Any business that works on or near navigable waters could face exposure arising from maritime laws. Unfortunately, many businesses are not aware of the applicability and breadth of these laws, so they do not take the time to properly identify and insure maritime risks. This session will provide an overview of key maritime laws, the exposures that can arise from each law, and practical solutions for building an effective risk management program that properly addresses maritime exposures. Role-playing will be used to provide a bird’s-eye view and a better understanding of the common problems that occur when identifying and insuring maritime risks.
This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.
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Adams and Reese LLP

Mr. Potts is a partner in Adams and Reese’s New Orleans office. He is the leader of the firm’s Maritime Team. Over his 17 years of practice, he has litigated a variety of claims involving personal injury and property damage under the general maritime law, matters brought pursuant to the Jones Act, claims relating to vessel seizures, and claims arising on the Outer Continental Shelf. He also has counseled clients through government investigations of maritime casualty events.

Mr. Potts earned a bachelor of arts degree from the University of Texas at Arlington in 1996 and his juris doctorate from Loyola University School of Law in 1999.

Pascal Ray  
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Mr. Ray joined USI Insurance Services as Marine and Energy Practice leader in March 2015. Prior to joining USI, he was the Upstream Energy Practice leader for AmWINS Group, Inc., and a national resource in those areas. His experience includes developing and managing energy and marine underwriting programs. He has created, developed, and managed energy and marine binding authorities on behalf of the US domestic, London, and Bermudian insurance markets for the past 25 years.

Mr. Ray is an instructor for energy and marine insurance continuing education courses in his community and has written and participated in articles involving energy and marine industry insurance issues. Current topics of issue include hydraulic fracturing in the oil and gas industry and the changing legal environment and risk for the maritime industry.

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Mr. Spansel is a partner in Adams and Reese’s New Orleans office. As a trial lawyer with more than 30 years of experience, he concentrates his practice in the areas of commercial litigation and complex litigation, environmental and toxic tort litigation, and energy and maritime litigation.
Mr. Spansel has served as trial and coordinating litigation counsel for a major international energy company for 30 years, obtaining successful trial verdicts and outcomes in casualty and commercial litigation arising in connection with offshore and onshore drilling operations.

Mr. Spansel frequently lectures on maritime law and offshore/oil field liabilities at professional and industry seminars and has been a regular speaker at IRMI’s Construction Risk Conference since 1984 and at its Energy Risk & Insurance Conference since its inception. He also has co-authored several articles on maritime law for its Risk Report and was honored with the “Words of Wisdom” speaker’s award presented at the Construction Risk Conference in 2007.

In his community, Mr. Spansel serves on the Executive Committee of Greater New Orleans, Inc., as secretary and is involved in the Super-Region Committee, a collaborative effort between Greater New Orleans, Inc., and the Baton Rouge Area Chamber to focus on beneficial economic outcomes for Southeast Louisiana.

Mr. Spansel is a New Orleans native and received his juris doctorate and undergraduate degrees from Tulane University.
Applicable Laws

- Jones Act
- Unseaworthiness
- Wages, maintenance and cure
- Maritime tort
- Death on the High Seas act
- Statutory compensation laws
Identification of Available Remedies

- **Status of the Plaintiff**
  - Seaman
  - Longshoreman
  - Other

Identification of Available Remedies (cont.)

- **Status of the Defendant**
  - Employer
  - Non-Employer
  - Vessel Owner
  - Non-Vessel Owner
Identification of Available Remedies (cont.)

- **Situs of Accident**
  - Land
  - Vessel
  - Platform
  - Within or beyond state territorial waters

Jones Act

**Elements of Claim**
- Must be brought by injured “seaman” or survivors
- Against “employer” for negligence
- Employer can be direct, payroll, or borrowing
- Suit can be brought in state or federal court
- Seaman has right to elect a jury trial
Seaman Status

- More or less permanent assignment or perform substantial part of work duties Specific vessel or fleet of vessels
- Under common ownership or control
- Duties contribute to function of vessel or accomplishment of its mission
- Member of vessel’s crew or land-based employee who happens to be working on a vessel?

Vessel Status

- **Vessel**
  
  Traditionally refers to structures designed or utilized for transportation of passengers, cargo or equipment from place to place across navigable waters
Vessel Status (cont.)

• **What is a vessel?**
  
  Every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water.

  • *Stewart v. Dutra Construction*, U. S. Supreme Court (2005)

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 loss of consortium or society
• 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 (cont.)

• **Elements of the Claim**
  - Seaman or one who performs traditional duties of a seaman and is not covered by the LHWCA
  - Vessel
  - 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 crew
  - Causation - proximate cause

Unseaworthiness (cont.)

• **Damages**
  - Loss of past and future wages
  - Impairment of future earning capacity
  - Medical expenses
  - Past and future pain, suffering, disability, humiliation and mental anguish
  - Loss of consortium or society
  - Prejudgment interest is discretionary, but generally awarded
  - Punitive damages not recoverable against non-employer vessel owner or bareboat charter in Fifth Circuit – possible issue in other Circuits
  - If the claim is coupled with a Jones Act claim, then Jones Act damages govern
Unseaworthiness (cont.)

• **Defenses**
  • Comparative negligence
  • Operational negligence
  • Vessel not in navigation?
    – withdrawn from navigation for substantial repairs
    – launched but incomplete vessel
    – undergoing sea trials
  • Three (3) year statute of limitation

Wages, Maintenance & Cure

• **Elements of the Claim**
  • Right is implicit in the contractual relationship between the seaman and the employer ("Liability without fault")
  • Designed to ensure recovery for seaman injured or who falls ill while "in the service of the vessel"
  • "Answerable to the call of duty"
  • No jury unless coupled with Jones Act claim
Wages, Maintenance & Cure (cont.)

- **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 (cont.)

- **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 (cont.)

• **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 (cont.)

• **Defenses**
  • Laches
  • Gross intoxication - 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

• Remedy for personal injuries occurring on navigable waters
• Brought by the injured party or his spouse, where recovery for loss of society is permitted
• May be brought against the vessel, person or corporation committing the tort
• Damages are the same as for unseaworthiness

Maritime Tort (cont.)

• Elements of the claim
  • Situs of the Accident
  • Situs of the Negligent Act - 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 - Standard of reasonable care under the circumstances
  • Proximate cause
Maritime Tort (cont.)

• Defenses
  • Comparative Negligence
  • Time Limitation
  • Suit must be filed within three years from the date that death or injury occurs

Death on the High Seas Act - DOHSA

• 46 U.S.C. §§ 30301-30308
• Applies to wrongful death occurring on the high seas beyond 3 nautical miles from shore
• Gives the personal representative the right to bring a civil action against the person or vessel responsible
Death on the High Seas Act – DOHSA (cont.)

• Losses are limited to pecuniary losses – statutory scheme
• Applies to commercial aviation accidents 12 miles off shore
• Liability based on negligence, unseaworthiness

Death Within 3 Nautical Miles of Shore – Territorial Waters

• A general maritime law cause of action for wrongful death exists for death in state territorial waters
• 46 U.S.C. § 30106 statute of limitations is 3 years
• Lawsuit can be filed against the vessel and against the vessel owner in § 1333 jurisdiction federal court
• Yamaha Motor Corporation v. Calhoun – Supreme Court held that federal wrongful death remedies can be supplemented by state wrongful death remedies
Punitive Damages

- Punitive damages under General Maritime Law may not exceed compensatory damages if the defendant’s conduct was knowing and reckless but not intentionally malicious.


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**McBride v. Estis Well Serv., L.L.C.**

- The Fifth Circuit issued its en banc decision in *Estis v. McBride Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) and ruled that a Jones Act seaman’s recovery is limited to pecuniary losses where liability is predicated on the Jones Act or unseaworthiness. Because punitive damages are non-pecuniary losses, punitive damages are not recoverable under the Jones Act or for unseaworthiness.

- Plaintiffs filed a petition for a writ of certiorari to the U.S. Supreme Court on December 30, 2014, and the writ was subsequently denied.
Punitive Damages (cont.)

- A seaman with a Jones Act claim may also seek punitive damages under General Maritime Law for his employer’s willful and wanton refusal to pay maintenance and cure.

- Atlantic Sounding Co. v. Townsend, U.S. Supreme Court (2009)

Longshore And Harbor Workers’ Compensation Act (LHWCA)

- Compensation remedy against employer
- Injury or death
- Course and scope of employment

- 33 U.S.C. Sec. 901, et seq.
LHWCA (cont.)

- **Jones Act and Longshore Act**
  - Benefits are mutually exclusive.

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LHWCA (cont.)

- **Longshoreman**
  - **Status:**
    - Engaged in maritime employment
  - **Situs:**
    - Upon navigable waters of the United States and adjoining areas
LHWCA (cont.)

• **Status by Statute**
  - Longshoremen
  - Workers in longshoring operations
  - Harbor-Workers
  - Ship repairmen
  - Shipbuilders
  - Ship-breakers

LHWCA (cont.)

• **No Status by Statute**
  - Employees performing clerical, secretarial, security, data processing
  - Employees of a club, camp, recreational operation, restaurant, museum or retail outlet
  - Marina workers not engaged in marina construction
  - Employees of suppliers, transporters or vendors who are temporarily performing their job on your premises
  - Aquaculture workers
  - Personnel building, repairing or dismantling recreational vessels under 65 feet in length or repairing small vessels under 18 tons
  - Master or member of crew of any vessel (seaman)
LHWCA (cont.)

- **Situs by Statute**
  - Pier
  - Wharf
  - Drydock
  - Terminal
  - Building way
  - Marine railway
  - Other adjoining areas customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel

LHWCA (cont.)

- **Benefits**
  - Medical
  - Compensation
    - Temporary
    - Permanent Partial
    - Permanent Total
  - Death
LHWCA (cont.)

• **Defenses**
  • 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

LHWCA (cont.)

**Employer Must Provide Longshore Coverage**

• If an employer fails to obtain coverage an injured employee or his survivors may elect compensation benefits or may file an action at law or in admiralty for damages. Should such an action be filed, the employer does not have the following defenses:
  – Negligence of a co-employee
  – Assumption of the risk
  – Contributory negligence

• 33 U.S.C. Sec. 905 (a)
Penalty For Failure To Secure Payment Of Compensation

• Misdemeanor:
  • Fined up to $10k and/or
  • Imprisoned for up to one year
• Corporate president, secretary and treasurer:
  • Severally liable for such fine or imprisonment
  • Severally personally liable, jointly with such corporation, for any benefits owed to any employee

• 33 U.S.C. Sec. 938 (a)
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Skinner v. Schlumberger Tech. Corp., 655 F. App’x 188 (5th Cir. 2016) 
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Wilcox v. Wild Well Control, Inc., 794 F.3d 531 (5th Cir. 2015), as revised (Aug. 11, 2015) 
Coffin v. Blessey Marine Servs., Inc., 771 F.3d 276 (5th Cir. 2014) 
Wilcox v. Welders, 969 F. Supp. 2d 668 (E.D. La. 2013) 
MacLay v. M/V SAHARA, 926 F. Supp. 2d 1209 (W.D. Wash. 2013) 

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BW Offshore USA, LLC v. TVT Offshore AS, 145 F. Supp. 3d 658 (E.D. La. 2015) 
Warrior Energy Servs. Corp. v. ATP Titan M/V, 551 F. App’x 749 (5th Cir. 2014) 
Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013) 
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I. SEAMAN STATUS

Halle v. Galliano Marine Serv., L.L.C., 855 F.3d 290 (5th Cir. 2017)

Plaintiff Kyle Halle sued his employer under the Fair Labor Standards Act to recover unpaid wages for overtime worked during his employment. Halle argued that he should be considered a seaman for purposes of the FLSA.

Halle was employed by as an ROV technician responsible for operating remotely-operated vehicles (“ROV”) that were used to fix, service, and repair offshore drilling rigs underwater. ROV technicians like Halle navigate and control ROVs aboard an ROV Support Vessel, to which the ROVs remain tethered while in use. ROV Support Vessels serve as “a means of transporting their attached ROVs over water” and are specially outfitted for this purpose, and the ROV’s handling and control systems are all welded to the support vessel. The technicians worked inside a windowless shipping container on the support vessel. From there, the ROV technicians controlled the ROVs using a video feed and joysticks. Although located on the support vessel, technicians were not mixed with the support vessel’s crew, could not see whether any navigational issues are affecting the support vessel, and were considered by the crew to be “passengers.” ROV technicians were subject to a chain of command separate and apart from that of the support vessel, and Halle always reported to land-based supervisors. His particular duties were dedicated only to ROVs. He took no part in upkeep of the support vessel—he never performed maintenance work like sanding, painting, or chipping the support vessel. Halle also never steered the support vessel but, in his role as ROV Supervisor, did occasionally relay GPS coordinates from customers to the support vessel’s captain either by radio or by pointing to a location on a chart. Despite his knowledge of the support vessel’s final destination, Halle had no role in determining the ROV Support Vessel’s path to the intended target, nor did he have any role in steering, anchoring, or navigating.
The employer-defendant moved for summary judgment, arguing that Halle was exempt from the FLSA’s overtime provisions because he qualifies as a “seaman” under the FLSA. The district court granted summary judgment on those grounds.

The U.S. Fifth Circuit reversed the trial court’s decision and concluded that Halle was not a seaman under the FLSA. However, the court went out of its way to reiterate the long-recognized concept that “the definition of ‘seaman’ in the Jones Act is not equivalent to that in the FLSA.” The court noted that the two acts are “separate and independent of each other,” noting that the Jones Act interprets seaman “broadly to maximize the scope of the remedial coverage,” whereas the exemptions under the FLSA “have been drawn narrowly . . . to minimize the number of employees who lose the Act’s protections.” Accordingly, the court held that “it is error” for any court to resolve an FLSA case by resorting to legal standards, such as the definition of a “seaman,” from Jones Act case law.

