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Workshop M

***CONSTRUCTION MARITIME RISKS AND
INSURANCE***

Presented by

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Wednesday, November 10, 9 a.m.–noon

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Mr. Liantonio is one of the presenters for Workshop M, "Construction Maritime Risks and Insurance," on Wednesday morning. He is a litigator with experience in many diverse areas of law. With more than 20 years of experience in the maritime field, including work as a marine surveyor, he has handled a variety of energy and marine claims involving collisions, towage, limitation of liability, oil pollution, salvage, personal injury, wrongful death, property damage, pipelines, drilling and completion, reservoir damage, charter parties, master service agreements, drilling contracts, operating agreements, and other similar claims. Mr. Liantonio has experience defending professional liability claims against, among others, surveyors and insurance professionals. Other areas of litigation experience include environmental, toxic tort, federal whistle-blower, and trucking claims.

In addition to litigating claims, Mr. Liantonio regularly advises clients on contractual and general business issues. He regularly drafts and negotiates maritime and oilfield contracts, including vessel construction and repair contracts, and has defended corporate criminal investigations. Mr. Liantonio has appeared in federal and state courts in Louisiana and Texas and before the National Transportation Safety Board, the Minerals Management Service, and the United States Coast Guard.

He is active in firm management, previously serving as both a leader of the Marine and Energy Practice Team and the Litigation Practice Group. He was recently elected to the firm's Executive Committee.

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Mr. Spansel is one of the presenters for Workshop M, "Construction Maritime Risks and Insurance," on Wednesday morning. In his trial practice, Mr. Spansel concentrates in the areas of environmental and toxic tort, complex, class action, energy, and marine litigation. He served as a member of the firm's executive committee, serving as its chairman in 1999, and has served as the team leader for the Marine and Energy Practice Team.

Mr. Spansel frequently lectures on maritime law and offshore, oil field liabilities at professional and industry seminars including the Petroleum Insurance & Environmental Protection Conference, the Construction Insurance Conference, the Dallas Bar Association—Energy Law Section, the Loyola Longshore Conference, and the PSAM-II (an international conference devoted to the design and operation of technological systems and processes). Twice a year he chairs the Forum on Litigation in the Gulf South (Fall—Dallas, Spring—San Antonio), a seminar hosted by Adams and Reese. He is the coauthor of several articles on maritime law appearing in *The Risk Report*, published by International Risk Management Institute, Inc.

Mr. Spansel received his Juris Doctor from Tulane University Law School in 1978.

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CONSTRUCTION MARITIME RISKS AND INSURANCE

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APPLICABLE LAWS

- Jones Act
- Unseaworthiness
- Wages, maintenance and cure
- Maritime tort
- Submerged lands and the Outer Continental Shelf
- Death on the High Seas Act
- Statutory compensation laws



IDENTIFICATION OF AVAILABLE REMEDIES

- Status of the Plaintiff
 - Seaman
 - Longshoreman
 - Other
- Status of the Defendant
 - Employer
 - Non-Employer
 - Vessel Owner
 - Non-Vessel Owner
- Situs of Accident
 - Land
 - Vessel
 - Platform
 - Within or beyond state territorial waters
 - Within or beyond three mile limit

JONES ACT

- 46 USC 688 ET SEQ.
 - Must be brought by injured seaman or survivors
 - Action is against employer for negligence
 - Employer can be direct, payroll, or borrowing
 - Suit can be brought in state or federal court in which the employer engages in business activity
 - Seaman has right to elect a jury trial; Jones Act defendant does not

JONES ACT

- Elements of Proof:
 - Employer – employee relationship must exist
 - Employee must be a “seaman”
 - Seaman must be injured in the “course and scope” of his employment
 - Must be negligence on the part of the employer, employees or agents
 - Negligence must contribute in whole or in part (even the slightest) to the injury or death; not proximate cause
 - Situs of accident is not controlling



JONES ACT STATUS

- More or less permanent assignment or perform substantial part of work duties
- Specific vessel or fleet of vessels
- In navigation
- Under common ownership or control
- Work in furtherance of overall function of the vessel

SEAMAN STATUS

- Duties contribute to function of vessel or accomplishment of its mission
- Substantial connection (in duration and nature) to a vessel in navigation or an identifiable group
- Ultimate inquiry is whether worker is a member of the vessel's crew or a land-based employee who happens to be working on a vessel

CHANDRIS v. LATSIS (U.S. SUPREME COURT 1995)

SEAMAN STATUS

"Rule of Thumb"

- **A worker who spends less than thirty percent (30%) of his time in the service of a vessel in navigation should not qualify as a Jones Act seaman**



CHANDRIS v. LATSIS (U.S. SUPREME COURT 1995)

PERMANENT ASSIGNMENT

- **Determined in the context of worker's entire employment with his current employer**
- **Does not preclude consideration of shorter period if permanent job assignment occurs**

SPECIFIC VESSEL OR FLEET

- Identifiable vessel or fleet of vessels
- Acting together or under common control



VESSEL STATUS

- **Vessel** - Traditionally refers to structures designed or utilized for transportation of passengers, cargo or equipment from place to place across navigable waters.
- **General Vessel Status Test** - In evaluating whether a structure is a vessel, courts examine the purpose for which the craft is constructed and the business in which it is engaged



VESSEL STATUS

- Factors to consider in determining whether given structure is a vessel:
 - Navigational aids
 - Raked bow
 - Lifeboats and other life-saving equipment
 - Bilge pumps
 - Crew quarters
 - Registration as a vessel with the Coast Guard
 - Intention of owner to move structure on regular basis
 - Ability of submerged structure to be refloated
 - Length of time structure has remained stationary



VESSEL STATUS

Floating structure may not be considered a vessel when:

1. Structure was constructed and used primarily as a work platform
2. Structure was moored or otherwise secured at time of accident
3. Structure was capable of movement, but the transportation function was merely incidental to primary purpose of serving as work platform

STEWART v. DUTRA CONSTRUCTION

U.S. Supreme Court to answer in 2004:

- **When is floating construction equipment a “vessel” within the meaning of the Jones Act?**

NAVIGABLE WATERS

- **Capable of commercial travel**
- **Between states or other countries**
- **Directly or with connecting waters**

JONES ACT DAMAGES

- **Loss of past and future wages**
- **Impairment of future earning capacity**
- **Medical expenses**
- **Past and future pain, suffering, disability, humiliation, and mental anguish**
- **No punitive damages**
- **Prejudgment interest may be awarded in non-jury cases, but**
- **Not in jury trials, where interest is awarded from date of judgment**

JONES ACT DEFENSES

- **Comparative negligence of the seaman**
- **No assumption of risk**
- **Three (3) year statute of limitation**

UNSEAWORTHINESS

- A strict liability remedy to compensate for injury or death of a seaman caused by a vessel or vessel equipment not reasonably fit for its intended use

UNSEAWORTHINESS

- Claim is against vessel, the owner, or bareboat charterer; time and voyage charterer do not owe the warranty unless they exercise a high degree of control over the operation of the vessel
- Suit may be brought in state or federal court (except that *in rem* claims must be brought in federal court)
- No jury unless claim is coupled with Jones Act claim or there is diversity of citizenship in federal court

UNSEAWORTHINESS

Elements of the Claim:

- 1. Seaman or one who performs traditional duties of a seaman and is not covered by the LHWCA**
- 2. Vessel in navigation**
- 3. Breach of the warranty of seaworthiness**
 - **duty is absolute, continuing, and non-delegable**
 - **warranty extends to the ship's hull, gear, stowage, appurtenances, appliances, passageways, cargo, and**
- 4. Causation - proximate cause**

UNSEAWORTHINESS

DAMAGES

- 1. Same as under the Jones Act**
- 2. Prejudgment interest is discretionary, but generally awarded**
- 3. Punitive damages not recoverable against employer, but may be recoverable against non-employer vessel owner or bareboat charter**

UNSEAWORTHINESS

DEFENSES

- 1. Comparative negligence**
- 2. Operational negligence**
- 3. Vessel not in navigation**
 - withdrawn from navigation for substantial repairs
 - launched but incomplete vessel
 - undergoing sea trials
- 4. Three (3) year statute of limitation**

WAGES, MAINTENANCE & CURE

- Right is implicit in the contractual relationship between the seaman and the employer
- Designed to ensure recovery for seaman injured or who falls ill while in the service of the vessel
- Seaman may bring claim against employer or vessel
- Can be filed in state or federal court, except that *in rem* claims must be filed in federal court
- No jury unless coupled with Jones Act claim

WAGES, MAINTENANCE & CURE

WAGES

- Payable to the end of the voyage
- “Voyage” depends upon articles and custom
- Wage withheld without sufficient cause gives rise to liability under the double wage penalty law

WAGES, MAINTENANCE & CURE

MAINTENANCE

- Per diem living allowance payable until maximum cure – the point beyond which further medical treatment will not improve the seaman’s condition
- Value of room and board while aboard the vessel
- Rate can be an issue at trial
- Union contract rates are still enforceable in the 5th Circuit

WAGES, MAINTENANCE & CURE

CURE

- **Cost of necessary medical expenses**
- **Medical, therapeutic and hospital expenses are owed until the seaman reaches the point of maximum cure**
- **Obligation ends when condition is incurable or future treatment will merely relieve pain**

WAGES, MAINTENANCE & CURE

- **Elements of the claim:**
 - Liability without fault
 - Seaman must be “in the service of the vessel.” Issue is whether seaman is “answerable to the call of duty.”
- **Defenses:**
 - Laches
 - Gross intoxication - must be sole cause or willful and wanton. “Ordinary” drunkenness is acceptable.
 - Willful misconduct and fighting
 - Venereal disease
 - Conscious concealment of a relevant, known prior disability
 - No actual expenditures - seaman who lives with parents

MARITIME TORT

- **Provides a remedy for personal injuries occurring on navigable waters**
- **A maritime negligence action must be brought by the injured party or his spouse, where recovery for loss of society is permitted**
- **A claim for maritime tort may be brought against the vessel, person or corporation committing the tort**

ELEMENTS OF THE CLAIM

- **Situs of the Accident - The accident must occur on navigable waters**
- **Situs of the Negligent Act - The location of the injury may be irrelevant; courts look instead to where the "substance and consummation of the occurrence giving rise to the injuries" occurred**
- **The circumstances surrounding the accident must be significantly related to traditional maritime activity**
- **Negligence - Plaintiff must establish that the defendant breached the standard of reasonable care under the circumstances**
- **The injury must be proximately caused by the negligence of defendant**

DAMAGES

- **General and special damages** - loss of past and future wages, impairment of future earning capacity, medical expenses, pain, suffering, disability, humiliation and mental anguish.
- Courts are divided on loss of consortium or society. However, the spouse of a Jones Act seaman may not assert such a claim.
- Prejudgment interest is usually allowed, but is within the discretion of the court.
- Courts are divided on whether punitive damages can be recovered in an action under the General Maritime Law. Courts generally require willful and wanton acts performed or ratified by a representative of the defendant with decision-making authority. However, a Jones Act seaman or his survivors may not recover punitive damages against the employer.

