986). [↑](#footnote-ref-547)
547. 547 Rainbow Line, Inc. v. M/V Tequila, 480 F.2d 1024, 1973 AMC 1431 (2d Cir. 1973). [↑](#footnote-ref-548)
548. 548 Trinidad Foundry & Fabricating, Ltd. v. M/V K.A.S. Camilla, 966 F.2d 613, 1992 AMC 2636 (11th Cir. 1992). [↑](#footnote-ref-549)
549. 549 Trans-Tec, 518 F.3d at 1131, 2008 AMC at 698. The court also noted that the vessel had regularly called at U.S. ports before and after the transaction at issue here. Id. at 1132, 2008 AMC at 699. [↑](#footnote-ref-550)
550. 550 See, e.g., id. at 1131, 2008 AMC at 698 ("Recognition of freely negotiated contract terms encourages predictability and certainty in the realm of international maritime transactions."). [↑](#footnote-ref-551)
551. 551 See, e.g., Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U.S. 1, 10, 2001 AMC 2692, 2696-97 (1920); The Bird of Paradise, 72 U.S. (5 Wall.) 545, 555 (1867); Bominflot, Inc. v. The M/V Henrich S, 465 F.3d 144, 146, 2006 AMC 2510, 2511 (4th Cir. 2006); Trinidad Foundry, 966 F.2d at 616, 1992 AMC at 2640; Gulf Trading & Transp. Co. v. Vessel Hoegh Shield, 658 F.2d 363, 366, 1982 AMC 1138, 1141 (5th Cir. 1981). [↑](#footnote-ref-552)
552. 552 Trans-Tec, 518 F.3d at 1122-23, 2008 AMC at 686. [↑](#footnote-ref-553)
553. 553 Id. [↑](#footnote-ref-554)
554. 554 Id. at 1122, 2008 AMC at 686. [↑](#footnote-ref-555)
555. 555 Id. at 1127, 2008 AMC at 692. [↑](#footnote-ref-556)
556. 556 Id. at 1126-34, 2008 AMC at 691-702. [↑](#footnote-ref-557)
557. 557 77 U.S.L.W. 3121 (Sept. 2, 2008) (No. 08-293). [↑](#footnote-ref-558)
558. 558 While this Article was going to press, the Supreme Court denied the petition for certiorari on December 1, 2008. See Splendid Shipping Sendirian Berhard v. Trans-Tec Asia, 129 S. Ct. 628 (2008). [↑](#footnote-ref-559)
559. 559 504 F. Supp. 2d 68 (D. Md. 2007). [↑](#footnote-ref-560)
560. 560 Id. at 69. [↑](#footnote-ref-561)
561. 561 Id. at 70. [↑](#footnote-ref-562)
562. 562 To the extent that Trans-Tec Asia and Triton Marine Fuels are distinguishable, the Triton Marine Fuels transaction has stronger ties to the United States. The Cayman Islands charterer had its only place of business in Seattle, Washington, and was owned in part by a U.S. citizen. Moreover, the fuel was ordered for the vessel by the charterer's U.S. agent in Seattle. It also appears that the Triton Marine Fuels vessel called more regularly at U.S. ports. [↑](#footnote-ref-563)
563. 563 Triton Marine Fuels, 504 F. Supp. 2d at 70. [↑](#footnote-ref-564)
564. 564 Id. at 73. [↑](#footnote-ref-565)
565. 565 No. 07-1958, 2008 WL 5077017 (4th Cir. Nov. 24, 2008). [↑](#footnote-ref-566)
566. 566 538 F.3d 1271, 2008 AMC 1960 (9th Cir. 2008). [↑](#footnote-ref-567)
567. 567 Id. at 1274, 2008 AMC at 1961-62. [↑](#footnote-ref-568)
568. 568 Id. at 1273, 2008 AMC at 1960. [↑](#footnote-ref-569)
569. 569 Id. at 1275, 2008 AMC at 1963. [↑](#footnote-ref-570)
570. 570 Id. at 1280-81, 2008 AMC at 1966. [↑](#footnote-ref-571)
571. 571 522 F.3d 279, 2008 AMC 1389 (2d Cir. 2008); see supra Part IV.I. [↑](#footnote-ref-572)
572. 572 358 U.S. 625, 1959 AMC 597 (1959). [↑](#footnote-ref-573)
573. 573 City of New York, 522 F.3d at 280-81, 2008 AMC at 1389-90. [↑](#footnote-ref-574)
574. 574 The court carefully applied the "formula" in such a way as to point fairly strongly toward the conclusion that the City was negligent, but then it stated that the formula's factors - burden, probability, and gravity - "are, of course, difficult to quantify and weigh against one another. Judge Hand's test is really more of an analytical framework than an actual formula into which we could plug rough numerical estimates … , and our abstract comparison of the factors is inconclusive." Id. at 285, 2008 AMC at 1396. [↑](#footnote-ref-575)
575. 575 The court ended up saying that "industry custom does not provide a ready answer." Id., 2008 AMC at 1397. [↑](#footnote-ref-576)
576. 576 46 C.F.R. § 78.30-5 (2009). [↑](#footnote-ref-577)
577. 577 City of New York, 522 F.3d at 287, 2008 AMC at 1399. [↑](#footnote-ref-578)
578. 578 Alaska Stat. § 09.50.250 (2003). [↑](#footnote-ref-579)
579. 579 175 P.3d 1240, 2008 AMC 183 (Alaska 2008). [↑](#footnote-ref-580)
580. 580 Id. [↑](#footnote-ref-581)
581. 581 483 U.S. 468, 1987 AMC 2113 (1987). [↑](#footnote-ref-582)
582. 582 527 U.S. 706 (1999). [↑](#footnote-ref-583)
583. 583 Glover, 175 P.3d at 1253-56, 2008 AMC at 188-95. [↑](#footnote-ref-584)
584. 584 502 U.S. 197 (1991). [↑](#footnote-ref-585)
585. 585 Glover, 175 P.3d at 1255, 2008 AMC at 201-02. [↑](#footnote-ref-586)
586. 586 547 U.S. 189, 2006 AMC 913 (2006). [↑](#footnote-ref-587)
587. 587 See 2006 Recent Developments, supra note 1, at 473-74. [↑](#footnote-ref-588)
588. 588 531 F.3d 868, 2008 AMC 1941 (D.C. Cir. 2008). [↑](#footnote-ref-589)
589. 589 539 F. Supp. 2d 439, 440 (D. Me. 2008). [↑](#footnote-ref-590)
590. 590 521 F.3d 122, 124, 2008 AMC 913, 913-14 (2d Cir. 2008). [↑](#footnote-ref-591)
591. 591 Id. at 124, 2008 AMC at 915. [↑](#footnote-ref-592)
592. 592 Id., 2008 AMC at 914. [↑](#footnote-ref-593)
593. 593 Id. at 124-25, 2008 AMC at 914. [↑](#footnote-ref-594)
594. 594 Id. at 125, 2008 AMC at 914. [↑](#footnote-ref-595)
595. 595 Id. at 130, 2008 AMC at 921. [↑](#footnote-ref-596)
596. 596 Id. at 126, 2008 AMC at 916-17. [↑](#footnote-ref-597)
597. 597 Id.; Fed. R. Civ. P. 4(k)(2). [↑](#footnote-ref-598)
598. 598 Porina, 521 F.3d at 128, 2008 AMC at 919-20. [↑](#footnote-ref-599)
599. 599 Id. at 127-29, 2008 AMC at 918-20 (some citations and internal quotation marks omitted; Judge Calabresi's emphasis). [↑](#footnote-ref-600)
600. 600 503 F.3d 351, 2007 AMC 2304 (4th Cir. 2007), cert. denied, 128 S. Ct. 2080 (2008). [↑](#footnote-ref-601)
601. 601 Id. at 353, 2007 AMC at 2305. [↑](#footnote-ref-602)
602. 602 Id. at 352-53, 2007 AMC at 2305. [↑](#footnote-ref-603)
603. 603 Id. at 353, 2007 AMC at 2305. [↑](#footnote-ref-604)
604. 604 Id. at 353, 355, 2007 AMC at 2305, 2308. [↑](#footnote-ref-605)
605. 605 Id. at 354-60, 2007 AMC at 2306-14. [↑](#footnote-ref-606)
606. 606 Id. at 355, 2007 AMC at 2308. [↑](#footnote-ref-607)
607. 607 359 U.S. 500 (1959). [↑](#footnote-ref-608)
608. 608 Lockheed Martin, 503 F.3d at 355, 2007 AMC at 2308. [↑](#footnote-ref-609)
609. 609 Id. at 359-60, 2007 AMC at 2313-14. [↑](#footnote-ref-610)
610. 610 See supra Part IV.I. [↑](#footnote-ref-611)
611. 611 In re City of New York, 522 F.3d 279, 282, 2008 AMC 1389, 1392 (2d Cir. 2008). [↑](#footnote-ref-612)
612. 612 Id., 2008 AMC at 1393. [↑](#footnote-ref-613)
613. 613 See 2005 Recent Developments, supra note 1, at 258-59. [↑](#footnote-ref-614)
614. 614 419 F.3d 3, 13 & n.8, 2005 AMC 2127, 2139 & n.8 (1st Cir. 2005). [↑](#footnote-ref-615)
615. 615 Id. at 15, 2005 AMC at 2141. [↑](#footnote-ref-616)
616. 616 Doyle v. Huntress, Inc., 474 F. Supp. 2d 337, 345 (D.R.I. 2007). [↑](#footnote-ref-617)
617. 617 Id. at 345-47. [↑](#footnote-ref-618)
618. 618 513 F.3d 331, 338, 2008 AMC 464, 472 (1st Cir. 2008). [↑](#footnote-ref-619)
619. 619 Id. at 335-36, 2008 AMC at 467-69. [↑](#footnote-ref-620)
620. 620 Id. at 336, 2008 AMC at 469. [↑](#footnote-ref-621)
621. 621 Id. [↑](#footnote-ref-622)
622. 622 46 U.S.C. §§70501-70507 (2006). [↑](#footnote-ref-623)
623. 623 Id. § 70503(a)(1). [↑](#footnote-ref-624)