The test for whether someone is a “seaman” under the FLSA involves two prongs — first, whether the employee performs as “master or subject to the authority, direction, and control of the master aboard a vessel,” and second, whether the “employee’s service is primarily offered to aid the vessel as a means of transportation.” The court focused on the second prong, particularly on whether the employee’s duties “primarily aid[ed] in the operation of the vessel as a means of transportation” and whether the “primary purpose” of the employee’s work involved the safe navigation of the ship. The court found that even assuming that it took the Halle “several hours every few days to calculate coordinates” and communicate them to the captain of the vessel, that activity would not “account for 80% of the estimated eighty-four plus hours worked weekly by ROV Technicians.” Accordingly, the court held that the seaman exemption did not apply based on the facts in evidence.
Skinner v. Schlumberger Tech. Corp., 655 F. App’x 188 (5th Cir. 2016)

Plaintiff worked for defendant Schlumberger as a “Field Specialist Trainee” who performed coiled tubing work for Schlumberger’s clients. His work took place at Schlumberger’s district office, on inland waters, and offshore on platforms and vessels. He worked on a variety of assignments “but maintained the same essential duties, focusing on coiled tubing work, throughout his employment.” Plaintiff was assigned to remove a tool that was stuck in a well located in the Gulf of Mexico. He was transported out to the well on a lift boat that Schlumberger’s client had retained pursuant to a time charter agreement. The lift boat transported Schlumberger’s employees and equipment to the well site and assisted Schlumberger’s operation with its on-board crane. The lift boat jacked-up next to the platform, and the workers used a gangway plank to move between the lift boat and the platform to complete the operation. The plaintiff claimed that he injured his neck when he attempted to untangle a hydraulic hose that had become caught on the gangway as his crew was moving equipment back onto the lift boat after the work was completed.

Plaintiff sued Schlumberger, the well owner, and the lift boat owner in Louisiana state court, alleging general maritime negligence and violations of the Jones Act. Schlumberger removed the case to federal court based on diversity jurisdiction, OCSLA, and federal question jurisdiction, and argued that the plaintiff had fraudulently pleaded that he was a Jones Act seaman, thereby making removal appropriate. The plaintiff filed a motion to remand, arguing that he was in fact a seaman entitled to damages under the Jones Act. Specifically, plaintiff argued that his “time spent onshore preparing for jobs should qualify as time spent as a seaman;” that his work on the lift boat qualified as a new assignment; and that the district court “improperly calculated the amount of time that he spent in service of vessels by using days as
opposed to hours.” The district court denied the plaintiff’s motion to remand, finding that the plaintiff “did not have a substantial connection to a vessel or group of vessels.”

The Fifth Circuit agreed with the district court’s decision and found that none of the plaintiff’s arguments had merit. The court cited to the U.S. Supreme Court’s decision in *Chandris*, which provided the rule of thumb that “a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act.” Since the plaintiff maintained the same job and essential duties during his entire employment with Schlumberger, none of his work assignments would qualify as a new assignment under the *Chandris* standard, and his work on land at Schlumberger’s district office was not in service of a vessel or fleet of vessels. And regardless of whether the plaintiff’s time working aboard vessels is viewed by “hours worked” or “days worked,” the facts demonstrated that he did not spend 30% of his time “in service of a single vessel or fleet of vessels.” Accordingly, the court held that the plaintiff was a not a seaman.

**Alexander v. Express Energy Services Operating, L.P., 784 F.3d 1032 (5th Cir. 2015)**

Plaintiff was employed as a lead hand/operator in the plug and abandonment (“P&A”) team at Express Energy Services Operating, which specialized in plugging decommissioned oil wells on various platforms off the coast of Louisiana for Express’s customers. This particular case arose from an injury sustained by the plaintiff while working on a P&A project on a platform owned by Apache Corporation which had four wells on it. At the time of the accident, a liftboat (owned by Aries Marine Corporation) was positioned next to the Apache platform, with a catwalk connecting the vessel to the platform. The record shows that the permanent crane, which was operated by an Aries employee for the benefit of the P&A crew, was located on the liftboat, while other equipment, including wireline equipment, was located on the platform.
Plaintiff testified that he and the P&A crew had set up the equipment on the platform before work began, and he was working on the platform. Plaintiff was injured when a wireline from the crane snapped, dropping a bridge plug/tool combination which had been suspended a foot above the deck, which then rolled onto his foot.

Plaintiff filed suit under the Jones Act. His employer, Express, filed a motion for summary judgment on seaman status, arguing that the plaintiff was a platform-based worker who failed to satisfy either prong of the *Chandris* seaman status test. With respect to the first prong, Express argued that the plaintiff did not contribute to the function of a vessel or the accomplishment of its mission because he worked on non-vessel fixed platforms. With respect to the second prong, Express argued that even though the plaintiff had demonstrated that approximately 35% of his P&A jobs involved the use of an adjacent liftboat, he had failed to demonstrate that he spent at least 30% of his total work time on the adjacent liftboat. In response, the plaintiff argued that he did contribute to the function of the liftboat, and that that all of his time spent on jobs that used an adjacent vessel (here, at least 35%) should be allowed to count toward the *Chandris* temporal requirement, without regard to how much time he actually spent on the vessel itself. The plaintiff never offered any evidence that he actually spent 30% or more of his work time on a vessel. The district court granted Express’ motion for summary judgment on the first prong, concluding that the plaintiff’s duties did not contribute to the function of a vessel because they related to the fixed platform, not the vessel. The district court opined that the plaintiff had also failed to meet the second prong.

On appeal, the U.S. Fifth Circuit determined that the undisputed evidence showed that approximately 64% of the plaintiff’s jobs involved a fixed platform only, without any use of an adjacent vessel. Even for the remaining jobs, which did involve a vessel adjacent to the
platform, the plaintiff’s work occurred mostly on the platform. The Fifth Circuit held that “[i]t is not sufficient under Chandris (or indeed under Barrett) that [the plaintiff] was merely near a vessel on more than 30% of his jobs or that he performed some incidental work on a vessel on those jobs; to be a seaman, he must show that he actually worked on a vessel at least 30% of the time.” Because the plaintiff had failed to produce sufficient evidence to prove that point, which is an essential element of seaman status, the appellate court affirmed the district court’s ruling that the plaintiff was not a seaman.

Wilcox v. Wild Well Control, Inc., 794 F.3d 531 (5th Cir. 2015), as revised (Aug. 11, 2015)

Plaintiff was a welder employed by a welding contractor that provided various offshore construction, fabrication, and repair services. Over the course of his employment, the plaintiff worked in numerous locations, including a fabrication yard and on various rigs, barges, and vessels owned by customers of his employer. The plaintiff estimated that he spent less than thirty percent of his time in the service of any one vessel of group of vessels.

The defendant, Wild Well Control, Inc., contracted with the plaintiff’s nominal employer to obtain some welders to assist with the decommissioning of a well in the Gulf of Mexico, and the plaintiff was included among the welders selected to work for the defendant. The job was expected to last two months, during which time the plaintiff was considered to be a borrowed employee of the defendant. The plaintiff was required to live on the defendant’s barge, which was on site at the well to provide support for the decommissioning work. While working on this job, the plaintiff sustained injuries when gasses exploded while he was welding inside on the well platform.

The plaintiff filed suit against his borrowing employer for negligence under the Jones Act, claiming that he had a substantial connection to the barge that provided support for the
decommissioning project. The borrowing employer subsequently filed a motion for summary judgment to dismiss the plaintiff’s Jones Act claim, arguing that the plaintiff was not a seaman. The district court granted summary judgment in favor of the borrowing employer on the basis that the plaintiff was not able to satisfy the substantial-connection prong of the *Chandris* test. On appeal, the plaintiff argued that the district court erred in its substantial-connection analysis by determining his seaman status by referring only to his entire employment with his nominal employer, rather than to his more limited period of employment with the borrowed employer only. Plaintiff argued that he should be considered as having “started a new job with a new employer” when he began work as a borrowed employee, thereby making his borrowing employer his current employer for the purposes of the seaman-status inquiry. The plaintiff argued that under this analysis, he has satisfied the substantial-connection prong because he spent more than thirty percent of his employment with the borrowed employer aboard a vessel.

The only issue addressed on appeal was related to the second-prong of the *Chandris* test for seaman status; namely, the requirement that “a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.” The court noted that the fundamental purpose of this second prong inquiry is “to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation.” “Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore.” The court further observed that it had “generally declined to find seaman status where the employee spent less than 30 percent of his time aboard ship.”
While recognizing that courts are not required to always look to a borrowed employee’s entire employment with his nominal employer when determining seaman status, the Fifth Circuit specifically declined to adopt a rule that borrowed-employee status automatically requires courts to look only to the borrowed employee’s period of employment with the borrowing employer. In this case, the court found that there was “good reason” to distinguish the plaintiff from the other permanent employees who worked for the defendant. Over the course of his entire employment with his nominal employer, the plaintiff had worked for 34 different customers on 191 different jobs, both offshore and onshore. He was only assigned to work for the borrowing employer for one specific project, and that project had a clear end date only two months after it began. Furthermore, the plaintiff’s essential duties never changed — his primary duty continued to be welding. The court noted that the plaintiff did no present any evidence which suggested a “fundamental change in status” had occurred.

After considering the facts and “focusing on the essence of what it means to be a seaman,” the Fifth Circuit concluded that the plaintiff had failed to demonstrate a genuine issue of material fact from which a reasonable jury could conclude that he qualified for seaman status under the Jones Act, and the summary judgment in favor of the defendant was affirmed.


Plaintiff was employed by Montco Oilfield Contractors (“MOC”) as an offshore welder engaged in the deconstruction of decommissioned offshore platforms. While performing this work, the plaintiff and other MOC employees were stationed aboard the L/B ROBERT, a lift vessel owned and operated by Montco Offshore, Inc. that was jacked down beside the platform being decommissioned. The MOC employees rode on the L/B ROBERT from one job site to another. The MOC employees ate and slept aboard the L/B ROBERT. Daily production and
safety meetings were also held aboard the L/B ROBERT, and the MOC welders’ “field office” was a shipping container located on the L/B ROBERT’s deck.

The welders’ job responsibilities required them to work on the platform, a materials barge, and the L/B ROBERT. On the platform, the welders would cut material to be taken away and install lifting eyes on that material. Once the scrap metal was lifted to the material barge by the L/B ROBERT’s cranes, the MOC welders would weld it in place for transport. On the L/B ROBERT the MOC welders did preparatory work related to the work on the platform or material barge.

During a two-week hitch, the plaintiff became ill and was ultimately sent ashore on a crewboat after repeatedly complaining to his supervisor and the L/B ROBERT’s captain and medic. Shortly after arriving on shore, he went to the emergency room and was diagnosed with pneumococcal meningitis, causing him to miss approximately nine weeks of work. The plaintiff subsequently filed suit against MOC and Montco Offshore alleging that he was a seaman and crew member of the L/B ROBERT when he contracted pneumococcal meningitis, that he sustained brain damage and other injuries because of the defendants’ failure to provide immediate medical care, and that the defendants were liable under the Jones Act and the general maritime law of unseaworthiness.

The defendants filed a motion for partial summary judgment arguing that the plaintiff did not qualify as a seaman because less than 30% of his work was performed on the L/B ROBERT. Defendants argued that the plaintiff was not a member of the L/B ROBERT’s crew, and instead characterized him as a platform-based worker and a passenger aboard the L/B ROBERT. They argued that the vessel’s mission was to serve as a “floating hotel” for the MOC employees who were working on decommissioning the platform. Defendants further argued that the precedents
set by the U.S. Fifth Circuit in prior cases (including *Hufnagel* and *Alexander v. Express Energy Servs. Operating, L.P.*, discussed supra) are directly on point and dictate that the plaintiff could not satisfy the test for seaman status.

The court disagreed and found the plaintiff’s situation distinguishable from the plaintiffs in *Hufnagel* and *Alexander*. Specifically, the vessels at issue in those cases were owned and controlled by entities completely separate from plaintiffs’ employers. Further, neither Hufnagel nor Alexander had any duties pertaining to the vessels at issue. However, in the instant case, the court found genuine issues of material fact regarding the plaintiff’s precise relationship to the L/B ROBERT. For example, the plaintiff was employed by MOC and permanently assigned to the L/B ROBERT, which was owned and operated by Montco Offshore, a related entity. Additionally, no evidence was introduced to evaluate whether MOC actually controlled the L/B ROBERT, or whether MOC’s employees were Montco Offshore’s borrowed servants. Similarly, the record was unclear as to whether the materials barges used in the work were controlled by MOC. Furthermore, the plaintiff’s supervisor testified that the plaintiff would perform maintenance work on the vessel when asked by the vessel captain, and the plaintiff also performed some of his welding work while on board the L/B ROBERT. As a result, the court concluded that these genuine issues of material fact precluded the granting of summary judgment on seaman status.

*Coffin v. Blessey Marine Servs., Inc.*, 771 F.3d 276 (5th Cir. 2014)

The plaintiffs, all of whom served as tankermen on a ship, brought an action against the vessel owner, alleging violations of overtime pay provisions of Fair Labor Standards Act (FLSA). The vessel owner filed a motion for summary judgment arguing that the plaintiffs were exempt from the FLSA as seamen.
As tankermen, the plaintiffs had gained deckhand experience and received required training in the loading and unloading of liquid cargo from a barge. The plaintiffs were vessel-based tankermen and shared several duties also performed by deckhands, along with various additional tasks related both to the maintenance of the barges and the loading and unloading process. The parties agreed that most of the plaintiffs’ tasks were seaman work, with the exception of the plaintiffs’ loading and unloading duties.

The vessel owner produced extensive evidence during discovery suggesting that the Plaintiffs’ loading and unloading duties were done as part of the vessel crew and aided the seaworthiness of the vessel. In response, the plaintiffs pointed to the case of Owens v. SeaRiver Maritime, Inc., 272 F.3d 698 (5th Cir. 2001), a case holding that a land-based tankermen did not qualify for the seamen exemption. Plaintiffs also pointed to DOL regulations indicating that seamen can lose that status if they spend a substantial amount of time (20% or more) performing non-seamen duties, such as loading and unloading cargo. In response, the vessel owner argued that Owens should be limited to land-based tankermen only and not apply to vessel-based tankermen.

The lower court denied the vessel owner’s motion, holding that Owens found loading and unloading were not seamen duties as a matter of law, and if a tankerman spent more than 20% of his time loading/unloading, that tankerman was not exempt under the “seamen” exemption.

On appeal, the Fifth Circuit distinguished the Owens case, limiting it to land-based tankermen only. In the case of vessel-based tankermen, the Fifth Circuit held that “loading and unloading was seaman work when done by vessel-based Plaintiffs’ who worked, ate, and slept on board their assigned barges. The Fifth Circuit ordered the lower court to enter judgment in favor of the vessel owner. This ruling strengthens the “seamen” exemption because duties that
have been categorized as “non-seamen” work are found to be seamen’s work if performed by vessel-based seamen.


The plaintiff was a dockbuilder who was injured while replacing a crane block cable after the crane block tipped over and crushed his left leg (a crane block is a large steel apparatus weighing over one ton that is suspended from cables that hang from the crane’s boom).