PERTINENT DEFENSES

- **Comparative Negligence**
- **Time Limitation**

Suit must be filed within three years from the date that death or injury occurs

LONGSHORE AND HARBOR WORKERS COMPENSATION ACT

- **Compensation remedy against employer for injury or death occurring in course and scope of employment**
- **Maritime employment (status)**
- **Navigable waters of the U.S. or adjoining areas (situs)**
- **Excludes Jones Act seamen**

JONES ACT AND LONGSHORE ACT

- **Benefits are mutually exclusive**
- **Workers specified by Longshore Act not excluded from Jones Act status**

- **Longshoremen**
 - Longshore and Harbor Workers Compensation Act
- **Seamen**
 - Jones Act
 - Unseaworthiness
 - Wages, maintenance and cure

LONGSHORE AND HARBOR WORKERS COMPENSATION ACT

- **Elements of claim**
 - Maritime work (status and situs)
 - Injury
 - Course and scope of employment

LONGSHOREMAN

- **Status:**
 - Engaged in maritime employment
- **Situs:**
 - Upon navigable waters of the United States and adjoining areas

STATUS FOUND

- **Specifically included:**
 - Longshoremen/harbor workers
 - Ship repairmen
 - Shipbuilders
 - Ship-breakers



STATUS FOUND

- Others engaged in maritime employment:
 - Construction workers
 - Chippers
 - Maintenance workers
 - General managers of shipyards
 - Machinists
 - Pipefitters
 - Sandblasters
 - Security guards – patrols on and off vessels
 - Sheet metal workers
 - Welders

STATUS NOT FOUND

- Specifically included:
 - Clerical secretarial
 - Security
 - Data processing
 - Recreational workers – camp, club & restaurant
 - Marina workers
 - Personnel building, repairing or dismantling recreational vessels under 65 feet in length or repairing small vessels under 18 tons
 - Individuals employed by suppliers, transporters or vendors who are temporarily performing their job on your premises
 - Master or member of crew of any vessel (seaman)

STATUS NOT FOUND

- **Others:**
 - Maintenance workers
 - Laborers
 - Cooks
 - Security guards
 - Mechanics
 - Machinists
 - Truck drivers

SITUS

AREAS COVERED

- **Specifically included:**
 - Pier
 - Warf
 - Drydock
 - Terminal
 - Building way
 - Marine railway
 - Other adjoining areas customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel



SITUS

AREAS COVERED

- **Others:**
 - Fabrication shop
 - Sheet metal shop
 - Steel fabrication plant
 - Scrapyard
 - Maintenance and storage buildings
 - Public highways adjoining employer's facility



SITUS

AREAS NOT COVERED

- **Offices**
- **Steel fabrication plants**
- **Public streets**
- **Shipyards shops not used in shipbuilding**

BENEFITS UNDER THE LHWCA

- 1. Medical Benefits**
- 2. Compensation Benefits**
 - Temporary
 - Permanent Partial
 - Permanent Total
- 3. Death Benefits**

DEFENSES

- **Classes of workers specifically excluded**
- **Intoxication**
- **Suicide**
- **Intent to injure another**
- **Failure to give written notice within 30 days**
- **Failure to file claim within one year**
- **Election of state benefits**

EMPLOYER MUST PROVIDE LONGSHORE COVERAGE

- If an employer fails to obtain longshore coverage, an injured employee or his survivors may elect compensation under the Longshore Act or may file an action at law or in admiralty for damages; should such an action be filed, the employer may not use the following defenses:
 - Negligence of a co-employee
 - Assumption of the risk
 - Contributory negligence

SIGNIFICANT DIFFERENCES BETWEEN LONGSHORE AND STATE COMPENSATION ACT

- Coverage limited to areas on, around or near water
- Higher benefits – longer time
- Administration by federal bureaucracy
- More paperwork
- More difficult to settle
- Civil and criminal penalties

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MARITIME EXPOSURES AND LAW

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INTRODUCTION

The abundance of petroleum resources in the Gulf Coast region attracted the attention of the petroleum industry early in the history of oil exploration in the United States. As early as the 1930's, extensive onshore oil production was underway in Louisiana and Texas with expansion to offshore exploration and development occurring within the next decade. Offshore activity has continued to develop, and today, an overwhelming majority of offshore oil exploration in the United States is conducted in the waters off the coasts of Alabama, Louisiana, Mississippi and Texas.

Because of the ports in Houston, New Orleans, and Mobile, courts in those areas were fundamental in developing maritime remedies applicable to casualty losses involving maritime commerce. It is not surprising that the same courts began to apply maritime principles to oilfield activity as it first became amphibious in Louisiana's marshlands, and later went offshore to the Outer Continental Shelf of the United States. Therefore, American maritime principles control the rights of the parties in some controversies arising from casualty losses during operations related to offshore oil and gas exploration, development, production, and transportation. Accordingly, it is important that anyone dealing with casualty risks arising from oilfield activity have an awareness of the American maritime system.

HISTORY AND DEVELOPMENT OF AMERICAN MARITIME LAW RELEVANT TO OILFIELD ACTIVITY

The laws applicable to offshore oilfield risks are primarily the same laws that apply to the overall maritime industry. A review of the historical development of these laws may be helpful in understanding their application to the offshore oilfield industry.

Maritime law has its origin in the ancient sea codes, which developed in response to the need to regulate seagoing commerce. Since the adoption of the United States Constitution in 1784, by congressional enactments and court decisions, the United States has developed a workable body of maritime law, drawing heavily on the historical development of admiralty law in England.

The obligation of employers to pay wages, maintenance and cure may be traced back to the medieval sea codes. This obligation was recognized in the United States as early as 1823. Maintenance and cure is designed to provide the seaman with food, lodging and medical care when he becomes ill or injured in the service of the vessel. The seaman's entitlement arises when he becomes incapacitated and continues until he reaches maximum medical recovery. The obligation to pay wages continues to the end of voyage.

Another long-standing duty of vessel owners has been to furnish a seaworthy vessel. Originally, unseaworthy conditions merely gave the seaman a privilege to leave the service of the vessel without incurring the penalty for desertion and without forfeiting his wages. Until late in the 19th Century, the vessel owner's obligation to provide maintenance and cure marked the limit of his liability to seamen injured as a result of either the vessel's unseaworthiness or negligence on the part of the master and fellow crew members. In 1903,

the United States Supreme Court recognized the right to recover damages for injuries caused by unseaworthiness. The Court held that both the vessel and its owner are "liable to an indemnitee for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." *THE OSCEOLA*, 189 U.S. 158 (1903).

In 1920, the United States Congress enacted legislation in consequence of the growth of merchant marine activities immediately following World War I. In that year, it passed the Jones Act and the Death on the High Seas Act, both of which have played an important role in the development of maritime law.

With the passage of the Jones Act in 1920, claims based on unseaworthiness diminished. The Jones Act entitled a seaman who sustained personal injury or death in the course of his employment to maintain, at his election, an action for negligence against his employer, with a right to trial by jury. The phrase "at his election" was originally construed to mean that the plaintiff was required to elect between the Jones Act negligence remedy and the unseaworthiness remedy. The Jones Act became the predominant remedy as it provided the plaintiff with a right to trial by jury and a remedy for wrongful death which was not provided for under the general maritime law.

The law then evolved procedurally to allow an unseaworthiness action to be joined with a Jones Act action, and in more recent years, the unseaworthiness action has often been the primary basis for recovery, with the Jones Act being utilized to provide a jury.

Also in 1920, recognizing that there was no remedy for wrongful death under the General Maritime Law, Congress enacted the Death on the High Seas Act (DOHSA), providing a statutory remedy for wrongful deaths occurring on the high seas. DOHSA covers the death of any person caused by a wrongful act, neglect or default occurring on the high seas beyond a marine league from the United States, its territories or dependencies. The DOHSA remedy is not limited to seamen and an employment relationship is not a prerequisite. Nothing in DOHSA limits recovery to persons killed on a vessel. Thus, a person killed in an airplane accident on the high seas falls within the DOHSA rule to the same extent as one killed on vessels. DOHSA also differs from the Jones Act in that DOHSA does not have a survival provision authorizing recovery for pain and suffering sustained by the decedent prior to his death. The two acts also designate different beneficiaries for death actions.

Congress' next successful intervention into the field of maritime law came in 1927, with the enactment of the Longshoremen's and Harbor Workers' Compensation Act. During the prior ten years, Congress had unsuccessfully attempted to apply compensation acts of the various states to maritime workers. These attempts, however, were repeatedly struck down by the United States Supreme Court as being unconstitutional as an unauthorized delegation of federal authority over maritime matters to the various states that unduly interfered with the uniformity of maritime jurisdiction. In 1924, the Supreme Court suggested that Congress had the power to enact a comprehensive compensation remedy and stressed that such activity could not be delegated to the states.

The LHWCA, enacted in 1927, was modeled on the compensation statute of the State of New York and contained nothing novel in most of its substantive provisions. What was novel about the Act was a series of limitations on its coverage which left the relationship between the LHWCA and the state compensation laws in a state of confusion. The LHWCA provided compensation for injuries or deaths occurring on the navigable waters of the United States as long as recovery for the disability or death through compensation proceedings could not validly be provided by state law. As one might expect, litigation about the meaning of this last phrase was extensive.

In 1972, Congress substantially revised these provisions of the LHWCA relating to its coverage and consequently to its relationship to state acts. A substantial motivation in amending the act, however, was the desire to overturn a series of United States Supreme Court decisions which permitted injured maritime workers covered by the LHWCA to recover full damages (as distinguished from statutory compensation benefits) from vessel owners who, in turn, were entitled to be indemnified by the direct employers of the workers.

From 1927 until 1953, Congress made no legislative enactments in the area of maritime personal injury. In 1953, Congress passed the Submerged Lands Act and the Outer Continental Shelf Lands Act (OCSLA), making applicable the laws and jurisdiction of the United States to the subsoil and the seabed of the Outer Continental Shelf and to all artificial islands and fixed structures erected on the Shelf to explore for natural resources. Jurisdiction over the submerged lands lying within their historical seaward boundaries was reserved to the states. Beyond these boundaries, OCSLA provided that the laws of the various adjacent states would be adopted and applied as surrogate federal law to the extent that they were applicable and not inconsistent with existing federal law. The OCSLA also specifically made the LHWCA applicable to fixed drilling platforms on the Outer Continental Shelf. Those platforms situated within the territorial waters of a state remained, however, within the jurisdiction of the adjacent state.

