RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW

Michael J. Daly, Timothy W. Hassinger, Christopher Nolan, Scott Richards, and Laurie Sands

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This article discusses several significant decisions issued by admiralty courts across the country between October 1, 2009, and September 30, 2010. This article is not intended to provide an exhaustive description of all maritime cases issued during that time period. Rather, cases were

Michael Daly is an attorney with Pierce Atwood LLP in Providence, Rhode Island. Timothy W. Hassinger is a director with the law firm of Galloway, Johnson, Tompkins, Burr & Smith in New Orleans. Christopher Nolan is a partner with Holland & Knight in New York City. Scott Richards is an attorney in the Tampa office of Fowler White Boggs. Laurie Sands is counsel at Wolff & Samson in West Orange, New Jersey. Mr. Daly is the immediate past chair, Mr. Nolan the chair-elect, and Ms. Sands the chair-elect designee of the TIPS Admiralty and Maritime Law Committee.

selected based on their treatment of critical or unsettled issues of law, or their unique factual backdrops.

I. JURISDICTION

In an interesting decision of a decidedly international flavor, the Fifth Circuit recently addressed the question of whether a U.S. court could exercise admiralty jurisdiction over a maritime tort committed by one Mexican company against another Mexican company in the Mexican Exclusive Economic Zone (EEZ). In *Perforaciones Exploracion Y Produccion v. Maritimas Mexicanas, S.A. DE C.V*,[1] the owner of a Mexican-flagged mobile operating drilling unit brought suit against the owner and operator of a Mexican-flagged supply vessel that allided with the drilling unit in the Mexican EEZ.[2] The owner of the vessel argued that a U.S. federal court does not have jurisdiction over an allision that occurred in Mexico's EEZ given that jurisdiction is based in part on the locality of the incident.[3] The court explained that there are "no clear territorial limits to federal maritime tort jurisdiction."[4] The owner of the vessel also argued there could be no jurisdiction unless there was some clear link to the United States. The court stated that although links to the United States may be relevant for a forum non conveniens or choice of law analysis, it has no bearing on whether a court had admiralty jurisdiction.[5] Accordingly, the court found that it had jurisdiction in the case.

The Admiralty Extension Act took center stage in *Oliver v. Omega Protein, Inc*,[6] where the plaintiff was injured on shore when he was filling the defendant's propane tank and it exploded. The defendant used the tank on its fishing vessels for cooking. The plaintiff alleged, and it was supported by expert testimony, that the explosion was caused by the defendant's negligent storage of propane tanks on the vessels.[7] The plaintiff asserted admiralty jurisdiction under the Admiralty Extension Act on the grounds that the tank was an appurtenance of the vessel that proximately caused the injury on land.[8] The plaintiff argued that his injury flowed from negligent acts regarding the tank while the tank was on the ship on navigable waters.[9] The court agreed with the plaintiff and found the location test for

1. 356 Fed. App'x 675 (5th Cir. 2009).
2. *Id*. at 676.
3. *Id*. at 678.
4. *Id*.
5. *Id*. at 679.
6. 2010 WL 2976522 (E.D. Va. July 19, 2010).
7. *Id*.
8. *Id*.
9. *Id*. at *4

admiralty jurisdiction was met.[10] The court also explained that although propane tanks have other uses, the one at issue was used for the sole purpose of cooking in the ship's galley, and, therefore, would be considered an appurtenance to the ship.[11] The court also found that the accident involved a traditional maritime activity. The court stated that a vessel's commercial purposes would go unfulfilled if the crew was unable to eat.[12] The ship providing food for the crew on a fishing vessel is integral to the operations of that vessel and implicates a traditional maritime activity necessary to trigger admiralty jurisdiction.

The courts in the following cases were less willing to extend admiralty jurisdiction to the facts before them. In *Casas v. U.S. Joiner, LLC*,[13] the Fifth Circuit refused to extend admiralty jurisdiction to a negligence claim arising out of an injury that the plaintiff suffered while working on a ship under construction in navigable waters. The plaintiff, Casas, was an employee of a subcontractor that the defendant, J.S. Joiner, hired to install insulation on an amphibious transport dock under construction.[14] During the job, Casas tripped, fell, and was injured. He then sued defendants for negligence in federal court, alleging admiralty jurisdiction because the incident involved the construction of a vessel. Conceding that Casas was injured on navigable waters, defendants argued that his claim was not significantly related to a traditional maritime activity to invoke admiralty jurisdiction.[15] The Fifth Circuit agreed with the defendants and reiterated that an injury to a shipbuilder while working on a vessel under construction does not give rise to a maritime tort.[16] Accordingly, there was no maritime tort and, consequently, no admiralty jurisdiction.[17]

In one of the more colorful cases issued by any court over the past year, the U.S. District Court for the District of South Carolina in *Gossett v. McMurtry*[18] considered whether admiralty jurisdiction extended to a defamation case stemming from antics on a fishing trip. In *Gossett*, the plaintiff went on a fishing trip off the coast of South Carolina with defendants. During the trip, the plaintiff feel asleep and, while he was sleeping, one the defendants pulled his own shorts down and placed his buttocks by the plaintiff's face.[19] Another defendant took pictures of the incident. The

10. *Id*. at *5.
11. *Id*.
12. *Id*.
13. 372 Fed. App'x 440 (5th Cir. 2010).
14. *Id*.
15. *Id*. at 441.
16. *Id*.
17. *Id*.
18. 2010 WL 2985808 (D.S.C. July 26, 2010).
19. *Id*. at *1.

pictures were then e-mailed to other individuals who posted them as a screen saver on a business computer.[20] The plaintiff asserted claims against the defendants for defamation, negligence, and intentional infliction of emotional distress. The plaintiff alleged that the claims were subject to admiralty jurisdiction because the pictures were taken on navigable waters.[21] The court, however, concluded that the alleged defamation did not occur on navigable waters. The court reasoned the publication of the allegedly defamatory pictures was the basis for the plaintiff's claim and that publication did not occur until the parties were on land.[22] The court also held that the negligence and emotional distress claims stemmed from a defendant placing his buttocks near the plaintiff's face and this was not an incident that could disrupt maritime commerce.[23] Consequently, the court found that the attenuated relationship of the plaintiff's claims to the objectives of maritime jurisdiction cannot invoke such jurisdiction.[24]

In re Complaint of MLC Fishing, Inc.[25] concerned whether a ramp extending to a floating dock used to access a vessel constitutes a part of the vessel. In that case, a patron was injured when he slipped on the ramp while in the process of boarding MLC's vessel. Seeking exoneration or limitation of liability, MLC contended that the patron's claim against it sounded in admiralty and limitation (or exoneration) was available because the accident occurred on the vessel. The patron countered that because the accident did not occur on the vessel there was no admiralty jurisdiction.[26] In considering whether the ramp was part of the vessel, the court noted that the ramp was not physically attached to the vessel, but rather, was separated from it by a floating dock. In this sense, the ramp was distinguishable from a gangway leading directly to a vessel. Thus, although the ramp was used to access the vessel, it was not an appurtenance to it and the injury did not occur on a "vessel."[27] MLC Fishing also argued that the Admiralty Extension Act, which extends admiralty jurisdiction to cases where a vessel on navigable waters causes injury on land, applied to the case.[28] The court found that conclusory allegations regarding the crew's maintenance of a ramp, not connected to the vessel, was not sufficiently similar to the operation of a vessel to invoke jurisdiction under the Admiralty Extension Act.[29]