The plaintiff sought to recover damages as a Jones Act seaman. In support of this claim, plaintiff argued that he spent more than half his working hours during a five-month period aboard barges, primarily transporting and assembling construction supplies, while working on the repair of a Staten Island pier. He would sometimes help the tugboat and barge crews with handling lines and moving spuds, and he occasionally helped bilge pump the barge. Although the barges were usually moored to a pier, they were occasionally unmoored and moved along the East River with plaintiff aboard, including a trip that took place the day before the accident.

The court found that the plaintiff did not qualify as a seaman. In rendering this decision, the court noted that the barges were almost always secured to a pier, that none of the plaintiff’s tasks involved sea-based activities, and that he never operated the barges or otherwise assisted in their navigation. Even assuming the plaintiff was present for and assisted with every barge movement, the court concluded that he still would have only spent 5–10% of his work time involved in navigation-related activities. The court also considered the fact that the plaintiff belonged to the dockbuilders’ union, had no Coast Guard license or other “seaman’s papers,” and never spent the night aboard any of the barges. The court found that this level of involvement with a vessel was not sufficient to make the plaintiff a “seaman” under the Jones Act.
Wilcox v. Welders, 969 F. Supp. 2d 668 (E.D. La. 2013)

Plaintiff suffered serious injuries while performing welding services on a fixed platform located on the Outer Continental Shelf in the Gulf of Mexico for the purpose of disassembling and demolishing the platform. The work assignment required that plaintiff live aboard a barge owned by the platform’s owner. Plaintiff alleges that he was injured when undetected gases exploded as he was welding inside a pipe on the platform. Plaintiff sought to recover as a Jones Act seaman, and his employer subsequently filed a motion for summary judgment challenging his alleged seaman status on the basis that plaintiff was nothing more than a land-based welder and that he did not have the requisite connection to a vessel for seaman status. Plaintiff argued that he meets the test for Jones Act seaman status because he believed himself to be “permanently reassigned” as a member of the barge crew for this particular assignment and that the totality of the time he spent working offshore during the course of his employment qualified him as a seaman.

The court held that the plaintiff did not qualify as a Jones Act seaman because he did not present sufficient evidence to show that at least 30% of his work was spent in the service of a vessel or identifiable group of vessels under common ownership of control. The court rejected the plaintiff’s argument that he had been “permanently reassigned” to the barge vessel. Rather, the court concluded that he was a land-based employee and that, in the absence of the aforementioned 30% requirement, such a classification could only be changed if he had received a new work assignment before his accident which permanently changed either his essential duties or his work location. Evidence that plaintiff received training in offshore work and safety, that he was treated as part of the crew, or that he was ordered to work a crew position is insufficient to meet this requirement. The court held that an otherwise land-based worker must
show that his “essential duties” had “substantially or fundamentally changed,” and not merely that he had served on a boat sporadically, in order to obtain seaman status.


Plaintiff was assigned as a mechanic performing mechanical and welding on boats and barges that were moored to a floating dock, and he would occasionally assist in the repositioning of those vessels. He-commuted to work each day and did not sleep aboard any vessels. Plaintiff was injured after falling into an open manhole while aboard a barge, after which he sued seeking to be compensated as a Jones Act seaman.

In considering whether plaintiff’s connection to the ships was substantial enough to warrant seaman status, the court considered whether he was regularly exposed to the perils of the sea. Plaintiff argued that he was required to wear a life preserver at all times and that he faced hazards such as wind gusts, river turbulence, icy barge decks, inclement weather, and long stepping from barge to barge. However, the court reasoned that those activities and risks were associated with longshoremen and went on to list the following potential risks as more indicative of a seaman’s duties: the need to fight fires without outside assistance, the need to abandon ship, the need to survive exposure to inclement weather until help arrives, potential delay or inconvenience of being transported onsite for medical attention, and being stuck on a vessel for extended periods of time until the next port call.

**MacLay v. M/V SAHARA, 926 F. Supp. 2d 1209 (W.D. Wash. 2013)**

Plaintiff brought a maritime survival and wrongful death suit against the vessel owner following the death of her daughter after a fall from the vessel. The vessel was a decommissioned oceanographic research vessel that the defendant had purchased for conversion into a luxury floating hotel. The decedent was initially hired to perform clerical and
administrative duties shore-side, but her office was moved onto the vessel a short time later. She routinely engaged in general labor to assist in the conversion process, including heavy cleaning and disposing of scrap metal. Plaintiff estimated that roughly fifty percent of the decedent’s daily activities involved general labor on the vessel. At the time of the decedent’s death, the conversion project was substantially incomplete, the vessel had not received stability letters or been classed by a society, and millions of dollars of work remained before the vessel could be returned to service.

Plaintiff brought a summary judgment seeking a determination that the decedent was covered under the LHWCA, but the vessel owner argued that she was a Jones Act seaman and thus not eligible for LHWCA coverage.

The Court concluded that the decedent was not a Jones Act seaman. In support of this finding, the court noted that the vessel was not in navigation at the time of the accident and the majority of the conversion work remained substantially incomplete. It was also undisputed that the vessel was not yet in a condition to be used in commerce as a luxury floating hotel. The court further noted that the vessel was not seaworthy because it had not received stability letters or been classed.


Two ironworkers, employed by Boh Brothers, were injured in the reconstruction of I-10 across Lake Pontchartrain. The workers performed their work on a derrick barge and also performed part of their work from the bridge structure. The workers were injured while being transported by a crew boat, which one of the plaintiffs was operating. The district court ultimately determined that both workers were seaman because they contributed to the mission of the derrick barge and had a connection to it which was substantial in nature and duration. One of the plaintiffs in the case was an ironworker foreman who spent a substantial portion of his time,
30-95% on the derrick barge, which moved around the work site, and his work sufficiently exposed him to traditional maritime perils. All of the time that the plaintiff spent aboard the barge was devoted to the furtherance and supervision of the crane barge’s objective, which was the construction of the bridge. The plaintiff was also cross-trained to perform a variety of tasks related to the maintenance and function of the barge. The Fifth Circuit noted the fact that the plaintiff returned home daily did not remove him from exposure to cognizable dangers of the sea. Nor did the fact that ironworkers are traditionally land-based negate the seaman status to which plaintiff would otherwise be entitled by virtue of his connection with the vessel.

The second plaintiff in the case was a similarly-situated ironworker who was injured in the same fashion, but the injury occurred on his first day of work. The Fifth Circuit held that the appropriate scope of the duration inquiry was not limited to the day of his injury, but included the full breadth of the intended scope and duties of his employment. The plaintiff was a full-time employee with an expectation that his employment would extend indefinitely until the bridge construction project was completed. He also presented testimony that his job responsibilities would have required him to work on the vessel between 40–60% of the time. Consequently, the Fifth Circuit affirmed the district court’s finding that the plaintiffs were seaman.

II. VESSEL STATUS


Plaintiff Kelvin Gold filed suit against his employer, Helix Energy Solutions Group, for injuries he allegedly suffered in December 2012 and in April 2013 while working aboard a Helix-owned ship, the HELIX 534, while it was laid up in a shipyard.

The HELIX 534 served her previous owner as a well-drilling ship, but it had been laid up in a shipyard prior to Helix’s purchasing it. Following the purchase, another vessel towed it to a
shipyard in Singapore, where Helix planned to convert the ship into a well-intervention ship (a
ship that services pre-existing offshore wells). Due to the extent of the conversion, Helix turned
the HELIX 534 over to the control of contractors at the shipyard for completion of the bulk of
the overhaul; though, Helix employees still assisted with minor repairs. The conversion involved,
among other things, removing obsolete equipment, configuring and installing well-intervention
equipment, and overhauling the engines, thrusters, generators, and in-line propulsion equipment.
The work done on the propulsive components rendered the HELIX 534 unable to navigate on her
own for a substantial portion of the conversion process. Though Helix initially expected the
conversion to take five or six months (ending in mid-2013), unanticipated work, labor issues, and
trouble procuring certain parts delayed the conversion. In September 2013, with work still to be
done, Helix dry-towed the HELIX 534 from Singapore to Galveston, Texas. In April 2014 (20
months after work began), the HELIX 534 entered well-intervention service for the first time
under Helix’s control. In all, the 20-month conversion cost $115,000,000, or roughly 135% of
the purchase price paid by Helix.

In November 2012, near the beginning of the project, Helix hired Gold as an “able bodied
seaman,” anticipating that he would serve as an offshore worker. Consequently, Gold’s
responsibility was to familiarize himself with the craft and to assist with the overhaul (painting,
cleaning, taking inventory, etc.). Gold served two alternating 28-day hitches between early
December 2012 and March 2013, along with a partial hitch in late April 2013. During the entire
time Gold worked aboard the HELIX 534 (almost five months), the ship lacked the ability to
navigate on her own due to the overhaul of her engines.

Helix paid Gold maintenance and cure benefits, but it terminated the payments after Gold
allegedly failed to follow his doctor’s orders. Gold then sued Helix for additional maintenance
and cure benefits, as well as actual and punitive damages. Gold claimed these remedies under the Jones Act as a “seaman” aboard a “vessel in navigation.” Helix disagreed that the Jones Act applied and moved for summary judgment on the ground that the HELIX 534 was not a vessel in navigation while undergoing a major overhaul. The trial court agreed with Helix and granted its motion for summary judgment. Gold appealed, and the court of appeals reversed on the grounds that Helix had failed to conclusively prove that the ship was totally deactivated or out of service for an extended period of time before Gold's injury.

The Texas Supreme Court granted Helix’s petition for review to determine whether a ship such as the HELIX 534 — which had been taken out of service, subjected to a 20-month conversion process, and unable to engage in transportation during the entirety of the claimant’s onboard employment — was “out of navigation” and therefore outside the Jones Act, and it concluded that such a ship was indeed “out of navigation” as a matter of law. In reaching its decision, the court considered the permanency of the ship’s time out of the water and its status prior to the plaintiff’s injury to determine whether it was a “vessel in navigation.” The court also relied on the established rule of law that “major overhauls that render watercraft practically incapable of transportation are sufficient to remove those crafts from ‘vessel in navigation’ status.” Accordingly, since the HELIX 534 was not in navigation, the Jones Act did not apply during the course of Gold’s employment.

**Baker v. Dir., Office of Workers’ Comp. Programs, 834 F.3d 542 (5th Cir. 2016)**

Plaintiff, a maritime carpenter, was injured while working at a waterside marine fabrication yard on the construction of a housing module designed for use on a tension leg offshore oil platform named “Big Foot.” Plaintiff filed a claim for disability benefits under the LHWCA and argued that he was covered by the LHWCA directly as a shipbuilder and maritime worker, or alternatively, that he should be covered under the LHWCA as extended by OCSLA.
An administrative law judge (ALJ) denied the plaintiff’s claim for LHWCA benefits on the basis that (1) he was not engaged in maritime employment as a shipbuilder because Big Foot was not a “vessel” under the LHWCA and (2) that OCSLA did not extend LHWCA because “there was no significant causal link between [his] alleged injury and operations on the OCS.” Plaintiff appealed the ALJ’s decision to the Benefits Review Board (BRB), which affirmed the ALJ’s denial of benefits, after which plaintiff filed a petition for review with the U.S. Fifth Circuit.

The U.S. Fifth Circuit affirmed the BRB’s decision and findings (see corresponding case summary in Section VI for detailed discussion of the court’s analysis of the OCSLA issue). After conducting a thorough review of the relevant characteristics of the Big Foot, the court concluded it was not a vessel, thereby precluding the plaintiff from being considered a shipbuilder/maritime employee. The parties conceded that Big Foot was not built to regularly transport goods or people. Its various component parts were constructed in several locations across the globe and then transported to Texas to be assembled—a process that often takes several months, if not years. The court also noted that “although the Big Foot can float, it is not capable of self-propulsion, has no steering mechanism, does not have a raked bow, and has no thrusters for positioning once on location.” Once its assembly was completed, it was scheduled to be towed to a location approximately two hundred miles off the coast of Louisiana and anchored to the sea floor by over sixteen miles of tendons, after which it would serve as a work platform for the life of the oil field, which is estimated to be twenty years. Moreover, the U.S. Coast Guard classified Big Foot as a “Floating Outer Continental Shelf [OCS] Facility.”

In light of the aforementioned characteristics, the court cited to the U.S. Supreme Court’s prior decisions in Stewart and Lozman (discussed in this section) and concluded that “a
reasonable observer, looking to Big Foot’s physical characteristics and activities, would not consider it designed to a practical degree for carrying people or things over water.”

**BW Offshore USA, LLC v. TVT Offshore AS, 145 F. Supp. 3d 658 (E.D. La. 2015)**

In this case, the court was tasked with determining whether a floating, production, storage, and offloading unit (“FPSO”), which was used to produce oil and gas in the Gulf of Mexico, was a vessel for purposes of determining contractual indemnity liability for injuries sustained by the plaintiff. Each defendant argued that the other was liable pursuant to mutual indemnity clauses contained in separate master service agreements. In order to determine whether the contracts are to be interpreted under maritime law or must be interpreted under Louisiana law, the court was required to first decide whether the FPSO was a vessel.

At the outset, the court cited to the Supreme Court’s holding in *Lozman*, stating that “the word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water” and that “a structure is not included in this definition unless a reasonable observer, looking to the structure’s physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.” “Indeed, a structure may qualify as a vessel even if it attached—but not permanently attached—to the land or ocean floor.” The court recognized that “longstanding precedent in this circuit establishes that mobile offshore drilling units are vessels under general maritime law,” including non-self-propelled drilling platforms, jack-up rigs, and semi-submersible deepwater drilling platforms that utilize dynamic positioning.

The court examined the specific characteristics of the FPSO. The FPSO was “ship shaped” and built on the base of a converted oil tanker. It maintained a full marine crew and flew the flag of Bermuda. Importantly, it possessed its own propulsion system and could detach
itself from a well and relocate under its own power in as little as six hours. Though its primary purpose is oil production, the court noted that fact was not dispositive of the vessel status issue.

Based on the above facts, the court concluded that the FPSO was clearly a vessel. In doing so, it rejected the defendants’ argument that the FPSO should be treated similar to a spar platform (large oil production platforms that float on the ocean’s surface but are moored to large anchors in the seabed), which courts have repeatedly found not to be vessels due to their limited movement capabilities, the time and expense necessary to render them capable of marine transport, and the permanence of their attachment to the sea floor. However, the court pointed out that FPSO’s are not only practically capable of maritime transport, but are also imminently capable of such transportation. They can detach from the well and relocate under their own power within six hours, transporting the crew, equipment, and stored oil along with them, which stands in stark contrast to the logistical hurdles presented by the relocation of a spar platform.