Although Congress has been relatively silent since 1953, insofar as maritime personal injury litigation is concerned, the courts have been busy construing the statutes and creating new law. As the drilling industry moved offshore, the courts quickly recognized the similarity of offshore activity to other maritime activity and, therefore, began to apply maritime law to such activity. Perhaps the most significant legal development in this area was the classification of many drilling rigs and other oilfield special purpose vehicles as "vessels in navigation" and the people who work on them as "seamen and members of the crew" of such vessels. Jurisprudence applied the law of the adjoining states to controversies for which the federal maritime law did not otherwise provide. Additionally, in 1970, the United States Supreme Court created a non-statutory remedy in the maritime law for wrongful death.

The United States Supreme Court has continued to address important issues in recent terms that shape maritime law. For example, the Court has considered and clarified who are seamen and the rights and remedies of seamen and their families. In doing so, the Court focused on the interplay of statutes and general maritime law. The Court has also addressed other significant issues in recent years. The common thread in almost all of these cases has been the importance of uniformity in maritime law, which has and will continue to be an issue of concern to all in the maritime industry. This activity by the courts, both

supplementing and interpreting the existing maritime law, has created a complex system of laws governing the offshore drilling industry, which results in maritime exposures which are not easily recognized. Our purpose in the following discussion is to familiarize you with such exposures.

The remedies provided by American Maritime Law encompass a number of individual laws giving rise to a wealth of jurisprudential interpretation. Particular attention should be given to the subtle but extremely significant distinctions that exist among the various remedies. The topics discussed in the sections immediately following are intended to provide an immediate reference to each of the specific remedies available to persons engaged in offshore oilfield employment.

THE JONES ACT

A. Purpose of the Law

The Jones Act was enacted to provide a remedy for injury or death sustained by seamen or members of the crew of vessels caused by the negligence of their employers. Prior to its enactment in 1920, seamen could not recover from their employers for injuries caused by the negligence of their fellow crewmen. Both Congressional and judicial directives require that the Jones Act be "liberally construed" in favor of seamen. Seamen are considered to be "wards of the court", entitled to special solicitude.

B. Source of the Law

Title 46 of the United States Code §688, *et seq.* It adopts by reference the substantive provisions of the Federal Employer's Liability Act (FELA), Title 45 of the United States Code §51, *et seq.*

C. Parties

1) Who can bring the claim?

a) Injury

The action must be brought by the injured seaman. An injured seaman's spouse does not have a claim for loss of society or consortium under the Jones Act.

b) Death

The action must be brought by the personal representative of the decedent-seaman (an administrator or executor of the estate) as nominal party-plaintiff on behalf of the specified beneficiaries: surviving spouse and children; if none, the seaman's parents; and if none, the next of kin dependent on the seaman.

The spouse of the deceased seaman does not have a claim for loss of society or consortium under the Jones Act.

- 2) Against whom may the claim be brought?

The action for negligence under the Jones Act may be brought only against the seaman's employer. It may either be his direct, payroll employer or a borrowing employer or, in some instances, both. The employer need not be the owner of the vessel.

D. Jurisdiction

Suit may be brought in any federal or state court within whose jurisdiction the employer engages in business activity. A valid Jones Act claim filed in state court may not be removed by the defendant to federal court. The Jones Act gives only the injured seaman or his personal representative the right to elect a jury trial; a Jones Act defendant does not have that option.

E. Elements of the Claim

- 1) Seaman status

The U.S. Supreme Court has declared that the injured worker must prove the following to qualify as a Jones Act seaman:

- a) that he or she has a connection with a vessel* in navigation (or to an identifiable fleet or group of such vessels) which is substantial in terms of both its duration and nature; and
- b) that his or her job duties must contribute to the function of the vessel or its accomplishment of its mission during its movement or during anchorage.

- NOTE:
- i) The Supreme Court has rejected the requirement that the seaman be involved in the actual navigation or movement of the vessel.
 - ii) The duration of a worker's connection to a vessel or an identifiable fleet of vessels and the nature of the worker's activities determine whether a worker is a seaman, because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on a vessel at a given time.
 - iii) The Supreme court has approved "rule of thumb" that a worker who spends less than thirty percent (30%) of his or her time in the service of the vessel in navigation will not normally

qualify as a Jones Act seaman. However, this is a guideline and is open to challenge in particular circumstances.

*The term "vessel" has been broadly defined to include any kind of watercraft or equipment capable of being used for transportation on navigable waters. The controlling factors in determining whether equipment is a "vessel" are: the purpose for which it was constructed and the business in which it is engaged. A vessel is considered to be "in navigation" when it is engaged as an instrument of commerce or in transportation on navigable waters.

- 2) An employer-employee relationship must exist.
- 3) The accident or injury must occur while the seaman is in the "course and scope" of his employment.
- 4) There must be negligence on the part of the employer, or its employees or agents.
- 5) The negligence must contribute in whole or in part (even the slightest) to the injury or death; it need not be a proximate cause.
- 6) The situs of the accident is not controlling.

F. Pertinent Defenses

- 1) Comparative Negligence - The contributing negligence of the seaman reduces his or his survivors' recovery by the percentage of the negligence attributable to him. It does not bar recovery completely. (The common law doctrine of voluntary assumption of a known risk is not a defense under the Jones Act where negligence is established.)
- 2) Suit must be filed within three years of the accident.
- 3) The Oceanographic Research Vessels' Act, 46 U.S.C. 441, *et seq.* applies to those workers performing oceanographic research aboard oceanographic research vessels certified as such by the U.S. Coast Guard. These particular workers, although sometimes classified as seamen, may not be entitled to bring an action for negligence under the Jones Act.
- 4) A seaman injured while assigned to a vessel owned by or operated for the United States Government has his exclusive remedy against the United States. (Public Vessels Act, 46 USC 781 and Suits in Admiralty Act, 46 USC 741.)

G. Benefits

1) Injury

- a) When a seaman is injured, he is entitled to recover all general and special damages attributable to the accident, including loss of past and future wages, impairment of future earning capacity, medical expenses, pain, suffering, disability, humiliation and mental anguish.
- b) Loss of consortium or society is not allowed to the spouse of an injured seaman under the Jones Act.
- c) Non-pecuniary damages, such as loss of consortium and society, are not recoverable by the spouse or children of an injured seaman under the Jones Act.
- d) Non-pecuniary damages, such as punitive damages, are not recoverable by the seaman or the spouse or children of an injured seaman under the Jones Act.

2) Death

In wrongful death actions under the Jones Act, recovery is limited to the pecuniary or financial loss sustained by the designated beneficiaries. Recovery may include:

- a) Funeral expenses
- b) Loss of support - all financial contributions the decedent would have made to his dependents had he lived.
- c) Loss of services - the monetary value of services the decedent provided and would have continued to provide but for his wrongful death. Such services include, for example, the nurture, training, education, and guidance that a child would have received had the parent not been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable.
- d) The survivorship claim – seaman's lost wages to date of death; medical expenses and pain and suffering of the decedent before his death.
- e) Non-pecuniary losses such as loss of love, affection, society, care, comfort and companionship are not recoverable in a Jones Act negligence action regardless of where the death occurred.
- f) When an award for loss of earnings is made to the survivors of a seaman in a Jones Act death claim, it must be based upon the decedent's after tax income and must be discounted to its present

value. Evidence of the effect of inflation and wage increases due to cost of living, promotions, merit raises or productivity may be submitted to and considered by the jury.

- 3) Prejudgment interest from date of accident may be awarded where a Jones Act suit is filed under the court's admiralty jurisdiction. When the suit is filed at law (i.e., with a jury) interest is generally awarded only from date of judgment.

H. Special Considerations under the Jones Act

1) Claims By Non-U.S. Citizens

U.S. legislation prohibits actions under the Jones Act or other maritime law of the United States for maintenance, cure or damages for the injury to or death of an alien, who was not a permanent resident of the United States, if the incident occurred in the waters of a foreign nation while that person was in the employ of an enterprise engaged in the offshore mineral or energy industry. However, this prohibition does not apply if the person bringing the action establishes that no remedy is available under the laws of the nation asserting jurisdiction over the area where the incident occurred or under the laws of the worker's domicile or residence.

As to claims to which this legislation does not apply, the courts have now adopted a single and uniform approach in determining whether the Jones Act of General Maritime Law would be applied to accidents sustained by non-U.S. citizens.

The initial consideration is whether a foreign forum is available to provide an adequate remedy to the claimant. If so, the U.S. Court must weigh the relevant private and public interest factors to determine the relative convenience of it and the foreign forum.

Some of the private interest facts to be considered are:

- a) Relative access to sources of proof.
- b) Availability of witnesses.
- c) Availability of compulsory process.
- d) Cost of obtaining the testimony of willing witnesses.

Some of the public interest considerations are as follows:

- e) Administrative difficulties in handling the case in the U.S. forum.

- f) The interest of the U. S. Court in the controversy.
- g) The application of U.S. or foreign law.

2) Settlement Under The Jones Act

At one time, settlement of Jones Act claims were effected by court approval; otherwise, the defendant employer had a heavy burden of establishing that the plaintiff fully understood the rights available, the remedies available and the effect of the settlement.

Today, United States District Courts will usually refuse to make a determination of seaman's status in settlement proceedings. Therefore, settlements are generally effected by means of a *proces verbal* in which available rights are explained to the seaman, and he acknowledges his understanding of them and his willingness to enter into settlement.

If a settlement is subsequently challenged by the seaman, the defendant has the burden of establishing the validity of the release.

UNSEAWORTHINESS

A. Purpose of the Law

The shipowner's warranty of seaworthiness is imposed to compensate for injuries or deaths resulting from vessels and vessel appurtenances which are not reasonably fit for their intended use. The breach of the warranty of seaworthiness gives rise to a claim separate from a claim for negligence under the Jones Act.

B. Source of the Law

The warranty of seaworthiness is based upon the General Maritime Law of the United States. It had its origin in the ancient maritime codes and court decisions.

C. Parties

1) Who can bring the claim?

A seaman or one who performs traditional seaman's duties can bring a general maritime claim for unseaworthiness against an owner or bareboat charterer of a vessel in navigation. Since the 1972 amendment to the Longshore Act, longshoremen and other personnel covered by the Act are denied the right to bring a claim for unseaworthiness.

a) Injury

The action must be brought by the injured party. In certain cases, the spouse of a non-seaman may assert claims for non-pecuniary damages,

such as loss of society or consortium and punitive damages. However, a seaman's spouse may not assert such claims.

b) Death

The action must be brought by the personal representative of the decedent (an administrator or executor of the estate) as nominal party-plaintiff, on behalf of certain beneficiaries, the classification of which has not been definitively determined. However, the United States Supreme Court has suggested that the beneficiaries be financially dependent upon the decedent.

2) Against whom may the claim be brought?