20. *Id.*
21. *Id.* at *2.
22. *Id.* at *3.
23. *Id.* at *4.
24. *Id.*
25. 2010 WL 582570 (E.D.N.Y Feb. 16, 2010).
26. *Id.*
27. *Id.*
28. 2010 WL 582570, at *3.
29. *Id.*

ii. choice of law/preemption

In one of the most important decisions this year, a full panel of the Fifth Circuit clarified a conflicting area of the law impacting oil field contractual indemnity clauses. *Grand Isle Shipyard Inc. v. Seacor Marine, LLC*[30] concerned a dispute between two contractors of BP American Production Company arising out of a slip and fall incident on a vessel. The person who sustained injuries was employed by Grand Isle, a contractor, which was responsible for the repair and maintenance of BP's offshore platform, while the other contractor, Seacor, was responsible for transporting BP workers and its contractors to and the oil platform.[31] Reversing a panel of the circuit court, the full panel found Louisiana law applied to the dispute and rendered the indemnity provision at issue unenforceable.[32]

It was undisputed that the Grand Isle employee injured himself in 2005 when falling aboard a Seacor vessel heading from the oil platform to the living quarters platform; the accident was thus in open waters.[33] The injured Grand Isle employee sued Seacor, and Seacor in turn sought to invoke the indemnity provision so that Grand Isle would be responsible for defense of the suit. As is customary in the industry, the contracting parties' contracts contained reciprocal indemnity provisions involving employee injuries on the job. The purpose of the indemnity provisions was for each contractor who has an employee injured to hold harmless and indemnify BP for all liability suffered as a result of injuries or death of said employee.[34] In addressing the crux of the action, the Fifth Circuit stated, "the ultimate legal issue before the district court and the panel, and now before the full court, is whether the adjacent state law of Louisiana, including the LOIA[35], applies to this case. The parties agree that if the LOIA does apply, it invalidates Grand Isle's indemnity obligations to Seacor, but if Louisiana law and the LOIA does not apply, the indemnity agreement is enforceable."[36]

The district court and panel differed as to how to interpret a key Supreme Court decision concerning the Outer Continental Shelf Lands Act (OCSLA) to ultimately resolve if the OCSLA mandated the application of state law to the dispute. The three-part test in *Rodriguez v. Aetna Casualty*

30. 589 F.3d 778 (5th Cir. 2009).
31. *Id*. at 781.
32. *Id*.
33. *Id*.
34. *Id*. at 782.
35. The LOIA is the Louisiana Oilfield Indemnity Act, La. Rev. Stat. Ann. § 9:2780(A). The LOIA was established to even the playing field between rig operators and companies. Oil exploration companies had the negotiating advantage with operators in the Gulf of Mexico, before the passage of the LOIA, and would seek broad indemnity clauses.
36. *Grand Isle Shipyard*, 589 F.3d at 782.

& Surety Co.,[37] to determine if state law applies in place of federal law, requires: (1) the dispute arising in an area or situs covered by the OCSLA; (2) federal maritime law does not apply of its own force; and (3) the state law proffered is not inconsistent with federal maritime law.[38] It is the situs factor that has proven difficult to determine both in this dispute and previous actions. A full panel of the circuit granted en banc review of the issue because both the district court and a panel found support in Fifth Circuit case law for their respective situs positions, which the full panel acknowledged was "conflicting and confusing."[39]

The conflicting trains of thought on the situs issue revolves around tort and contractual principles. Some courts have looked to the exact site of the tort to determine the situs of the dispute for contractual indemnity purposes while others employ a "focus-of-the-contract" test for situs purposes. The distinction is critical because, as the panel found, if the tort-based test is employed, the accident occurred on navigable waters above the Outer Continental Shelf–not a situs covered by the OCSLA–and thus not in a covered situs. The LOIA would then not apply to the dispute and the indemnity clause would not be invalidated.[40] The full panel instead agreed with the district court in that the dispute arose on an OCSLA situs because the focus-on-the-contract test looks to the nature and purpose of the underlying contract and in this matter all parties agreed the majority of the work to be performed would occur on a stationary platform on the Outer Continental Shelf and thus within the OCSLA purview.[41] The full panel reached this conclusion for a rather simple reason: indemnity is a creature of contract. "Once we recognize that the claim for indemnity is a claim based in contract rather than in tort, we see no reason to apply tort analysis to determine where the contractual controversy arose."[42]

The reasoning of the full court was based on sound policy reasons. The use of tort rules, heavily reliant on the fortuitous nature of the location of the tort, is inconsistent with sophisticated parties who carefully allocate risks in the form of negotiated contracts containing indemnity clauses.[43] As a result of the situs finding, and with there being no challenge of the remaining two factors articulated in *Rodriguez*, the full panel held the adja-

37. 395 U.S. 352.

38. *Grand Isle Shipyard*, 589 F.3d at 783 (quoting Union Texas Petroleum Corp. v. PLT Eng'g Inc., 895 F.2d 1043, 1047 (5th Cir. 1990), in turn citing *Rodriguez*).

39. *Id*. at 787–88.

40. *Id*. at 783.

41. *Id*. at 789.

42. *Id*. at 787.

43. *Id*.

cent state law of Louisiana, in particular the LOIA, renders the indemnity agreements unenforceable.[44]

The recovery of attorney fees in maritime actions played critical role in two preemption cases this year. In *Misener Marine Constr., Inc. v. Norfolk Dredging Co.*,[45] the Eleventh Circuit determined whether a Georgia statute, the Georgia Prompt Pay Act (GPPA), was preempted by general maritime law, which has traditionally followed the American Rule forbidding the recovery of attorney fees by the prevailing party unless one of three narrow exceptions applied. When the Georgia Ports Authority needed to demolish a dock and build a new one in the Port of Savannah (the fourth largest container port in the United States), it turned to Misener.[46] Misener in turn subcontracted Norfolk to dredge a part of the Savannah River in the port. Misener and Norfolk entered into a pro-forma two page dredging contract, which failed to contain a choice of law or attorney fees provision.[47]

When a mooring apparatus failed, resulting in damage to a vessel, Misener brought suit for negligent dredging, among other causes, against Norfolk. Norfolk counterclaimed seeking payment for its work, interest, and attorney fees. After subsequent investigation, Misener was satisfied Norfolk was not to blame for its work product and voluntarily dismissed its claim. Norfolk nonetheless moved for summary judgment on its claims.[48] The district court granted Norfolk's motion, including attorney fees request, holding that the GPPA, which regulates construction contracts between contractors and subcontractors, was not preempted by federal maritime law and allowed for the recovery of fees. In so holding, the court ruled "there is not an established federal rule regarding attorneys' fees in maritime cases" and in any event, it is not the sort of rule where uniformity is necessary.[49]

Unfortunately for Norfolk, the presiding judge passed away before issuing a ruling on the quantum of fees to be awarded and the new judge reversed course, finding the GPPA conflicted with federal maritime law; Norfolk's appeal followed. The Eleventh Circuit had little trouble finding the general maritime law preempted the GPPA. Before doing so, the court first had to find that the dredging contract was a maritime contract. Besides noting the Supreme Court had previously held dredging is a traditional maritime activity, looking at the contract itself it was evident Norfolk's work had an effect on maritime services and commerce.[50] Such are

44. 589 F.3d at 789.
45. 594 F.3d 832 (11th Cir. 2010).
46. *Id.* at 835.
47. *Id.*
48. *Id.* at 836.
49. *Id.*
50. *Id.* at 837.

the benchmarks for finding a maritime contract under settled Supreme Court law. With the finding of a maritime contract, substantive admiralty law is applied. The Eleventh Circuit has consistently found the prevailing party in a maritime case is not permitted to recover attorney fees unless one of three situations is present: (1) a federal statute allows for it; (2) the nonprevailing party acted in bad faith; or (3) the contract has an attorney fees indemnity provision.[51]

None of the three exceptions applied, as the GPPA is not a federal statute; there was no claim of bad faith in the case; and the underlying dredging contract did not contain an attorney fees clause.[52] In closing, the court reaffirmed the wide application of the American Rule as substantive maritime law to maritime cases around the country. As such, the GPPA could not be used as a supplement to admiralty law; it is in direct conflict with it. In the end, the court refused "to alter the terms of [the] contract through the retroactive injection of a state law that contravenes a principle of substantive maritime law."[53]

In *Continental Insurance Co. v. Cota*,[54] a state statute faired much better than the GPPA did in the case above. *Cota* is one of many decisions arising out of the *M/V COSCO BUSAN* allision in San Francisco-Oakland Bay on November 7, 2007. John Joseph Cota was the pilot on the vessel that day and faced a number of civil actions.[55] Continental Insurance Company issued an insurance policy for the San Francisco Bar Pilots and therefore appointed defense counsel for Cota in the suits, which resulted in over $300,000 in' attorney fees before related vessel owner companies assumed the defense.[56] Cota and Continental brought suit to recover these fees incurred, relying on the California Harbors and Navigation Code §1198, which provides the vessel, its owner, or operator, must purchase trip insurance for the pilot or defendant, and indemnify and hold harmless the pilot should an accident occur due to his negligence when within the scope of his duties.[57] Owners of the vessel on partial summary judgment argued that § 1198(c) is preempted by federal maritime law while Cota and Continental sought the opposite finding.