Warrior Energy Servs. Corp. v. ATP Titan M/V, 551 F. App’x 749 (5th Cir. 2014)

A tool and services supplier brought an action against the owners of a production facility seeking a declaratory judgment that the facility was a vessel. The facility was floating oil and gas production facility moored miles offshore Louisiana on the Outer Continental Shelf (“OCS”).

In considering whether the facility should be classified as a vessel, the Fifth Circuit relied on the Supreme Court’s holding in Stewart and reasoned that that the dispositive question was “whether the watercraft’s use as a means of transportation on water is a practical possibility or merely a theoretical one.” The court concluded that the facility did not constitute a vessel based upon the court’s prior precedent decisions addressing similar structures. First, the court noted that the facility was moored to the floor of the OCS by twelve chain mooring lines connected to twelve anchor piles, each weighing 170 tons and each embedded over 200 feet into the seafloor, as well as by an oil and gas production infrastructure. Second, the facility had not been moved.
since it was constructed and installed at its current location in 2010. Third, the facility had no means of self-propulsion, apart from repositioning itself within a 200 foot range by manipulating its mooring lines. Fourth, moving the facility would require approximately twelve months of preparation, at least fifteen weeks for its execution, and would cost between $70 and $80 million. In light of these characteristics, the court found that the facility was not “practically capable of transportation on water” and was therefore, as a matter of law, not a vessel.


Plaintiff Sean Gautreaux was employed by defendant Trinity Trading Group, Ltd., working as a deckhand/supervisor trainee on the Louisiana Midstream One (“LMO”), a non-self-propelled barge equipped with a conveyor system that performs midstream cargo transfer operations on the Mississippi River. Plaintiff alleges that he was injured in the course of his employment when a mooring line connecting a coal barge to the LMO snapped and struck him. Plaintiff filed an action against Trinity to recover damages under the Jones Act and general maritime law for his resulting personal injuries.

The parties filed cross motions for summary judgment on the issue of vessel status. In evaluating this issue, the court relied on the guidance provided by the Supreme Court’s recent decision in _Lozman_ regarding “borderline cases where ‘capacity’ to transport over water is in doubt;” specifically, the _Lozman_ Court’s holding that a watercraft is not practically capable of maritime transportation “unless a reasonable observer, looking to the [watercraft’s] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.”

In this case, the court noted that the LMO was a non-self-propelled barge containing cargo handling equipment which it used to transfer coal and other products midstream between
ships and barges in the Mississippi River. Each time the LMO performed an operation, it was moved by tugboat on the river from its temporary mooring location to one of three different buoys where it met the ships and barges to which it will transfer cargo. Therefore, to perform an operation, the LMO was required to travel on the river for what is a roundtrip of at least three miles. During these trips, the LMO regularly transported crew members and equipment. As for its physical characteristics, the LMO has a raked bow and an air-conditioned dining area onboard for its crew, along with life-saving equipment onboard. It was also registered as a vessel with the Coast Guard. Despite these characteristics, Defendant Trinity argued that the LMO was not a vessel because it lacked certain characteristics typically associated with a vessel, including navigational aids, means of mechanical propulsion, and a bilge pump.

The court found that the evidence established that the LMO traveled on the river and carried people and/or equipment with significant frequency and minimal expense or effort. For those reasons, the LMO possessed a “practical capability of maritime transportation,” thereby affording it vessel status as a matter of law.


Plaintiff brought a claim under the Jones Act after he suffered spinal injuries while working on the “Mad Dog” oil and gas spar platform after a lifeboat he was testing released prematurely. Defendants moved for summary judgment on the ground that plaintiff was not a seaman because he was not working on a vessel.

The central issue in this case was whether the oil and gas spar platform in the Gulf of Mexico where the plaintiff worked was a “vessel.” The court found several characteristics of platform to be relevant to this inquiry:

- The spar was assembled onsite in 2005 to access eight wells and has no steering mechanism, system of self-propulsion, or raked bow.
The spar was intended to be used at its current location for approximately 25 years.

Eleven polyester rope and chain mooring lines connect the spar to eleven suction piles driven into the seabed 4,500 feet below. The spar is also connected to two pipelines on the floor of the Outer Continental Shelf that are designed to transport natural gas and oil.

Although tethered to the floor of the OCS, the spar was capable of movement in a 180- to 221- foot radius with its crew and equipment on board.

The range of movement between wells for drilling operations is approximately 180 feet, while the range of movement due to environmental conditions (e.g., wind, wave, or current) was approximately 221 feet.

The spar had not moved wells in over four years.

Noting that “the relevant inquiry in determining vessel status is whether the watercraft’s use as a means of transportation on water is a practical possibility or merely a theoretical one,” the court concluded that this platform was not a vessel. The court found that in this case, the platform was not practically capable of maritime transportation (as opposed to mere movement). The platform’s infrastructure (specifically the multiple attachments to the seabed) restricted its range of movement, and the process of disconnecting and dismantling the existing infrastructure in order to move the spar to a new location would take at least sixteen months. Additionally, the court noted that moving the platform to another location would require “abandoning and plugging the eight wells, removing each well’s jumpers, removing its eleven mooring lines, decommissioning the production drill site’s infield lines, and removing hydrocarbons from the jumpers, infield oil and gas risers, and sales lines.” Such a process would require heavy lift vessels and other specialized equipment needing up to two years of lead time. The court concluded that such a complex infrastructure rendered the platform “practically incapable of transportation,” and thus held that it was not a vessel.
Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013)

The City of Riviera Beach sought to obtain a maritime lien for unpaid dockage fees and damages for maritime trespass by the petitioner’s “floating home.” The Court described the structure as “a house-like plywood structure with French doors on three sides. . . . a sitting room, bedroom, closet, bathroom, and kitchen, along with a stairway leading to a second level with office space. . . . [and] an empty bilge space underneath the main floor kept it afloat.” In the approximately ten years the petitioner owned the house, it remained stationary except for two instances where it was towed to different marinas.

The Court held that the house was not a vessel. The Court acknowledged the traditional requirement that a vessel must be “capable of being used as a means of transportation on water,” and it held that “a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.” In this case, the Court noted that the floating house had no rudder or steering mechanism, had an unraked hull, was incapable of self-propulsion, could not generate or store electricity when away from the dock, had French doors and ordinary windows (instead of portholes).

The Court also noted that it utilized this “reasonable observer” test in order to avoid considering any subjective elements, such as owner's intent, and only allow for consideration of objective evidence of a waterborne transportation purpose.

Warrior Energy Servs. Corp. v. ATP TITAN, 941 F. Supp. 2d 699 (E.D. La. 2013), aff’d sub nom., 551 F. App’x 749 (5th Cir. 2014)

Plaintiff filed suit asserting maritime liens against the ATP TITAN, a triple-column, deep-draft, floating production facility moored in a production field approximately 65 miles offshore of Louisiana. The dispute arose from fees allegedly owed for tools and services.
provided to the ATP TITAN. Defendants filed a motion to dismiss for lack of jurisdiction on the grounds that the ATP TITAN was not a vessel but a floating production platform, which would deprive the court of in rem jurisdiction over the ATP TITAN.

The ATP TITAN was considered to be a “hybrid semi-submersible/spar.” The court noted that semi-submersible drilling rigs are generally considered vessels, whereas production platforms and spars are not. In this case, the court rejected the notion that the ATP Titan qualified as a semi-submersible drilling rig or modular offshore drilling unit. Although at one time it had a modular drilling rig and been involved in drilling activities, it did not have a built-in capacity to drill and thus could not be considered a semi-submersible drilling rig for purposes of determining vessel status. Rather, the court found that the relevant inquiry was not whether the ATP TITAN had ever drilled but whether its capacity for movement distinguishes it from other structures designated as spars.

The ATP TITAN was securely moored to the floor of the Outer Continental Shelf in over 4000 feet of water by twelve moorings connected to mooring piles that are embedded over 205 feet into the sea floor, and it was also stabilized by flowlines, umbilicals, and pipeline systems. It had no means of self-propulsion but could reposition itself over wells by manipulating its mooring lines. It had not been moved since 2010, and it was not anticipated that it will be moved until all surrounding fields are no longer productive (estimated 5-8 years). Moving the ATP TITAN to a new location would take “approximately 15–29 weeks after 12 months of preparation” and would cost $70–$80 million. It also had navigational features such as “a wave-rider hull, navigational lights, life boats, crew quarters, and an onboard generator and drinking-water plant,” as well as “hydrocarbon processing equipment to separate oil, gas and water,
pumps to transport oil production into an oil export line, and gas compressors to transport gas production.”

Despite the ATP TITAN’s ability to shift laterally and to be moved, the court found that the ATP TITAN did not serve “a waterborne transportation function in any practical sense.” Specifically, the court noted that “a reasonable observer, in considering the infrastructure affixing the ATP TITAN to its present location, its function as a production platform, the way in which it was brought to its current location, and the enormous expense anticipated if it is moved, would likely find that the ATP TITAN is not practically capable of carrying people or things over water.” Accordingly, the ATP TITAN was found to not be a vessel. The U.S. Fifth Circuit affirmed the district court’s decision in January 2014. A summary of the court’s opinion and reasoning is included earlier in this section.


The plaintiff was a marine engineer hired by Dutra Construction Company to maintain mechanical systems on what was then the world’s largest dredge, the Super Scoop. The dredge was owned by Dutra and was being used to dredge Boston Harbor. The dredge itself was a floating platform with limited means of self-propulsion, moving short distances by manipulating its cables and anchors. It traveled greater distances by use of a tug. The dredge used a massive clambucket to remove silt from the ocean floor and deposit it upon one of two scows that floated alongside the dredge, and the scows were then used to transport the dredge out to sea.

When the scow’s engine malfunctioned, the plaintiff was asked to assist in the repair process. Although the dredge was idle at this time, it had not been taken out of service or permanently anchored. While the plaintiff was onboard the scow feeding wires through an open hatch, the dredge used its bucket to move the scow. This caused the scow to collide with the
dredge. The jolt created by the two ships colliding threw the plaintiff headlong through the hatch to the deck floor below, seriously injuring him in the process.

The U.S. Supreme Court unanimously reversed the judgment of the 1st Circuit that the dredge was not a vessel under the Jones Act or the LHWCA. The court remanded the case, holding that under the definition set out in 1 U.S.C. § 3 which applied to both the LHWCA and the Jones Act claims, the dredge was a vessel since it was a watercraft practically capable of maritime transportation.

III. MAINTENANCE, CURE, AND WAGES


Plaintiff Thibodeaux was working on a crane crew on the Ensco Rig 90, a mobile offshore drilling unit that was being prepared for a move to another location. The crew was working when a load swung and came into contact with the port side navigational light assembly that hung on the jack house. The entire light assembly fell and struck Thibodeaux on his left hip and left knee. He complained of a hematoma to his hip and pain in his neck, left hip, knee and back, and he later had a fusion and decompression surgery based on his subjective complaints. The court found that Thibodeaux sustained significant injuries to his hip and back as a result of the accident, but it did not find his complaints of pain and the extent of his disability to be genuine.

Defendant Ensco, which had timely paid all maintenance and cure to Thibodeaux, argued that it was entitled to have the maintenance and cure payments offset by social security disability payments. The court noted that “there is no Fifth Circuit case which directly addresses the issue of off-setting social security disability insurance (SSDI) payments.” Thibodeaux argued that the court should follow the Third Circuit’s holding in *Delaware River & Bay Authority v. Kopacz*,...
584 F3d. 622 (3rd Cir. 2009), which specifically discussed set off in the context of SSDI payments. In that case, the Third Circuit court concluded that SSDI payments could not be used to offset maintenance and cure because SSDI payments were meant to replace wages, not living expenses or medical expenses, and therefore were not the “exact equivalent” of maintenance and cure and could not be used to off-set that obligation. Ensco argued that the Third Circuit case was not analogous because the U.S. Fifth Circuit does not have an “exact equivalent” standard.

The court sided with the defendant Ensco and declined to extend the Third Circuit’s reasoning in Delaware River. The court noted that the Fifth Circuit had never cited or discussed that case, nor had it adopted the “exact equivalent” standard. It further noted that the Fifth Circuit had consistently found that the collateral source rule appeared to be “incompatible” with maintenance and cure; that a seaman must “actually incur” expenses to receive maintenance and cure; and that “where a seaman has alone purchased medical insurance,” the employer may not offset those payments from its maintenance and cure obligation.

In light of the general rules articulated by the Fifth Circuit, the court declined to apply the collateral source rule to the instant matter and found the exception to the general rule inapplicable since an employee and employer both pay into SSDI. The court ultimately concluded that there was insufficient evidence to determine who paid what amounts toward Thibodeaux’s SSDI credits to accurately determine what, if any, set off was owed to Ensco. Accordingly, the court declined to offset Thibodeaux’s SSDI payments since it would require “complete conjecture” to proceed with any such calculation.


Plaintiff was employed by REC Marine as a vessel captain. He alleges he was injured while participating in a Helicopter Underwater Escape Training exercise conducted by SafeZone.
Safety Systems, LLC (“STC”). During that training, plaintiff sat inside a helicopter simulator, which was inverted in a pool as part of the exercise. Plaintiff claims his safety belt failed to operate properly when the simulator was inverted, thereby trapping him underwater and causing him to struggle to escape, which resulted in injuries to his right shoulder. Plaintiff filed suit seeking maintenance and cure benefits from REC Marine for his right shoulder injury. REC Marine subsequently filed a motion for summary judgment requesting the dismissal of the plaintiff’s maintenance and cure claim. REC Marine argued that plaintiff was precluded from receiving maintenance and cure benefits pursuant to the Fifth Circuit’s decision in McCorpen v. Central Gulf Steamship Corp. and its progeny because plaintiff concealed material medical facts relating to a pre-existing shoulder condition while filling out REC Marine’s pre-employment medical history questionnaires. Plaintiff responded by arguing that summary judgment was inappropriate because there were genuine disputes of material fact as to all three elements of the McCorpen defense.

The court noted that to rely on the McCorpen defense, an employer must establish three elements: (1) the seaman-plaintiff intentionally misrepresented or concealed medical facts; (2) the misrepresented or concealed facts were material to the employer's hiring decision; and (3) there exists a causal link between the pre-existing disability that was concealed and the disability incurred during the voyage.

Prior to being hired, REC Marine required plaintiff to complete two separate pre-employment medical history questionnaires and also required him to be examined by an REC Marine physician. REC Marine claimed that Plaintiff intentionally concealed his extensive history of shoulder problems and treatment, as well as other prior injuries and/or surgeries, when filling out the pre-employment questionnaires in order to avoid a negative result in the hiring
process. This condition was confirmed by plaintiff’s prior medical records, which confirmed that a doctor had treated him for arthritis and recurrent bilateral shoulder pain with steroid injections into both shoulders and prescription medication. The pre-employment questionnaire specifically asked: “Do you have now or have you ever had in the past, injury or disease to” certain body parts, and the plaintiff checked “NO” for all body parts, including when asked about his shoulders.