An unseaworthiness claim may be brought against the vessel *in rem* and its owner and bareboat charterer *in personam*. Time and voyage charterers do not owe the warranty of seaworthiness, unless they exercise a high degree of control over the operation of the vessel.

D. Jurisdiction

Suit may be brought in any federal or state court within whose jurisdiction the owner or bareboat charterer engages in business activity. Due to an anomaly in American law, an *in rem* claim against a vessel for unseaworthiness may be brought only in federal court. Regardless, there is no right to a jury trial unless coupled with a Jones Act claim or brought under the court's diversity of citizenship jurisdiction.

E. Elements of the Claim

1) The warranty applies to a seaman or other worker who performs traditional seaman's duties and is not covered by the Longshore Act.

2) A Vessel

The term "vessel" has been broadly defined to include any kind of watercraft or equipment capable of being used for transportation on navigable waters. The controlling factors in determining whether equipment is a "vessel" are the purpose for which it was constructed, and the business in which it is engaged.

3) Vessel In Navigation

A vessel is considered to be "in navigation" when it is engaged as an instrument of commerce or in transportation on navigable waters.

4) Breach of The Warranty of Seaworthiness

The owner or bareboat charterer of a vessel has the absolute, continuing and non-delegable duty to provide a seaworthy vessel, that is, a vessel which is

reasonably fit for its intended use. The warranty extends to the ship's hull, gear, stowage, appurtenances, appliances, passageways, cargo and crew. Ships with inadequate, understaffed or ill-trained crews have been declared unseaworthy.

5) Causation

An unseaworthy condition must be a proximate cause of the accident.

6) Death Claims Occurring Within State Territorial Waters

In death claims only, the accident must occur within three nautical miles of the United States, its territories or dependencies. However, death claims resulting from unseaworthiness are also included in the Death on the High Seas Act discussed below.

F. Pertinent Defenses

- 1) Comparative Negligence - The contributing negligence of the injured or deceased party reduces his or his survivor's recovery by the percentage of the negligence attributable to him. It does not bar recovery completely.
- 2) Operational Negligence - An accident resulting from operational negligence which does not create a permanent or transitory condition aboard a vessel is not actionable as a breach of the warranty of seaworthiness. However, transitory conditions on a vessel can make the vessel unseaworthy. Neither the lack of knowledge nor lack of control over the condition is a defense, since liability is imposed without regard to fault.
- 3) Vessel Not In Navigation - The obligation to provide a seaworthy vessel does not apply to a vessel which has been withdrawn from navigation or which is undergoing substantial repairs. So too, the obligation to provide a seaworthy vessel is not imposed upon the shipowner when the vessel is launched but incomplete, or when it is undergoing sea trials.
- 4) Time Limitation - Suit must be filed within three years from the date that death or injury occurs. Claims arising before October 6, 1980 are governed by the doctrine of laches. Under this doctrine, a mere delay in asserting a maritime claim does not bar it, unless the delay is unreasonable and the party against whom it is asserted is unduly prejudiced. One factor to be considered in determining whether laches bars the action is whether the analogous statute of limitations has expired. If so, the burden of proof to establish lack of prejudice and excusable delay shifts to the plaintiff.
- 5) Assumption of The Risk - The common law doctrine of voluntary assumption of a known risk is not a defense under the General Maritime Law.

- 6) Misuse - A shipowner is not liable for an accident resulting from the improper use of seaworthy equipment.

G. Benefits

- 1) Injury
- a) When a worker is injured as a result of an unseaworthy condition, he is entitled to recover all general and special damages attributable to the accident, including loss of past and future wages, impairment of future earning capacity, medical expenses, pain, suffering, disability, humiliation and mental anguish.
- b) In certain cases, the spouse of an injured non-seaman who is entitled to the warranty of seaworthiness has a right to recover non-pecuniary damages, such as loss of consortium or society and punitive damages. However, the spouse of a Jones Act seaman does not have such claims.

2) Death

In wrongful death actions based on unseaworthiness, recovery is not limited to pecuniary loss. However, survivors of decedents covered by the Jones Act or DOHSA may not recover non-pecuniary damages.

Recoverable elements of damage are:

- a) Funeral expenses
- b) Loss of support - all financial contributions the decedent would have made to his dependents had he lived.
- i) When an award for loss of future earnings is made to the survivors of a worker, it must be based upon the decedent's after-tax income and must be discounted to its present value. Evidence of the effect of inflation and wage increases due to cost of living, promotions, merit raises or productivity may be submitted to and considered by the jury.
- c) Loss of services - the recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death. Such services include, for example, the nurture, training, education, and guidance that a child would have received had the parent not been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable.
- d) Loss of Society/Consortium – It is unclear whether loss of society and consortium damages are recoverable under the general maritime law. Several state and federal courts have disagreed on this issue. If

recoverable, loss of society and consortium damages may include loss of love, affection, attention, companionship, care, comfort and protection. However, in actions covered by the Jones Act or DOHSA, these non-pecuniary damages are generally not recoverable.

- e) The Survivorship Claim — including lost wages to date of death; medical expenses and pain and suffering of the decedent before his death. However, a claimant can no longer supplement a DOHSA action with a claim for pre-death pain and suffering under the general maritime law.

3) Prejudgment Interest

Prejudgment interest is usually allowed, but the denial thereof is within the discretion of the court.

4) Punitive Damages

It is unclear whether punitive damages are recoverable under the general maritime law. Several state and federal courts has disagreed on this issue. Courts allowing punitive damages generally require a showing of willful and wanton acts be performed or ratified by a representative of the defendant with decision-making authority. However, a Jones Act seaman or his survivors may not recover punitive damages against the employer.

WAGES, MAINTENANCE AND CURE

A. Purpose of the Law

A seaman's right to wages, maintenance and cure is implicit in the contractual relationship between the seaman and his employer, and is designed to insure recovery by a seaman who is injured or falls ill in the service of the vessel. It is intended to compensate him for wages until the end of the voyage (wages), the value of his room and board while aboard the vessel (maintenance), and necessary medical expenses (cure).

B. Source of the Law

The right to wages, maintenance and cure has its origin in the ancient sea codes and was later adopted by the United States general maritime law.

C. Parties

A seaman may bring an action for wages, maintenance and cure either against his employer *in personam* or against the vessel *in rem* (even if the owner of the vessel is not the seaman's employer). The lien which arises against the vessel for a seaman's wages, maintenance and cure is of the highest order, even ahead of a salvage claim, and has been characterized as a super-priority lien that is "sacred and indelible."

D. Jurisdiction

A claim for wages, maintenance and cure against the employer under the General Maritime Law may be brought in any federal or state court where the employer conducts business activities. If brought against the vessel *in rem*, the action may be brought only in Federal Court. If brought as the sole cause of action in Federal Court under the admiralty jurisdiction of the court, trial by jury is not permitted. However, it is generally coupled with a claim under the Jones Act, and if so, may be tried before a jury. Additionally, the negligent failure by the employer of a seaman to pay maintenance and cure may form the basis for a Jones Act claim which brings with it the right to trial by jury.

E. Elements of Claim

The obligation to pay wages, maintenance and cure is a form of liability without fault which arises without regard to the negligence of the employer or the unseaworthiness of the vessel. Moreover, the law provides that wages, maintenance and cure benefits are not diminished by the sole or contributing negligence of the injured seaman.

The incident giving rise to the injury must occur while the seaman is "in the service of the vessel" as distinguished from "in the course of employment" and does not require his presence on the vessel. The standard for determining whether a seaman is "in the service of the vessel" is whether the seaman is "answerable to the call of duty".

F. Pertinent Defenses

There are five principal defenses to a claim for maintenance and cure. They are as follows:

- 1) Laches - A mere delay in asserting a maritime claim does not bar it, unless the delay is unreasonable and the party against whom it is asserted is unduly prejudiced. One factor to be considered in determining whether laches bars the action is whether the analogous three year statute of limitations has expired. If it has, the burden of proof to establish lack of prejudice and excusable delay shifts to the plaintiff.
- 2) Gross Intoxication - Gross intoxication may be a defense if a seaman's gross intoxication is the sole cause of his injury or if it is demonstrated to be willful and wanton misconduct. Normally, however, a finding that a seaman's injuries resulted from ordinary drunkenness is not a bar to his recovery of maintenance and cure benefits.
- 3) Willful Misconduct - Seamen have been denied maintenance and cure benefits for various types of willful misconduct. For instance, courts have denied maintenance and cure for fighting when the seaman has been the aggressor. The courts have also denied maintenance and cure benefits for seamen whose medical problems were the result of illegal drug use or sexually transmitted diseases.

- 4) **Conscious Concealment of a Relevant, Known Prior Disability** - Usually, the courts will allow a seaman whose illness preexisted his employment to recover maintenance and cure benefits, if the illness manifests itself while the seaman is in the service of the vessel. However, where a seaman consciously conceals from his employer a prior known disability, the court will deny maintenance and cure benefits.
- 5) **The seaman must show actual expenditures** - One who does not pay his own living expenses, such as a seaman living at home with his parents, cannot recover maintenance benefits from his employer.

G. Benefits

- 1) **Wages To The End of The Voyage** - Wages are generally determined by reference to shipping articles or offshore or overseas employment contracts. Sections 10313 and 10504 of The Merchant Seaman Protection and Relief Act, Title 46 United States Code, guarantee the right to payment of wages at intermediate ports and at the conclusion of the voyage or discharge from the vessel. If wages are withheld "without sufficient cause," the master or owner may be subjected to the payment of double wages for the duration of such withholding beyond the period provided by the statute.

The United States Supreme Court has interpreted the double wage penalty to be mandatory in nature and has allowed a seaman, who was owed only \$412.50 in wages, to recover over \$300,000.00, representing double wages which accrued from date of entitlement to date of judgment.

- 2) **Maintenance** - This per diem living allowance is paid for the period that the seaman is outside the hospital and has not reached the point of maximum cure, that is, the point beyond which further medical treatment will not improve his condition. Traditionally, maintenance was paid at a rate of \$8.00 per day based upon rates commonly found in union contracts. In the late 1970's, however, the United States Courts adjusted the rate upwards to \$15.00 per day based upon expert testimony on the effect of inflation on expenditures for food and lodging. Some courts have approved awards as high as \$50.00 per day.

Although a seaman's actual living expenditures have been considered a factor in determining maintenance benefits, the proper rule is that a seaman is entitled to maintenance at a rate equal to the reasonable cost of meals and lodging of the same quality as those that were furnished to him while he was working aboard the vessel.

- 3) **Cure** - The payment of curative, medical and hospital expenses (prosthesis, etc.) are owed until the seaman reaches the point of maximum medical recovery. The courts have determined that it is appropriate to declare that a point of maximum medical recovery has been achieved where it appears that the seaman's condition is incurable, or that future treatment will merely

relieve pain and suffering but not otherwise improve the seaman's physical condition. While the costs of such "palliative" treatment is generally not recoverable, courts have sanctioned the recovery of "therapeutic" treatment costs which sustain life itself, including lifetime kidney dialysis and transplantation, if medically indicated.