624. 624 Id. § 70504(a). [↑](#footnote-ref-625)
625. 625 United States v. Perlaza, 439 F.3d 1149 (9th Cir. 2006). [↑](#footnote-ref-626)
626. 626 United States v. Tinoco, 304 F.3d 1088, 2002 AMC 2998 (11th Cir. 2002). [↑](#footnote-ref-627)
627. 627 523 F.3d 1 (1st Cir. 2008). [↑](#footnote-ref-628)
628. 628 Id. at 8-11. [↑](#footnote-ref-629)
629. 629 537 F.3d 1006, 1010, 2008 AMC 2459, 2460 (9th Cir. 2008). [↑](#footnote-ref-630)
630. 630 474 F.3d 185, 2006 AMC 2997 (5th Cir. 2006). [↑](#footnote-ref-631)
631. 631 See 2007 Recent Developments, supra note 1, at 546-48. [↑](#footnote-ref-632)
632. 632 439 F. Supp. 2d 1178, 2006 AMC 2887 (S.D. Ala. 2006). [↑](#footnote-ref-633)
633. 633 See 2007 Recent Developments, supra note 1, at 548. [↑](#footnote-ref-634)
634. 634 535 F.3d 1299 (11th Cir. 2008). [↑](#footnote-ref-635)
635. 635 Id. at 1312. [↑](#footnote-ref-636)
636. 636 543 U.S. 481, 497, 2005 AMC 609, 620 (2005). [↑](#footnote-ref-637)
637. 637 Belle of Orleans, 535 F.3d at 1311. [↑](#footnote-ref-638)
638. 638 Id. The Board of Commissioners court took the Seventh Circuit's decision in Tagliere v. Harrah's Illinois Corp., 445 F.3d 1012, 2006 AMC 1290 (7th Cir. 2006), as being in accord with De La Rosa. We have a sharply different view of Tagliere. See 2006 Recent Developments, supra note 1, at 478-79, 497-98. [↑](#footnote-ref-639)
639. 639 Belle of Orleans, 535 F.3d at 1311-12 (parallel citation omitted). [↑](#footnote-ref-640)
640. 640 See 2007 Recent Developments, supra note 1, at 548 (discussing In re Grand Casino of Miss. Inc., No. 106-CV-195-LG-RHW, 2007 WL 188265 (S.D. Miss. Jan 23, 2007)); Robertson, supra note 93, at 131-39 (discussing three different types of noncruising casino boats). [↑](#footnote-ref-641)
641. 641 Stewart, 543 U.S. at 494, 2005 AMC at 617-18. [↑](#footnote-ref-642)
642. 642 445 F.3d at 1013-14, 2006 AMC at 1290-93. [↑](#footnote-ref-643)
643. 643 Stewart, 543 U.S. 481, 2005 AMC 609. [↑](#footnote-ref-644)
644. 644 Pavone v. Miss. Riverboat Amusement Corp., 52 F.3d 560, 564-65, 1995 AMC 2038, 2041-42 (5th Cir. 1995). [↑](#footnote-ref-645)
645. 645 264 F. App'x 363, 2008 AMC 909 (5th Cir. 2008). [↑](#footnote-ref-646)
646. 646 Id. at 364-65, 2008 AMC at 909-10. [↑](#footnote-ref-647)
647. 647 Id. at 365, 2008 AMC at 910. [↑](#footnote-ref-648)
648. 648 Id. [↑](#footnote-ref-649)
649. 649 Id. at 366, 2008 AMC at 911. [↑](#footnote-ref-650)
650. 650 See id. [↑](#footnote-ref-651)
651. 651 Id. at 366, 2008 AMC at 911-12. [↑](#footnote-ref-652)
652. 652 See 2006 Recent Developments, supra note 1, at 559-60 (discussing Abt v. Dickson Equip. Co., No. G-06-129, 2006 WL 1751897 (S.D. Tex. June 22, 2006)). [↑](#footnote-ref-653)
653. 653 See the summary of Grubart, supra Part IV.A. [↑](#footnote-ref-654)
654. 654 Id. [↑](#footnote-ref-655)
655. 655 251 F. App'x 293, 294-95, 2008 AMC 2699 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-656)
656. 656 394 F.3d 891, 2005 AMC 214 (11th Cir. 2004). [↑](#footnote-ref-657)
657. 657 See 2005 Recent Developments, supra note 1, at 266-69. [↑](#footnote-ref-658)
658. 658 Celebrity Cruises, 394 F.3d at 902, 2005 AMC at 227. [↑](#footnote-ref-659)
659. 659 534 F. Supp. 2d 1345, 1349-50, 2008 AMC 936, 937-41 (S.D. Fla. 2008). [↑](#footnote-ref-660)
660. 660 Compare the discussion of John Crane, Inc. v. Jones, 650 S.E.2d 851 (2007), cert. denied, 128 S. Ct. 1257 (2008), supra notes 75-84 and accompanying text. [↑](#footnote-ref-661)
661. 661 No. 3:06-cv-12-J-TEM, 2007 WL 3011267, at 1, 3 (M.D. Fla. Oct. 12, 2007). [↑](#footnote-ref-662)
662. 662 Id. at 2. [↑](#footnote-ref-663)
663. 663 Id. at 1-2. [↑](#footnote-ref-664)
664. 664 Id. at 3. [↑](#footnote-ref-665)
665. 665 494 F. Supp. 2d 1342, 1351-52 (S.D. Fla. 2007). [↑](#footnote-ref-666)
666. 666 Id. at 1346. [↑](#footnote-ref-667)
667. 667 Id. at 1346-47. [↑](#footnote-ref-668)
668. 668 Id. at 1347. [↑](#footnote-ref-669)
669. 669 Id. [↑](#footnote-ref-670)
670. 670 Id. at 1348-50. [↑](#footnote-ref-671)
671. 671 Id. at 1347. [↑](#footnote-ref-672)
672. 672 But see Kalafrana Shipping v. Sea Gull Shipping Co., No. 08 Civ. 5299(SAS), 2008 WL 4489790, at 1 (S.D.N.Y. Oct. 4, 2008), which is discussed supra notes 95-125 and accompanying text. [↑](#footnote-ref-673)
673. 673 See F.W.F., 494 F. Supp. 2d at 1343. [↑](#footnote-ref-674)
674. 674 Id. at 1354. [↑](#footnote-ref-675)
675. 675 No. 3:07-CV-402-J-33TEM, 2007 WL 3202715, 2008 AMC 215 (M.D. Fla. Oct. 29, 2007). [↑](#footnote-ref-676)
676. 676 Id. at 2, 2008 AMC at 217-18. [↑](#footnote-ref-677)
677. 677 Id. at 3-5, 2008 AMC at 219-23. [↑](#footnote-ref-678)
678. 678 Id. at 5, 2008 AMC at 222-23. [↑](#footnote-ref-679)
679. 679 See David W. Robertson, The Outer Continental Shelf Lands Act's Provisions on Jurisdiction, Remedies, and Choice of Law: Correcting the Fifth Circuit's Mistakes, 38 J. Mar. L. & Com. 487, 506-09, 540 (2007). [↑](#footnote-ref-680)
680. 680 Id. [↑](#footnote-ref-681)
681. 681 No. 06-4488, 2007 WL 2713278, at 1 (E.D. La. Sept. 14, 2007). [↑](#footnote-ref-682)
682. 682 Id. [↑](#footnote-ref-683)
683. 683 43 U.S.C. § 1333(a)(2)(A) (2006). [↑](#footnote-ref-684)
684. 684 Fuselier, 2007 WL 2713278, at 1. [↑](#footnote-ref-685)
685. 685 See generally Robertson, supra note 679. [↑](#footnote-ref-686)
686. 686 In Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, 543 F.3d 256, 263, 2008 AMC 2572, 2581 (5th Cir. 2008), the Fifth Circuit said that the Fuselier court was right. Grand Isle is discussed in the text immediately following. [↑](#footnote-ref-687)
687. 687 Id. at 256, 2008 AMC at 2572. [↑](#footnote-ref-688)
688. 688 See discussion supra note 686. [↑](#footnote-ref-689)
689. 689 Grand Isle, 543 F.3d at 256, 2008 AMC at 2573. [↑](#footnote-ref-690)
690. 690 Id. [↑](#footnote-ref-691)
691. 691 Grand Isle Shipyard, Inc. v. Seacor Marine, LLC, No. 06-1405, 2007 WL 2874808, at 1, 3 (E.D. La. Sept. 26, 2007); see Robertson, supra note 679, at 503 n.79, 528 n.200 (treating cases indicating that events occurring on or in the waters close to OCS structures can sometimes be regarded as sufficiently related to those structures to satisfy the OCS situs requirements). [↑](#footnote-ref-692)
692. 692 Grand Isle, 543 F.3d at 259, 2008 AMC at 2575. [↑](#footnote-ref-693)
693. 693 Id. at 262-63, 2008 AMC at 2579-81. [↑](#footnote-ref-694)
694. 694 Id. at 260 n.3, 2008 AMC at 2577 n.3. [↑](#footnote-ref-695)
695. 695 495 F.3d 182, 2007 AMC 1943 (5th Cir. 2007). [↑](#footnote-ref-696)
696. 696 Id. at 183, 2007 AMC at 1943-44. [↑](#footnote-ref-697)
697. 697 Id. at 184, 2007 AMC at 1945. [↑](#footnote-ref-698)
698. 698 43 U.S.C. § 1333(a)(2)(A) (2006). [↑](#footnote-ref-699)
699. 699 See Robertson, supra note 679, at 510-11. [↑](#footnote-ref-700)
700. 700 495 F.3d at 185, 2007 AMC at 1946. [↑](#footnote-ref-701)
701. 701 Id. [↑](#footnote-ref-702)
702. 702 242 F. App'x 965, 966-67 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-703)
703. 703 43 U.S.C. § 1349(b)(1). [↑](#footnote-ref-704)
704. 704 See Robertson, supra note 679, at 517-19, 529-31. [↑](#footnote-ref-705)
705. 705 At 242 F. App'x 967, the Golden panel quotes "situs" language from Texaco Exploration and Production, Inc. v. AmClyde Engineered Products Co., 448 F.3d 760, 774, 2006 AMC 1297, 1311 (5th Cir. 2006), where the court discussed 43 U.S.C. § 1333(a)(2)(A), not § 1349(b)(1). [↑](#footnote-ref-706)