In California, foreign vessels must use a pilot when traversing the Bay of San Francisco.[58] Section 1198(c) applies to a foreign flagged vessel unless and until a federal law is shown which is inconsistent with the state

51. 594 F.3d at 838.
52. *Id.*
53. *Id.* at 841.
54. 2010 WL 383367 (N.D. Cal. Jan. 27, 2010).
55. *Id.* at *1.
56. *Id.*
57. *Id.*
58. *Id.* at *2.

statute. This is based on the Supremacy Clause in the U.S. Constitution, which confers Congress with the power to preempt state law.[59] Pilotage is a supremely local endeavor. Navigating ships in and out of key waterways within a state takes great skill and expertise. This was recognized by the very first Congress, when in its first session it passed the Lighthouse Act of 1789, which essentially left the power to regulate pilots to the individual states.[60] California exercised this power when passing § 1198(c).

Though the court recognized it is well settled that a shipowner cannot be held personally liable for the negligence of a compulsory pilot (which Cota was), §1198(c) was not inconsistent with this settled rule because foreign owners were given a choice–trip insurance could be obtained to cover a pilot's negligence. The shipowner would then not be obligated to defend the pilot; the trip insurance company would.[61] The court noted that California's rule was consistent with other states which limit the liability of pilots or provide full indemnity.[62] In closing, the court found it was "Congress's intent to allow the states to regulate pilotage, and there is no danger that state regulation of pilotage interferes with federal maritime law's proper harmony and uniformity."[63]

The final preemption decision meriting emphasis concerns the interplay between federal and state statutes in the context of an employee slip and fall. In *Morrow v. Marinemax*,[64] the plaintiff employee was injured at an employee appreciation event. Plaintiff's employer was a dealer and distributor of yachts. On the day of the Atlantic City air show, plaintiff's employer invited him aboard the yacht to watch the event.[65] While acting within the scope of his employment, plaintiff was paralyzed when a fellow employee fell on him, fracturing his cervical vertebrae.[66]

Following the injury, plaintiff sought workers' compensation benefits and the employer commenced payments. The federal suit followed, seeking damages under general maritime law in negligence against the vessel owner and against the boat manufacturer for unseaworthiness; his wife made a final loss of services and consortium claim.[67] The vessel owner

59. *Id*. at *3.
60. *Id*. at *3–4.
61. *Id*. at *5.
62. *Id*. (citing laws around the country).
63. *Id*. at *6. The court also rejected a half-hearted argument that § 1198(c) was preempted by the Oil Pollution Act of 1990 by noting that statute concerns pollution removal costs, not pilotage, and it nonetheless provides indemnity provisions are freely allowed thereunder. *Id*. at *7.
64. 731 F. Supp. 2d 390 (D.N.J. 2010).
65. *Id*. at 392.
66. *Id*. at 393.
67. *Id*.

moved for summary judgment on the negligence claim and spousal claim, arguing the claims were barred by the New Jersey Workers' Compensation Act and its exclusive remedy provision.[68] The owner argued that because plaintiff filed a workers' compensation claim and collected payments under the Act, the exclusive remedy provision was triggered preempting plaintiff's claims.[69] Owner's position was consistent with the Eleventh Circuit, differed with the Fifth and Ninth Circuits, and was an issue of first impression in the Third Circuit.[70]

In deciding the motion, the court analyzed the differing circuit court decisions that considered whether a true conflict existed between the general maritime negligence claim and the state's workers' compensation law. Ultimately, the court opined that when sitting in admiralty, it would not allow a state statute to preclude a plaintiff's claim when such a claim is expressly recognized in the general maritime law.[71] In so holding, the court found that when an injured worker is not covered under the Jones Act or LHWCA based on the circumstances of the injury, as was the case there, the worker has an option of claiming under state workers' compensation law or under general maritime law principles.[72] The plaintiff here did not file suit relying on the New Jersey workers' compensation statute, only general maritime law. Thus, the court found this claim must be "preserved" notwithstanding the state-law exclusivity provision.[73]

III. CARGO

In one of the most anticipated decisions in the area of admiralty law in years, the Supreme Court decided a cargo matter that will have substantial ramifications for through bills of lading throughout the world. *Kawasaki Kisen Kaisho Ltd. et al. v. Regal-Beloit Corp*.[74] involved a number of companies, a host of amicus curiae interests, and a divided court featuring a spirited dissent penned by Justice Sotomayor. The Court was called upon to bring uniformity and predictability to admiralty law concerning multimodal carriage of goods.

A circuit split is often looked upon as the easiest way to predict whether certiorari will be granted and in this area of admiralty law a real schism existed. The Fourth, Sixth, Seventh, and Eleventh Circuits had ruled the Carmack Amendment did not apply to the U.S. inland portion of through

68. N.J. Stat. Ann. § 34:15–8 (2010).
69. *Morrow*, 731 F. Supp. 2d at 393.
70. *Id*. at 397–99.
71. *Id*. at 398.
72. *Id*. at 399 (quoting Chandris, Inc. v. Latsis, 515 U.S. 347, 356 (1995)).
73. *Id*.
74. 130 S. Ct. 2433 (2010).

carriage from a foreign country to various locations in the United States while the Second and Ninth Circuits applied the Carmack Amendment.[75] Ultimately, the majority sided with the majority of circuits finding the Carmack Amendment not applicable.

The main issue revolved around railroads demanding contractual indemnity. The Second and Ninth Circuits had, to the surprise of most maritime practitioners, opined that a trucking or railroad company was deprived of contractual protections if the shipper of the cargo did not offer full Carmack liability.[76] They found the Carmack Amendment applied to the U.S. inland portion of a multimodal shipment and that a carrier was mandated under Carmack to offer full Carmack liability in the first instance. The stakes are substantial. Under the Carmack Amendment, the carrier could face unlimited liability if it does not offer complete Carmack liability.[77] This differs from the familiar protections of the Carriage of Goods by Sea Act,[78] where a carrier's liability is limited to $500 per package, or with goods not shipped in packages, the expected freight unit.[79] It also impacts where the dispute would be decided: in the United States or Japan based on a forum selection cause contained in the through bill of lading.[80]

The majority opinion, authored by Justice Kennedy, rejected the Ninth and Second Circuit's Carmack Amendment interpretations. In finding the Carmack Amendment did not apply to a shipment that originated overseas rather than in the United States, it stated ocean carrier K-Line took hold of the cargo directly from the "receiving" shipper in China and that there could only be one receiving carrier in a multimodal shipment.[81] As such, if the receiving carrier is not a U.S. based carrier, the Carmack should not be applicable to that portion of the cargo carriage in the United States. Just as important, the scope of the Carmack Amendment was specifically delineated: it only concerns cargo carried from one U.S. state to another U.S. state and from one place in the United States to another point in a foreign country.[82]

The majority's decision can be interpreted as recognizing the importance of freedom of contract among sophisticated parties. It stated, "Congress has decided to allow parties engaged in international maritime commerce to structure their contracts, to a large extent, as they see fit. It has not

75. 49 U.S.C. § 11706; 130 S. Ct. at 2440.