Plaintiff argued that he had never injured his shoulder and did not consider arthritis to be an injury or a disease. However, the court held that even though the plaintiff testified that he did not intentionally misrepresent or conceal medical facts, the required inquiry into the intentional concealment prong of the McCorpen defense “does not require a finding of subjective intent.” In this case, the plaintiff failed to disclose on the pre-employment questionnaires his bilateral shoulder impingement diagnosis and the nature of his arthritis, as well as to explain his past treatment for shoulder pain, including injections and prescription medication. Because the pre-employment questionnaire was obviously designed to elicit such information, the court found that the plaintiff had intentionally misrepresented or concealed medical facts for purposes of the McCorpen defense. The court went on to conclude that the withheld information was material to their hiring decision and that the plaintiff’s complained-of injury — a right rotator cuff tear — was causally related to the pre-existing injury as it involved the same part of the body affected by plaintiff’s shoulder impingement syndrome. With all three elements of the McCorpen defense satisfied, the court granted REC Marine’s motion for summary judgment.

**Meche v. Doucet, 777 F.3d 237 (5th Cir. 2015)**

Plaintiff was a vessel captain who brought suit against his former employer and supervisor seeking maintenance and cure and damages under the Jones Act and general maritime law after he injured his back while lifting a hatch cover to check the oil on the vessel.
Defendants denied that the incident ever occurred and argued that the plaintiff forfeited his right to maintenance and cure by lying about his preexisting spinal injuries on his pre-employment application and medical questionnaire. Following a bench trial, the trial court ruled against plaintiff’s unseaworthiness and Jones Act negligence claims, but awarded him maintenance and cure after concluding that the plaintiff did not intentionally conceal his prior medical history.

The Fifth Circuit ultimately affirmed the dismissal of the Jones Act and unseaworthiness claims, but it reversed the maintenance and cure award. The defendant had argued that the Fifth Circuit’s holding from McCorpen v. Central Gulf Steamship Corp., which concluded that a seaman who “knowingly fails to disclose a pre-existing physical disability during his pre-employment physical examination” may not recover maintenance and cure, precluded the plaintiff from obtaining maintenance and cure in this case. The court found that the trial court incorrectly applied the proper standard for determining concealment under McCorpen in finding the employer liable. Specifically, the trial court had applied the “subjective nondisclosure standard” instead of the purely objective “intentional/misrepresentation/concealment standard.” The court held that the intentional concealment prong of the McCorpen defense does not require subjective intent to conceal; rather, the employer need only show that the seaman “failed to disclose medical information in an interview or questionnaire that is obviously designed to elicit such information.”

The defendant-employer in this case had acquired the company for which the plaintiff worked, and it did not itself conduct a pre-employment medical examination of the plaintiff following its acquisition of the company which originally hired him. Importantly, the plaintiff had not disclosed his prior medical issues to the predecessor company. The Fifth Circuit concluded that the misrepresentation to the predecessor company was “tantamount to a
misrepresentation to the [successor] for purposes of the McCorpen defense,” thereby precluding the plaintiff from recovering. In support of its holding, the court noted that “it makes little economic or logical sense to require a successor company to reexamine its predecessor’s employees solely for the purpose of avoiding maintenance and cure liability for their previously concealed medical conditions. . . . More importantly, an intervening asset sale does not reduce the risk of injury to the seaman or to others resulting from the injured seaman's presence on the ship. Employers need to be certain that each employee is physically able to do the work, not only to protect the employer from liability, but also to protect the employees. This is the purpose of the pre-employment health questionnaire, and of the McCorpen defense.” The Fifth Circuit concluded by stating that “an intervening asset sale does not automatically relieve a seaman from the consequences of his or her prior intentional concealment of material medical information.”


Plaintiff was employed as the captain of the M/V St. June. As the plaintiff was descending the stairs to investigate a matter in the engine room, a wave hit the vessel, and because there were no handrails on the stairwell for plaintiff to grab onto, he alleges that he fell down the stairs, injuring his back and neck. Plaintiff filed suit against the owner of the vessel under the Jones Act, claiming that vessel owner’s negligence in “failing to furnish complainant a safe place to work” proximately caused his injuries.

The defendant filed a counterclaim against the plaintiff seeking reimbursement of all sums it may be required to pay for purposes of maintenance and cure, as well as recovery of all expenses incurred in defending the main claim. In this case, the defendant had never requested that the plaintiff submit to a pre-employment medical examination or complete a medical questionnaire. However, during an interview with the plaintiff at the time of his hiring, the
plaintiff voluntarily informed the defendant that he had neck and shoulder surgery two years earlier, and that the injury had since “healed.” However, the defendant pointed out that the plaintiff “did not disclose that he had been experiencing chronic neck and low back pain since 1986,” or “that he was under doctor's care for his neck and back pain” at the time of the interview. The defendant argued that this intentional failure to disclose facts material to its decision to hire the plaintiff, as well as plaintiff's decision to place himself in a work environment he was well aware could cause him “injury or re-injury,” makes him “guilty of negligence in causing his own injury.” Additionally, because of the plaintiff’s intentional misrepresentation regarding the existence and extent of his pre-existing injuries, the defendant invoked the *McCorpen* defense and argued that the plaintiff should be precluded from recovering damages for maintenance and cure.

Defendant subsequently filed a motion for summary judgment, arguing that the *McCorpen* defense should apply and seeking to have the plaintiff's claims for maintenance and cure dismissed. In response, the plaintiff argued that the *McCorpen* defense was not applicable because he was never expressly asked to disclose information regarding his pre-existing back and neck injuries. Plaintiff also argued that because the defendant had never requested a medical examination or questionnaire, information regarding those preexisting injuries was not material to its decision to hire the plaintiff.

The court found that the plaintiff should have known that information regarding his recent surgery and a history of neck and back pain would have been material and desired by the employer. The court noted that the plaintiff had extensive experience in the boating industry, having worked on shrimp boats for 42 years and even stated in his deposition that “every oilfield company he ever worked for” had asked him “if he ever had any injuries or medical problems...
with his neck and back.” As such, the plaintiff should have been familiar with expectations of potential employers regarding the disclosure of past medical history and was aware that the defendant would be interested in learning of his pre-existing back and neck injuries, even if the defendant failed to specifically ask about them during the employment interview. The court held that because the plaintiff knew that the disclosure of his pre-existing back and neck injuries was “plainly desired” by the defendant and yet still intentionally concealed and misrepresented the existence and extent of these injuries, the first element of the McCorpen defense was met, and summary judgment was ultimately rendered in favor of the defendant vessel owner.

IV. MARITIME JURISDICTION


Defendant Specialty Rental Tools & Supply, L.L.P. (“STS”) was working for Apache Corporation (“Apache”), pursuant to a master services contract (the “STS / Apache MSC”), which contained an indemnity provision running in favor of Apache and its contractors. Apache issued on oral order directing STS to perform “flow-back” services on a gas well in navigable waters off Louisiana. The work did not initially require a vessel and neither Apache nor STS anticipated one would be needed. After unsuccessful attempts at performing the work, STS determined that a crane barge would be required. Apache contracted with plaintiff Larry Doiron, Inc. (“LDI”) to provide this vessel. During operations on the platform, the LDI crane operator struck and injured an STS employee. Anticipating a claim from the injured STS employee, LDI initiated limitation of liability proceedings. The injured worker filed a claim in these proceedings, after which LDI filed a third-party complaint against STS seeking indemnity under the STS / Apache MSC as a contractor of Apache.
The central issue in the case was whether the STS / Apache MSC was a “maritime” contract: if it was, general maritime law applied and the indemnity provision would be enforced; if not, the Louisiana Oilfield Indemnity Act (“LOIA”) applied and the indemnity provision would be unenforceable. Both the district court and a panel of the U.S. Fifth Circuit concluded that the contract was maritime in nature and, therefore, that LDI was entitled to the benefit of indemnity protection. However, in its recent en banc decision, the U.S. Fifth Circuit unanimously agreed to change the test for analyzing maritime contracts, ultimately to conclude that the STS / Apache MSC was not maritime in nature and therefore subject to the indemnity bar of the LOIA.

Prior to Doiron, the test for maritime contracts in the U.S. Fifth Circuit was a complex fact-intensive six-factor inquiry, established in Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313 (5th Cir. 1990). Under the Davis & Sons test, the court asked: (1) what does the specific work order in effect at the time of the injury provide? (2) what work did the crew assigned under the work order actually do? (3) was the crew assigned to work aboard a vessel in navigable waters? (4) to what extent did the work being done relate to the mission of that vessel? (5) what was the principal work of the injured worker? And (6) what work was the injured worker actually doing at the time of injury?

The U.S. Fifth Circuit’s en banc decision in Doiron now requires a much simpler analysis to determine whether a contract relating to the drilling or production of oil and gas is a maritime contract. The Court set forth a simple two-step analysis:

1. Is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? If the answer is “yes”, the court should go to the next step.

2. Does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract?
If the answer to both questions is “yes,” then the contract is maritime in nature. The U.S. Fifth Circuit explained that this new test places the focus on the contract and the expectations of the parties, which would assist the parties in evaluating their risks, particularly in the context of indemnity agreements.

Applying the test to the case at hand, the U.S. Fifth Circuit concluded that use of a vessel to lift equipment was an insubstantial part of the job and not work the parties expected to be performed. The STS / Apache MSC was therefore not maritime in nature, which made it subject to Louisiana law and rendered the indemnity provision unenforceable.


The plaintiff filed a wrongful death suit and survival action on behalf of the decedent, who was a marine cargo surveyor employed by Maritech Commercial, Inc. who had fallen into the Mississippi River while he was attempting to board a ship from a crew boat. At the time of his fall, the decedent was wearing an inflatable life vest manufactured by defendant Absolute Outdoor, Inc. The vest was designed to self-inflate when wet, but it never inflated. The deflated vest was on the decedent’s body when he was located in the river by a passing vessel two days after the incident.

In the complaint, the plaintiff pled strict products liability against Absolute as the manufacturer of the allegedly defective life vest and alleged that its cause of action was “based upon the general maritime law of the United States.” Defendant Absolute filed an answer which included affirmative defenses relating to the Louisiana Products Liability Act (“LPLA”). The plaintiff subsequently filed a motion for judgment on the pleadings, arguing that Absolute’s affirmative defenses alleging the application of the LPLA must be stricken because the case should be governed solely by the general maritime law.
The court granted the plaintiff’s motion and struck the affirmative defenses. The court observed that the U.S. Supreme Court has recognized that products liability, including strict products liability, is a part of the general maritime law, and it agreed that “the seafarer’s state water wrongful death action…includes a general maritime products liability cause of action.”

The court was then left having to determine whether the LPLA supplements or supplants the general maritime products liability law. It recognized that “a court may supplement general maritime law with state law under three conditions: (1) where there is no applicable admiralty rule; (2) where local and state interests predominate; and (3) where the uniformity principle is not crucial.” The court concluded that the first condition was not met because there was no gap in the general maritime law for which state law is needed to fill. The court went on to conclude that the second and third conditions also had not been met, noting state interest did not predominate and the uniformity principle is indeed crucial for product liability cases. Accordingly, the court declined to apply the LPLA to the plaintiff’s strict products liability claims because the plaintiff’s claims in this matter sounded solely in admiralty.

**Hargus v. Ferocious & Impetuous, LLC, 840 F.3d 133 (3d Cir. 2016)**

Plaintiff was a passenger on a recreational vessel that was traveling to various destinations throughout the U.S. Virgin Islands. At one stop, the plaintiff was standing on the deck of the vessel while it was anchored in knee deep water when a couple of the passengers began throwing beer cans at the plaintiff from shore. Upon seeing this, the vessel’s captain (who was also on shore) threw his plastic insulated coffee cup at the plaintiff. The plastic coffee cup struck the plaintiff in the temple on the side of his head. The plaintiff did not complain of any injuries immediately, but he did seek medical attention two days later after experiencing pain and vision impairments and was diagnosed with a concussion.
After complaining of ongoing headaches, the plaintiff filed suit against the cup-throwing captain, the vessel, and the vessel owner in the U.S. District Court of the Virgin Islands. The district court issued an opinion following a two-day bench trial in which it concluded “that it had admiralty jurisdiction over [plaintiff’s] claims because claims such as these for personal injury to the passenger of a vessel caused by the captain of the vessel meet the situs and nexus requirements for admiralty tort jurisdiction of this Court.”

On appeal, the U.S. Third Circuit reviewed de novo the district court’s determination of its own admiralty jurisdiction. Citing to U.S. Supreme Court precedent, the Third Circuit noted that “to invoke federal admiralty jurisdiction over a tort claim, the claim must satisfy conditions both of location and of connection with maritime activity.” The “location” aspect of this test is satisfied if “the tort occurred on navigable water” or the “injury suffered on land was caused by a vessel on navigable water.” The “connection” aspect is a conjunctive two-part inquiry — (1) the court “must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce,” and (2) the court “must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.”

The Third Circuit vacated the trial court’s ruling, concluding that, “even assuming the location test is satisfied… admiralty jurisdiction is lacking because the first prong of the connection test is not met.” The court noted that “the activity in question can be described as throwing a small inert object from land at an individual onboard an anchored vessel,” and compared it to a case involving a fistfight on board a vessel. The court held that the requirements for maritime jurisdiction were not met because the alleged activity “does not have the potential
of disrupting navigation, damaging nearby commercial vessels, or causing a commercial vessel to divert from its course.”

**Tundidor v. Miami–Dade Cty., 831 F.3d 1328, 1334 (11th Cir. 2016)**

Plaintiff was seriously injured after striking his head on a water pipe located on the underside of a bridge while the vessel (on which he was a passenger) was passing underneath it while traveling on a canal. The plaintiff filed suit in federal court against the governmental entity that owned the water pipe, but the district court dismissed his suit for lack of subject matter jurisdiction on the basis the canal was not “navigable in interstate commerce” due to the presence of the bridge, which constituted an “artificial obstruction” to navigation. On appeal, the Eleventh Circuit addressed the issue of “whether a canal is navigable for purposes of admiralty jurisdiction…if an artificial obstruction prevents vessels from using the canal to conduct interstate commerce.”

The waterway at issue in this case was described as a “drainage canal” that connected to the Miami River, which in turn led to the Biscayne Bay and the Atlantic Ocean. However, the canal was crossed by “a series of low-lying bridges, water pipes, and railroad tracks [that] partially obstruct the waterway.” None of the bridges was capable of opening to allow vessels to pass. Beyond those obstructions, there was a water control structure, located at the entrance to the Miami River, with mechanical gates that opened only underwater and with a sign that read “DANGER—NO BOATING BEYOND THIS POINT.”