706. 706 Fed. r. Civ. P. 9(h). [↑](#footnote-ref-707)
707. 707 U.S. Const. amend. VII. [↑](#footnote-ref-708)
708. 708 See Robertson, supra note 679, at 524-27, 548-49. [↑](#footnote-ref-709)
709. 709 Id. [↑](#footnote-ref-710)
710. 710 No. 07-613, 2007 WL 3343011, at 1 (E.D. La. Nov. 8, 2007). [↑](#footnote-ref-711)
711. 711 Id. [↑](#footnote-ref-712)
712. 712 Id. [↑](#footnote-ref-713)
713. 713 Id. [↑](#footnote-ref-714)
714. 714 Id. at 2. [↑](#footnote-ref-715)
715. 715 Id. [↑](#footnote-ref-716)
716. 716 See id. [↑](#footnote-ref-717)
717. 717 The Henson court's holding that the platform crane operator's activities did not meet Grubart's "substantial relationship to traditional maritime activity" requirement is debatable. But once it had determined that the action against that defendant was not within admiralty jurisdiction, the court was certainly right in its handling of the jury trial issue. The court's determination that the case against the non-maritime defendant entailed the necessity of jury trial (while the case against the admiralty defendant entailed the necessity of a bench trial) is a familiar and widely accepted technique. It puts the lie to the courts and pundits who have read Grubart to mean that a showing of admiralty jurisdiction against one of multiple defendants means that all of the defendants are subject to admiralty jurisdiction. If the experienced district judge who handled Henson had been confronted with that argument, he would clearly have rejected it out of hand. For a careful demonstration of how wrong it is to say that establishing admiralty jurisdiction over one defendant effects the extension of admiralty jurisdiction over all defendants, see Robertson, supra note 64. See also Cenac Towing Co. v. Neal, Nos. 07-1458, 07-3794, 2008 WL 239758, at 1 (E.D. La. Jan. 29, 2008) ("In multiple tortfeasor situations, the claims against each tortfeasor must be analyzed separately to determine whether admiralty jurisdiction exists as to each claim. If there is a case of admiralty jurisdiction against one of the tortfeasors, the cases against the others can be heard under the court's supplemental jurisdiction." (citations omitted)). [↑](#footnote-ref-718)
718. 718 No. 07-1508, 2007 WL 2726064, at 1, 3 (E.D. La. Sept. 17, 2007). [↑](#footnote-ref-719)
719. 719 Id. at 1. [↑](#footnote-ref-720)
720. 720 Id. [↑](#footnote-ref-721)
721. 721 Id. at 2. [↑](#footnote-ref-722)
722. 722 Id. at 2-3. [↑](#footnote-ref-723)
723. 723 La. Rev. Stat. Ann. § 32:245.1.E (2002). [↑](#footnote-ref-724)
724. 724 Augman, 2007 WL 2726064, at 3. [↑](#footnote-ref-725)
725. 725 Id. at 4. [↑](#footnote-ref-726)
726. 726 492 F. Supp. 2d 571, 572, 2007 AMC 2812, 2812 (E.D. La. 2007). [↑](#footnote-ref-727)
727. 727 Id. [↑](#footnote-ref-728)
728. 728 Id. [↑](#footnote-ref-729)
729. 729 Id., 2007 AMC at 2812-13. [↑](#footnote-ref-730)
730. 730 Id. at 572, 575, 2007 AMC at 2812-13, 2816. [↑](#footnote-ref-731)
731. 731 Id. at 575, 2007 AMC at 2816. [↑](#footnote-ref-732)
732. 732 903 F.2d 1523, 1991 AMC 586 (11th Cir. 1990). [↑](#footnote-ref-733)
733. 733 Frazier, 492 F. Supp. 2d at 575, 2007 AMC at 2815-16. [↑](#footnote-ref-734)
734. 734 Id. at 573-75, 2007 AMC at 2813-16. [↑](#footnote-ref-735)
735. 735 580 F.2d 842, 847, 1979 AMC 1794, 1803-04 (5th Cir. 1978). [↑](#footnote-ref-736)
736. 736 398 U.S. 375, 1970 AMC 967 (1970). [↑](#footnote-ref-737)
737. 737 558 F.2d 750 (5th Cir. 1977). [↑](#footnote-ref-738)
738. 738 Id. at 751. [↑](#footnote-ref-739)
739. 739 144 F.3d 332, 1998 AMC 2328 (5th Cir. 1998). [↑](#footnote-ref-740)
740. 740 Id. at 341, 1998 AMC at 2340-41. [↑](#footnote-ref-741)
741. 741 Frazier v. Carnival Corp., 492 F. Supp. 2d 571, 573-75, 2007 AMC 2812, 2813-16 (E.D. La. 2007). [↑](#footnote-ref-742)
742. 742 Id. at 575, 2007 AMC at 2816. [↑](#footnote-ref-743)
743. 743 No. 06-10116-CIV, 2007 WL 1879172 (S.D. Fla. June 27, 2007). [↑](#footnote-ref-744)
744. 744 Id. [↑](#footnote-ref-745)
745. 745 Id. at 2. [↑](#footnote-ref-746)
746. 746 Id. [↑](#footnote-ref-747)
747. 747 Id. at 2-3. [↑](#footnote-ref-748)
748. 748 See supra notes 170-172 and accompanying text for enumeration of the four requirements for seaman status. [↑](#footnote-ref-749)
749. 749 See 2007 Recent Developments, supra note 1, at 555 (discussing Hyman v. Transocean Offshore U.S.A., Inc., 207 F. App'x 485 (5th Cir. 2006)); 2005 Recent Developments, supra note 1, at 274-76 (discussing Cain v. Transocean Offshore Deep Water Drilling, Inc., No. Civ.A.03-1372, 2005 WL 1959147, 2007 AMC 992 (W.D. La. 2005), and an unreported decision from the Eastern District of Louisiana that we then knew only as Hyman (E.D. La. Aug. 12, Mar. 11, 2005)). [↑](#footnote-ref-750)
750. 750 518 F.3d 295, 301, 2008 AMC 831, 839 (5th Cir. 2008). [↑](#footnote-ref-751)
751. 751 Id. at 296-997, 299, 2008 AMC at 831-33, 835. [↑](#footnote-ref-752)
752. 752 543 U.S. 481, 2005 AMC 609 (2005). [↑](#footnote-ref-753)
753. 753 Cain, 518 F.3d at 303-04, 2008 AMC at 841-42 (Owen, J., dissenting). [↑](#footnote-ref-754)
754. 754 Cain v. Transocean Offshore USA Inc., 277 F. App'x 526 (5th Cir. 2008). [↑](#footnote-ref-755)
755. 755 Cain v. Transocean Offshore USA Inc., 129 S. Ct. 193 (2008) (Mem.). [↑](#footnote-ref-756)
756. 756 See 2007 Recent Developments, supra note 1, at 555-56 (discussing Jordan v. Shell Offshore Inc., No. G-06-265, 2007 WL 128313 (S.D. Tex. Jan 10, 2007)). [↑](#footnote-ref-757)
757. 757 No. G-06-265, 2007 WL 2220986, at 1, 3 (S.D. Tex. Aug. 2, 2007). [↑](#footnote-ref-758)
758. 758 Id. at 2. [↑](#footnote-ref-759)
759. 759 534 F. Supp. 2d 671, 2008 AMC 2384 (W.D. La. 2008). [↑](#footnote-ref-760)
760. 760 Id. at 683, 2008 AMC at 2397. [↑](#footnote-ref-761)
761. 761 Id. at 682, 2008 AMC at 2396. [↑](#footnote-ref-762)
762. 762 Stewart v. Dutra Constr. Co., 543 U.S. 481, 2005 AMC 609 (2005). [↑](#footnote-ref-763)
763. 763 Holmes v. Atl. Sounding Co., 437 F.3d 441, 2006 AMC 182 (5th Cir. 2006). [↑](#footnote-ref-764)
764. 764 In Stewart, the Court said the holding in Cope v. Vallette Dry-Dock Co., 119 U.S. 625, 2002 AMC 2694 (1887), that a floating dry dock was not a vessel was correct because the dry dock involved in that case "was not practically capable of being used as a means of transportation." 543 U.S. at 493, 2005 AMC at 609. [↑](#footnote-ref-765)
765. 765 Two-J Ranch, 534 F. Supp. 2d at 680, 2008 AMC at 2398 (parallel citation omitted). [↑](#footnote-ref-766)
766. 766 No. H-08-0835, 2008 WL 2714124 (S.D. Tex. July 10, 2008). [↑](#footnote-ref-767)
767. 767 Id.; 43 U.S.C. § 1349(b)(1) (2006); see supra Part V.C.3. [↑](#footnote-ref-768)
768. 768 Case, 2008 WL 2714124, at 1; 28 U.S.C. § 1445(a) (2006). [↑](#footnote-ref-769)
769. 769 Case, 2008 WL 2714124, at 1. [↑](#footnote-ref-770)
770. 770 Id. at 5. [↑](#footnote-ref-771)
771. 771 Id. at 6-8. [↑](#footnote-ref-772)
772. 772 520 U.S. 548, 558, 1997 AMC 1817, 1824 (1997). [↑](#footnote-ref-773)
773. 773 502 U.S. 81, 92, 1992 AMC 305, 313 (1991). [↑](#footnote-ref-774)
774. 774 33 U.S.C. § 902(3) (2006). [↑](#footnote-ref-775)
775. 775 Nos. 06-0833, 05-2148, 2007 WL 3244723, at 1 (E.D. La. Nov. 1, 2007). [↑](#footnote-ref-776)
