

**RECENT DEVELOPMENTS IN ADMIRALTY
LAW IN THE UNITED STATES SUPREME
COURT, THE FIFTH CIRCUIT, AND THE
ELEVENTH CIRCUIT**

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I. INTRODUCTION

The 1996 term of the Supreme Court reflected the Court’s recent approach to general maritime law claims, that “admiralty judges should look primarily to the legislature for policy guidance and should supplement the statutory remedies only to achieve uniform vindication of legislative

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policies.”¹ The Court has relied heavily on the circuit courts for the “sifting”² of various principles and tests before accepting a case to resolve a conflict between the circuit courts. The result is that the primary burden of declaring principles of maritime law lies with the federal circuit courts; and the Fifth and Eleventh Circuits certainly carry their share of that burden.³

II. JURISDICTION

When the Supreme Court makes fundamental revisions to long-standing principles of maritime law, the Court generally has had to return to the area to resolve the issues that arose as a result of the change in course. In 1972 the Supreme Court took most domestic airplane flights out of admiralty jurisdiction in *Executive Jet Aviation, Inc. v. City of Cleveland*.⁴ In that case, the Court added to the existing locality test for maritime tort claims a requirement “that the wrong bear a significant relationship to traditional maritime activity.”⁵ As the circuit courts struggled with the new test for admiralty jurisdiction,⁶ the Supreme Court revisited the

1. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 283 (1993).

2. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 408, 1970 AMC 967, 993 (1970).

3. Based on the Index by Jurisdiction of Cases Reported in 1996 in American Maritime Cases, the Fifth Circuit led all circuit courts with 25 reported opinions and the Eleventh Circuit was third with 14 reported opinions.

4. 409 U.S. 249, 274, 1973 AMC 1, 20 (1972) (“[W]e hold that in the absence of legislation to the contrary, there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States.”).

5. *Id.* at 268, 1973 AMC at 15–16. The Court based this additional requirement on the “recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test.” *Id.* at 261, 1973 AMC at 10. For a discussion of the waters covered by the Marine Protection Research & Sanctuaries Act, 16 U.S.C. §§ 1431–1445 (1994 & Supp. I 1996), see *United States v. M/V Jacquelyn L.*, 100 F.3d 1520 (11th Cir. 1996).

6. Compare *Crosson v. Vance*, 484 F.2d 840, 842, 1973 AMC 1895, 1899 (4th Cir. 1973) (“[A]dmiralty jurisdiction does not reach a claim for personal injury by a water skier against the allegedly negligent operator of the tow boat.”), with *Richards v. Blake Builders Supply Inc.*, 528 F.2d 745, 749, 1976 AMC 74, 81 (4th Cir. 1975) (stating that claim of passenger against vessel operator falls within admiralty jurisdiction, but court has “difficulty distinguishing between the claim by a water skier against the operator of a towing boat and a claim by a passenger against the operator of a motorboat”), and *Lane v. United States*, 529 F.2d 175, 180, 1976 AMC 66, 73 (4th Cir. 1975) (finding admiralty jurisdiction over collision between pleasure boat towing a

subject in *Foremost Insurance Co. v. Richardson*,⁷ *Sisson v. Ruby*,⁸ and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*⁹ In *Alderman v. Pacific Northern Victor, Inc.*, the Eleventh Circuit summarized the test for admiralty jurisdiction over torts that exists after *Foremost*, *Sisson*, and *Grubart*:

Today, for a tort claim to be cognizable under admiralty jurisdiction, the activity from which the claim arises must satisfy a location test and it must have sufficient connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. . . .

The connection test raises two issues. First, we are required to assess the general features of the type of accident involved, to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, we must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.¹⁰

Alderman was employed as a carpenter and was assisting in installing an elevator on the M/V *Northern Victor*, which was being converted from an oil drilling vessel to a fish processing vessel.¹¹ Alderman slipped in oil that had leaked from a codfish heading machine.¹² As the *Northern Victor* was docked in southern Florida, both parties agreed that the location test was satisfied because the tort occurred on navigable waters.¹³ The issue was whether the maritime nexus test was satisfied.¹⁴

skier and a submerged wreck, as “submerged wrecked vessels are a traditional concern of admiralty”).