- 4) **Failure To Pay** – An employer's willful, arbitrary or capricious failure to pay maintenance and cure benefits may result in an award of compensatory damages, attorneys' fees, and prejudgment interest. If an employer's failure to pay, guarantee payment or provide medical treatment causes the seaman's condition to get worse, the seaman may recover an award for additional pain and suffering. While most courts have denied punitive damages, there has been no definitive declaration from the U.S. Supreme Court regarding whether punitive damages are available after *Miles v. Apex Marine* and the progeny.
- 5) **Found** – Found is value of food and lodging which a seaman receives while aboard a vessel. After a seaman reaches maximum cure and his right to maintenance terminates, he may recover found on proper showing of liability on the part of his employer. This element is generally included in a claim for loss of "fringe benefits" in a Jones Act suit.

MARITIME TORT

A. Purpose of the Law

The law of maritime tort provides a remedy for personal injuries occurring on navigable waters. A remedy also exists for death of non-seamen with respect to accidents occurring within three miles of the United States, its territories or dependencies.

NOTE: There is case law which suggests that the territorial limit for death actions on the high seas is twelve, not three, miles.

B. Source of the Law

Maritime Tort Law, which is part of the general maritime law of the United States, has been derived from court decisions over the past centuries.

C. Parties

- 1) Who can bring the claim?

In maritime tort cases the proper parties plaintiff are as follows:

- a) **Injury**

A maritime negligence action must be brought by the injured party or his spouse, where recovery for loss of society is permitted.

b) Death

The United States Supreme Court recently recognized a cause of action for wrongful death of non-seamen based on negligence under general maritime law. Maritime claims for wrongful death must be brought by the decedent's personal representative on behalf of all beneficiaries. Whether the beneficiaries must show that they were financially dependent on the decedent is unsettled.

2) Against whom may the claim be brought?

A claim for maritime tort may be brought against the vessel, person or legal entity committing the tort.

D. Applicable Law

Suit may be brought in any federal or state court. Whether the suit is filed in federal or state court, federal maritime law applies.

E. Admiralty Jurisdiction

For admiralty tort jurisdiction to exist there must be a "maritime locality" and "maritime nexus."

- 1) Situs Requirement - The accident must occur on navigable waters. But the situs requirement is also met if the accident occurs on land, but is caused by vessel activity on navigable waters.
- 2) Nexus Requirement - The circumstances surrounding the accident must be substantially related to traditional maritime activity, and must have a potential impact on maritime commerce.

F. Elements of the Claim

- 1) Negligence - Plaintiff must establish that the defendant breached the standard of reasonable care under the circumstances.
- 2) The injury must be proximately caused by the negligence of defendant.
- 3) The accident giving rise to the claim must occur within three nautical miles of the shore of the United States, its territories or dependencies. Again, it is unclear whether this territorial limit will remain three miles or be extended to twelve miles.

G. Pertinent Defenses

- 1) Comparative Negligence - The contributing negligence of the injured or deceased party reduces his or his survivor's recovery by the percentage of the negligence attributable to him. It does not bar recovery completely.

- 2) **Time Limitation** - Suit must be filed within three years from the date that death or injury occurs. Claims arising before October 6, 1980 are governed by the doctrine of laches. Under this doctrine, a mere delay in asserting a maritime claim does not bar it unless the delay is unreasonable and the party against whom it is asserted is unduly prejudiced. One factor to be considered in determining whether laches bars the action is whether the analogous statute of limitations has expired. If so, the burden of proof to establish lack of prejudice and excusable delay shifts to the plaintiff.
- 3) **Assumption of The Risk** - The common law of voluntary assumption of the risk has been rejected by the United States General Maritime Law. Thus, it is not a defense available to the defendant in a maritime tort claim.

H. Benefits

- 1) **Injury**
 - a) Recovery in a suit for personal injuries may include all general and special damages attributable to the accident, including loss of past and future wages, impairment of future earning capacity, medical expenses, pain, suffering, disability, humiliation and mental anguish.
 - b) In certain cases, the spouse of a maritime worker may recover non-pecuniary damages, such as loss of consortium or society caused by a maritime tort, and punitive damages. However, the spouse of a Jones Act seaman may not assert such claims.

- 2) **Death**

In wrongful death actions based upon negligence, the following remedies are available:

- a) **Funeral Expenses**
- b) **Loss of Support** – all financial contributions the decedent would have made to his dependents had he lived.
 - i) When an award for loss of future earnings is made to the survivors, it must be based upon the decedent's after-tax income and must be discounted to its present value. Evidence of the effect of inflation and wage increases due to cost of living, promotions, merit raises or productivity may be submitted to and considered by the jury.
- d) **Loss of Services** — the recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death. Such services include, for example, the nurture, training, education, and guidance that a child would have received had

the parent not been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable.

- e) Loss of Consortium/Society– It is unclear whether loss of consortium or society damages are recoverable under the general maritime law. Several state and federal courts have disagreed on this issue. If recoverable, loss of consortium or society damages may include loss of love, affection, attention, companionship, care, comfort and protection. However, in actions covered by the Jones Act or DOHSA, loss of consortium or society are not recoverable.
- f) The Survivorship Claim — including lost wages to date of death; medical expenses and pain and suffering of the decedent before his death. However, in actions covered by DOHSA, damages for pain and suffering are not recoverable, even if coupled with a general maritime law survival claim based on negligence.
- g) In cases involving the death of a non-seaman occurring within three (3) nautical miles of any state, state laws can sometimes be used to supplement death remedies available under the general maritime law.

NOTE: This proposition is subject to an extension to twelve (12) nautical miles under recent case law.

3) Punitive Damages

It is unclear whether punitive damages are recoverable under the general maritime law. Several state and federal courts has disagreed on this issue. Courts allowing punitive damages generally require a showing of willful and wanton acts be performed or ratified by a representative of the defendant with decision-making authority. However, a Jones Act seaman and his or her survivors may not recover punitive damages against the employer.

4) Prejudgment Interest

Prejudgment interest is usually allowed, but the denial thereof, and the rate of interest is within the discretion of the court.

SUBMERGED LANDS AND THE OUTER CONTINENTAL SHELF

A. Purpose of the Law

With the advent of offshore oil exploration off the coast of the United States, a contest for dominion and control of the subsoil and mineral resources beneath the coastal waters of the United States surfaced between the United States Government and several of the states. The United States Congress resolved this controversy by passage of the Submerged Lands Act, 43 U.S.C. 1301, *et seq.* and the Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.*

B. Source of the Law

- 1) The Submerged Lands Act confirmed to the states the ownership of the lands and natural resources beneath the navigable waters within three nautical miles of their respective coastlines. Specific exceptions were made for Texas and Florida whose territorial seaward boundaries at the time of their admission into the United States had been ten nautical miles. The authority of the states to apply their laws to fixed platforms located within their territorial seaward boundaries was left intact.
- 2) The Outer Continental Shelf Lands Act made applicable the laws and jurisdiction of the United States to the subsoil and seabed of the Outer Continental Shelf and to all artificial islands and fixed structures erected on the shelf to explore for natural resources.

The Continental Shelf has been defined as the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the state's territorial boundaries, to a water depth of 200 meters or beyond that limit, to that area within the United States territorial jurisdiction where the depth of the superjacent waters admits exploration of the natural resources of the area.

- 3) On the Outer Continental Shelf, where there is no federal law on the particular subject of inquiry, the law of the adjacent state is applied as surrogate federal law.
- 4) The Outer Continental Shelf Lands Act specifically incorporates by reference the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq.* and makes it applicable to all platform workers on the Outer Continental Shelf. As a result of this incorporation, the exclusive remedy of these fixed platform workers or their survivors against employers is the statutory compensation benefits provided by the Longshore Act.

C. Parties

- 1) Who can bring the action?

Injured workers or any other persons designated by the law of the adjacent state may bring an action against third parties (non-employers) for deaths or injuries that occur on offshore fixed platforms. Claims for injury or death against employers are governed by the Longshore Act.

- 2) Against whom may the claim be brought?

Any non-employing person, corporation and/or vessel committing the tort.

D. Jurisdiction

Tort actions brought by workers on fixed platforms located on the Outer Continental Shelf may be brought in Federal Court under the Outer Continental Shelf Lands Act or diversity of citizenship jurisdiction, or in state court. In either case, trial by jury is permitted.

Tort actions brought by workers on fixed platforms located within the state's territorial seaward boundaries may be brought in state court, or in federal court under diversity of citizenship jurisdiction. In either case, trial by jury is permitted. Jurisdiction of compensation claims is governed by the appropriate compensation statute.

E. Elements of the Claim

- 1) Due to the absence of a federal common law of the United States, a personal injury or wrongful death action involving events occurring on fixed platforms located on the Outer Continental Shelf is governed by federal law, the content of which is borrowed from the law of the adjacent state. Although it was originally thought that the General Maritime Law of the United States would be applied to fixed platforms erected on the Outer Continental Shelf for the purpose of exploring and producing natural resources, it is now well settled that they are to be considered artificial islands which are not governed by maritime law.
- 2) Claims for injury or death involving events occurring on fixed platforms located within the state territorial waters are governed by the laws of the adjacent states.
- 3) Pertinent defenses and benefits are also determined by reference to the laws of the adjacent state if the state law is not inconsistent with applicable federal law.

DEATH ON THE HIGH SEAS ACT

A. Purpose of the Law

Historically, there was no action for wrongful death in admiralty. In 1920, Congress passed the Death on the High Seas Act (DOHSA) which created a remedy in admiralty for wrongful deaths occurring more than three nautical miles from the United States, its territories or dependencies.

- * Case law suggests that the territorial limit may be extended to twelve, not three, miles.

B. Source of the Law

Title 46 of the United States Code 761, *et seq.*

C. Parties

1) Who can bring the claim?

The action must be brought by the personal representative of decedent (an administrator or executor of the estate) for the collective benefit of the specified statutory beneficiaries', the decedent's spouse, parents, child and dependent relative.

2) Against whom may the claim be brought?

Any vessel in rem, person or corporation responsible for the death.

D. Jurisdiction

A claim based upon the Death on the High Seas Act may be brought in federal or state court. There is no right to a jury trial.

E. Elements of the Claim

A claim under the Death on the High Seas Act may be brought for a death caused either by the unseaworthiness of a vessel or the negligence or strict liability of a person or corporation or both. In either case, the elements are:

1) Death of Person

a) Proximately caused by a wrongful act, neglect, or default.

b) Occurring on the high seas, defined as being those seas beyond three nautical miles from the shore of any state, territory or dependency of the United States. The term "high seas" also includes the territorial waters of a foreign nation.

c) Involving pecuniary loss to the enumerated beneficiaries.