76. *Kawasaki*, 130 S. Ct. at 2440.

77. *Id*. at 2441.

78. 46 U.S.C. § 30701.

79. The Court focused on the Carmack Amendment statutory scheme and liability issues, not the COGSA limitation. A brief description of COGSA is provided at 130 S. Ct. at 2440.

80. *Kawasaki*, 130 S. Ct. at 2449.

81. *Id*. at 2443.

82. *Id*. at 2445.

imposed Carmack's regime, textually and historically limited to the carriage of goods received for domestic rail transport, onto what are 'essentially maritime' contracts."[83] With Carmack not applying, the Court found the cargo owners bound by the contracts agreed upon and thus the agreement to litigate in Tokyo, Japan, stood.[84]

It should be noted the dissent excoriated the majority for failing to interpret the text of the Carmack Amendment properly and as such, the decision as to whom was the receiving carrier differed. That difference resulted in the dissent finding the Carmack Amendment should have applied to the U.S. inland rail portion of the shipment.[85] This would be regardless of whether domestic bills of lading were issued.[86]

IV. SEAMAN'S CLAIMS

A. *Right to a Jury Trial*

In *Endicott v. Icicle Seafoods, Inc.*,[87] the Washington Supreme Court sitting en banc considered whether a defendant in a Jones Act and general maritime suit filed in state court has a right to a jury trial. After a fish cart crushed plaintiff's arm while working in the freezer aboard a ship, he filed suit under the Jones Act for negligence and under general maritime law for unseaworthiness. The trial court struck defendant's demand for a jury trial and found in favor of plaintiff following a bench trial. On appeal, the court of appeals certified the case to the Washington Supreme Court for direct review.[88]

In reversing the decision below, the Washington Supreme Court examined the history of claims brought "in admiralty" or "at law." The U.S. Constitution extends the judicial power of the federal courts to "all cases of admiralty and maritime jurisdiction," but preserves general maritime law as a species of federal common law.[89] In turn, Congress has provided federal courts with exclusive jurisdiction over all cases of "admiralty or maritime jurisdiction," with the "saving to suitors clause" of 28 U.S.C. § 1331(1) affording plaintiffs the right to sue on maritime causes of action in state court as well. However, the state court must proceed *in personam* and not *in rem*.[90]

83. *Id.* at 2449 (quoting Norfolk Southern Ry. Co. v. Kirby Pty Ltd., 543 U.S. 14 (2004)).
84. *Id.*
85. *Id.* at 2449–50.
86. *Id.* at 2451.
87. 224 P.3d 761 (Wash. 2010).
88. *Id.* at 763.
89. *Id.* at 764.
90. *Id.* (citing Madruga v. Superior Court, 346 U.S. 556, 560–61(1954).

The *Endicott* court observed that the Jones Act, by its terms, allows seamen to sue at law for their employers' negligence, but not in admiralty.[91] However, in an early case interpreting the Jones Act, the U.S. Supreme Court "adopted a fictitious reading of the Act to save it from constitutional challenge."[92] In *Pan. R.R. Co. v. Johnson*, the U.S. Supreme Court interpreted the Jones Act as allowing negligence suits both in admiralty and at law, with the former yielding a bench trial and the latter a jury trial.[93] However, the Washington Supreme Court explained that the *Johnson* decision "left ambiguous" whether a plaintiff's election between different forms of action is a statutory right to elect the mode of trial (jury versus nonjury) or a right to select merely the jurisdictional basis of trial (at law versus in admiralty).[94]

Recognizing a split among federal and state courts as to the correct interpretation of *Johnson*, the *Endicott* court sided with the Fifth and Seventh Circuits, along with prior decisions from state courts in Louisiana and Illinois. The court held that the "jurisdictional" interpretation was the proper interpretation—namely, that a plaintiff's Jones Act election is limited to choosing the jurisdictional basis for his suit (either in admiralty or at law). As the court explained, "[o]nce the plaintiff makes his choice of jurisdiction, procedural rights flow as normal incidents of the suit."[95] Since there is no substantive federal right to elect the mode of trial directly, state procedural law governs whether a party has a right to a jury trial in state court.[96] After recognizing that the Washington Constitution confers a right to a jury trial in Jones Act cases, the Washington Supreme Court vacated the lower court's judgment and remanded the case for a trial by jury.[97]

B. *Negligence Per Se*

Webb v. Teco Barge Line, Inc. involved plaintiffs who were allegedly injured after being required to remain on defendant's vessel during the onslaught of Hurricane Katrina.[98] They filed suit alleging negligence under the Jones Act and unseaworthiness under general maritime law, as well as that defendant's violation of OSHA constituted negligence per se.

In response, defendant filed a motion to dismiss or, alternatively, to strike the claim of negligence per se, arguing that allowing a violation of OSHA to constitute negligence per se would contravene 29 U.S.C. § 653(b)(4) by

91. *Id.* at 764.
92. *Id.* at 764–65.
93. 264 U.S. 375, 390–91 (1924).
94. 224 P.3d at 765.
95. *Id.* at 767.
96. *Id.*
97. *Id.*
98. 2010 WL 552309 (S.D. Ill.).

enlarging employer liabilities. This statute provides that OSHA cannot be construed to "enlarge, diminish or affect in any other manner the common law or statutory rights, duties or liabilities of employers and employees under any law with respect to injuries . . ."[99]

The court disagreed with the defendant, however, explaining that the Jones Act incorporates the terms of the Federal Employers' Liability Act (FELA), under which violations of safety statutes constitute negligence per se.[100] Meanwhile, the Supreme Court has extended the negligence per se doctrine to the Jones Act and all safety statutes.[101] Given that OSHA applies to ships that are not inspected by the Coast Guard, such as the vessel at issue in *Webb*, and is a safety statute whose fundamental purpose is to ensure "safe and healthful working conditions," a violation of OSHA constitutes negligence per se under the Jones Act.[102] Moreover, allowing a violation of OSHA to constitute negligence per se does not expand the liabilities of employers, but serves as a guide for determining the applicable standard of care.[103] In short, it "simply allows the presence of a statutory regulation to serve as irrefutable evidence that particular conduct is unreasonable."[104] Since the doctrine of negligence per se applies to violations of Coast Guard regulations on inspected vessels, the rights of employees will be diminished unless OSHA is allowed to "fill the regulatory gap" in cases involving uninspected vessels.[105]

C. *Maintenance and Cure*

The court in *Royal Caribbean Cruises, Ltd. v. Whitefield* discussed the appropriate forum for deciding whether a plaintiff is entitled to maintenance and cure when the filing of a federal court declaratory judgment action precedes a related state court action for damages.[106] After the decedent's employment with the cruise line ended, he received maintenance and cure benefits from Royal Caribbean for various health reasons.[107] When plaintiff reached maximum medical improvement, Royal Caribbean terminated benefits and then filed suit seeking a declaratory judgment that no further benefits were owed.[108] Nine days later, plaintiff filed a separate lawsuit in state court under the Jones Act and general maritime law for failure to

99. *Id.* at *2.
100. *Id.*
101. Kernan v. Am. Dredging Co., 355 U.S. 426, 438–39 (1958).
102. 2010 WL 552309, at *3 (citations omitted).
103. *Id.*
104. *Id.* (citing Practico v. Portland Terminal Co., 783 F.2d 255, 265 (1st Cir. 1985)).
105. *Id.* at *4.
106. 664 F. Supp. 2d 1270 (S.D. Fla. 2009).
107. *Id.* at 1274.
108. *Id.*

provide maintenance and cure, along with negligent failure to provide adequate medical care.[109] The plaintiff died approximately three months later and his wife, who was substituted as his representative, moved to dismiss the declaratory judgment action in federal court, arguing that the federal court should exercise its discretion under the Declaratory Judgment Act to decline to hear the matter since a parallel action was pending in state court.