7. 457 U.S. 668, 1982 AMC 2253 (1982).

8. 497 U.S. 358, 1990 AMC 1801 (1990).

9. 513 U.S. 527, 1995 AMC 913 (1995).

10. 95 F.3d 1061, 1064, 1997 AMC 70, 71 (11th Cir. 1996) (footnotes and quotations omitted).

11. *See id.* at 1063, 1997 AMC at 71.

12. *See id.*

13. *See id.* at 1064, 1997 AMC at 72.

14. *See id.*

The first part of the maritime nexus test requires an examination of the “potentially disruptive impact” of the incident on maritime commerce.¹⁵ Seeking to defeat admiralty jurisdiction, Alderman asserted “that, as a matter of fact, there was no disruptive impact on maritime commerce as a result of his injury.”¹⁶ However, reliance on the *actual impact* of an incident is not proper under *Sisson* and *Grubart*: “The first *Sisson* test turns, then, on a description of the incident at an intermediate level of possible generality.”¹⁷ The Eleventh Circuit considered the distinction between actual and potential impact to be “crucial:” “The correct inquiry is not whether there was an effect on maritime activity, but rather whether there ‘potentially’ could have been.”¹⁸ Focusing “not on what *actually* happened, but upon the *potential* effects of what could happen,” the court described the general features of the accident “as an onboard injury which occurred during the repair, maintenance or conversion of a vessel.”¹⁹ Based on this level of generality, the court easily concluded: “Any accident occurring in this manner could have the potential to disrupt further repairs of that vessel, vessels being worked on at the same dock, or vessels waiting to be worked upon.”²⁰

Alderman also contended the general character of the activity lacked a substantial relationship to maritime activity, citing *Penton v. Pompano Construction Co.*²¹ In *Penton*, the Eleventh Circuit held that an injury to the operator of a construction crane mounted on a barge used in constructing a jetty was not within admiralty jurisdiction.²² Despite the injury on a vessel, the court considered the injury to be “a typical construction site accident.”²³ Alderman contended that he was a “construction worker” and that his accident was like the “typical construction site accident” in *Penton*.²⁴ However, it is not the plaintiff’s activity that is controlling, but “whether a *tortfeasor’s* activity, commercial or

15. *See id.* (quotations omitted).

16. *Id.*

17. *Id.* at 1064, 1997 AMC at 73 (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge Dock Co.*, 513 U.S. 527, 538, 1995 AMC 913, 922 (1995)).

18. *Id.* (citing *Grubart*, 513 U.S. at 539, 1995 AMC at 922; *Sisson*, 497 U.S. at 362–64, 1990 AMC at 1805).

19. *Id.*

20. *Id.*

21. *See id.* at 1064–65, 1997 AMC at 74 (citing *Penton v. Pompano Constr. Co.*, 976 F.2d 636, 1993 AMC 812 (11th Cir. 1992)).

22. *See Penton*, 976 F.2d at 642, 1993 AMC at 819–20.

23. *Id.* at 641, 1993 AMC at 818.

24. *Alderman*, 95 F.3d at 1065, 1997 AMC at 74.

noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the case at hand.”²⁵

Examining the tortfeasor’s activities from a “broad perspective,” the Eleventh Circuit looked to “the general conduct from which the incident arose.”²⁶ From this broad perspective, the ship repair and conversion had to be considered substantially related to maritime activity.²⁷ “It is essential to the continued productive use of those vessels.”²⁸ Therefore, the Eleventh Circuit held that admiralty jurisdiction and substantive admiralty law applied to Alderman’s suit.²⁹

While admiralty jurisdiction over torts requires an examination of the activity in which the wrongdoer was involved, the test for admiralty jurisdiction over contract disputes is based on “the nature of the disputed contract, not the status or alignment of parties.”³⁰ In *Ambassador Factors v. Rhein-, Maas-, und See- Schifffahrtskontor GmbH*, Sanara Reedereikontor hired Topgallant Lines to ship cargo from Europe to the United States.³¹ Topgallant borrowed money from Ambassador Factors and assigned its accounts receivable and contract rights to Ambassador.³² Ambassador brought suit in admiralty against RMS, as successor to Sanara, seeking to recover \$31,000 in unpaid freight on the shipping contract, and RMS moved to dismiss the suit for lack of admiralty jurisdiction because Ambassador brought the suit as an assignee of, not an original party to, the maritime contract.³³ The district court agreed with RMS and dismissed the suit for lack of admiralty jurisdiction.³⁴

25. *Id.* (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 539, 539–40, 1995 AMC 913, 922–23 (1995)).