776. 776 Id. at 3. [↑](#footnote-ref-777)
777. 777 251 F. App'x 305 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-778)
778. 778 Jenkins v. Aries Marine Corp., 554 F. Supp. 2d 635, 641, 2008 AMC 2143, 2149 (E.D. La. 2008); Parker v. Jackup Boat Serv., LLC, 542 F. Supp. 2d 481, 491 (E.D. La. 2008). [↑](#footnote-ref-779)
779. 779 5 F.3d 877, 880, 1994 AMC 826, 845 (5th Cir. 1993). [↑](#footnote-ref-780)
780. 780 700 F.2d 240, 245, 1984 AMC 1740, 1745 (5th Cir. 1983). [↑](#footnote-ref-781)
781. 781 Jenkins, 554 F. Supp. 2d at 641, 2008 AMC at 2149; Parker, 542 F. Supp. 2d at 491. See also Van Norman v. Baker Hughes, Inc., No. G-06-0719, 2007 WL 4410677, at 1 (S.D. Tex. Dec. 14, 2007), in which the plaintiff, an oilfield technician, could not satisfy the fleet requirement because during the relevant period he worked "on fifteen different rigs controlled by ten different companies." [↑](#footnote-ref-782)
782. 782 See Van Norman, 2007 WL 4410677. [↑](#footnote-ref-783)
783. 783 700 F.2d 240, 1984 AMC 1740. [↑](#footnote-ref-784)
784. 784 Parker, 542 F. Supp. 2d at 487. [↑](#footnote-ref-785)
785. 785 278 F. App'x 443, 2008 AMC 1461 (5th Cir. 2008). [↑](#footnote-ref-786)
786. 786 266 F.3d 368, 2002 AMC 83 (5th Cir. 2001). [↑](#footnote-ref-787)
787. 787 736 F.2d 307, 1985 AMC 1177 (5th Cir. 1984). [↑](#footnote-ref-788)
788. 788 Willis, 278 F. App'x at 447, 2008 AMC at 1465. The plaintiffs in Bertrand and in Willis were specialists in moving MODUs (mobile offshore drilling units) from location to location, and their work exposed them to ocean hazards to an unusual degree. The plaintiff in Roberts was a garden variety offshore ***oil*** worker. (For further attention to Roberts, see 2002 Recent Developments, supra note 1, at 559-60.) The Buras plaintiff was a "coal sampler and temperature taker" who worked at the dock, not at sea. 736 F.2d at 308, 1985 AMC at 1178. [↑](#footnote-ref-789)
789. 789 No. G-07-261, 2008 WL 3823035, at 1 (S.D. Tex. Aug. 12, 2008). [↑](#footnote-ref-790)
790. 790 Id. [↑](#footnote-ref-791)
791. 791 Id. [↑](#footnote-ref-792)
792. 792 Id. [↑](#footnote-ref-793)
793. 793 Id. [↑](#footnote-ref-794)
794. 794 Bertrand v. Int'l Mooring & Marine, Inc., 700 F.2d 240, 1984 AMC 1740 (5th Cir. 1983). [↑](#footnote-ref-795)
795. 795 See Woods, 2008 WL 3823035. [↑](#footnote-ref-796)
796. 796 No. 06-2290, 2007 WL 2265233, at 1 (E.D. La. Aug. 1, 2007). [↑](#footnote-ref-797)
797. 797 Compare supra notes 177-178 and accompanying text (discussing Belcher). [↑](#footnote-ref-798)
798. 798 46 U.S.C. § 10101(3) (2006). [↑](#footnote-ref-799)
799. 799 Chauvin, 2007 WL 2265233, at 2. [↑](#footnote-ref-800)
800. 800 250 F. App'x 54, 58 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-801)
801. 801 Id. For treatment of earlier activities in this case, see 2007 Recent Developments, supra note 1, at 556; 2006 Recent Developments, supra note 1, at 575-76. [↑](#footnote-ref-802)
802. 802 515 U.S. 347, 371, 1995 AMC 1840, 1862-63 (1995). [↑](#footnote-ref-803)
803. 803 Mudrick, 250 F. App'x at 60. [↑](#footnote-ref-804)
804. 804 Id. at 59 n.2. [↑](#footnote-ref-805)
805. 805 No. G-08-0090, 2008 WL 2783457 (S.D. Tex. July 15, 2008). [↑](#footnote-ref-806)
806. 806 Id. [↑](#footnote-ref-807)
807. 807 28 U.S.C. § 1445(a) (2006). [↑](#footnote-ref-808)
808. 808 LaCount is discussed in 2007 Recent Developments, supra note 1, at 516. [↑](#footnote-ref-809)
809. 809 Grothe, 2008 WL 2783457, at 2-3. [↑](#footnote-ref-810)
810. 810 Id. at 3. [↑](#footnote-ref-811)
811. 811 Id. [↑](#footnote-ref-812)
812. 812 No. 06-5756, 2007 WL 4365384 (E.D. La. Dec. 11, 2007). [↑](#footnote-ref-813)
813. 813 Id. at 6. [↑](#footnote-ref-814)
814. 814 525 F. Supp. 2d 843, 844-45 (S. D. Tex. Nov. 19, 2007). [↑](#footnote-ref-815)
815. 815 Id. [↑](#footnote-ref-816)
816. 816 Id. at 847 (emphasis added). [↑](#footnote-ref-817)
817. 817 Chandris, Inc. v. Latsis, 515 U.S. 347, 372, 1995 AMC 1840, 1858-59 (1995). For further attention to the change-of-assignment doctrine, see Robertson, supra note 93, at 141-42; 2005 Recent Developments, supra note 1, at 228; 2003 Recent Developments, supra note 1, at 206-07. [↑](#footnote-ref-818)
818. 818 Hebert v. Weeks Marine, Inc., 251 F. App'x 305, 206-07 (5th Cir. 2007) (per curiam); supra note 777 and accompanying text. [↑](#footnote-ref-819)
819. 819 Id. (footnote and parallel citation omitted). [↑](#footnote-ref-820)
820. 820 It may be relevant to this debate that when the Supreme Court approved the change-of-assignment doctrine, it cited to Judge Rubin's dissent in Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1986 AMC 2455 (5th Cir. 1986) (en banc), rather than to the Barrett majority opinion. 515 U.S. at 372, 1995 AMC at 1858-59. [↑](#footnote-ref-821)
821. 821 No. M-07-31, 2007 WL 2539056, at 1-2 (S.D. Tex. Aug. 30, 2007). [↑](#footnote-ref-822)
822. 822 Id. at 2. [↑](#footnote-ref-823)
823. 823 Id. at 3. [↑](#footnote-ref-824)
824. 824 Mudrick v. Cross Equip. Ltd., 250 F. App'x 54 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-825)
825. 825 285 F. App'x 203, 204 (5th Cir. 2008). [↑](#footnote-ref-826)
826. 826 340 U.S. 523, 529, 1951 AMC 416, 420-21 (1951). [↑](#footnote-ref-827)
827. 827 Id. at 529-30, 1951 AMC at 420-21. [↑](#footnote-ref-828)
828. 828Brownwater seamen" is jargon for workers who achieve seaman status through their work on rivers, see, e.g., Ross, As They Say on the River 12 (2d ed. 1997), or their connection with drilling rigs and other unorthodox vessels in the Gulf of Mexico, see, e.g., Frank L. Maraist & Thomas C. Galligan, Admiralty in a Nutshell 199 (5th ed. 2005). [↑](#footnote-ref-829)
829. 829 See Baker v. Ocean Sys., Inc., 454 F.2d 379, 1972 AMC 287 (5th Cir. 1972) (fight in pool hall); Sellers v. Dixilyn Corp., 433 F.2d 446, 1971 AMC 425 (5th Cir. 1970) (home-bound care trip); Daughdrill v. Diamond M. Drilling Co., 447 F.2d 781, 1972 AMC 1103 (5th Cir. 1971) (rig-bound car trip). [↑](#footnote-ref-830)
830. 830 Vincent v. Harvey Well Serv., 441 F.2d 146, 1971 AMC 2541 (5th Cir. 1971). [↑](#footnote-ref-831)
831. 831 262 F. App'x 669 (5th Cir. 2008) (per curiam). [↑](#footnote-ref-832)
832. 832 Id. [↑](#footnote-ref-833)
833. 833 Id. [↑](#footnote-ref-834)
834. 834 Id. [↑](#footnote-ref-835)
835. 835 Id. at 670. [↑](#footnote-ref-836)
836. 836 Id. (citations omitted). [↑](#footnote-ref-837)
837. 837 247 F. App'x 572 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-838)
838. 838 Id. at 578. [↑](#footnote-ref-839)
839. 839 Id. at 578-79. [↑](#footnote-ref-840)
840. 840 See 2007 Recent Developments, supra note 1, at 559; 2006 Recent Developments, supra note 1, at 581-82. [↑](#footnote-ref-841)
841. 841 No. 07-3545, 2007 WL 3353300, at 1 (E.D. La. Nov. 7, 2007). [↑](#footnote-ref-842)
842. 842 Id. at 2. [↑](#footnote-ref-843)
843. 843 See Dinet v. Rene J. Cheramie & Sons, Inc., No. 07-2204, 2007 WL 4348312, at 1 (E.D. La. Dec. 6, 2007). [↑](#footnote-ref-844)
844. 844 See Leija v. Penn Mar., Inc., No. 06-10489, 2007 WL 3046151, at 1 (E.D. La. Oct. 17, 2007). [↑](#footnote-ref-845)
845. 845 No. 07-2204, 2007 WL 4348312, at 1 (E.D. La. Dec. 6, 2007). [↑](#footnote-ref-846)
846. 846 Leija, 2007 WL 3046151, at 1. [↑](#footnote-ref-847)