The federal court noted that the Eleventh Circuit's decision in *Ameritas Variable Life Ins. Co. v. Roach*[110] provides nine factors to evaluate in deciding whether to entertain a declaratory judgment action or to dismiss the action in favor of a pending state court action that will resolve the same issues. However, when the issue involves maintenance and cure in federal court compared to a Jones Act claim pending in state court, other unique factors also should be considered. The first is the propriety and practicality of conducting a trial on the maintenance and cure claim without a jury under the district court's admiralty jurisdiction as compared to the Jones Act claim in state court that would be tried with a jury, along with the proper weight to be afforded a plaintiff's choice of forum under the Saving to Suitors Clause.[111] For example, since the state court trial may occur after the federal trial, it creates the likelihood that some findings in the federal case could be res judicata in the state court case, which "could potentially implicate an award of damages in whichever case goes to trial last."[112] Another concern is one of efficiency, as the federal and state cases may involve duplicative evidence and witnesses.[113] Additionally, if a district court conducts a bench trial in a declaratory judgment action on the issue of maintenance and cure while a state court Jones Act suit is pending, it would undermine the Saving to Suitors Clause since the federal court's findings are res judicata in the state court case, thereby depriving the seaman of a jury on such issues.[114] Under Supreme Court precedent, however, the federal court noted that the seaman could simply file a counterclaim in the federal proceeding, which would entitle the seaman to a jury trial on the maintenance and cure claim that would not otherwise be triable before a jury.[115] Another significant consideration is whether the parties are acting in bad faith in selecting one forum versus the other.[116] However, the court

109. *Id.*
110. 411 F.3d 1328, 1331 (11th Cir. 2005).
111. *Whitefield*, 664 F. Supp. 2d at 1276.
112. *Id.* (citing Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 18 (1963); Belle Pass Towing Corp. v. Cheramie, 763 F. Supp. 1348 (E.D. La. 1991)).
113. *Id.* at 1276.
114. *Id.* at 1277.
115. *Id.* (citing *Fitzgerald*, 374 U.S. at 21).
116. *Id.* at 1277.

noted that bad faith is generally a question of intent such that the circumstantial evidence "can be plausibly interpreted in either direction."[117]

In applying these additional criteria to the facts of the case, the *Whitefield* court held that the factors weighed in favor of dismissing the declaratory judgment action. For instance, the court noted that even with a special verdict form, it is difficult or impossible to determine whether the damages awarded by the jury in the state court proceeding would be duplicative of any damages awarded by the court in the federal matter.[118] Similarly, the evidence and witnesses concerning denial of maintenance and cure would likely be duplicative of the witnesses and evidence concerning damages under the Jones Act claim.[119] And while a seaman can certainly file a counterclaim in the federal proceeding, it does not "ensure that the party will have his choice of forum" under the Saving to Suitors Clause.[120]

Moreover, although there was no evidence of bad faith by either party, the *Ameritas* factors weighed in favor of dismissing the federal court action as well. Admittedly, the state of Florida did not have a significant interest in deciding the case, but the majority of the *Ameritas* factors weighed in favor of declining federal jurisdiction: a judgment as to maintenance and cure would not completely resolve the controversy; the declaratory judgment action would create issues concerning res judicata that would not fully clarify the legal relations of the parties; issues concerning res judicata, particularly as to damages, would be alleviated if one finder of fact considered all issues; a superior remedy would exist in state court before a single fact finder; and Florida state courts are equipped to handle all of the claims, especially since there is ample jurisprudence on the issue of maintenance and cure to serve as a guide.[121]

D. *Arbitration*

In *Harrington v. Atlantic Sounding Co., Inc.*,[122] the Second Circuit considered the enforceability of an arbitration agreement between a seaman and his employer. After plaintiff allegedly suffered a back injury while working for Weeks Marine, he signed a "Claim Arbitration Agreement" in which his employer agreed to pay sixty percent of his gross wages as an advance against settlement until plaintiff reached maximum medical improvement or was declared fit for duty provided plaintiff agreed to arbitrate any claims that may arise from his personal injury or illness.[123] After plaintiff filed

117. *Id.* (citing Lady Deborah, Inc. v. Ware, 855 F. Supp. 871, 876 (E.D. Va. 1994)).
118. *Id.* at 1278.
119. *Id.*
120. *Id.*
121. *Id.* at 1280–81.
122. 602 F.3d 113 (2d Cir. 2010).
123. *Id.* at 116.

suit under the Jones Act instead of a claim in arbitration, the district court denied defendant's motion to dismiss or, alternatively, to stay the Jones Act proceeding or to compel arbitration.[124] Plaintiff argued that the arbitration agreement was unenforceable under the Federal Employers' Liability Act and was unconscionable under New Jersey law.[125]

The Second Circuit disagreed, holding that seamen arbitration agreements are not unenforceable as a matter of law and that §§ 5–6 of the Federal Employers' Liability Act are inapplicable to such agreements. While the Supreme Court in *Boyd v. Grand Trunk Western Railroad Co*. invalidated an agreement limiting an injured party's "right to bring the suit in any eligible forum,"[126] the Second Circuit noted that *Boyd* was not decided under the Federal Arbitration Act, which applies to maritime transactions and commerce with a liberal policy in favor of arbitration agreements.[127] Moreover, §6 by its terms and purposes is inapplicable to arbitration agreements.[128] In upholding the agreement, the court also noted the federal policy favoring arbitration as but an additional factor.[129]

With respect to plaintiff's argument that the agreement was unconscionable, the *Harrington* court held that a party to an arbitration agreement seeking to avoid arbitration bears the burden of establishing that the agreement is inapplicable or invalid.[130] While the burden rests with the party attempting to obtain a release of a seaman's claims to show that it was executed freely, without deception or coercion, and with a full understanding by the seaman of his rights, this principle does not apply to an agreement to arbitrate those rights, only a release.[131] Instead, the court found the agreement at issue neither procedurally nor substantively unconscionable under New Jersey law, as waivers of jury trials are fully enforceable under the Federal Arbitration Act and the agreement at issue did not entail an "exchange of obligations so one-sided as to shock the court's conscience."[132] For these reasons, the Second Circuit vacated the district court's decision and remanded for a determination of the merits of plaintiff's contractual defenses of lack of mental capacity and intoxication when the agreement was signed.[133]

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124. *Id*. at 115.
125. *Id*. at 116.
126. 338 U.S. 263, 265 (1949) (per curiam).
127. *Harrington*, 602 F.3d at 121.
128. *Id*. at 121–22.
129. *Id*.
130. *Id*. at 124 (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91–92 (2000)).
131. *Id*.
132. *Id*. at 126 n.7.
133. *Id*. at 127.

V. DAMAGES

A. *Punitive Damages*

In *Borkowski v. F/V Madison Kate*,[134] three commercial fishermen filed suit seeking unpaid wages and damages under federal maritime law and Massachusetts state wage laws. At the end of a voyage, each fisherman and the other crewmembers were paid pursuant to an unwritten "lay-share system" in which net proceeds of the catch were divided into shares that were distributed based on the experience and performance of the crewmembers.[135] Two of the fishermen received a full share, while another received a three-quarter share.[136] The fishermen filed suit alleging that the lack of written wage agreements for fishermen violated 46 U.S.C. § 10601; unlawful seamen engagements entitled them to damages under 46 U.S.C. § 11107 for either the highest rate of wages at the port or the amount agreed to be given the seamen, whichever was higher; egregious conduct on the part of the employer entitled them to punitive damages; and state wage laws were violated.[137] The district court awarded the one fisherman his remaining one-quarter share, but dismissed the remaining claims.