26. *Id.* at 1065, 1997 AMC at 74–75 (quoting *Sisson v. Ruby*, 497 U.S. 358, 366–67, 1990 AMC 1801, 1808 (1990)).

27. *See id.* at 1065, 1997 AMC at 75 (quoting *Sisson*, 497 U.S. at 364–66, 1990 AMC at 1806).

28. *Id.* (stating that “conversions, repairs, or maintenance aboard a vessel in navigable water are substantially related to traditional maritime activity”).

29. *See id.* at 1065–66, 1997 AMC at 75.

30. *Ambassador Factors v. Rhein-, Maas-, und See- Schifffahrtskontor GmbH*, 105 F.3d 1397, 1398, 1997 AMC 1562, 1563 (11th Cir. 1997).

31. *See id.* at 1398, 1997 AMC at 1562.

32. *See id.* at 1398, 1997 AMC at 1562–63.

33. *See id.* at 1398, 1997 AMC at 1563.

34. *See id.*

In reversing the district court, the Eleventh Circuit reasoned that Ambassador was not seeking to enforce the contract assigning accounts receivable.³⁵ Having already been assigned the rights to the contract of carriage from the carrier, Ambassador brought the suit directly on the underlying shipping contract.³⁶ The contract of carriage was “self-evidently maritime in nature.”³⁷

[W]here a contract is indisputably maritime in nature, such as the shipping contract at issue in this case, and a party to the contract assigns its rights to a third party, the third party may sue in admiralty to enforce the original contract, even though the assignment contract itself might not be within the federal courts’ admiralty jurisdiction.³⁸

III. PERSONAL INJURY

A. Seamen

After a series of decisions in the late 1950s from the Supreme Court that one can best describe as “befuddling,”³⁹ the Supreme Court allowed the circuit courts to flounder in “a myriad of standards and lack of uniformity in administering the elements of seaman status.”⁴⁰ After waiting for three decades, the Supreme Court finally agreed to address the test for seaman status in *McDermott*

35. *See id.* at 1399, 1997 AMC at 1564.

36. *See id.* “[C]ourts uniformly have agreed that [s]uits brought against a cargo owner by a carrier to recover freight due under the terms of an ocean bill of lading . . . are clearly within the admiralty jurisdiction of the federal court” *Id.* (quoting 1 STEVEN F. FRIEDEL, BENEDICT ON ADMIRALTY § 190[a], at 12–50 (1996)) (first omission and second alteration in original).

37. *Id.* at 1399, 1997 AMC at 1565.

38. *Id.* at 1400, 1997 AMC at 1565. The court expressly avoided deciding whether the assignment contract was maritime. *See id.* at 1400 n.3, 1997 AMC at 1565 n.3. When an attorney enters into a contingent fee agreement with a seaman and that contract is held as void, the attorney’s claim against the seaman’s employer for tortious interference with the contract fails. *See Yanakakis v. Chandris, S.A.*, 97 F.3d 448, 1997 AMC 1161 (11th Cir. 1996).

39. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 353, 1991 AMC 913, 925 (1991). The court admitted that the cases were befuddling, “at least in part because they tie ‘seaman’ under the Jones Act to ‘member of the crew’ under the [Longshore and Harbor Workers’ Compensation Act (LHWCA)]” *Id.* The Court offered no relief after *Butler*, as it “accepted no more of these cases, relegating to the lower courts the task of making some sense of the confusion left in our wake.” *Id.*

40. *Id.* (quoting Kenneth G. Engerrand & Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. 431, 494 (1983)).

*International, Inc. v. Wilander*⁴¹ and then revisited and clarified the test in *Chandris, Inc. v. Latsis*.⁴² Each of those decisions addressed an element of the seaman status inquiry.