F. Pertinent Defenses

1) Three-year preemptive period from date of wrongful act, neglect or default.

2) The contributing negligence of decedent reduces his survivor's recovery by the percentage of the negligence attributable to him. It does not bar recovery completely.

3) The common law doctrine of voluntary assumption of a known risk is not a defense under the Death on the High Seas Act.

G. Benefits

The United States Congress has specifically limited the recovery available to the decedent's survivors to the pecuniary loss sustained by them, proportioned among them according to their respective loss. This includes:

- 1) Loss of Support - all financial contributions the decedent would have made to his dependents had he lived.
- 2) Loss of Services - the recovery for the monetary value of services the decedent provided and would have continued to provide but for his wrongful death. Such services include, for example, the nurture, training, education, and guidance that a child would have received had the parent not been wrongfully killed. Services the decedent performed at home or for his spouse are also compensable.
- 3) The survivors cannot recover for the loss of society, consortium, love and affection of the decedent.
- 4) Survivors cannot recover for lost wages to time of death, medical expenses and pain and suffering of the decedent prior to his death.
- 5) Funeral expenses are not recoverable.
- 6) Punitive damages are not allowed.
- 7) Prejudgment interest is allowed but is discretionary with the court.

STATUTORY COMPENSATION LAWS

The Longshore Act

A. Purpose of the Law

The Longshore Act was passed to provide a compensation remedy in lieu of the common law remedy of damages to employees, other than members of the crew of a vessel, who are injured or suffer an occupational disease while engaged in maritime employment on navigable waters, on fixed platforms on the Outer Continental Shelf, or on certain land-based sites.

B. Source of the Law

The Longshore Act is contained in Title 33 of the United States Code 901, *et seq.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. 1331.

C. Parties

1) Who can bring the claim?

Any employee or a surviving dependent spouse, child under 18, or wholly dependent disabled child over 18, or a child under 23 years of age who is a full-time student at a recognized school and who has not yet completed four years of education beyond the high school level, or dependent parents.

2) Against whom can the claim be brought?

The immediate employer, or a borrowing employer. In the event that the immediate employer defaults on its obligation to secure compensation, then benefits are recoverable from the general contractor of the employer and its compensation insurer.

An employer which fails to secure compensation is subject to a civil action for damages in which it may not plead the defenses of contributory negligence or assumption of the risk, and a criminal misdemeanor charge for which its corporate officers are severally liable. Finally, the officers are jointly liable for any benefits under the Act, which the corporation has failed to secure.

D. Jurisdiction

1) Application of The Law

The Act applies to any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, shipbuilder, or shipbreaker, whose employer is engaged in maritime activity, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or adjoining area customarily used by such employer in loading, unloading, repairing, dismantling or building a vessel).

However, the United States Supreme Court has decided that the "maritime employment" requirement is met if the injured worker establishes that his injury occurred on actual navigable waters. In such an instance, the worker need not prove that his employment possessed a direct or substantial relation to navigation or commerce.

The Act does not apply to a master or member of a crew of any vessel or to any person hired by the master to load, unload or repair any vessel under 18 tons, or to any officers or employees of the United States or foreign governments.

Nor is the Act applicable to employees covered under a state workers' compensation law who are:

- office clerical, secretarial, security or data processing workers

- employees of a club, camp, recreational operation, restaurant, museum or retail outlet
- marina employees who are not engaged in construction, replacement or expansion of the marina, except for routine maintenance
- individuals employed by suppliers, transporters or vendors, temporarily doing business on the premises of an employer and not engaged in work normally performed by employees of that employer
- aquiculture workers
- individuals employed to build, repair or dismantle recreational vessels under 65 feet in length

A final class of workers excluded from the Act are employees of facilities which are certified as exclusively engaging in the business of building, repairing or dismantling small vessels, such vessels being defined as commercial barges under 900 lightship displacement tons or commercial tugboats, towboats, crewboats, supply boats, fishing vessels or other work vessels under 1600 tons gross, unless

- the injury occurs upon navigable waters or upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting or drydocking vessels
- the facilities receive federal maritime subsidies or
- the employee is not covered by a state workmen's compensation law.

The Outer Continental Shelf Lands Act incorporates by reference the Longshore Act and makes it applicable to any non-seaman employee who is employed in operations conducted on the Outer Continental Shelf for the purpose of exploring for, developing, removing or transporting by pipeline, natural resources. However, the United States Supreme Court has held that the Act does not apply to non-seamen working on fixed platforms within state territorial boundaries unless they are engaged in traditional maritime employment, such as the loading and unloading of vessels. The Act has also been applied in one instance to workers injured on waters outside the territorial limits of the United States. The ultimate effect of this extension of the jurisdiction of the Act cannot presently be determined.

2) Administration of Claims

The United States Department of Labor has been vested with the authority to govern the disposition of claims arising under the Longshore Act. Claims are administered by deputy commissioners appointed for the various compensation districts, and controverted claims are adjudicated by Federal Administrative Law Judges. Appeals from Administrative Law Judge

decisions are reviewed by the Benefits Review Board and finally by the Federal Court of Appeals having jurisdiction over the compensation district involved. Review by the United States Supreme Court may also be available.

E. Elements of the Claim

Any accidental death or injury occurring within the course and scope of employment within the jurisdictions to which the law applies; any injury caused by the willful act of a third person directed against an employee because of his employment, and such occupational diseases or infections as arise naturally out of such employment or as natural or unavoidable results of such accidental injury.

F. Pertinent Defenses

- 1) Injury or death occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another is not compensable.
- 2) The master or member of the crew of a vessel is not covered by the Act.
- 3) Also not covered are those classes of workers defined at pages M-53 and M-54.
- 4) The right to compensation for disability or death will be barred unless a claim is filed within one year after the injury or death. In the instance of occupational disease causing delayed death or disability, the claim must be filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease and the death or disability. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. The time for filing a claim will not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment. In some instances, the failure of the employer to report a known accident extends the time for filing of the claim.

G. Benefits

- 1) The Act provides for payment of compensation benefits and for medical services and supplies.
- 2) Compensation benefits for disability generally are sixty-six and two-thirds (66-2/3%) percentum of the employee's average weekly wage for permanent total disability and temporary total disability. For other cases of permanent partial disability and temporary partial disability creating economic loss to the employee, he is entitled to sixty-six and two-thirds (66-2/3%) percentum of the difference between his average weekly wages and his wage earning capacity thereafter. The maximum benefits to which an employee would be

entitled is two hundred (200%) percentum of the national average weekly wage. The minimum benefit payable for total disability is fifty (50%) percentum of the national average weekly wage.

- 3) If any employee receiving benefits for disability dies as a result of the covered injury, his beneficiaries are entitled to additional payments.

If the disability was scheduled, the total unpaid portion of the award is payable regardless of whether the death is related to the injury or not.

Under the 1984 Amendments to the Act, except as relates to a scheduled disability discussed above, death benefits are not payable to the employee's beneficiaries if the death was not caused by a covered injury. Where he employee's death is caused by a covered injury, death benefits will be paid to his beneficiaries as follows:

- Funeral expenses not exceeding \$3,000.00
- Fifty (50%) percent of the employee's average weekly wage to the surviving spouse
- An additional sixteen and two-thirds (16-2/3%) percent if the decedent leaves children.

If the surviving spouse remarries, a lump sum payment equal to two years compensation is made and the benefits cease. Also, if the surviving spouse remarries or dies, the percentages of the average weekly wage available to the other surviving dependents change. A different arrangement of percentages exists for children, dependent grandchildren, parents and collaterals under various other circumstances. The total percentages payable, however, do not exceed sixty-six and two-thirds (66-2/3%) percent of the average weekly wage. The maximum weekly death benefits payable are also limited to two hundred (200%) percent of the national weekly wage, but shall not exceed the actual weekly wage of the deceased.

- 4) Provision is also made in the Act for payment of benefits when the employee suffers a second injury increasing his disability. Additionally, a provision is made for compensation to employees undergoing vocational rehabilitation.
- 5) Payment for medical services and supplies is required for such period as the nature of the injury or the process of recovery may require.

H. Special Considerations

- 1) Concurrent Jurisdiction

Except where specifically excluded by the Longshore Act or state compensation laws, jurisdiction of federal and state compensation remedies are concurrent.

2) Settlement of Claim

A procedure for administrative approval of proposed settlement agreements is provided for in the Act and its accompanying regulations. Approval of such settlements is discretionary with the Deputy Commissioner and may include compensation benefits, death benefits, and future medical expenses.

Settlements may also be approved after entry of a final compensation order. Such settlement proposal must be submitted to the Deputy Commissioner or the Administrative Law Judge, who shall approve it within 30 days, unless it is found to be inadequate or procured by duress. If the parties are represented by counsel, settlements submitted to the Deputy Commissioner shall be deemed approved unless specifically disapproved within 30 days of submission of the settlement. A claim cannot be otherwise withdrawn without the approval of the Deputy Commissioner or the Administrative Law Judge.

I. Claims Against Third Parties [Section 905(b)]

- 1) Employees entitled to compensation under the Act can also sue third parties for damage caused by their fault or negligence. Such third parties include vessels on which the employees may be working. However, the vessel does not owe a warranty of seaworthiness to such employees.

If the person was employed to provide shipbuilding, repairing or breaking services, and such person's employer was also the owner, owner pro hac vice or charterer of the vessel, no third-party action is permitted against the injured person's employer in its capacity as vessel's owner, owner pro hac vice or charterer.

- 2) The standard of care in a 905(b) negligence action has been redefined by the United States Supreme Court. The standard was defined in terms of the stevedore-vessel owner's relationship during cargo operations, but is applied to all 905(b) actions. At the present time, the primary responsibility for the safety of the longshoreman rests with the stevedore. However, vessel liability may still arise in three instances.
- if, on turning over the vessel, the vessel owner fails to warn of hidden defects of which he should have known;
 - if the injury is caused by hazards under the control of the vessel; and
 - if the vessel owner fails to intervene in the stevedore's operations when he has actual knowledge of the hazards, and that the stevedore in the exercise of "obviously improvident" judgment intends to continue working in the face of the hazard and, therefore, cannot be relied on to remedy the hazard.
- 3) Contracts of indemnity whereby the vessel seeks indemnity from the employer are unenforceable unless the injured employee was receiving benefits under

the Act by virtue of Section 4 of the Outer Continental Shelf Lands Act. In that event, the vessel may enforce any reciprocal indemnity obligation whereby the employer and the vessel agree to defend and indemnify the other for injury to or death of their respective employees. However, an agreement requiring the vessel owner be named as an additional assured under a liability insurance policy is valid and enforceable.