On appeal, the First Circuit noted that it was not required to decide whether the remedy of § 11107 is the exclusive remedy for violations of § 10601 or whether federal maritime law preempts Massachusetts wage laws. Instead, the court affirmed on two grounds: plaintiffs failed to establish any other measure of compensatory damages or entitlement to punitive damages.[138] With respect to their compensatory damage claim, the court explained that plaintiffs conducted little or no discovery to gather evidence in support of their claims, including how deductions for expenses should be made or wages should be divided.[139] Meanwhile, although federal courts sitting in admiralty have the power to award common-law punitive damages to supplement statutory remedies, the circumstances are limited to "cases . . . of enormity, where a defendant's conduct is outrageous, owing to gross negligence, willful, wanton, and reckless indifference for the rights of others, or behavior even more deplorable."[140] In this case, however, defendant's violation of the writing requirement was "unknowing and commonplace."[141] As punitive damages do not automatically follow every statutory violation, "[i]gnorance of the law sometimes can be an ex-

134. 599 F.3d 57 (1st Cir. 2010).
135. *Id.* at 58.
136. *Id.*
137. *Id.* at 59.
138. *Id.* at 60.
139. *Id.* at 61.
140. *Id.* at 61–2 (citing Exxon Shipping Co. v. Baker, 129 S. Ct. 2561, 2621 (2008)).
141. *Id.* at 62.

cuse when it comes to punitive damages."[142] Finding nothing in the record to support a claim for punitive damages, the Second Circuit affirmed the district court's ruling.

The court in *Wagner v. Kona Blue Water Farms, LLC* considered whether punitive damages were recoverable for a Jones Act negligence claim as a matter of law.[143] In that case, plaintiff alleged he suffered ear trauma while working as a diver for defendant and filed suit for negligence under the Jones Act; unseaworthiness, maintenance, and cure under general maritime law; and for vessel negligence.[144] He also sought an award of punitive damages due to the "aggravated acts and omissions" of his employer, arguing that the Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*[145] entitled him to such relief.

The district court recognized that courts have uniformly interpreted the Supreme Court's decision in *Miles v. Apex Marine Corp*.[146] as precluding plaintiffs from recovering punitive damages in Jones Act claims since such damages are nonpecuniary in nature.[147] However, the court questioned such decisions in light of the Supreme Court's recent holdings in *Exxon Shipping Co. v. Baker*[148] and *Townsend*. For example, the Supreme Court in *Baker* upheld a punitive damage award based solely on federal maritime common law for commercial fishermen who suffered economic damages following the Exxon oil spill off Alaska's coast in 1989. Meanwhile, the Supreme Court in *Townsend* allowed punitive damages in the context of a maintenance and cure claim, finding that the Jones Act did not preclude such preexisting remedies and leaving open the question of whether such damages are recoverable under the Jones Act. After examining the history of case law on this issue, the court disagreed with plaintiff's expansive interpretation of *Townsend*, finding that *Townsend* allowed punitive damages in the context of maintenance and cure because the general maritime cause of action for maintenance and cure, and the remedy of punitive damages, were "well established" before the Jones Act was enacted.[149] Instead, a Jones Act negligence cause of action is limited by the terms and conditions of the Act, including the limitation on nonpecuniary damages.[150] Accordingly, the district court dismissed plaintiff's claim for punitive damages under the Jones Act.

142. *Id*. (citation omitted and emphasis in original).
143. 2010 WL 3566730 (D. Haw. 2010).
144. *Id*. at *1.
145. 129 S. Ct. 2561 (2009).
146. 498 U.S. 19 (1990).
147. *Wagner*, 2010 WL 3566730, at *3 (citations omitted).
148. 128 S. Ct. 2605 (2008).
149. *Wagner*, 2010 WL 3566730, at *7.
150. *Id*. at *8.

B. *Emotional Distress*

In *Stacy v. Rederiet Otto Danielsen, A.S.*,[151] the Ninth Circuit reversed the dismissal of a claim for negligent infliction of emotional distress brought by a fisherman who sustained no direct physical impact during a collision. Plaintiff was trolling for salmon aboard his vessel amid the fog of the Pacific Coast when he noticed defendant's ship headed on a collision course toward his vessel. When plaintiff signaled the danger to the freighter, it avoided striking his vessel, but passed close enough for plaintiff to hear the vessel's engine and feel its wake.[152] After passing plaintiff, the freighter then collided with another vessel and killed the latter's captain. Plaintiff filed suit under general maritime law for emotional distress that purportedly caused him to be disabled and need psychiatric treatment.

The Ninth Circuit explained that under maritime jurisdiction and Supreme Court precedent, courts should employ a "zone of danger" test allowing recovery for plaintiffs who sustain physical impact from the defendant's negligent conduct or who are placed in immediate risk of physical harm by the same.[153] In sum, those within the "zone of danger" of physical impact can recover for fright, but those outside of it cannot.[154] While the dissent argued at length that Ninth Circuit precedent in *Chan v. Society Expeditions, Inc*.[155] limited the contours of the test to situations where an individual witnessed harm or peril to another and was threatened with physical harm as a result of a defendant's negligence, the majority disagreed, explaining that *Chan* did not concern a claim for emotional damages by someone directly endangered by a vessel.[156] Instead, the majority held that the test enunciated by the Supreme Court in *Gottshall* remained the applicable test in this context. Although plaintiff did not witness the collision, he nonetheless had stated a cause of action since he allegedly was in immediate risk of physical harm from defendant's vessel.[157]

VI. LONGSHOREMAN'S CLAIMS

As a matter of first impression, the Ninth Circuit had before it the issue of whether psychological injuries arising from legitimate personnel actions were compensable under the Longshore and Harbor Worker's Compen-

151. 609 F.3d 1033 (9th Cir. 2010).
152. *Id*. at 1034.
153. *Id*. at 1035 (citing Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 547–48 (1994).
154. *Gottshall*, 512 U.S. at 548 (quotation omitted).
155. 39 F.3d 1398 (9th Cir. 1994).
156. *Stacy*, 609 F.3d at 1037.
157. *Id*. at 1035.

sation Act (LHWCA).[158] In *Pedroza v. Benefits Review Bd.*,[159] an employee petitioned for review of an order of the Benefits Review Board (BRB) denying benefits under the LHWCA for psychological injuries due to his employer's legitimate adverse personnel actions.[160] In finding substantial evidence supporting the findings that the employee's psychological injuries were a result of legitimate personnel actions, the Ninth Circuit affirmed the BRB's ruling.[161]

In *Pedroza*, the employee was a load handler. While unloading a ship, he struck an electrical wire and caused an explosion, but he did not seek medical attention. One year later, the employee's department manager wrote him a letter about the accident that informed the employee that the accident was caused by the employee's negligence. The employee refuted the letter, and he ultimately informed his union supervisor that his immediate supervisor's actions adversely affected his ability to perform his job. At that time, the employee's immediate supervisor issued a verbal warning that if the employee was unable to improve his performance, he would be demoted.[162]

Approximately six months later, the employee was informed of his poor performance, and he went on leave from work for three months. Upon his return, the employee was demoted for his poor work performance and his failure to fill out the proper safety forms after the accident. One month thereafter, the employee's doctor placed him on medical leave. While on leave, the employee filed a workers' compensation claim for psychological injuries caused by his stressful working conditions.[163]

During the administrative hearing, the administrative law judge (ALJ) denied the employee's workers' compensation claim because the medical evidence provided by both parties supported the employer's contention that the employee's disability was a result of the disciplinary action and not the accident.[164] Upon review, the Ninth Circuit announced that to be eligible, a claimant must have sustained an injury within the meaning of the LHWCA.[165] For example, a psychological impairment, which is work related, is presumed to be compensable under the LHWCA.[166] However, the court distinguished that layoffs or a reduction in force do not constitute "working conditions" that would give rise to a compensable injury under the LHWCA.[167]

158. *See* 33 U.S.C. §§ 901–950.
159. 583 F.3d 1139 (9th Cir. 2009).
160. *Id*. at 1140.
161. *Id*.
162. *Id*. at 1141.
163. *Id*.
164. *Id*. at 1142 (relying on Marino v. Navy Exch. Serv., 20 B.R.B.S. 166 (1988)).
165. *Id*. at 1143 (citing 33 U.S.C. § 903(a)).
166. *Id*. (internal citations omitted).
167. *Id*. at 1144 (internal citations omitted).