Wilander agreed with the Fifth Circuit that “the requirement that an employee’s duties must ‘contribut[e] to the function of the vessel or to the accomplishment of its mission’ captures well an important requirement of seaman status.”⁴³ The Court in *Wilander* was not, however, called upon to define in detail the connection element for seaman status,⁴⁴ but the Court addressed that element in *Chandris*.⁴⁵ In *Chandris* the Court rejected a “snapshot” approach or “voyage test” by which a worker could be considered “a seaman simply because he is doing a seaman’s work at the time of the injury.”⁴⁶ The Court explained that “[s]eaman status is not co-extensive with seamen’s risks.”⁴⁷ Thus, the Court required 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.”⁴⁸ Rather than create a detailed test for the duration and nature element, the Court recognized that the Fifth Circuit had “identified an appropriate rule of thumb for the ordinary case: 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.”⁴⁹

Neither *Wilander* nor *Chandris* involved a claim of seaman status because of a connection to more than one vessel.⁵⁰ In *Harbor Tug & Barge Co. v. Papai* the Court

41. *Id.* at 339, 1991 AMC at 914.

42. 515 U.S. 347, 349–50, 1995 AMC 1840, 1841 (1995).

43. *Wilander*, 498 U.S. at 355, 1991 AMC at 926 (quoting *Offshore Co. v. Robison*, 266 F.2d 769, 779, 1959 AMC 2049, 2062 (5th Cir. 1959)). The Court jettisoned the requirement that the worker’s duties aid in the navigation of the vessel. *See id.* at 353, 1991 AMC at 925.

44. *See id.* at 355, 1991 AMC at 926. However, the Court held that a seaman must at least perform the “work of a vessel;” that is, it must contribute to the vessel’s function or mission. *Id.*

45. *See Chandris*, 515 U.S. at 350, 1995 AMC at 1841.

46. *Id.* at 358–64, 1995 AMC at 1850–52.

47. *Id.* at 361, 1995 AMC at 1850.

48. *Id.* at 368, 1995 AMC at 1856.

49. *Id.* at 371, 1995 AMC at 1858. The court stated this figure was a “guideline” and that “departure from it will certainly be justified in appropriate cases.” *Id.*

50. *See id.* at 350–51, 1997 AMC 1841 (framing the issue in *Wilander* and *Chandris* as seaman status under the Jones Act in reference to a singular

clarified the final prong of the seaman status test: the vessel or fleet of vessels element.⁵¹ Papai was employed through a union hiring hall that had been dispatching him to jobs for 2 1/4 years.⁵² On March 13, 1989, Papai was dispatched to perform maintenance work on the *Pt. Barrow*, operated by Harbor Tug & Barge Company.⁵³ The job was expected to end that day.⁵⁴ Papai was injured while painting the housing of the tug.⁵⁵

Most of Papai's jobs were short, lasting for three days or less, with the longest job lasting about forty days.⁵⁶ He had been employed by Harbor Tug on 12 occasions in the 2 1/2 months before his injury.⁵⁷ Papai described his work as being of three types: maintenance, longshoring, and deckhand; but deckhand work was the most frequent.⁵⁸ The union hall sent workers to three tugboat operators in the San Francisco area on a job-by-job basis.⁵⁹ Papai brought suit against Harbor Tug for negligence under the Jones Act, but the district court granted the defendant's summary judgment motion because Papai was not a seaman.⁶⁰ The Ninth Circuit reversed the district court because "a maritime worker who regularly performs seaman's work is entitled to seaman status."⁶¹ The Ninth Circuit was not troubled by Papai's transitory employment, finding "no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall . . . should not be treated as a common employer for purposes of determining a maritime worker's seaman status."⁶²

Papai repeated his claim to the Supreme Court that he met the test for seaman status "based on his employments with the various vessels he worked on through the IBU hiring

vessel). Latsis was a superintendent engineer for six passenger cruise ships, but his status was addressed in connection with his work on the S.S. *Galileo*. See *id.* at 350-52, 1997 AMC at 1841-43.

51. See *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535, 1538, 1997 AMC 1817, 1818 (1997).

52. See *id.*

53. See *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 204-05, 1995 AMC 2888, 2889 (9th Cir. 1995), *rev'd*, 117 S. Ct. 1535, 1997 AMC 1817 (1997).