- 4) If a third party is responsible for the injury, the employer is entitled to recover the amount of compensation paid or to be paid in the future. Acceptance of compensation payments by the claimant creates a lien against the funds recovered by the claimant from third parties.
- 5) Settlement between the employee and third parties, without the written approval of the employer, terminates the employer's obligation for future compensation benefits. The United States Supreme Court has held that this provision of the Act is absolute. Settlement with written approval of the employer reduces the employer's future compensation obligation by the net proceeds received by the claimant in the settlement.

State Worker's Compensation Act

The worker's compensation acts of the various states adjacent to offshore oilfield activity may be applied to accidents arising on fixed platforms within the seaward territorial boundaries of the individual state. The particulars of the various state laws involved differ, and reference must be made to a particular state's law when questions arise pertaining to its scope and application.

INTERRELATIONSHIP OF MARITIME REMEDIES IN USUAL OILFIELD ACTIVITY

Seldom does a casualty claim arising from an oilfield related accident involve only one of the remedies discussed in the previous sections of this manual. More often than not, a casualty claim will involve multiple remedies, some of which may overlap or even supplement the other. It is therefore extremely important to understand how the remedies interrelate to each other. Such an understanding is important for proper underwriting of the risks involved, as well as for sorting out the various exposures presented in handling claims arising from such accidents.

The common denominator of all maritime remedies is that each seeks to provide monetary compensation for losses suffered within its particular jurisdiction. However, because of the piecemeal development of the remedies, they sometimes work in conjunction with each other, sometimes preclude each other, and, at other times, duplicate and supplement each other to a point where individual claimants often are entitled to the same type of damages from two completely different remedies afforded under maritime law. In instances where similar recovery is permitted under one or more remedies, duplication of recovery for the same element of damage is not allowed.

As one can see from a review of the previous sections, the availability of each remedy to any given claimant depends upon the determination of various factual issues, such as, is the claimant a seaman, is the claimant a longshoreman, is the equipment involved a vessel, are the waters navigable, etc.? These issues are generally referred to as status issues, i.e., does the person enjoy the status of a seaman, does the equipment enjoy the status of a vessel? The answers to these status questions determine what remedies are available to a particular casualty.

The availability and interrelationship of the various remedies depend upon four controlling factors:

- 1) Location of the Accident
- 2) Status of the Equipment
- 3) Status of the Plaintiff
- 4) Status of the Defendant

Location of the Accident

This factor involves the question of where the accident occurred. Did it occur on land, on navigable or non-navigable waters, on offshore equipment, or some other location?

Status of the Equipment

This factor involves the question of whether the equipment involved in the accident enjoys the status of a vessel and, if so, whether the vessel was in navigation at the time of the accident.

Status of the Plaintiff

This factor involves the question of whether the plaintiff is a seaman and member of the crew of the vessel. If not, is he a longshoreman, a business invitee, a passenger; and were his activities at the time of his accident within the scope of his employment?

Status of the Defendant

This factor involves the relationship of the defendant to the plaintiff. Was the defendant an employer of the injured or killed person? Is that particular defendant the owner and/or operator of a vessel on which the plaintiff was injured or killed?

A personal injury claim that commonly arises from offshore oilfield activity involves a seaman's action against his employer, wherein he combines claims for damages under the Jones Act with claims for unseaworthiness and for wages, maintenance and cure under the general maritime law. In cases of this type, the location of the accident normally is on navigable waters, the equipment involved is a vessel in navigation, the plaintiff has the status of a seaman and member of the crew of the vessel, and the defendant is the employer of the plaintiff and the owner of the vessel.

With the controlling factors thus arranged, it is clear from the discussions dealing with each individual remedy in the previous sections of this manual that such a plaintiff will have a right to claim damages against such a defendant both under the Jones Act and for unseaworthiness, and at the same time be entitled to wages, maintenance and cure.

The first two remedies permit recovery of virtually the same damages, but for different reasons, i.e., negligence of the employer on one hand and unseaworthiness of the vessel on the other. The wages and cure aspect of the third remedy is somewhat duplicative in that it provides a claim for similar elements of damages – lost wages and medical expenses – included in the damages available from the first two remedies.

This third remedy also supplements the other two with the additional element of maintenance – weekly benefits that are not otherwise available from the other two remedies. The right to wages, maintenance and cure, however, is not dependent upon either negligence or unseaworthiness, but arises simply out of the employment relationship itself. Therefore, with the controlling factors established, the plaintiff, if he can prove either negligence or unseaworthiness of the vessel, will be entitled to general damages. If, on the other hand, he can prove neither, he will still be entitled to recover his wages, his medical expenses and a weekly maintenance benefit.

Should any one of the controlling factors be different, the remedies available to the plaintiff would likewise be different. For instance, if the defendant against whom the claim is directed is not the employer, the remedies provided by the Jones Act and wages and maintenance and cure are no longer available, but damages for a general maritime tort and unseaworthiness may still be available from such a defendant.

The analysis of the situation becomes more complex with multiple plaintiffs and multiple defendants and with a variety of equipment. The approach to analyzing such situations, however, remains basically the same. The claim of each plaintiff against each possible defendant is examined individually in order to determine which controlling factors exist insofar as that particular claim is concerned. These controlling factors determine the remedies available to that plaintiff from that particular defendant. The plaintiff's claim is then examined against each of the other defendants in a similar manner.

In each instance, reference must be made to the judicial test governing the various status issues which are outlined in previous sections of this manual. Because the facts controlling status issues are often in dispute, all legitimate assumptions must be made to effect an analysis of which laws will govern and which remedies and defenses will be available under such loss.

An example of such a multi-party and equipment situation would include plaintiffs A and B and defendants C and D. A is employed by C, the owner and operator of a fixed platform. B is employed by D, the owner and operator of a supply vessel. An accident occurs on the deck of the vessel located on the Outer Continental Shelf caused by the joint operations of C and D, causing injury to both A and B. The location of the accident and the status of the vessel and legal responsibility therefor are common to both claims. The status of the individual plaintiffs and their employment relationships are, however, not common. A is a platform worker. B is a seaman and member of the crew of the vessel. Each has a different employer.

Therefore, A's claim against C, his employer and operator of the fixed platform, would be limited to compensation benefits. His claim against D, however, would include a claim under the general maritime law. On the other hand, B could claim damages from C under appropriate state laws adopted by the Outer Continental Shelf Lands Act ("OCSLA") and general maritime tort. At the same time, B could also maintain actions against D, his employer, under the Jones Act, for unseaworthiness and for wages, maintenance and cure. The rights of C and D between themselves would be controlled by contractual arrangements and applicable laws of legal subrogation and non-contractual contribution and indemnity.

By following the above approach and examining the controlling factors for each claim against each defendant, even the most complex casualty situation can be sorted out and appropriate conclusions can be reached as to what exposures are presented by the claims, to whom, what potential damages exist, and what defenses are available.

From an underwriting viewpoint, it is essential to provide coverage to an offshore oilfield insured for all of the maritime remedies, because sooner or later, such an insured will be exposed to all of them. Claims personnel must be able to sort out what remedies are available to whom and what the value of any such remedy is in an individual case.

CONTRACTUAL INDEMNITY CONSIDERATIONS

A. Introduction

An indemnity agreement is a contract by which one person agrees to protect another against an anticipated loss. There are two types of contractual indemnity recognized by maritime law:

- 1) Express Contractual Indemnity
- 2) Implied Contractual Indemnity

Because of the prevalence of indemnity provisions in contracts between oilfield companies, the emphasis of this section will be on express contractual indemnity provisions.

B. Express Contractual Indemnity

In an express contractual indemnity agreement, the indemnitor agrees to protect and hold harmless the indemnitee for any anticipated loss or liability. Thus, the major issues for determination involve contract formation, contract interpretation and limitations on the enforceability of the indemnity provisions.

- 1) Contract Formation - Is there a contract?

The initial consideration for an indemnitor (or his underwriter) faced with a request for indemnification based on an express contract is to examine the formation of the contract itself. There are six principal factors which should be considered: 1) whether the contract was signed; 2) whether it was superseded; 3) whether there was adequate consideration; 4) whether there

was a mutual meeting of the minds with regard to the indemnity provision; 5) whether the contract was executed by an individual with authority to bind; and, 6) whether the indemnitor is a party to the contract.

2) Contractual Interpretation

a) Which law governs, state or maritime?

Indemnity provisions may be governed by either state or maritime law depending on the specific facts involved in a given case. Jurisprudence has been inconsistent in determining how the choice of law decision is to be made with respect to any given contract. This decision is important, however, because while maritime law will generally enforce the intent of the parties, state law often prohibits or circumscribes certain types of indemnification in certain instances.

b) Talismanic Language

Through contractual indemnity, parties seek to allocate losses between themselves in a manner which is generally different from the allocation of loss imposed by law. Thus, to effectuate such an allocation, courts will require that the parties express their intent in clear and unambiguous terms ("talismanic language"). Courts will demand precise adherence to this requirement, particularly in cases in which one party seeks to be indemnified for his own negligence, strict liability, or obligations resulting from his breach of the warranty of seaworthiness.

c) Incidents Covered

An indemnity agreement does not generally require one to indemnify another for all losses in all instances and under all circumstances. Rather, the contract usually limits the indemnity obligation to those losses "arising out of or incidental to" the operations which the indemnitor agrees to perform under the contract. In order to determine whether a particular loss falls within the intended scope of the indemnity agreement, a careful analysis should be made as to the connection or relationship between the circumstances surrounding the loss and the operations which the indemnitor agreed to perform.

d) Reciprocal Indemnity

It is not uncommon that a single contract contains reciprocal indemnity provisions whereby both parties undertake to indemnify the other for certain losses. Frequently, contracting parties, each of whom will have employees participating in a common operation, undertake to indemnify the other for claims for injury or death sustained by their own employees, regardless of which party may have caused the loss.

This has been recognized by the courts as an effective way to apportion loss and to minimize the cost of litigation.

In order to apportion loss by this method, however, courts will require that the parties express their intent in clear and unambiguous language, setting forth precisely the parties to be indemnified and the scope of the proposed indemnification.

3) Limitations On Enforceability

Parties are generally free to allocate loss by means of indemnity agreements, and courts will give effect to such agreements unless they are found to be prohibited by law or contrary to public policy.

United States Congress, several states, and the U.S. Supreme Court have enacted legislation prohibiting or circumscribing certain types of indemnification in certain instances. Also, because of the unique nature of particular industries and the autonomy reserved to the several states to enforce their own laws, indemnity agreements have been vitiated as being contrary to the public policy of the jurisdiction in which the agreements are sought to be enforced.

a) The Longshore Act

In the 1972 amendments to the Longshore Act, the United States Congress attempted to eliminate the circuitous route by which an injured longshoreman could recover damages from his employer, whose exclusive obligation was designed to be only the payment of statutory benefits. Prior to the amendments, an injured longshoreman could sue a vessel owner for unseaworthiness, and the vessel owner, in turn, could recover against the injured worker's employer for breach of contract, express or implied.