The Eleventh Circuit affirmed the trial court’s dismissal for lack of subject matter jurisdiction. The court recognized that the actual existence of “present or planned commercial activity” was not required to establish admiralty jurisdiction as long as the waterway was “capable of supporting commercial activity.” However, even though the Miami River was undoubtedly a navigable waterway, the adjoining canal could not be considered navigable
because the water control structure prevented vessels on the canal from traveling outside the State of Florida. Since the water control structure prevented the canal from supporting interstate commerce, the plaintiff was unable to satisfy the location requirement for admiralty jurisdiction. In rendering this decision, the court specifically rejected the plaintiff’s argument that a waterway could retain “navigability” if the artificial obstruction could be circumvented by a minor portage or land crossing, which in this case consisted of a walk of a couple of hundred feet around the water control structure. In rejecting this argument, the court found that the proposed “portage” was neither a customary nor practical means of carrying on commercial maritime activity. The court also rejected the plaintiff’s argument that the EPA’s designation of the canal as a “navigable water of the United States” (for purposes of the Clean Water Act) should be determinative of navigability for purposes of maritime jurisdiction.

**In Re Louisiana Crawfish Producers, 772 F.3d 1026 (5th Cir. 2014)**

The Louisiana Crawfish Producers Association and some commercial fishermen operating in Louisiana’s Atchafalaya Basin sued a number of oil and gas companies and their insurers, claiming aspects of the companies’ pipeline activities impeded water flows and commercial navigation, thereby allegedly causing economic damages. The trial court determined granted Rule 12(b)(6) motions filed by two of the defendants on the basis that maritime jurisdiction did not exist, and the plaintiffs appealed.

The plaintiffs’ alleged that the defendants had engaged in activities that constitute maritime torts. Specifically, the defendants had placed cement mats on exposed sections of an existing pipeline and obstructed gaps in an existing spoil bank through its construction of a pipeline — actions which allegedly impeded water flows and commercial navigation in the area.

The court held that to state a claim for a maritime tort, the plaintiffs must allege facts sufficient to satisfy the “location test” and “connection test” which were set forth in *Grubart*. 
The location test is satisfied if the tort occurred on navigable waters or if the injury occurred on land but was caused by a vessel on navigable waters. In this case, the plaintiffs’ allegations “easily satisfied” the location test since plaintiffs allege the defendants' activities impeded water flows and commercial navigation, meaning the harm “took effect” on navigable waters. The “connection test” would be satisfied if two conditions are met: (1) “the general features of the type of incident involved” must have “a potentially disruptive impact on maritime commerce;” and (2) “the general character of the activity giving rise to the incident” must show “a substantial relationship to traditional maritime activity.” In this case, the court found that the first prong of this test was met, but that the plaintiffs had failed to allege facts sufficient to satisfy the second prong. The court found that the general character of the allegedly negligent activity was “pipeline construction and repair,” and it concluded that the established case law shows that such activity does not qualify as having “a substantial relationship to traditional maritime activity.” As a result, the trial court’s holding was affirmed due to the plaintiffs’ failure to state a claim under maritime law.


The wife of a deceased employee brought claims for negligence and unseaworthiness after her husband died while working on an offshore oil well. Plaintiff claimed that her husband suffered a cardiac arrest and defendants failed to provide proper medical assistance and did not have a helicopter available to bring plaintiff back to shore. Defendant removed that case to federal court, but the plaintiff moved to remand it back to state court by arguing that 28 U.S.C. § 1441 precluded the removal of general maritime claims.

The court ultimately concluded that recent amendments to § 1441 now allowed for the removal of general maritime claims involving nondiverse parties. Specifically, the court found that revised § 1441(b) no longer prohibited federal courts from exercising removal jurisdiction
over cases for which they have original jurisdiction. Instead, the court interpreted the revisions to indicate that § 1441(b) should only apply to cases removed on the basis of diversity jurisdiction, and it cited to the new title of the section, “Removal based on diversity of citizenship,” in support of this holding.

Since federal courts have original jurisdiction over admiralty claims pursuant to 28 U.S.C. § 1333 and the revised removal statute (28 U.S.C. § 1441) no longer limits the removal of these claims, the court held that removal of the plaintiff’s maritime claims was proper pursuant to section 1441(a), even in the lack of diversity of citizenship.


Plaintiff was a former naval shipyard worker who was exposed to asbestos while working on vessels that were drydocked at a naval shipyard. He brought an action against manufacturers of asbestos-containing products for use on United States Navy ships. Plaintiff sought to have Hawaii state law apply to his claims, but defendants argued that admiralty jurisdiction was present and that maritime law should apply.

The parties agreed that the “locality” prong of the situs test was satisfied as it is well settled that vessels in drydock are still considered to be in navigable waters for jurisdictional purposes. However, the parties disputed the “connection” prong of the situs test concerning whether the incident had a significant relationship with traditional maritime activities. In considering this issue, the court noted that injuries to workers on Navy ships caused by defective parts have the potential to disrupt ships engaged in maritime commerce. Specifically, Navy vessels engage in some degree of commerce by protecting shipping lanes, transporting mail, transporting goods under bills of lading issued by the officers of such vessels, and transporting commercial merchandise which is sold as an ordinary transaction at a profit to those on board.
The court also concluded that the Applying these principles, the court finds that “the general activity giving rise to the incident is the manufacture of products for use on vessels,” and because the products at issue were necessary for the proper functioning of the vessels, the alleged defective products “bear a substantial relationship to traditional maritime activity.” Accordingly, the court held that admiralty jurisdiction applied and denied the plaintiff’s request for the application of state law.

**Mala v. Crown Bay Marina, Inc., 704 F.3d 239 (3d Cir. 2013)**

Plaintiff was refueling his powerboat at the defendant’s dock when the fuel pump malfunctioned and overflowed the boat’s tank, causing fuel to spill onto his engine and boat. The plaintiff and some marina’s employees attempted to clean up the spilled gasoline. However, the boat’s engine exploded shortly after leaving the dock, resulting in severe burns and injuries to the plaintiff. Court held that maritime jurisdiction clearly applied because “the alleged tort occurred on navigable water and bore a substantial connection to maritime activity.”

V. PUNITIVE DAMAGES

**Batterton v. Dutra Grp., No. 15-56775, 2018 U.S. App. LEXIS 1627 (9th Cir. Feb. 8, 2017)**

The case from the U.S. Ninth Circuit addresses that circuit’s position on the availability of punitive damages for unseaworthiness claims. The plaintiff, Christopher Batterton was a deckhand on a vessel owned and operated by the defendant, Dutra Group. While Batterton was working on the vessel in navigable waters, a hatch cover blew open and crushed his left hand. Pressurized was being pumped into a compartment below the hatch cover, and the vessel lacked an exhaust mechanism to relieve the pressure when it got too high. The court observed that the lack of such a mechanism made the vessel unseaworthy and caused permanent disability and other damages to Batterton.
The only question before the Ninth Circuit in this case was whether punitive damages are an available remedy for unseaworthiness claims. The court pointed out that its opinion in Evich v. Morris provided the answer to that question; specifically, “punitive damages are available under general maritime law for claims of unseaworthiness, and for failure to pay maintenance and cure,” but unavailable for Jones Act claims. However, the defendant argued that the U.S. Supreme Court’s decision in Miles v. Apex Marine Corp. had implicitly overruled the holding in Evich, and the court acknowledged that this argument “was given force” by the US. Fifth Circuit in McBride v. Estis Well Service.

Nonetheless, the Ninth Circuit rejected the defendant’s argument and concluded that its holding in Evich was still good law. The court held that “punitive damages are indeed awardable to seamen for their own injuries in general maritime unseaworthiness actions” and that it “cannot treat Evich as overruled by Miles unless Miles is fundamentally inconsistent with the reasoning of Evich and Evich is clearly irreconcilable with Miles.” The court further concluded that even if it was not bound by Evich, it would still reach the same conclusion under the U.S. Supreme Court’s decision in Atlantic Sounding Co., Inc. v. Townsend (discussed infra).


Plaintiff’s son was a passenger in a recreational boat whose steering failed while on plane. The boat went into a spin and threw him overboard, after which the boat’s propeller struck him nineteen times, causing his death. The decedent’s father brought a survival action and wrongful death claims under general maritime law, seeking compensatory damages and punitive damages against several defendants, including the driver and owner of the boat, various marinas, insurers, and three manufacturers. The Louisiana Department of Wildlife & Fisheries investigated the accident and determined that the boat had lost its steering because of a hydraulic
oil/fluid leak in one of the steering system’s hydraulic lines at a hose/nut or coupling assembly. At the time of trial, the only remaining defendant was Teleflex, which had manufactured and supplied the boat’s hydraulic steering system. However, one of the original Teleflex hoses had been replaced with a non-Teleflex hydraulic hose by an unknown party. The plaintiff claimed that the steering system was defective because it contained an inherent danger unknown to users and that Teleflex had breached its duty to warn unsuspecting users of a dangerous risk in using its product.

The matter proceeded to trial, after which the jury found in favor of Teleflex resulting in the dismissal of all claims against it. However, the trial court subsequently granted a motion for new trial filed by the plaintiff based on prejudicial error during the first trial. At the conclusion of the second trial, the jury rendered a verdict against Teleflex and in favor of the plaintiff with an award for compensatory damages of $125,000 and punitive damages of $23,000,000 (a ratio of 184:1).

Teleflex appealed this award, arguing (1) that an award of punitive damages was improper due to the lack of sufficient evidence of wanton, reckless, or callous conduct, and (2) that even if punitive damages were available, the amount of the award was grossly excessive and violated the defendant’s due process rights. The Louisiana Third Circuit Court of Appeal affirmed the full award of punitive damages by a vote of 2-1.

The Louisiana Supreme Court subsequently granted writs to address a number of issues. First, the Court rejected Teleflex’s argument that the jury should have been given a jury instruction recognizing that a component parts manufacturer’s duty to warn differs from that of an end-product manufacturer. The Court cited to Restatement (Third) of Torts: Products Liability § 5 and concluded that even though the hydraulic steering system was a component part of the
boat, it was a system designed to perform a certain function. Since the steering system was specifically designed for installation in boats, the Court agreed with the appellate court’s finding that it was not a “special adaptation” within the meaning of the Restatement.

Second, the Court did not find any abuse of discretion in the trial court’s decision to not bifurcate the trial on liability and punitive damages issues. The Court noted that “while there may be valid policy reasons for mandatory bifurcation,” that issue was better left to the legislature.

Third, the Court agreed with the state’s appellate courts that punitive damages are an available remedy under general maritime law “where a defendant’s intentional or wanton and reckless conduct amounted to a conscious disregard for the right of others.” In this case, Teleflex “certainly possessed knowledge of the risk to its customers” and that despite receiving reports of leaks and conducting further testing, Teleflex “either chose not to act or failed to do so despite opportunities.” The Court held that the defendant’s awareness of the risk of harm and failure to provide adequate warning was “more than simple negligence” and was evidence of “a conscious disregard for, or indifference to, the safety of its customers, justifying the imposition of punitive damages.”

Fourth, the Court considered the U.S. Supreme Court’s decisions on excessiveness of punitive damages in Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008), and BMW of North Am., Inc. v. Gore, 517 U.S. 559 (1996). Exxon provided a punitive-compensatory ratio of 1:1 for maritime cases. BMW established three guideposts for determining whether a claim is “grossly excessive” — (1) the degree of reprehensibility of the misconduct; (2) the ratio or disparity between the punitive award and the harm (or potential harm) suffered by plaintiff; and (3) the difference between this remedy and the civil penalties authorized or imposed in comparable
cases. The Louisiana Supreme Court also noted that it had previously recognized that the wealth of the defendant could be considered.

The Court agreed that Teleflex’s conduct reprehensible, but it found that plaintiff failed to prove that Teleflex “acted maliciously or was driven primarily by desire for gain.” The Court noted that “[b]ecause there was no showing that Teleflex’s conduct was malicious or profit-driven, such that it needed to be severely punished, the amount of exemplary damages awarded by the jury simply does not further the goals of punitive damages. There is no doubt that the defendant is a wealthy corporation, but wealth should not be a driving factor behind a punitive damage award in the absence of a showing that the defendant’s conduct was motivated by malice or greed.” Based on those facts and the factors set forth in the BMW and Mosing cases, the Court concluded that the $23 million punitive damages award violated the defendant’s due process rights.

The Court went on to reduce the jury’s punitive damages award to $4,250,000, based on “a ratio of 2:1 to the relevant compensatory damages of $2,125,000, and held that such an award “appropriately furthers the goal of punitive damages…to punish and deter future conduct…while protecting the defendant’s right to due process.” The Court reached this hypothetical compensatory damages award amount by relying on an earlier settlement between the defendant and the decedent’s mother, and cited to Exxon Shipping for the proposition that settlements paid to the plaintiffs during the litigation could be considered in determining the “relevant compensatory damages” under the ratio analysis.


The owner and operator of a capsized vessel filed a Complaint for Exoneration or Limitation of Liability following a fatal capsizing incident. The father of a decedent who was
killed in the capsizing incident brought claims for loss of future earnings, mental and emotional pain and suffering, loss of consortium, loss of love and affection, punitive damages, and pecuniary damages. The vessel owner and operator filed a motion for summary judgment, arguing that the claimant could not recover any of these damages.

The court granted summary judgment against the claimant. In addressing the claimant’s request for non-pecuniary damages (including loss of consortium, loss of love and affection, and punitive damages), the court found that “the Fifth Circuit has clearly held that damages under the Jones Act and general maritime law are limited to pecuniary losses” and that the claimant had offered “no reason to question the application of this well-settled rule.” Accordingly, the claimant’s claims for non-pecuniary damages were dismissed.


Dwayne Melancon was a Jones Act seaman who filed suit, along with his wife and children, under general maritime law for injuries sustained while he was working as a tankerman onboard a tugboat. Melancon alleged that the tugboat, which was time-chartered by his employer (and defendant) Gaubert Oil Company and owned by defendant Low Land Construction, allided with a rock barge. As a result of the allision, Melancon fell down a stairwell on the tugboat, causing injuries to his left wrist and lumbar spine. Melancon attributed the allision to steering failure, equipment failure, and electrical failure onboard the tugboat.