54. See *Papai*, 117 S. Ct. at 1538, 1997 AMC at 1818.

55. See *id.*

56. See *id.*

57. See *id.*

58. See *id.* at 1538, 1997 AMC at 1818-19.

59. See *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 204, 1995 AMC 2888, 2889 (9th Cir. 1995), *rev'd*, 117 S. Ct. 1535, 1997 AMC 1817 (1997).

60. See *Papai*, 117 S. Ct. at 1538-39, 1997 AMC at 1819.

61. *Papai*, 67 F.3d at 206, 1995 AMC at 2892.

62. *Id.*

hall in the 2 1/4 years before his injury, vessels owned, it appears, by three different employers not linked by any common ownership or control.”⁶³ He asserted that “the group of vessels [he] worked on through the IBU hiring hall constitutes ‘an identifiable group of . . . vessels’ to which he has a ‘substantial connection.’”⁶⁴ The Supreme Court, however, cited its description in *Chandris* of the fleet rule, “allow[ing] seaman status for those workers who had the requisite connection with an ‘identifiable fleet’ of vessels, a finite group of vessels under common ownership or control.”⁶⁵ The Ninth Circuit had not addressed the requirement of *common* ownership or control, pointing instead to the statement from *Chandris*: “[W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker’s service with a particular employer.”⁶⁶ Using that statement to aggregate work for different employers was not a correct reading of *Chandris*. The Supreme Court explained the meaning of this language in *Chandris*, “which is that the employee’s prior work history with a particular employer may not affect the seaman inquiry if the employee was injured on a new assignment with the same employer, an assignment with different ‘essential duties’ than his previous ones.”⁶⁷

The phrase “particular employer” in *Chandris* was not intended to broaden the scope of the seaman status inquiry to duties performed for more than one employer, but to allow a limited inquiry when there has been a change of assignment with a particular employer.⁶⁸ The broadening of the status inquiry to employment with previous employers “gave the phrase a meaning opposite from what the context requires.”⁶⁹

The Supreme Court also rejected the Ninth Circuit’s treatment of the three employers as a common employer:

63. *Papai*, 117 S. Ct. at 1540, 1997 AMC at 1821 (citation omitted).

64. *Id.* (quoting *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 1995 AMC 1840, 1856 (1995)) (alteration in original).

65. *Id.* at 1541, 1997 AMC 1822 (quoting *Chandris*, 515 U.S. at 366, 1995 AMC at 1854).

66. *Id.* (quoting *Chandris*, 515 U.S. at 371–72, 1995 AMC at 1859) (alteration and omission in original).

67. *Id.* at 1541, 1997 AMC at 1822–23 (quoting *Chandris*, 515 U.S. at 371, 1995 AMC at 1859).

68. *See id.* at 1541, 1997 AMC at 1823.

69. *Id.*

“There is no evidence in the record that the contract Harbor Tug had with the IBU about employing deckhands . . . was negotiated by a multiemployer bargaining group, and, even if it had been, that would not affect the result here.”⁷⁰ The Court reiterated: “In deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman status determination, the question is whether the vessels are subject to common ownership or control.”⁷¹ Applying the test to the facts in *Papai*, the Court concluded: “The requisite link is not established by the mere use of the same hiring hall which draws from the same pool of employees.”⁷²

Finally, *Papai* claimed that he would qualify as a seaman if the Court considered his 12 prior jobs with Harbor Tug in the 2 1/2 months prior to his injury.⁷³ The Court responded that “these discrete engagements were separate from the one in question, which was the sort of ‘transitory or sporadic’ connection to a vessel or group of vessels that, as we explained in *Chandris*, does not qualify one for seaman status.”⁷⁴ The Court repeated its analysis from *Chandris*: “The substantial connection test is important in distinguishing between sea- and land-based employment, for land-based employment is inconsistent with Jones Act coverage.”⁷⁵ Applying that principle to *Papai*’s claim, the Court concluded: “The only connection a reasonable jury could identify among the vessels *Papai* worked aboard is that each hired some of its employees from the same union hiring hall where it hired him. That is not sufficient to establish seaman status under the group of vessels concept.”⁷⁶