In order to prohibit this undesired result, Congress eliminated the longshoremen's right to recover for unseaworthiness, limiting the longshoremen's right against the shipowner to a negligence action. At the same time, Congress prohibited the shipowner from seeking indemnity from the longshoremen's employer, by declaring that agreements having that effect are "null and void."

Thus, indemnity agreements purporting to require the employer of an injured longshoreman to indemnify a shipowner for claims asserted by the longshoreman are unenforceable.

b) State Statutes

Various states, including Texas and Louisiana, have enacted statutes limiting or prohibiting those involved in the oilfield industry from seeking to be indemnified for the consequence of their own negligence.

Generally, the expressed legislative basis for such enactments is that, within the oil industry, there exists such a pervasive inequality of bargaining power that large, established companies can demand indemnity concessions from smaller entities as a condition of doing business, a form of economic duress. However, state laws relating to the enforceability of indemnity agreements may not validly apply to maritime contracts, which are interpreted and given effect according to the general maritime law.

c) Public Policy

A court will refuse to enforce those provisions of indemnity agreements which are found to be contrary to the public policy of its jurisdiction.

The Texas and Louisiana statutes prohibiting certain types of indemnity specifically declare those provisions to be contrary to public policy. Other states have similar prohibitions against agreements by which a party seeks to be indemnified for losses sustained as a result of intentional torts.

Under the general maritime law, indemnity agreements purporting to indemnify one for one's own negligence are not contrary to public policy. However, the United States Supreme Court has declared unenforceable contracts whereby operators of tugboats sought to be released from liability for their negligence in performing towage services. The Court observed that because of the unique nature of the towing business, tug owners may be in a position to demand such concessions, and that such agreements do nothing to discourage negligent conduct. The decision of the Court was based upon considerations of public policy.

INSURANCE CONSIDERATIONS

A. Introduction

Offshore oilfield operations usually involve several companies working in concert with each other in order to accomplish the desired objective. Each company normally has its own liability insurance program. In addition, a variety of contractual arrangements generally set forth the responsibilities and obligations of each company. These arrangements often include requirements that the contracting parties provide adequate insurance programs for the particular tasks to be undertaken. The net result is that a complex insurance package often exists covering oilfield casualty exposures.

The purpose of this section is to discuss some of the common insurance problems that arise in this context.

B. Insurance Requirements In Oilfield Contracts

1) Obligations To Provide Necessary Insurance

a) "Failure To Provide Insurance" as Breach of Contract

Oilfield contracts often require the parties to obtain certain insurance coverage. The failure on the part of one party to do so may expose the other to liabilities which would not normally be visited upon him, and may give rise to a contractual claim for damages separate and apart from those arising from the casualty. Damages for this type of contractual breach are often an amount in excess of the loss created by the casualty itself. Therefore, even in the absence of an indemnity provision in the contract, one party may still have to indemnify the other, if it failed to obtain the required insurance coverage for the loss.

b) Is The Breach Insured Against?

The question then arises as to whether the loss arising from such a breach of contract is insured by any insurer of the breaching party and, if so, by what insurance policy. Some policies contain exclusions for contractual liability, others provide for contractual liability coverage in limited circumstances, while others provide blanket coverage for such liability. A circumstance that often arises in this context is that a party required to carry employer's liability coverage fails properly to do so, thereby exposing the contractual liability insurer to a claim for breach of contract. The effect of this is to cause the contractual liability insurer to suffer the economic loss equivalent to the employer's liability obligations which may have been otherwise specifically excluded in the policy. If insurance does not exist for such breach of contract, the assured suffers the economic loss.

2) Obligation To Name Another Party As Additional Insured

a) "Failure To Name An Additional Insured" as Breach of Contract

The failure to comply properly with the contractual requirement to name another party as an additional insured under existing policies also constitutes a breach of contract which gives rise to the problems described above.

b) Unintentional Expansion of Coverage

If an additional insured endorsement is not written properly, the additional insured may become covered for all of its activities and not just the undertaking described in the contract. The addition of a standard additional insured endorsement can greatly increase the exposure insured against without a corresponding increase in

premium. Such an endorsement may create a separate insurance policy providing coverage to the additional insured regardless of its contractual relationship to the named insured. Therefore, any additional insured endorsement furnished in compliance with contractual requirements must be specifically tailored to that purpose. With careful underwriting, such endorsements can be written to cover liabilities arising only as to certain, designated contracts.

c) Modification of "Other Insurance Clause"

The additional insured usually has its own insurance policy covering it for the same risk, and often the "other insurance" provisions in such policy may be incompatible with the provisions in the additional policy. One policy may have an "escape" clause, while the other may have a "pro-rata" or perhaps an "excess insurance" clause or some combination thereof. This, too, can give rise to contractual disputes between the parties which can be avoided by proper modification of the "other insurance" clause of the policy required by the contractual arrangement.

3) Obligation To Waive Subrogation Rights

The failure to comply with a contractual obligation to waive subrogation also constitutes a breach of contract with many of the ramifications discussed above. The situation often arises wherein a company agrees to waive its subrogation rights against another party to the contract, but fails to obtain a waiver of subrogation to that effect in its appropriate policies of insurance. If, however, a legal right to subrogation is afforded the insurer as a matter of law, such as in statutory compensation schemes, absent a waiver of subrogation in the policy of insurance, the insurer may still legally exercise its subrogation rights against the other party even though the assured has agreed to waive such rights. This brings into play the breach of contract situation discussed above, which if not otherwise insured against may cause the assured to suffer the very economic loss he sought to avoid.

4) Errors and Omissions

Each problem discussed above also raises questions of additional areas of potential exposure. Insurance agents and brokers undertaking to arrange for adequate insurance for the insured may be exposed to "errors and omissions" claims for the failure to provide properly for the client's needs.

Quite obviously, the contractual obligations as well as the legal obligations of an insured must be considered in developing a comprehensive insurance program.

C. Conflicts Between Different Types of Insurance Policies

The very nature of offshore oilfield activity involves problems of general liability, contractual liability, employer's liability and vessel liability. Oftentimes, such liability is insured by separate policies including the contractor's standard general liability form, the standard employer's liability form, and the traditional maritime protection and indemnity form, all of which often are written by different underwriters. This can give rise to conflicts not anticipated by either the assured or the underwriters.

The general liability policy provides coverage for negligence in the operations of an assured, whereas the protection and indemnity policy is limited to coverage for the assured as "owner" of a vessel. In offshore operations, it is not uncommon for an assured to be engaged in operations on a fixed platform and to be the owner or charterer of attending vessels. An accident involving both a platform and vessel(s) may raise questions as to which policy provides coverage for such accidents, or whether both policies provide coverage.

The resolution of this question is dependent upon the facts of each case, but in many instances, the answer to such question lies in a gray area and is not subject to precise predictability. With potential exposure existing under both policies, the respective "other insurance" clauses often conflict, adding additional complexity to the problem. Similar problems can arise from situations where separate companies control the platforms and the vessels' operations, but the contractual agreement between them requires that one be named as an additional insured under the other's policy. Analogous problems also arise from combinations of employer's liability policies and protection and indemnity policies as well. These problems can be avoided only by an artful formation of the insurance package at the beginning of any operation.

D. Excess Coverage

Insurance coverage for offshore operations is normally afforded in layers of insurance, with each layer provided by different insurance companies. In many instances, the primary layer is written by a company in one market, with successive excess layers written by underwriters in other markets. Often such coverage is placed through several agents and brokers operating independently of each other. This may result in gaps, contradictions and/or overlaps in the insurance package.

In addition thereto, differences in terminology used in diverse insurance markets can also result in anomalies which interfere with the scope of the desired coverage. Care must therefore be taken to be sure that the completed insurance package produces the desired results.

E. Watercraft Exclusion

Efforts by underwriters to control the extent of their exposure with respect to claims involving watercraft give rise to other problems. Often provisions affecting such coverage are not consistent within the same policy, are declared ambiguous, and are ignored by the courts. A common problem occurs in instances where general liability policies also afford blanket contractual liability coverage. Quite often, the watercraft

provision is modified in the general liability portion, but it is not similarly modified in the blanket contractual coverage portion. In other cases, the pertinent provisions are not consistent in all policies in the insurance package, thereby resulting in gaps in coverage.

Because of the maritime nature of offshore oilfield activity, all provisions affecting coverage for watercraft must be examined with care.

F. Duty to Defend

The significant cost of litigation has focused attention on the provisions in policies relative to the obligation to defend the insured. The traditional provision in most American general liability and employer's liability policies created a separate and distinct duty to defend in addition to the duty to indemnify for losses. This has had the effect of increasing the economic value of the policy to the value of the policy limits, plus the value of the cost of the defense of the case.

In more recent times, some policies have been modified to include the cost of defense within the indemnity limits afforded. This restricts the economic value of the policy to the value of the expressed limits, less the amount expended in defense of the case.

This modification has two significant results. First, a primary or underlying insurer can avoid the cost of continuing litigation after it has expended the amount of its indemnity limits in costs of defense in earlier stages of the litigation. This may place the burden of the cost of continuing defense on a succeeding layer. Second, exhaustion of underlying limits in whole or in part, may bring an excess carrier within the range of exposure created by the casualty, whereas under the previous form of obligation to defend, their limits would not otherwise have been reached.

Additional problems may also arise where the limits of the primary policy are relatively small. Little incentive exists for extensive defense of the claim by the primary carrier, regardless of the extent of the continuing exposure to excess layers.

At times the duty to defend also creates conflicts of interest in the insurance afforded to an offshore operator. Most American employer's liability policies provide statutory compensation coverage under Coverage A, with primary maritime employer's liability afforded under Coverage B. In many instances, the primary limits of liability for the maritime employer's exposure under the Jones Act and general maritime law is considerably less than the statutory obligations for Longshore and Harbor Workers' Compensation benefits.

The status of the employee as a Jones Act seaman or as a longshoreman is a fact question, and such status is mutually exclusive. A temptation may develop for the primary carrier who is obligated to defend to develop the facts of the case in such a manner as to establish Jones Act status to avoid the higher and continuing exposure under the compensation statute. This may result in larger exposure to excess underwriters covering the remainder of the Jones Act exposure; whereas, if the case resulted in Longshore coverage, no exposure to excess would exist.

G. Retrospective Policies

The development of retrospective premium policies has created additional problems to be considered. In such policies, the assured ultimately bears most of the loss, as well as the cost of defense incurred during a given policy period, once the premium for that period has been readjusted. This raises questions as to which party, the assured or the insurer, has the right to control the course of the litigation, both in defense costs and in the decision to settle or risk final judgment. Although the provisions of the insurance policy seem to authorize the insurer alone to make such decisions, the insurer is now required by jurisprudence to exercise its judgment in a reasonable manner and in the best interest of the insured.