Plaintiffs sought to recover pecuniary and non-pecuniary damages, including punitive damages. In particular, Melancon’s wife and children sought damages for loss of consortium, love and affection and services. Defendant Low Land moved for the dismissal of the claims for non-pecuniary damages, arguing that such damages were unrecoverable under the Jones Act and general maritime law.
Low Land cited Supreme Court and Fifth Circuit precedent to argue that seamen cannot recover non-pecuniary damages under general maritime law. The court agreed with Low Land, and specifically noted that the recent decisions from the Eastern District of Louisiana “appear united in their understanding and application of Miles, Townsend, and McBride to claims of wrongful death and personal injury.” In line with those decisions, the court held “that Miles and its progeny, particularly the Fifth Circuit’s decisions in Scarborough and McBride, preclude...[the recovery of] non-pecuniary damages against Low Land under general maritime law.”

Plaintiffs argued in the alternative that the Court should not extend its rationale to the claims of Melancon’s wife and children. However, Plaintiffs did not cite any authority for that position, and the court did not believe that “controlling jurisprudence would treat the claims of an injured seaman’s family members differently than those of a deceased.” The court specifically cited to prior Fifth Circuit jurisprudence for the proposition that “the difference between a wrongful death action and a personal injury claim is insignificant.”


Plaintiff Donald Rinehart was injured while employed as a Jones Act seaman in his capacity as an engineer aboard the M/V Starfleet Viking, a vessel operated by the defendant, bareboat charterer Starfleet Marine Transportation, Inc. (“Starfleet”). Plaintiff alleged that he was ordered by the M/V Starfleet Viking’s captain to assist with loading pallets aboard the ship, which was docked in Port Fourchon, Louisiana. Third-party defendant National Oilwell Varco, L.P. (“NOV”) owned the mobile crane and hook which were used in loading the pallets and also employed the crane operator directing the crane. Plaintiff was injured when a pallet fork slipped from NOV’s crane hook onto the back of his head while loading pallets onto the vessel’s deck. The plaintiff underwent multiple complex surgical procedures with permanent scarring, suffered
from severe headaches with substantial neurological deficits, and required a surgically-implanted feeding tube. The plaintiff filed suit under the Jones Act and General Maritime law, seeking to recover for the damages he sustained, as well as for certain non-pecuniary damages against NOV, including punitive damages.

NOV filed a partial motion for summary judgment seeking to dismiss the plaintiff’s claims for punitive damages, relying on *Scarborough v. Clemco Industries, Inc.* to argue that because the plaintiff was alleging seaman status, he was precluded from recovering non-pecuniary damages, specifically punitive damages, from a non-employer third party.

The court granted NOV’s motion and dismissed the plaintiff’s claims for punitive damages. While the court recognized that there was “a longstanding tradition of availability of punitive damages under common law and general maritime law,” it found that U.S. Fifth Circuit’s precedent barred a seaman from recovering punitive damages against either his employer or against a non-employer third party. The court noted that the U.S. Fifth Circuit’s *en banc* decision in *McBride v. Estis Well Services* further bolstered its earlier ruling in *Scarborough* and concluded that “it is now clear in the Fifth Circuit that under both the Jones Act and general maritime law, a seaman’s claim against both employers and non-employers does not include punitive damages.”


The plaintiff filed suit following the death of her husband due to exposure to silica dust and asbestos fibers. Plaintiff alleged that her husband had been exposed while working as a sandblaster and paint sprayer on vessels and fixed platforms in Louisiana and federal waters, and that the protective gear that he was provided had been defective. The plaintiff sought $5,000,000
in both pecuniary and non-pecuniary damages for her husband’s wrongful death under general maritime law.

Multiple non-employer defendants filed motions for partial summary judgment seeking the dismissal of all claims for non-pecuniary damages, arguing that Jones Act seamen and their survivors cannot recover non-pecuniary damages — even against non-employer third parties — pursuant to the U.S. Fifth Circuit’s holding in *Scarborough v. Clemco Industries*. The plaintiff responded by relying heavily on another recent decision from the Eastern District of Louisiana (*Collins v. A.B.C. Marine Towing, L.L.C.*, discussed below in brief) which concluded that *Scarborough* was no longer good law and that “a plaintiff who brings a claim which does not implicate the Jones Act should be treated the same as any non-seaman” and be entitled to recover non-pecuniary damages, including punitive damages.

The court granted the defendants’ motion and dismissed the plaintiff’s claims for non-pecuniary damages. In support of its ruling, the court cited to the Fifth Circuit’s *en banc* opinion in *McBride v. Estis Well Service* (summary included below), noting that “it has become clear since the *en banc* opinion in *McBride* that in wrongful death cases brought under general maritime law, a survivor’s recovery from employers and non-employers is limited to pecuniary losses.”


Plaintiff filed suit following the death of her husband, who was a Jones Act seaman working for defendants Noble Drilling Services, Inc. and Noble Services International, Ltd. Plaintiff’s husband fell while descending stairs as he was working aboard the Homer Farrington, a mobile offshore drilling unit off the coast of Malta, and died one week later “due to cardiogenic shock, aortic stenosis, and congestive heart failure.” Plaintiff alleged that the defendants
provided her husband with “inadequate and/or improper” care by failing to notify him of a heart condition that they had learned about during a pre-employment medical examination six months earlier.

Plaintiff filed suit individually and on behalf of her husband, asserting causes of action under the Jones Act and the general maritime law for negligence and vessel unseaworthiness and seeking to recover pecuniary and nonpecuniary damages, including punitive damages for the vessel’s alleged unseaworthiness. The defendants filed a motion to dismiss all claims for nonpecuniary damages, arguing that nonpecuniary damages are not recoverable under the Jones Act and the general maritime law pursuant to the U.S. Supreme Court’s decisions in Miles and McBride (discussed below). In response, the plaintiff argued that she should have a right to recover punitive damages under the general maritime law for the alleged unseaworthiness of the vessel. In support of her position, plaintiff argued that the Fifth Circuit precedent which barred recovery of punitive damages by Jones Act seamen had been implicitly overruled by the U.S. Supreme Court in Atlantic Sounding Co. v. Townsend and that a Jones Act seaman was entitled to recover punitive damages against a non-employer where the Jones Act is not implicated.

The court rejected the plaintiff’s argument and granted the defendants’ motion to dismiss. In reaching that decision, the court held that the Townsend case was “specific to the maintenance-and-cure context and does not address whether punitive damages are available for claims of unseaworthiness under the general maritime law.” The court ultimately concluded that “binding Fifth Circuit precedents” dictated that “a Jones Act seaman, or his survivors, may not recover nonpecuniary damages against either his employer or a non-employer.”
The plaintiffs were injured while working aboard a vessel that was being pushed when a “breast wire/running wire” on the vessel “rose up and struck” the plaintiffs in the face and head. The plaintiffs suffered brain injuries, with one losing an eye and the other requiring facial reconstruction surgery. The plaintiffs filed suit against Quality Marine, the owner of the vessel that was pushing the plaintiffs’ vessel at the time of the accident, asserting a claim for punitive damages. Quality Marine filed a motion for judgment on the pleadings seeking the dismissal of the punitive damages claim, arguing (1) that the Jones Act limits a seaman’s recovery to pecuniary losses only where liability is predicated on the Jones Act or unseaworthiness and (2) that a seaman who has invoked his Jones Act seaman status cannot recover punitive damages against a non-employer third party, pursuant to the U.S. Fifth Circuit’s decision in *Scarborough v. Clemco Industries*.

The plaintiff opposed the motion for judgment on the pleadings by citing to a recent case from the Eastern District of Louisiana — *Collins v. A.B.C. Marine Towing, L.L.C.*, discussed below in brief — for the proposition that the *Scarborough* decision had been “effectively overruled” by the U.S. Supreme Court’s decision in *Atlantic Sounding v. Townsend* (also discussed below) and that punitive damages are available under general maritime law against a non-employer third party so long as the Jones Act is not implicated.

The court agreed with the plaintiffs and adopted the reasoning set forth in *Collins* — namely, that the Jones Act forecloses recovery for non-pecuniary loss in general maritime law cases only with respect to the relationship between a seaman and his employer. The court noted that, in this case, “the Jones Act has no bearing on Plaintiffs’ claims against Quality Marine,”
and “as far as Quality Marine is concerned, it should make no difference whether the Plaintiff was a seaman, a longshoreman, or a passenger.”


The plaintiff was injured during a personnel-basket transfer from the M/V Contender to the deck of the L/B Janie. At the time of the accident, the plaintiff was employed by Offshore Liftboats, LLC, (“OLB”), the owner and/or operator of the L/B Janie. The M/V Contender was owned and/or operated by K & K Offshore, LLC. The plaintiff filed suit against OLB— his Jones Act employer—alleging, inter alia, negligence under the Jones Act and seeking punitive damages. Raymond and Calvin also sued K & K Offshore, a non-employer third party, under the General Maritime Law for negligence and unseaworthiness, as well as for punitive damages. Both defendants filed motions to dismiss the plaintiff’s claims for punitive damages.

The defendants argued that controlling Fifth Circuit precedent, namely *McBride v. Estis Well Services, LLC*, expressly precluded awards for punitive damages related to claims arising under the Jones Act and General Maritime Law. The plaintiffs, relying on the U.S. Supreme Court’s decision in *Townsend*, argued that punitive damages should be available under general maritime law against a non-employer third party. However, the court rejected this argument and held that “the *Townsend* decision is specific to the maintenance-and-cure context and does not address whether punitive damages are available for claims of unseaworthiness,” and further noted that the U.S. Fifth Circuit’s decision in *Scarborough* (which held that a seaman may not recover punitive damages against either his employer or a non-employer) precludes an award of punitive damages under the Jones Act.

against a non-employer third party under general maritime law if the Jones Act is not implicated).


The plaintiff was employed as a roustabout who developed a disabling skin condition while working as a seaman aboard the IDB CAILLOU. While working on the drill floor, he began to experience an intense burning sensation, after which he discovered that severe and disabling blisters had developed on his feet, arms, and fingers. Upon seeing the open wounds, the HSE coordinator ordered that he be brought back to shore immediately. He was unable to walk by the time he reached shore, so he was carried off the crewboat and placed on a tree stump to wait for a ride. However, due to the unexpected timing of his return to shore, the plaintiff had no one to meet him to provide a ride home or to the hospital. Despite his condition, no medical attention was requested by the plaintiff’s employer. When his friend finally arrived to pick him up five hours later, the plaintiff was found lying on the sidewalk in pain. His friend immediately called an ambulance, and the plaintiff was ultimately diagnosed with a disabling skin condition after arriving at the emergency room.

The plaintiff’s employer refused to provide maintenance and cure based on its human resource manager’s conclusion that the plaintiff’s injuries were caused either by a pre-existing condition related to herpes or by a reaction to some medicine he had allegedly brought aboard the IDB CAILLOU. This conclusion was derived from a telephone interview of the plaintiff and a review of some incident reports. The plaintiff’s employer did not test him for herpes, review his medical records, or conduct any further investigation prior to denying maintenance and cure. The plaintiff subsequently filed suit against his employer, seeking maintenance and cure, compensatory damages, punitive damages, and attorneys’ fees. The case proceeded to a bench trial, at which the court was required to determine (1) whether Plaintiff is entitled to maintenance
and cure, and, if so, (2) whether the denial of benefits was unreasonable or willful and wanton. The court immediately determined that the plaintiff was entitled to maintenance and cure, and then turned its attention to whether the denial of benefits was unreasonable. The court noted that, rather than arrange treatment for those injuries, the defendant had “banished Plaintiff from the vessel without warning” and exhibited “callous disregard for Plaintiff's well-being.” The court further found the employer’s investigation to be “impermissibly lax under any reasonable standard” and that the employer had “made a medical determination without medical evidence.” The court concluded that “an award of punitive damages is necessary to ensure the next worker who falls ill aboard one of Defendant’s vessels receives the treatment he deserves, as a seaman and as a human being.” Accordingly, the plaintiff was awarded compensatory damages, punitive damages, and attorneys’ fees.


Plaintiff’s husband was a rig worker who was killed after being pinned between a derrick and mud tank while working on a rig in a navigable waterway in Louisiana. Plaintiff brought claims of unseaworthiness under general maritime law and negligence under the Jones Act, seeking both compensatory and punitive damages. Defendant moved to dismiss the claims for punitive damages, arguing that punitive damages were not an available remedy for unseaworthiness or under the Jones Act.

Following the district court’s granting of defendant’s motion, the decision was immediately certified for appeal to the Fifth Circuit on the issue of the availability of punitive damages. A panel of the Fifth Circuit held that punitive damages were available to seamen for unseaworthiness claims upon a showing of willful and wanton misconduct in connection with the unseaworthy condition. The Fifth Circuit panel based this holding on the U.S. Supreme Court’s
decision in *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009), which the panel interpreted as explicitly abrogating prior prohibitions against punitive damages for maintenance and cure claims under general maritime law. The panel concluded, through reliance on *Townsend*, that because the unseaworthiness cause of action and the punitive damages remedy pre-existed the Jones Act, then the remedy for punitive damages was available to injured seaman and the survivors of deceased seaman. “[I]f a general maritime law cause of action and remedy were established before the passage of the Jones Act, and the Jones Act did not address that cause of action or remedy, then that remedy remains available under that cause of action unless and until Congress intercedes.”

The full Fifth Circuit granted a rehearing *en banc* to address the issue of whether a seaman can recover punitive damages for breach of the warranty of unseaworthiness. The *en banc* court reversed the panel decision and upheld the district court’s original decision, concluding that the Supreme Court’s decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), preclude seamen or their survivors from recovering non-pecuniary damages, which includes punitive damages, under the Jones Act or the general maritime law for unseaworthiness. *Miles* provided that a deceased seaman’s survivors under the Jones Act are limited to the recovery of only pecuniary damages, and it established a uniform rule applicable to all actions for the wrongful death of a seaman. The Fifth Circuit explained that the same rule applies to the claims of an injured seaman, even though *Miles* involved a wrongful death action.


Employer of injured seaman was owner of vessel on which seaman was working at time of injury. Employer refused to pay maintenance and cure and sought declaratory judgment as to its obligations. Seaman counterclaimed under Jones Act and general maritime law, alleging arbitrary and willful failure to pay maintenance and cure, and seeking punitive damages on that
The Supreme Court held that the seaman was entitled, as a matter of general maritime law, to seek punitive damages for his employer's alleged willful and wanton disregard for its maintenance and cure obligation because punitive damages are an accepted remedy under general maritime law. No case law or statute had eliminated the availability of that remedy. Petitioners did not argue that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the court has elsewhere imposed. Because punitive damages have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law.