847. 847 2007 WL 4348312, at 1. [↑](#footnote-ref-848)
848. 848 No. 06-10758, 2008 WL 89006, at 1, 3-4 (E.D. La. Jan. 7, 2008). [↑](#footnote-ref-849)
849. 849 This matter is reliably litigious. See, e.g., 2007 Recent Developments, supra note 1, at 557-58; 2006 Recent Developments, supra note 1, at 578-80. Seamen - particularly Fifth Circuit area ***oil*** and gas seamen - get hurt a lot, and they change jobs a lot. So they have lots of opportunities to fudge (or to be accused of fudging) their medical answers on employment applications. See, for example, the recitation of the plaintiff's injury history in Johnson v. Cenac Towing Inc., 468 F. Supp. 2d 815, 820-21 (E.D. La. 2006). [↑](#footnote-ref-850)
850. 850 396 F.2d 547, 548-49, 1968 AMC 1147, 1148-49 (5th Cir. 1968). [↑](#footnote-ref-851)
851. 851 See 542 F. Supp. 2d 481 (E.D. La. 2008). [↑](#footnote-ref-852)
852. 852 Id. at 493. [↑](#footnote-ref-853)
853. 853 Id. at 494-95 (citations and internal quotation marks omitted). [↑](#footnote-ref-854)
854. 854 See 2004 Recent Developments, supra note 1, at 396. [↑](#footnote-ref-855)
855. 855 No. 07-5564, 2008 WL 1901698, at 1-3 (E.D. La. Apr. 25, 2008). [↑](#footnote-ref-856)
856. 856 59 F.3d 1496, 1995 AMC 2409 (5th Cir. 1995) (en banc), cert. denied, 516 U.S. 1046 (1996). [↑](#footnote-ref-857)
857. 857 For criticism of Guevara, see Robertson, supra note 215, at 293. [↑](#footnote-ref-858)
858. 858 496 F.3d 1282, 1284, 2007 AMC 2009, 2011 (11th Cir. 2007). [↑](#footnote-ref-859)
859. 859 Id. at 1288, 2007 AMC at 2013-14 (Carnes, J., concurring). [↑](#footnote-ref-860)
860. 860 Atl. Sounding Co. v. Townsend, 284 F. App'x 805 (11th Cir. 2008). [↑](#footnote-ref-861)
861. 861 Atl. Sounding Co. v. Townsend, 129 S. Ct. 490 (2008) (Mem.). [↑](#footnote-ref-862)
862. 862 Transcript of Oral Argument, Atl. Sounding Co. v. Townsend, No. 08-214 (Mar. 2, 2009). [↑](#footnote-ref-863)
863. 863 287 U.S. 367, 1933 AMC 9 (1932). [↑](#footnote-ref-864)
864. 864 551 F. Supp. 2d 478, 482-83 (E.D. La. 2008). [↑](#footnote-ref-865)
865. 865 MAS signifies the "Medical Advisory Service, … a service that provides ships at sea with 24-hour a day medical advice from doctors on shore." Id. at 485. [↑](#footnote-ref-866)
866. 866 Nos. 06-9026, 07-6103, 2008 WL 1730150, 2008 AMC 798 (E.D. La. Apr. 10, 2008). [↑](#footnote-ref-867)
867. 867 See 2007 Recent Developments, supra note 1, at 557-58; 2005 Recent Developments, supra note 1, at 280. [↑](#footnote-ref-868)
868. 868 468 F. Supp. 2d 815, 826 (E.D. La. 2006). [↑](#footnote-ref-869)
869. 869 Id. at 826. [↑](#footnote-ref-870)
870. 870 Id. [↑](#footnote-ref-871)
871. 871 Johnson v. Cenac Towing, Inc., 544 F.3d 296, 307 (5th Cir. 2008). [↑](#footnote-ref-872)
872. 872 Id. at 302. [↑](#footnote-ref-873)
873. 873 Id. at 303-04. [↑](#footnote-ref-874)
874. 874 None of the cases the Johnson court cites in connection with its contributory negligence discussion held or suggested that a worker's preemployment conduct can be deemed a legal cause of an injury during the employment. Still v. Norfolk & Western Railway Co., 368 U.S. 35, 46 n.14, 1962 AMC 563 (1961) (AMC reporter summarizing case) - which stands for the proposition that an injured FELA worker cannot be denied recovery for having falsified his employment application - states only that "a pre-existing physical defect might … be relevant" to the contributory negligence issue. Savoie v. Otto Candies, Inc., 692 F.2d 363, 372, 1985 AMC 220, 233, (5th Cir. 1982), held that a seaman who "knowingly exposes himself to conditions of employment while aware of an illness or disability which makes those conditions unsafe to him" is guilty of contributory negligence (emphasis added). The Fifth Circuit's decision in Gavagan v. United States, 955 F.2d 1016, 1992 AMC 2447 (5th Cir. 1992), was not based on contributory negligence. The plaintiff reinjured his broken finger while trying to open a valve that had been inadvertently left taped shut. Id. at 1017, 1992 AMC at 2448-49. The trial court held for the defendant on the basis of plaintiff's "one hundred percent contributory negligence" in exposing his broken finger to injury. Id. at 1019, 1992 AMC at 2451. The Fifth Circuit affirmed the result, but it disagreed with the trial judge's reasoning. The Fifth Circuit opinion explained at some length, see id. at 1019-22, 1992 AMC at 2451-56, that the correct characterization was not contributory negligence but rather that the defendant's negligence in having left the valve taped shut was not a legal cause of the accident: "In essence, the district court was not persuaded by a preponderance of the evidence that leaving the valve taped exposed those who might try to turn it to a sufficiently great or foreseeable risk of injury as to constitute negligence, even though leaving the tape on may have been negligent for other reasons." Id. at 1022, 1992 AMC at 2456. The Johnson court's parenthetical characterization of Gavagan as "upholding one hundred percent contributory negligence of seaman," 544 F.3d 296, 303 (5th Cir. 2008), thus appears to be a mistake. [↑](#footnote-ref-875)
875. 875 544 F.3d 296 (5th Cir. 2008). [↑](#footnote-ref-876)
876. 876 Id. at 302 n.4 (some citations and internal quotation marks omitted). [↑](#footnote-ref-877)
877. 877 246 F. App'x 278, 280 (5th Cir. 2007) (per curiam) (citations omitted). [↑](#footnote-ref-878)
878. 878 Id. (citations and internal quotation marks omitted). [↑](#footnote-ref-879)
879. 879 No. 07-3200, 2008 WL 3501015, at 1 (E.D. La. Aug. 8, 2008). [↑](#footnote-ref-880)
880. 880 See the discussion of the Cortes holding, supra note 863 and accompanying text. [↑](#footnote-ref-881)
881. 881 Hancock, 2008 WL 3501015, at 3. [↑](#footnote-ref-882)
882. 882 920 F.2d 322, 1991 AMC 928 (5th Cir. 1991). [↑](#footnote-ref-883)
883. 883 Hancock, 2008 WL 3501015, at 4. [↑](#footnote-ref-884)
884. 884 498 U.S. 19, 1991 AMC 1 (1990). [↑](#footnote-ref-885)
885. 885 Hancock, 2008 WL 3501015, at 4. [↑](#footnote-ref-886)
886. 886 910 F.2d 312, 1991 AMC 986 (5th Cir. 1990). [↑](#footnote-ref-887)
887. 887 Green v. Vermilion Corp., 144 F.3d 332, 1998 AMC 2328 (5th Cir. 1998). [↑](#footnote-ref-888)
888. 888 No. 06-9998, 2008 WL 1767000, at 1, 2 (E.D. La. Apr. 14, 2008). [↑](#footnote-ref-889)
889. 889 534 F. Supp. 2d 671, 683-84, 2008 AMC 2384, 2398 (W.D. La. 2008). [↑](#footnote-ref-890)
890. 890 548 F. Supp. 2d 390 (S.D. Tex. 2008). [↑](#footnote-ref-891)
891. 891 Id. at 391-92. [↑](#footnote-ref-892)
892. 892 Id. at 392. [↑](#footnote-ref-893)
893. 893 Id. [↑](#footnote-ref-894)
894. 894 Id. [↑](#footnote-ref-895)
895. 895 Id. at 397. [↑](#footnote-ref-896)
896. 896 Id. at 398. [↑](#footnote-ref-897)
897. 897 362 U.S. 539, 542, 1960 AMC 1503, 1506 (1960). [↑](#footnote-ref-898)
898. 898 400 U.S. 494, 500, 1971 AMC 277, 282 (1971). [↑](#footnote-ref-899)
899. 899 Fla. Marine Transporters, Inc. v. Sanford, 255 F. App'x 885, 887 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-900)
900. 900 Id. [↑](#footnote-ref-901)
901. 901 Id. at 890. [↑](#footnote-ref-902)
902. 902 See 2007 Recent Developments, supra note 1, at 561-66; 2005 Recent Developments, supra note 1, at 291-94; 2002 Recent Developments, supra note 1, at 516-17. [↑](#footnote-ref-903)