The Ninth Circuit ultimately held that "the psychological injury resulting from a legitimate personnel action is not the type of injury that was intended to be compensable under the [LHWCA]."[168] In citing to a doctrine developed through case law,[169] the Ninth Circuit held that the distinction between "legitimate" and "illegitimate" personnel actions is not about fault; it is about whether the employer's actions created an environment of poor working conditions to trigger psychological injuries.[170]

Similarly, the Ninth Circuit also analyzed a petition brought on behalf of an employer for review of a decision by the BRB affirming the grant of disability benefits under the LHWCA.[171] The issue for the court to examine was whether notice of an alleged work-related injury filed more than six months after the injury in any way affected the employee's ability to receive compensation under the LHWCA.[172] Importantly, the court confirmed that the harmless error analysis applies to petitions for review brought under the LHWCA.[173] The Ninth Circuit went on to hold that the LHWCA excuses late notice under several circumstances, including instances where the employer was not prejudiced by the failure to give proper notice.[174]

In *Hawaii Stevedores, Inc. v. Ogawa*, the employee worked as the storeroom maintenance clerk at the employer's marina terminal in Honolulu, Hawaii, for twenty-five years.[175] During that time, the employee found the work to be stressful, working up to fifteen unpaid hours per week from home and experiencing friction with co-workers resulting from the employee's cost-cutting efforts. The employee was eventually admitted to the emergency room after suffering a slow-developing stroke that left him with limited fine motor skills in his right hand and arm. The employee never fully regained his pre-stroke proficiency. Eventually, the employee, after being offered an opportunity to take a medical retirement, filed an accident report that gave notice to the employer that the employee believed his stroke was work related. Shortly thereafter, the employee chose medical retirement over termination.[176]

The Ninth Circuit proceeded to announce that the LHWCA creates a presumption that a disabling injury suffered by a maritime worker is work

168. *Id*. at 1145.

169. *Id*. at 1146 (citing the Marino-Sewell doctrine from *Marino*, 20 B.R.B.S. at 166 n.2; Sewell v. Noncommissioned Officers Open Mess, 32 B.R.B.S. 134 (1998)).

170. *Id*. at 1146.

171. *See* Haw. Stevedores, Inc. v. Ogawa, 608 F.3d 642 (9th Cir. 2010).

172. *Id*. at 649.

173. *Id*. at 648.

174. *Id*. at 649.

175. *Id*. at 647.

176. *Id*.

related and compensable.[177] The statutory presumption may be invoked by the claimant upon a prima facie showing that (1) the claimant suffered a harm and (2) a work-place condition could have caused, aggravated, or accelerated the harm.[178] If the claimant successfully invokes the presumption at the first step, the employer may rebut the presumption at the second step by presenting substantial evidence that is "specific and comprehensive enough to sever the potential connection between the disability and the work environment."[179] The court announced that if the employer carries its evidentiary burden at step two, the presumption in favor of the claimant falls out of the case, and the issue then is whether the evidence demonstrates that the claimant has established the necessary causal link between the injury and employment.[180]

In the underlying proceeding, the ALJ reached a conclusion that the totality of the evidence showed a relationship between the stressful working conditions and the employee's stroke.[181] Following its endorsement of the harmless error doctrine, the Ninth Circuit affirmed that the employee's stroke qualified as a compensable injury under the LHWCA.[182]

In one of the more controversial cases decided this year, the Fifth Circuit had the occasion to examine the issue of whether an undocumented worker is entitled to benefits under the LHWCA.[183] In relying on the statutory definition of "employee"[184] as well as the Supreme Court opinion of *Sure-Tan, Inc. v. NLRB*[185] and the Fifth Circuit opinion of *Hernandez v. M/V Rajaan*,[186] the Fifth Circuit found that the undocumented worker "was an employee within the intent of the statute and is thus eligible to recover workers' compensation benefits under the LHWCA."[187]

In *Bollinger Shipyards, Inc. v. Dir., Office of Workers' Comp. Programs*, the BRB awarded benefits under the LHWCA to an undocumented immigrant who fell and injured himself while employed as a pipefitter. At the time of the injury, the employee had been working for the employer for approximately eight months, having initially obtained employment after stating falsely that he was a U.S. citizen and providing the employer with

177. *Id*. at 650 (citing 33 U.S.C. § 920(a)).
178. *Id*. at 651 (citing Ramey v. Stevedoring Servs. of Am., 134 F.3d 954, 959 (9th Cir. 1998); Amerada Hess Corp. v. Dir.of Workers' Comp., 543 F.3d 755, 761 (5th Cir. 2008)).
179. *Id*. (quoting *Ramey*, 134 F.3d at 959).
180. *Id*. (citing Bath Iron Works Corp. v. Fields, 599 F.3d 47, 53 (1st Cir. 2010)).
181. *Id*. at 652.
182. *Id*.
183. *See* Bollinger Shipyards, Inc. v. Dir.of Workers' Comp., 604 F.3d 864, 867 (5th Cir. 2010).
184. *See* 33 U.S.C. § 902(3).
185. 467 U.S. 883 (1984).
186. 841 F.2d 582, amended after rehearing, 848 F.2d 498 (5th Cir. 1988).
187. *Bollinger*, 604 F.3d at 873–74.

a false Social Security number. The employer contended that the employee's undocumented status and his use of false information to obtain employment precluded the employee from recovering any LHWCA-related benefits.[188]

The Fifth Circuit, in examining cases looking to similar federal labor and employment laws, went on to hold that because the plain statutory text of the LHWCA broadly defines the term "employee" and specifies that nonresident "aliens" are entitled to benefits in the same amount, an undocumented worker is similarly entitled to recover benefits under the LHWCA.

In distinguishing a line of cases reviewing backpay-reinstatement orders by the National Labor Relations Board (NLRB), the Fifth Circuit announced:

> (1) unlike discretionary backpay under the [National Labor Relations Act (NLRA)], workers' compensation under the LHWCA is a non-discretionary, statutory remedy; (2) unlike the NLRA, the LHWCA is a substitute for tort law, abrogating fault of either the employer or the employee; and (3) awarding death or disability benefits *post hoc* to an undocumented immigrant under the LHWCA does not "unduly trench upon" the [Immigration Reform and Control Act], as Congress chose to include a provision in the LHWCA expressly authorizing the award of benefits "in the same amount" to nonresident aliens.[189]

Accordingly, the Fifth Circuit felt compelled by Supreme Court precedent, and its own prior cases, to find that the undocumented worker was entitled to receive benefits under the LHWCA.[190] As the ALJ had ruled correctly on the issue, the Fifth Circuit denied the employer's petition.[191]

VII. COLLISION/ALLISION

In *Combo Maritime, Inc. v. U.S. United Bulk Terminal, LLC*,[192] the Fifth Circuit addressed the presumption of fault based on the rule articulated in *THE LOUISIANA* (Louisiana Rule).[193] The Louisiana Rule, much like the Oregon Rule,[194] creates a presumption of fault that shifts the burden of production and persuasion to a moving vessel that drifts into an allision with a stationary object.[195] To rebut the presumption, the defendant can dem-

188. *Id*. at 867.
189. *Id*. at 877
190. *Id*. at 879.
191. *Id*. at 880.
192. 615 F.3d 599 (5th Cir. 2010).
193. 3 Wal. (70 U.S.) 164 (1865).
194. 158 U.S. 186 (1895).
195. *THE LOUISIANA*, 3 Wall. (70 U.S.) at 173.