Defendants employed a relapsed alcoholic to captain its oil tanker through a narrow Alaskan strait. While the captain was drunk, the oil tanker ran aground, causing a major oil spill. The district court found defendants liable for $507.5 million in harm, and a jury assessed $5 billion in punitive damages, which was later reduced to $2.5 billion. The court noted that defendants' conduct was not intentionally malicious, though it was knowing and reckless, and that defendants had promptly attempted to clean up the oil spill and mitigate the damage. The court determined that punitive damages may not exceed compensatory damages in cases in which the defendant’s conduct, while sufficiently blameworthy to deserve civil punishment, was not actuated by avarice or the purpose of inflicting injury. The court indicated that this limit might not apply when compensatory damages were small or the defendant's conduct was calculated to escape detection.

The $2.5 billion punitive damages award against Exxon arising from the 1989 Exxon Valdez oil spill was reduced to $507.5 million, a one-to-one ratio, which the court ruled as a fair
upper limit in such maritime cases. The Supreme Court emphasized that the most important indicium of a punitive damages award's reasonableness is the relative reprehensibility of the defendant's conduct. The court significantly refined the reprehensibility analysis by instructing courts to weigh five specific considerations: (1) whether the harm caused was physical as opposed to economic; (2) whether the conduct causing the plaintiff's harm showed indifference to or a reckless disregard of the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the defendant's conduct involved repeated actions as opposed to an isolated incident; and (5) whether the harm caused was the result of intentional malice, trickery, or deceit, or mere accident. The court has not ranked these factors. It has explained, however, that only one factor weighing in a plaintiff's favor may not be sufficient to support a punitive damages award, and the absence of all factors makes any such award suspect. The option of setting a hard-dollar punitive cap was rejected because there is no “standard” tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board. The more promising alternative was to peg punitive awards to compensatory damages using a ratio or maximum multiple. This is the model in many states and in analogous federal statutes allowing multiple damages. Accordingly, the court found that a 1:1 ratio is a fair upper limit in such maritime cases.

VI. LONGSHORE SITUS AND STATUS


Plaintiff Dalton was a longshoreman who suffered severe injuries while working on a ship for defendant Maritime Services. He applied for permanent total disability benefits under the LHWCA, but the parties couldn’t agree on when Dalton became disabled and how much
money he deserved. The ALJ determined his date of disability and his average weekly wage, and it was affirmed by the Benefits Review Board.

On appeal, the court agreed there was sufficient evidence to support the ALJ’s disability date, but not the wage compensation award. The ALJ used Dalton’s two-year work history immediately preceding his injury to calculate his weekly wage. However, the court found that “that calculation was too limited because one of those years was the worst in defendant Maritime Services’ history and Dalton had worked substantially less than usual.” Consequently, the effect of using that aberrant year for half of the calculation had “unfairly lowered” Dalton’s compensation.

The court recognized “the importance of deferring to the fact-finder,” but it noted that the LHWCA must be applied “in a way which avoids harsh and incongruous results” and “resolves all doubts in favor of the worker.” The court held that determining Dalton’s lifetime benefits based on one of his lowest years of earnings is “the type of harsh result that’s inconsistent with the ‘humanitarian nature’ of the LHWCA.” The case was remanded to recalculate Dalton’s compensation.

_Baker v. Dir., Office of Workers’ Comp. Programs, 834 F.3d 542 (5th Cir. 2016)_

Plaintiff, a maritime carpenter, was injured while working at a waterside marine fabrication yard on the construction of a housing module designed for use on a tension leg offshore oil platform named “Big Foot.” Plaintiff filed a claim for disability benefits under the LHWCA and argued that he was covered by the LHWCA directly as a shipbuilder and maritime worker, or alternatively, that he should be covered under the LHWCA as extended by OCSLA.

An administrative law judge (ALJ) denied the plaintiff’s claim for LHWCA benefits on the basis that (1) he was not engaged in maritime employment as a shipbuilder because Big Foot was not a “vessel” under the LHWCA and (2) that OCSLA did not extend LHWCA because
“there was no significant causal link between [his] alleged injury and operations on the OCS.”

 Plaintiff appealed the ALJ’s decision to the Benefits Review Board (BRB), which affirmed the ALJ’s denial of benefits, after which plaintiff filed a petition for review with the U.S. Fifth Circuit.

 The U.S. Fifth Circuit affirmed the BRB’s decision and findings. The court conducted a thorough review of the relevant characteristics of the Big Foot and concluded it was not a vessel (see case summary in Section II for detailed discussion of the court’s analysis of this issue). The court also rejected the plaintiff’s argument that OCSLA should extend the application of the LHWCA to his situation “since he was injured while constructing living quarters, which would ultimately be integrated into Big Foot, which would ultimately be placed on the OCS.” In rejecting this argument, the court cited to the U.S. Supreme Court’s decision in Pac. Operators Offshore, LLP v. Valladolid, which required that “the injured employee [must] establish a significant causal link between the injury that he suffered and his employer’s on-OCS operations conducted for the purpose of extracting natural resources from the OCS.” In this case, the plaintiff’s job was located solely on land and did not require him to ever travel to the OCS. The court concluded that the plaintiff’s injury did not satisfy the fact-specific test set forth in Valladolid since his injury was sustained “on dry land while building the living and dining quarters for [Big Foot]” and “while not an office employee, [plaintiff’s] job of constructing living and dining quarters is too attenuated from Big Foot’s future purpose of extracting natural resources from the OCS for the OCSLA to cover his injury.” Accordingly, the court held that the plaintiff’s injury did not satisfy the substantial nexus test and is not covered under the LHWCA as extended by the OCSLA.

The plaintiff Johnson was a payroll employee of Wood Group PSN, Inc. and was assigned to work as a mechanic for Apache Corporation on their production platform off the coast of Louisiana. At the time of Johnson’s employment, Apache and Wood Group’s relationship was governed by a Master Service Contract. Johnson’s crew was scheduled to make a crew change and leave the platform aboard a vessel owned by Apache. On its way to shore, the vessel collided with a vessel owned by Abe’s Boat Rentals, and Johnson claims that the collision caused severe and painful injuries that have limited his everyday activities and ability to work. Johnson filed a claim under the Longshoremen’s and Harbor Worker’s Compensation Act and filed suit against Abe’s under general maritime law. Abe’s subsequently filed a third-party action against Apache.

Apache filed a Motion for Summary Judgment seeking to dismiss Abe’s claims on the grounds that Abe’s is legally barred by the LHWCA from recovery against Apache. Apache argued that because Johnson was covered by the LHWCA, Abe’s was precluded from recovering against Apache. In response, Abe’s argued that Johnson was not covered by the LHWCA because he failed to satisfy the LHWCA’s “situs” and “status” requirements due to the nature and location of his work (mechanic on a fixed platform). Specifically, Abe’s argued that the fixed platform that Johnson worked on was not a covered “situs,” and that his presence on the MISS SYDNEY vessel was only transient and fortuitous under the “status” test.

The court denied Apache’s Motion for Summary Judgment, finding that Abe’s had sufficiently established that there were material issues of fact related to whether Johnson’s presence on the MISS SYDNEY was “transient or fortuitous.” Although Johnson appeared to have stated that he maintained the MISS SYDNEY and spent approximately 25% of his time
operating a boat for work purposes, his statement was in reference to “boats” generally, not work done specifically aboard the MISS SYDNEY; and as to the work Johnson performed specifically on the MISS SYDNEY, the record did not clearly support Johnson being aboard that vessel for the purpose of anything other than traveling to and from the work site. Additionally, Johnson’s statement about his work done on boats was somewhat vague and indicated that he mostly moved gear and personnel for work on the platform, which would not count towards satisfying the “status” test. Since key facts related to whether or not Johnson was covered by the LHWCA remained in dispute, the court was not willing to grant Apache’s motion for summary judgment.


The plaintiff worked as an offshore warehouseman on the Black Bay Central Facility, which was a fixed platform located in Louisiana state territorial waters. The Central Facility platform contained a warehouse and three cranes used for loading and unloading vessels with supplies and equipment used for oil and gas drilling. The uncontroverted testimony of both the plaintiff and the employer’s project manager established that loading and unloading vessels at the Central Facility was a large part of the plaintiff’s job and that he performed these activities on a daily basis.

The plaintiff was injured in the course of unloading a vessel at the Central Facility platform. Plaintiff subsequently filed a claim under the LHWCA, but his employer contested that he was covered under the Act. After due proceedings, the administrative law judge found that claimant’s injury did not occur on a covered situs; specifically, the judge found that the Central Facility was not an “other adjoining area” for purposes of coverage under the LHWCA because of the nature of the cargo that was loaded and unloaded at the facility. Plaintiff appealed to the Benefits Review Board.
The Benefits Review Board noted that the plaintiff’s injury occurred on a fixed platform, which is considered to be an artificial island for purposes of the LHWCA. Thus, since the plaintiff was not injured on navigable waters or on one of the other enumerated sites, the situs requirement is satisfied “only if his injury occurred in an ‘other adjoining area customarily used by an employer’ in loading or unloading a vessel.” In order to establish the Central Facility platform was an “other adjoining area,” the plaintiff must satisfy two distinct situs components: (1) a geographic component (the area must adjoin navigable waters) and (2) a functional component (the area must be ‘customarily used by an employer in loading [or] unloading…a vessel’). It was undisputed that the platform on which claimant was injured satisfied the geographic component of the situs test, thus the sole issue was whether the functional component was met.

The Benefits Review Board held that the platform was a covered situs. The BRB rejected the administrative law judge’s finding that, because the cargo that was loaded and unloaded at the platform consisted of supplies and equipment used for oil and gas drilling, the platform was “divest[ed] . . . of a maritime purpose.” The BRB noted that the where the site of claimant’s injury was customarily used for loading and unloading vessels, the nature of the cargo that was loaded and unloaded was not determinative of the situs inquiry. The BRB observed that “loading and unloading vessels are traditional maritime activities, and therefore those activities are necessarily related to maritime commerce.” The BRB concluded that, in a case where a claimant is injured in an area that is customarily used for loading and unloading vessels, the requisite relationship with maritime commerce is established for purposes of the functional component of the situs test, and any further inquiry into whether there is an “independent connection to maritime commerce” is “superfluous.”

This dispute arose between a temporary employment agency and its workers compensation carrier and involved the issue of whether an injury to one of the agency’s workers was covered by a workers’ compensation policy that excludes work “subject to” the LHWCA. The worker was injured while lifting a bag of oil-laden sand that would later be loaded onto a truck and transferred to a vessel for removal. He spent up to two hours per day loading and unloading the vessel at the pier, and six or seven hours cleaning beaches located just a few feet from Gulf waters. The carrier moved for summary judgment arguing that the injury is subject to the policy’s longshoreman exclusion. The district court entered summary judgment in favor of the workers’ compensation carrier.

On appeal, the Fifth Circuit addressed whether the beach was a covered situs under the LHWCA as an “other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.” The court concluded that the beach at issue was not a site customarily used for longshore work, and it reversed the trial court’s ruling. In support of this finding, the court observed that there were no structures on the beach and that the beach had never been used by longshoremen. The workers only activity was gathering spill-related debris and refuse into bags, and then throwing them into a designated area where they would be loaded onto a truck for daily transport to a vessel for removal. In light of those facts, the court concluded that the injury was not sustained at a location customarily used for “loading, unloading, repairing, dismantling, or building a vessel,” as required for the statute to apply; therefore, the policy exclusion did not apply.
The Fifth Circuit granted rehearing en banc following an employer’s petition for judicial review of a decision in which Benefits Review Board found it liable for award of workers’ compensation benefits under the LHWCA following an employee’s hearing loss due to exposure to loud noises at his worksite. The Fifth Circuit concluded that the employee was not eligible for benefits on the grounds that he was his worksite was not considered to be “adjoining navigable waters” for purposes of satisfying the situs requirement of the LHWCA.

The employee had worked at “Chef Yard,” which the court described as a small industrial park located approximately 300 yards from the Intracoastal Canal. It was surrounded by a carwash, a radiator shop, an automobile repair shop, a bottling company, and a company that manufactures boxes. The bottling company’s facility was located between the Intracoastal Waterway and Chef Yard.

The court noted that the LHWCA extends coverage for “injuries occurring upon the navigable waters of the United States (including any adjoining pier, wharf...or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel) and that most courts addressing this issue understand that an “other adjoining area” must satisfy two distinct situs components: (1) a geographic component (the area must adjoin navigable waters) and (2) a functional component (the area must be “customarily used by an employer in loading [or] unloading a vessel”). In evaluating this case, the court was considering whether the location of employee’s alleged injury satisfied the first geographic component.

After a detailed overview of other circuits’ jurisprudence regarding the geographic component, the court expressly adopted the Fourth Circuit’s standard as expressed in Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir.1995) Specifically, it held that the definition of...
“adjoining” navigable water was to be interpreted as “bordering on” or “contiguous with” navigable waters.

In adopting this definition, the court made clear that the literal definition of “adjoining” could not be circumvented by a broad interpretation of the word “area” and that for an area to constitute an “other area” under the statute, it must be a discrete shoreside structure or facility. The court also noted that “it is the parcel of land underlying the employer’s facility that must adjoin navigable waters, not the particular part of that parcel upon which a claimant is injured.”

Applying this definition of “adjoining” to the Chef Yard where the employee in this case worked, the court concluded that the Chef Yard did not border upon and was not contiguous with navigable waters; thus, the worksite was not “adjoining” and not an LHWCA-covered situs.

**BPU Mgmt., Inc./Sherwin Alumina Co. v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor, 732 F.3d 457 (5th Cir. 2013)**

Plaintiff, a dockworker at a waterside ore processing facility, was injured in one of the facility’s underground ore transport tunnels while shoveling fallen bauxite onto a conveyor. Benefits Review Board granted his request for benefits after finding that both the location and functional prongs of the situs test had been satisfied. The Fifth Circuit subsequently granted the employer’s petition for the purpose of reviewing the whether the place of the injury was a covered situs under the LHWCA.

The court determined that the location prong of the situs test was satisfied because the employer’s entire facility adjoined a navigable waterway. However, the court concluded that the functional prong of the situs test was not satisfied in this case because the underground tunnels were not customarily used for the unloading of vessels. The court specifically noted that “the fact that surface-level storage buildings are connected to the unloading process does not automatically render everything above and below the buildings a part of the unloading process.”
In this case, the underground tunnels were primarily used for transporting previously stored raw materials to another facility for further processing. In further support of this finding, the court recognized that “the surrender of cargo for land transport marks the end of the maritime unloading process because it is the point where the longshoreman’s duty to unload and move the cargo ceases.” In this case, once the ore was removed from the ship and deposited into a storage pile, the unloading process was complete, and any further activities involving the ore were unrelated to the unloading of the vessel.