903. 903 No. 06-21088, 2007 WL 1752410, 2007 AMC 972 (S.D. Fla. Mar. 30, 2007). [↑](#footnote-ref-904)
904. 904 No. 07-23040-CIV, 2008 WL 649178, 2008 AMC 798 (S.D. Fla. Feb. 1, 2008). [↑](#footnote-ref-905)
905. 905 549 F. Supp. 2d 1365 (S.D. Fla. 2008). [↑](#footnote-ref-906)
906. 906 2007 WL 1752410; 2008 WL 649178; 549 F. Supp. 2d 1365. [↑](#footnote-ref-907)
907. 907 Koda, 2007 WL 1752410, 2007 AMC 972; Vacaru, 2008 WL 649178, 2008 AMC 798; Del Orbe, 549 F. Supp. 2d 1365. [↑](#footnote-ref-908)
908. 908 No. 08-20518-CIV, 2008 WL 2261195, at 1 (S.D. Fla. May 30, 2008). [↑](#footnote-ref-909)
909. 909 Id. at 5. [↑](#footnote-ref-910)
910. 910 Id. at 8. [↑](#footnote-ref-911)
911. 911 255 F. App'x 885 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-912)
912. 912 Id. at 888. [↑](#footnote-ref-913)
913. 913 Id. [↑](#footnote-ref-914)
914. 914 Id. at 889. [↑](#footnote-ref-915)
915. 915 The Pennsylvania, 86 U.S. 125, 136, 1998 AMC 1506, 1512 (1874). [↑](#footnote-ref-916)
916. 916 Johnson v. Cenac Towing, Inc., 544 F.3d 296, 304 (5th Cir. 2008). [↑](#footnote-ref-917)
917. 917 Id. at 304-07. [↑](#footnote-ref-918)
918. 918 262 F. App'x 646, 649, 2008 AMC 1448, 1452 (5th Cir. 2008) (per curiam). [↑](#footnote-ref-919)
919. 919 Id. at 649, 2008 AMC at 1451. [↑](#footnote-ref-920)
920. 920 Garrett v. Moore-McCormack Co., 317 U.S. 239, 248, 1942 AMC 1645, 1652 (1942). [↑](#footnote-ref-921)
921. 921 No. 05-6328, 2007 WL 1557338, at 1 (E.D. La. May 29, 2007). [↑](#footnote-ref-922)
922. 922 Id. at 3. [↑](#footnote-ref-923)
923. 923 Id. at 1. [↑](#footnote-ref-924)
924. 924 256 F. App'x 672, 674 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-925)
925. 925 508 F.3d 300, 302, 2007 AMC 2920, 2920-21 (5th Cir. 2007). [↑](#footnote-ref-926)
926. 926 Id., 2007 AMC at 2921. [↑](#footnote-ref-927)
927. 927 Id. [↑](#footnote-ref-928)
928. 928 Id. [↑](#footnote-ref-929)
929. 929 Id. at 303, 2007 AMC at 2921. [↑](#footnote-ref-930)
930. 930 Id. [↑](#footnote-ref-931)
931. 931 Fed. R. Civ. P. 60(b). [↑](#footnote-ref-932)
932. 932 Steverson, 508 F.3d at 303, 2007 AMC at 2921-22. [↑](#footnote-ref-933)
933. 933 Id. [↑](#footnote-ref-934)
934. 934 Id. at 306, 2007 AMC at 2925. [↑](#footnote-ref-935)
935. 935 Id. at 303, 2007 AMC at 2922 (citations and internal quotation marks omitted). [↑](#footnote-ref-936)
936. 936 Id. at 304, 2007 AMC at 2922. [↑](#footnote-ref-937)
937. 937 288 F. App'x 188, 190 (5th Cir. 2008) (per curiam). [↑](#footnote-ref-938)
938. 938 Id. at 191. [↑](#footnote-ref-939)
939. 939 Id. at 192. [↑](#footnote-ref-940)
940. 940 In re Ruiz, 494 F. Supp. 2d 1339, 1339-40, 2007 AMC 1991, 1911 (S.D. Fla. 2007). [↑](#footnote-ref-941)
941. 941 Id. at 1340, 2007 AMC at 1991. [↑](#footnote-ref-942)
942. 942 46 U.S.C. § 30505(b) (2006). [↑](#footnote-ref-943)
943. 943 975 F.2d 379, 1993 AMC 312 (7th Cir. 1992). [↑](#footnote-ref-944)
944. 944 In re Ruiz, 494 F. Supp. 2d at 1341-42, 2007 AMC at 1994. [↑](#footnote-ref-945)
945. 945 See supra Part IV.I. [↑](#footnote-ref-946)
946. 946 See supra Part IV.I. [↑](#footnote-ref-947)
947. 947 No. 07-999, 2007 WL 3377257, at 1 (E.D. La. Nov. 13, 2007). [↑](#footnote-ref-948)
948. 948 See 2004 Recent Developments, supra note 1, at 448. [↑](#footnote-ref-949)
949. 949 See 2001 Recent Developments, supra note 1, at 274-75. [↑](#footnote-ref-950)
950. 950 Hilcorp, 2007 WL 3377257, at 1-2 (citations omitted). [↑](#footnote-ref-951)
951. 951 No. 06-5102 C/W, 07-75, 2007 WL 2908198 (E.D. La. Oct. 2, 2007). [↑](#footnote-ref-952)
952. 952 Hilcorp., 2007 WL 3377257, at 1. [↑](#footnote-ref-953)
953. 953 In re Santa Fe Cruz, Inc., 535 F. Supp. 2d 853, 859-60, 2008 AMC 1277, 1281-83 (S.D. Tex. 2007); In re Two-J Ranch, Inc., 534 F. Supp. 2d 671, 690, 2008 AMC 2384, 2407 (W.D. La. 2008). [↑](#footnote-ref-954)
954. 954 In re King Fisher Marine Serv., L.P., No. H-07-3918, 2008 WL 2368730, at 8 (S.D. Tex. May 30, 2008) (citing Place v. Norwich & N.Y. Transp. Co., 118 U.S. 468, 1998 AMC 2077 (1886)). [↑](#footnote-ref-955)
955. 955 46 U.S.C. § 30506(b) (2006). [↑](#footnote-ref-956)
956. 956 Id. § 30506(d). [↑](#footnote-ref-957)
957. 957 2008 WL 2368730, at 4. [↑](#footnote-ref-958)
958. 958 Id.; 43 U.S.C. § 30506(a) (2006). [↑](#footnote-ref-959)
959. 959 854 F.2d 758, 761-62, 1989 AMC 1004, 1007-08 (5th Cir. 1988). [↑](#footnote-ref-960)
960. 960 In re King Fisher, 2008 WL 2368730, at 11. [↑](#footnote-ref-961)
961. 961 541 F.3d 584, 2008 AMC 2369 (5th Cir. 2008). [↑](#footnote-ref-962)
962. 962 The court noted that the Wreck Act "is part of the Rivers and Harbors Act of 1899," citing as the Wreck Act 33 U.S.C. §§409, 411-412, and 414-415. In re Southern Scrap, 541 F.3d at 585 & n.1, 2008 AMC at 2369 & n.1. [↑](#footnote-ref-963)
963. 963 557 F.2d 438, 1977 AMC 2607 (5th Cir. 1977). [↑](#footnote-ref-964)
964. 964 In re Southern Scrap, 541 F.3d at 594, 2008 AMC at 2381. [↑](#footnote-ref-965)
965. 965 523 F.3d 528, 2008 AMC 1152 (5th Cir. 2008). [↑](#footnote-ref-966)
966. 966 Id. at 530, 2008 AMC at 1153. [↑](#footnote-ref-967)
967. 967 Id. at 530-31, 2008 AMC at 1153-54. [↑](#footnote-ref-968)
968. 968 Id. [↑](#footnote-ref-969)
969. 969 Id. at 538, 2008 AMC at 1163-64. [↑](#footnote-ref-970)
970. 970 Id. [↑](#footnote-ref-971)
971. 971 COGSA § 4(2)(c) (previously codified at 46 U.S.C. app. § 1304(2)(c) (2000)). [↑](#footnote-ref-972)
972. 972 British and Commonwealth courts, in contrast, apply the defense more broadly. See, e.g., Great China Metal Indus. Co. v. Malaysian Int'l Shipping Corp. Berhad, (1998) 1998 WL 1077023 (HCA), 1999 AMC 427 (Austl.) (reviewing British and Commonwealth authorities). [↑](#footnote-ref-973)
973. 973 The Giulia, 218 F. 744, 746 (2d Cir. 1914). Substantially the same definition has been followed in a host of modern cases. See, e.g., Steel Coils, Inc. v. M/V Lake Marion, 331 F.3d 422, 435, 2003 AMC 1408, 1423-24 (5th Cir. 2003); Thyssen, Inc. v. S/S Eurounity, 21 F.3d 533, 539, 1994 AMC 1638, 1645-46 (2d Cir. 1994); J. Gerber & Co. v. S.S. Sabine Howaldt, 437 F.2d 580, 588, 1971 AMC 539, 547-48 (2d Cir. 1971). [↑](#footnote-ref-974)
974. 974 Thyssen, 21 F.3d at 539, 1994 AMC at 1645. [↑](#footnote-ref-975)
975. 975 Id., 1994 AMC at 1646. [↑](#footnote-ref-976)
976. 976 251 F. App'x 873 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-977)
977. 977 Id. at 874. [↑](#footnote-ref-978)
978. 978 Id. [↑](#footnote-ref-979)
979. 979 513 F.3d 466, 2007 AMC 2991 (5th Cir. 2007). [↑](#footnote-ref-980)
980. 980 Id. at 467, 2007 AMC at 2991. [↑](#footnote-ref-981)
981. 981 Id., 2007 AMC at 2992. [↑](#footnote-ref-982)
982. 982 Id. at 471, 2007 AMC at 2997-98. [↑](#footnote-ref-983)
983. 983 No. 06-263, 2007 WL 4180599, at 1 (W.D. La. Nov. 21, 2007). [↑](#footnote-ref-984)
984. 984 470 U.S. 414, 1985 AMC 1700 (1985). [↑](#footnote-ref-985)
985. 985 33 U.S.C. § 902(3) (2006). [↑](#footnote-ref-986)
986. 986 Romero, 2007 WL 4180599, at 2. [↑](#footnote-ref-987)
987. 987 Id. [↑](#footnote-ref-988)
988. 988 Id. at 2 & n.5. [↑](#footnote-ref-989)
989. 989 See 2007 Recent Developments, supra note 1, at 576-77. [↑](#footnote-ref-990)
990. 990 No. 1:05CV463, 2007 WL 1062946, at 1 (S.D. Miss. Apr. 5, 2007). [↑](#footnote-ref-991)
991. 991 819 F.2d 124, 1987 AMC 2613 (5th Cir. 1987). [↑](#footnote-ref-992)