onstrate that the allision was the fault of the stationary object (essentially contributory negligence), that the moving vessel acted with reasonable care (negate negligence), or that the allision was an unavoidable accident (superseding causation).[196] In addition to these presumptions of fault, maritime law recognizes another presumption of fault for a passing vessel when its wake causes damage to a properly moored vessel.[197] The passing vessel may rebut the presumption by showing that it took reasonable care in passing or demonstrate that the stationary vessel was improperly moored.[198]

In *Combo Maritime*, a vessel owner brought an action against a barge owner to recover damages sustained when several barges broke free of their moorings and allided with the vessel. The barge owner filed a third-party complaint against a cruise line for negligent navigation seeking contribution and indemnity for the damages from the allision and the recovery of damages to its equipment.[199] The cruise line moved for summary judgment under the Louisiana Rule.[200] The district court granted the cruise line partial summary judgment and dismissed the third-party complaint with prejudice.[201]

On appeal, the Fifth Circuit found that the district court had improperly applied the Louisiana Rule when it "(1) applied the presumption between co-defendants; (2) applied the wrong standard of proof for rebutting the presumption; and (3) interpreted the presumption as a presumption of *sole* liability."[202] The Fifth Circuit found that the district court incorrectly applied the Act of God test instead of the reasonableness test for negating negligence. Additionally, the district court's application of the drifting vessel presumption as a presumption of sole fault "simply cannot square with the case law and '[t]he rule in admiralty . . . that joint tortfeasors are entitled to allocate a plaintiff's damages among themselves in accordance with their relative fault.' "[203] In addressing the issue of the passing vessel presumption, the Fifth Circuit announced that the passing vessel presumption first requires the moored vessel to demonstrate that it was properly moored before the burden is shifted to the passing vessel.[204]

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196. *Combo Maritime*, 615 F.3d at 605 (quoting Fishcer v. S/Y NERAIDA, 508 F.3d 586, 593 (11th Cir. 2007)).

197. *Id*. at 606 (internal citations omitted).

198. *Id*.

199. *Id*. at 601–02.

200. *Id*. at 602 (citing *THE LOUISIANA*, 3 Wall. (70 U.S.) at 173, which creates the rebuttable presumption that a drifting vessel that comes into an allision with a stationary object is at fault.).

201. *Id*.

202. *Id*. at 608.

203. *Id*. at 608 (quoting Rodi Yachts, Inc. v. Nat'l Marine, Inc., 984 F.2d 880, 885 (7th Cir. 1993)).

204. *Id*.

Interestingly, the dissent pointed out that the majority opinion relied heavily on a document received by the courtroom deputy at oral argument.[205] Recognizing that appellate courts have the ability to supplement the record on appeal, the dissenting judge opined that it should not be considered until formally submitted and accepted into the record.[206]

The Sixth Circuit had the opportunity to examine the presumption created under the Oregon Rule in *Bessemer & Lake Erie R.R. Co. v. Seaway Marine Transport*.[207] In *Bessemer*, a ship with its own 250-foot unloading boom at its stern was taking on a cargo of coal. In order to permit the loading of cargo into another hold, the vessel was advanced to allow the dock's overhanging loading arm to be in place for loading. During the advancement process, the ship's unloading boom struck the dock's overhanging loading arm, which took five weeks to repair.[208] The shipowner conceded that it bore some liability for the allision, but it argued that it should not be held solely liable under the Oregon Rule.[209]

The Sixth Circuit held that not unlike the doctrine of res ipsa loquitur, the Oregon Rule creates a prima facie case of negligence, not a final case of sole negligence.[210] The court went on to hold that comparative negligence is not abrogated in a particular case simply because the Oregon Rule is imposed. Rather, the court stated "[i]t would be odd . . . to transform a modest evidentiary presumption into a rule that wiped away a longstanding tradition of shared fault in allision cases."[211]

The Sixth Circuit also affirmed the district court's dismissal of the dock operator's claim for lost profits because of the dock operator's failure to comply with Fed. R. Civ. P. 26(a)(1)(A)(iii).[212] When a party fails to provide information to support a claim, the party is not allowed to use that information to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.[213] The dock operator challenged the district court's standard used in evaluating whether discovery sanctions were appropriate, but the court stated the test for exclusion under Rule 37(c) is a simple one: "the sanction is mandatory unless there is a reasonable explanation of why Rule 26 was not complied with or the mistake was harmless."[214]

205. *Combo Maritime*, 615 F.3d at 609 (Garza, C.J., dissenting).
206. *Id*. (internal citations omitted).
207. 596 F.3d 357 (6th Cir. 2010).
208. *Id*. at 361.
209. *Id*. at 362.
210. *Id*. (internal citations omitted).
211. *Id*. at 363.
212. *Id*. at 369.
213. *Id*. (citing Fed. R. Civ. P. 37(c)(1)).
214. *Id*. at 370 (internal citations omitted).

In another case, the Fifth Circuit examined the negligence standard that applies to the captain of an alliding vessel.[215] In *Crescent Towing & Salvage Co. v. CHIOS BEAUTY*, owners of barges and tugboats sued CHIOS BEAUTY in rem and her owners and operators for damages sustained when the ship allided with plaintiffs' barges and tugboats, which were moored in the Mississippi River near New Orleans, Louisiana, during Hurricane Katrina. The district court found the defendants to be negligent when they brought CHIOS BEAUTY into New Orleans in the face of the impending storm.[216] In so finding, the district court applied a regular negligence standard of care, rather than the heightened in extremis standard, in judging whether the captain was negligent in continuing to New Orleans instead of running for safety elsewhere in the Gulf of Mexico.[217]

The Fifth Circuit first addressed the standard of care applicable to the captain's negligence. The court opined that where a vessel is put in the very center of destructive natural forces, without prior negligence, and a hard choice between competing courses must be made immediately, "the law requires that there be something more than mere mistake of judgment by the master in that decision *in extremis*."[218] The court quickly pointed out, however, that the in extremis standard of care should not apply to the actions of a captain who had ample time to avoid the peril.[219] In *CHIOS BEAUTY*, the Fifth Circuit recognized the district court's finding that the captain had ample time to find a safer berth and was not in a position of peril at the time he decided to proceed to New Orleans ahead of Hurricane Katrina. Accordingly, the Fifth Circuit affirmed that the district court's dismissal of the in extremis standard of care.

CHIOS BEAUTY also permitted the Fifth Circuit to address the issue of interest on a bond or stipulation filed under Rule E(5) of the Supplemental Rules for Admiralty and Maritime Claims.[220] The Fifth Circuit acknowledged that by rule, once the bond or stipulation amount is set and the vessel is released by a letter of undertaking, that letter shall be conditioned for the payment of interest at six per cent per annum. This provision constitutes a gap-filling provision in any bond or letter of undertaking issued to secure the release of an arrested vessel. The court went on to hold that "[r]egardless of whether this provision of Rule E(5) can be

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215. *See* Crescent Towing & Salvage Co. v. CHIOS BEAUTY MV, 610 F.3d 263 (5th Cir. 2010).

216. *CHIOS BEAUTY*, 610 F.3d at 265.

217. *Id*. at 267.

218. *Id*. at 267–68 (quoting Emp'rs Ins. of Wausau v. Suwannee River Spa Lines, Inc., 866 F.2d 752, 771 (5th Cir. 1989)).

219. *Id*. at 268 (citing Boudoin v. J. Ray McDermott & Co., 281 F.2d 81, 84–86 (5th Cir. 1960)).

220. *Id*. at 269.

waived by consent of the parties, it was not waived here."[221] The Fifth Circuit affirmed the district court's denial of the plaintiffs' request to increase the value of the letter of undertaking to include the prejudgment interest because the security provided by a letter of undertaking cannot exceed the value of the vessel.[222]

221. *Id*. at 270.
222. *Id*.