992. 992 786 F.2d 1261, 1987 AMC 971 (5th Cir. 1986). [↑](#footnote-ref-993)
993. 993 McLaurin, 2007 WL 1062946, at 1. [↑](#footnote-ref-994)
994. 994 Id. [↑](#footnote-ref-995)
995. 995 McLaurin v. Noble Drilling (U.S.), Inc., 529 F.3d 285, 293, 2008 AMC 1298, 1306 (5th Cir. 2008). [↑](#footnote-ref-996)
996. 996 Id. at 293, 2008 AMC at 1305-06. [↑](#footnote-ref-997)
997. 997 No. 07 Civ. 3840, 2008 WL 3153721, at 4, 2008 AMC 2045, 2049 (S.D.N.Y. Aug. 5, 2008). [↑](#footnote-ref-998)
998. 998 See supra Part IV.L. [↑](#footnote-ref-999)
999. 999 See supra Part IV.L. [↑](#footnote-ref-1000)
1000. 1000 See Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 166-67, 172, 1981 AMC 601, 609-10, 614 (1981). [↑](#footnote-ref-1001)
1001. 1001 Id. at 172, 1981 AMC at 614. [↑](#footnote-ref-1002)
1002. 1002 505 F.3d 364, 365, 2007 AMC 2742, 2742-43 (5th Cir. 2007). [↑](#footnote-ref-1003)
1003. 1003 Time charterers are within the category of "vessels" subject to section 5(b) liability under the broad definition of "vessel" in section 2(21), 33 U.S.C. § 902(21) (2006). [↑](#footnote-ref-1004)
1004. 1004 Robinson, 505 F.3d at 366, 2007 AMC at 2744. [↑](#footnote-ref-1005)
1005. 1005 924 F.2d 1539, 1991 AMC 1555 (9th Cir. 1991). [↑](#footnote-ref-1006)
1006. 1006 542 F.2d 145, 1976 AMC 1780 (2d Cir. 1976). [↑](#footnote-ref-1007)
1007. 1007 See 2007 Recent Developments, supra note 1, at 577. [↑](#footnote-ref-1008)
1008. 1008 488 F. Supp. 2d 579, 582, 2007 AMC 2754, 2754-55 (S.D. Tex. 2007). [↑](#footnote-ref-1009)
1009. 1009 Id. at 583-87, 2007 AMC at 2755-60. [↑](#footnote-ref-1010)
1010. 1010 Id. at 591, 2007 AMC at 2766. [↑](#footnote-ref-1011)
1011. 1011 535 F.3d 388, 397, 2008 AMC 1906, 1917 (5th Cir. 2008). [↑](#footnote-ref-1012)
1012. 1012 512 U.S. 92, 1994 AMC 1817 (1994). [↑](#footnote-ref-1013)
1013. 1013 Romero v. Cajun Stabilizing Boats, Inc., 501 F. Supp. 2d 816, 823, 2008 AMC 509, 516 (W.D. La. 2007). [↑](#footnote-ref-1014)
1014. 1014 No. 06-892, 2008 WL 2952356, at 1 (E.D. La. July 28, 2008). [↑](#footnote-ref-1015)
1015. 1015 Id. [↑](#footnote-ref-1016)
1016. 1016 Id. at 2. [↑](#footnote-ref-1017)
1017. 1017 Id. at 6. [↑](#footnote-ref-1018)
1018. 1018 Id. [↑](#footnote-ref-1019)
1019. 1019 543 F. Supp. 2d 563, 565 (E.D. La. 2008). [↑](#footnote-ref-1020)
1020. 1020 Id. [↑](#footnote-ref-1021)
1021. 1021 Id. [↑](#footnote-ref-1022)
1022. 1022 See id. at 567. The "borrowed employee" doctrine says, roughly, that an entity that is not the worker's nominal or payroll employer can nevertheless be deemed the employer if it exercises sufficient control over the worker. See generally Ruiz v. Shell ***Oil*** Co., 413 F.2d 310, (5th Cir. 1969). For a typical case, see Hotard v. Devon Energy Corp., No. 07-1476, 2008 WL 2228922, at 1 (W.D. La. May 29, 2008). Hotard held that an OCS platform operator that used a labor contractor to supply workers was the borrowing employer of an injured worker and thus immunized from tort liability by LHWCA § 5(a), 33 U.S.C. § 905(a) (made applicable to an OCS platform by the OCSLA extension, 43 U.S.C. § 1333( b)). [↑](#footnote-ref-1023)
1023. 1023 943 F.2d 528, 1992 AMC 2381 (5th Cir. 1991). [↑](#footnote-ref-1024)
1024. 1024 Id. at 534, 1992 AMC at 2390. [↑](#footnote-ref-1025)
1025. 1025 244 F. App'x 557, 2007 AMC 2102 (5th Cir. 2007). [↑](#footnote-ref-1026)
1026. 1026 Id. at 560-61, 2007 AMC at 2105-06. See our treatment of Prestenbach in 2007 Recent Developments, supra note 1, at 575. Note that although Prestenbach was an "unpublished" per curiam opinion, this did not seem to weaken its authority in the Short court's view. The published/unpublished distinction is strange and scary. [↑](#footnote-ref-1027)
1027. 1027 Short, 543 F. Supp. 2d at 569. [↑](#footnote-ref-1028)
1028. 1028 Id. [↑](#footnote-ref-1029)
1029. 1029 Id. [↑](#footnote-ref-1030)
1030. 1030 See also supra notes 486-487 and accompanying text. [↑](#footnote-ref-1031)
1031. 1031 529 F.3d 548 (5th Cir. 2008). [↑](#footnote-ref-1032)
1032. 1032 42 U.S.C. §§1651-1654 (2006). [↑](#footnote-ref-1033)
1033. 1033 Lane, 529 F.3d at 556 n.3. [↑](#footnote-ref-1034)
1034. 1034 502 F.3d 361 (5th Cir. 2007). [↑](#footnote-ref-1035)
1035. 1035 Id. at 362. [↑](#footnote-ref-1036)
1036. 1036 Id. [↑](#footnote-ref-1037)
1037. 1037 Id. at 362. [↑](#footnote-ref-1038)
1038. 1038 Id. at 362-63. [↑](#footnote-ref-1039)
1039. 1039 Id. at 363. [↑](#footnote-ref-1040)
1040. 1040 Id. at 365. [↑](#footnote-ref-1041)
1041. 1041 Id. at 365-66. [↑](#footnote-ref-1042)
1042. 1042 No. 07-60541, 2008 WL 3876233, at 1 (5th Cir. Aug. 20, 2008) (unpublished per curiam). [↑](#footnote-ref-1043)
1043. 1043 273 F. App'x 370, 371-72 (5th Cir. 2008) (per curiam). [↑](#footnote-ref-1044)
1044. 1044 288 F. App'x 949, 950, 952 (5th Cir. 2008) (unpublished per curiam). [↑](#footnote-ref-1045)
1045. 1045 261 F. App'x 663 (5th Cir. 2008) (per curiam). [↑](#footnote-ref-1046)
1046. 1046 Id. at 666-67. [↑](#footnote-ref-1047)
1047. 1047 33 U.S.C. § 920(a) (2006). [↑](#footnote-ref-1048)
1048. 1048 Franks Casing Crew & Rental Tools Inc. v. Dupre, 248 F. App'x 581, 584 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-1049)
1049. 1049 Id. [↑](#footnote-ref-1050)
1050. 1050 248 F. App'x 573 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-1051)
1051. 1051 See, e.g., 2007 Recent Developments, supra note 1, at 539-40, 580. [↑](#footnote-ref-1052)
1052. 1052 526 F. Supp. 2d 1324, 1328, 2008 AMC 1145, 1148 (S.D. Fla. 2007). [↑](#footnote-ref-1053)
1053. 1053 See 2006 Recent Developments, supra note 1, at 540. [↑](#footnote-ref-1054)
1054. 1054 522 F.3d 1148, 2008 AMC 982 (11th Cir. 2008). [↑](#footnote-ref-1055)
1055. 1055 Id. at 1149, 2008 AMC at 983. [↑](#footnote-ref-1056)
1056. 1056 Id. [↑](#footnote-ref-1057)
1057. 1057 Id. at 1149-50, 2008 AMC at 983. [↑](#footnote-ref-1058)
1058. 1058 Id. at 1150, 2008 AMC at 984. [↑](#footnote-ref-1059)
1059. 1059 Id., 2008 AMC at 983-84. [↑](#footnote-ref-1060)
1060. 1060 Id., 2008 AMC at 984. [↑](#footnote-ref-1061)
1061. 1061 Id. [↑](#footnote-ref-1062)
1062. 1062 476 U.S. 858, 1986 AMC 2027 (1986). [↑](#footnote-ref-1063)
1063. 1063 See id. [↑](#footnote-ref-1064)
1064. 1064 536 F.3d 351, 2008 AMC 1933 (5th Cir. 2008). [↑](#footnote-ref-1065)
1065. 1065 Id. at 353, 2008 AMC at 1933. [↑](#footnote-ref-1066)
1066. 1066 243 F. App'x 16, 20-21 (5th Cir. 2007) (per curiam). [↑](#footnote-ref-1067)
1067. 1067 Id. at 18-19. [↑](#footnote-ref-1068)
1068. 1068 Id. at 19. [↑](#footnote-ref-1069)
1069. 1069 Id. at 20. [↑](#footnote-ref-1070)
1070. 1070 Id. [↑](#footnote-ref-1071)
1071. 1071 350 U.S. 124, 1956 AMC 9 (1956). [↑](#footnote-ref-1072)
1072. 1072 See Butterfly, 243 F. App'x 16. [↑](#footnote-ref-1073)
1073. 1073 Id. at 20-21 (citations omitted). [↑](#footnote-ref-1074)
1074. 1074 No. 06-2377, 2007 WL 2710809, at 2 (E.D. La. Sept. 12, 2007). [↑](#footnote-ref-1075)
1075. 1075 70 U.S. (3 Wall.) 164, 173, 2008 AMC 1811, 1815 (1865). [↑](#footnote-ref-1076)
1076. 1076 Bollinger, 2007 WL 2710809, at 3. [↑](#footnote-ref-1077)
1077. 1077 508 F.3d 586, 2008 AMC 100 (11th Cir. 2007). [↑](#footnote-ref-1078)
1078. 1078 See The Louisiana, 70 U.S. (3 Wall.) 164, 2008 AMC 1811. [↑](#footnote-ref-1079)
1079. 1079 Fischer, 508 F.3d at 593, 2008 AMC at 106. [↑](#footnote-ref-1080)
1080. 1080 Id. [↑](#footnote-ref-1081)
1081. 1081 See The Sabine, 101 U.S. 384, 384 (1879). [↑](#footnote-ref-1082)
1082. 1082 268 F. App'x 901, 902-03 (11th Cir. 2008) (per curiam). [↑](#footnote-ref-1083)
1083. 1083 Id. [↑](#footnote-ref-1084)
1084. 1084 See 2007 Recent Developments, supra note 1, at 573-74 (addressing Pemeno Shipping Co. v. Louis Dreyfus Corp., 238 F. App'x 6 (5th Cir. 2007) (per curiam)). [↑](#footnote-ref-1085)
1085. 1085 See Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 1928 AMC 61 (1927); Louisiana ex rel. Guste v. M/V Testbank, 752 F.2d 1019, 1022, 1985 AMC 1521, 1525 (5th Cir. 1985) (en banc). [↑](#footnote-ref-1086)
1086. 1086 238 F. App'x at 7-8. [↑](#footnote-ref-1087)
1087. 1087 Id. at 7. [↑](#footnote-ref-1088)
1088. 1088 520 F.3d 409, 2008 AMC 975 (5th Cir. 2008) (per curiam). [↑](#footnote-ref-1089)
1089. 1089 It is true that the court of appeals did not need to expend too much effort in the process. Its per curiam opinion is a single substantive paragraph adopting the "excellent" opinion of the district court. It attached Judge Vance's order, filling four and a half pages in the Federal Reporter, and that becomes the real opinion for the Fifth Circuit. [↑](#footnote-ref-1090)
1090. 1090 Robins Dry Dock, 275 U.S. 303, 1928 AMC 61. [↑](#footnote-ref-1091)
1091. 1091 Norwegian, 520 F.3d at 411, 2008 AMC at 177. [↑](#footnote-ref-1092)
1092. 1092 Id. at 413-14, 2008 AMC 180. [↑](#footnote-ref-1093)
1093. 1093 Id. at 413, 2008 AMC at 180. [↑](#footnote-ref-1094)
1094. 1094 Cong. Rec. E1282 (daily ed. June 20, 1997) (statement of Rep. McDade). [↑](#footnote-ref-1095)
1095. 1095 Id. [↑](#footnote-ref-1096)
1096. 1096 46 U.S.C. app. § 762 (2000). [↑](#footnote-ref-1097)
1097. 1097 But compare Mellor v. Moe, No. 06-61841-CIV, 2007 WL 2883784, 2008 AMC 370 (S.D. Fla. 2007), in which the court assessed the value of a twenty-one-year-old's lost services to his parents over their life expectancy as $ 152,958. Id. at 7, 2008 AMC at 379. The deceased was killed in a collision between the jet ski he was operating and a motorboat in Bahamas waters. Id. at 1, 2008 AMC at 371. (It is well-settled that DOHSA applies in foreign territorial waters.) The services that the twenty-one-year-old's death deprived his parents of included "mowing the lawn, shoveling snow, caring for the dogs, and driving his [younger] brother to dentist appointments and friend's houses." Id. at 6, 2008 AMC at 378. [↑](#footnote-ref-1098)
1098. 1098 See Mobil ***Oil*** Corp. v. Higginbotham, 436 U.S. 618, 1978 AMC 1059 (1978) (discussing application of federal law); Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 1986 AMC 2113 (1986) (discussing application of state law). [↑](#footnote-ref-1099)
1099. 1099 Dooley v. Korean Air Lines Co., 524 U.S. 116, 1998 AMC 1940 (1998). [↑](#footnote-ref-1100)
1100. 1100 46 U.S.C. § 30307 (2006). [↑](#footnote-ref-1101)
1101. 1101 Id. [↑](#footnote-ref-1102)
1102. 1102 See id. [↑](#footnote-ref-1103)
1103. 1103 See supra Part II.E; 2007 Recent Developments, supra note 1, at 501; 2006 Recent Developments, supra note 1, at 472. [↑](#footnote-ref-1104)
1104. 1104 Brown v. Eurocopter S.A., 111 F. Supp. 2d 859, 862, 1999 AMC 1949, 1950 (S.D. Tex. 2000). [↑](#footnote-ref-1105)
1105. 1105 See Rowan Cos. v. Houston Helicopters, Inc., Nos. 06-10755, 07-3350, 07-3351, 2007 WL 3046207, at 3 (E.D. La. Oct. 16, 2007); Alleman v. Omni Energy Servs. Corp., 512 F. Supp. 2d 448, 459 n.4 (E.D. La. 2007). [↑](#footnote-ref-1106)
1106. 1106 See 46 U.S.C. § 30307 (2006). [↑](#footnote-ref-1107)
1107. 1107 498 U.S. 19, 1991 AMC 1 (1990). [↑](#footnote-ref-1108)
1108. 1108 391 F.3d 660, 2005 AMC 96 (5th Cir. 2004). [↑](#footnote-ref-1109)
1109. 1109 See Sea-Land Servs., Inc. v. Gaudet, 414 U.S. 573, 1973 AMC 2572 (1974). In re American River Transportation Co., 490 F.3d 351, 2007 AMC 1593 (5th Cir. 2007), held that longshore workers' family members recover damages for loss of society only if they can show they were financially dependent on the deceased worker. See 2007 Recent Developments, supra note 1, at 582. [↑](#footnote-ref-1110)
1110. 1110 See, e.g., Nunez v. Forest ***Oil*** Corp., Nos. 07-6850, 07-7089, 2008 WL 2522121, at 2 (E.D. La. June 20, 2008) (stating that a widow would be entitled to seek damages for "loss of consortium" if the deceased worker was a longshoreman but not if he was a seaman). [↑](#footnote-ref-1111)
1111. 1111 See 2007 Recent Developments, supra note 1, at 586-87. [↑](#footnote-ref-1112)
1112. 1112 No. G-05-CV-579, 2007 WL 2021738 (S.D. Tex. July 10, 2007). [↑](#footnote-ref-1113)
1113. 1113 Id. at 1. [↑](#footnote-ref-1114)
1114. 1114 Id. [↑](#footnote-ref-1115)
1115. 1115 Id. [↑](#footnote-ref-1116)
1116. 1116 Id. at 6. [↑](#footnote-ref-1117)
1117. 1117 Id. at 4. [↑](#footnote-ref-1118)
1118. 1118 Id. at 6. [↑](#footnote-ref-1119)
1119. 1119 DeLeon v. Shih Wei Nav. Co., 269 F. App'x 487, 2008 AMC 1200 (5th Cir. 2008) (per curiam). [↑](#footnote-ref-1120)
1120. 1120 See 2007 Recent Developments, supra note 1, at 586. [↑](#footnote-ref-1121)
1121. 1121 269 F. App'x 487, 2008 AMC 1200. [↑](#footnote-ref-1122)
1122. 1122 Id. at 488-89, 2008 AMC at 1201-02. [↑](#footnote-ref-1123)
1123. 1123 Id. at 489, 2008 AMC at 1203. [↑](#footnote-ref-1124)
1124. 1124 Porina v. Marward Shipping Co., 521 F.3d 122, 2008 AMC 913 (2d Cir. 2008). [↑](#footnote-ref-1125)
1125. 1125 See also 2001 Recent Developments, supra note 1, at 242-44; 2002 Recent Developments, supra note 1, at 586-88. [↑](#footnote-ref-1126)
1126. 1126 265 F. App'x 402 (5th Cir. 2008) (per curiam). [↑](#footnote-ref-1127)
1127. 1127 Id. at 403 (internal quotation marks and footnote omitted). [↑](#footnote-ref-1128)
1128. 1128 No. 07-3671, 2007 WL 3046638 (E.D. La. Oct. 18, 2007). [↑](#footnote-ref-1129)
1129. 1129 Id. at 4 (footnote omitted). [↑](#footnote-ref-1130)
1130. 1130 517 F.3d 246, 2008 AMC 635 (5th Cir. 2008) (per curiam). [↑](#footnote-ref-1131)
1131. 1131 545 F.3d 304 (5th Cir. 2008) (en banc). [↑](#footnote-ref-1132)
1132. 1132 Id. at 307, 319. [↑](#footnote-ref-1133)
1133. 1133 276 F. App'x 916, 2008 AMC 2999 (11th Cir. 2008). [↑](#footnote-ref-1134)
1134. 1134 46 U.S.C. §§30901-30918 (2006). [↑](#footnote-ref-1135)
1135. 1135 28 U.S.C. § 2680(a) (2006). [↑](#footnote-ref-1136)
1136. 1136 Capt. Chance, Inc. v. United States, 506 F. Supp. 2d 1196, 1201 & n.5, 2007 AMC 1995, 1998 & n.5 (M.D. Fla. 2007). [↑](#footnote-ref-1137)
1137. 1137 520 F.3d 384 (5th Cir. 2008). [↑](#footnote-ref-1138)
1138. 1138 513 F.3d 135 (5th Cir. 2007). [↑](#footnote-ref-1139)
1139. 1139 494 F.3d 1006, 2007 AMC 2326 (11th Cir. 2007). [↑](#footnote-ref-1140)
1140. 1140 Id. at 1008, 2007 AMC at 2328. [↑](#footnote-ref-1141)
1141. 1141 Id. at 1011, 2007 AMC at 2331-32. [↑](#footnote-ref-1142)
1142. 1142 534 F.3d 398, 2008 AMC 1746 (5th Cir. 2008). [↑](#footnote-ref-1143)
1143. 1143 33 U.S.C. § 1901 (2006). [↑](#footnote-ref-1144)
1144. 1144 524 F. Supp. 2d 1378, 2008 AMC 661 (S.D. Fla. 2007). [↑](#footnote-ref-1145)
1145. 1145 Id. at , 2008 AMC at 664-65. [↑](#footnote-ref-1146)
1146. 1146 Nos. 06-10755, 07-3350, 07-3351, 2007 WL 3046207, at 1-2 (E.D. La. Oct. 16, 2007). [↑](#footnote-ref-1147)
1147. 1147 Id. at 4. [↑](#footnote-ref-1148)