The proper interpretation of the vessel or fleet of vessels element in the seaman status test was one of two important

70. *Id.* All of *Papai*’s maritime related work came through the IBU hiring hall, through which he had obtained jobs on various ships for approximately two years. *See id.* These jobs were short-term, with the majority lasting for three or fewer days. *See id.*

71. *Id.* The Court also stated:

Since the substantial connection standard is often, as here, the determinative element of the seaman inquiry, it must be given workable and practical confines. When the inquiry further turns on whether the employee has a substantial connection to an identifiable group of vessels, common ownership or control is essential for this purpose.

Id. at 1542, 1997 AMC at 1823.

72. *Id.*

73. *See id.* at 1542, 1997 AMC at 1825.

74. *Id.* (citing *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 1995 AMC 1840, 1856 (1995)).

75. *Id.* at 1543, 1997 AMC at 1825.

76. *Id.*

issues presented to the Supreme Court in *Papai*.⁷⁷ After the district court granted summary judgment against Papai's Jones Act claim, Papai filed a claim under the Longshore and Harbor Workers' Compensation Act (LHWCA).⁷⁸ The compensation claim was tried, and an Administrative Law Judge issued a decision that awarded compensation to Papai.⁷⁹ That order was not appealed and became final.⁸⁰ Because the LHWCA and Jones Act are "mutually exclusive" remedies,⁸¹ Harbor Tug argued that Papai's successful litigation of his LHWCA claim should bar his Jones Act claim.⁸² Although in *Sharp v. Johnson Bros. Corp.* the Fifth Circuit had held that an injured worker may not bring a Jones Act claim after obtaining a compensation order from a judge in an LHWCA proceeding,⁸³ the Ninth Circuit in *Papai* held that obtaining the compensation order did not bar the plaintiff's bringing a Jones Act claim.⁸⁴ The Supreme Court in *Papai* accepted certiorari on the claim preclusion issue as

77. See *id.* at 1538, 1997 AMC at 1818.

78. See *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 205, 1995 AMC 2888, 2890 (9th Cir. 1995), *rev'd*, 117 S. Ct. 1535, 1997 AMC 1817 (1997).

79. See *id.* at 205, 1995 AMC at 2890.

80. *Id.*

81. See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 347, 1991 AMC 913, 920 (1991) (citing *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 1946 AMC 715 (1946)). The Court explained:

The LHWCA provides relief for land-based maritime workers and the Jones Act is restricted to "a master or member of a crew of any vessel": "We must take it that the effect of these provisions of the [LHWCA] is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case [International Stevedoring Co. v. Haverty, 271 U.S. 50 (1926)] only such rights to compensation as are given by the [LHWCA]."

Id. (citing *Swanson*, 238 U.S. at 7, 1946 AMC at 718-19) (second alteration added).

82. See *Papai*, 67 F.3d at 207, 1995 AMC at 2893.

83. See *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 426-27, 1995 AMC 912, 912 (5th Cir. 1992) (stating that "[i]t follows that where the ALJ issues a compensation order ratifying a settlement agreement, a 'formal award' should be deemed to have been made under *Gizoni* [*Southwest Marine v. Gizoni*, 502 U.S. 81, 1992 AMC 305 (1991)], and the injured party no longer may bring a Jones Act suit for the same injuries").

84. See *Papai*, 67 F.3d at 207-08, 1995 AMC at 2893-94. The Ninth Circuit reached a similar result in *Figueroa v. Campbell Indus.*, but gave somewhat different reasoning for its decision. See *Figueroa v. Campbell Indus.*, 45 F.3d 311, 314-15, 1995 AMC 793, 795-96 (9th Cir. 1995).

well as the status issue.⁸⁵ In view of the resolution of the dispositive seaman status issue, there was no need for the Court to address the conflict between the Fifth and Ninth Circuits on the effect of an LHWCA finding of coverage on a Jones Act suit.⁸⁶ Consequently, while the 1990s have brought a series of decisions from the Supreme Court clarifying the confusion over the test for seaman status, the related conflict over the mutual exclusivity of the LHWCA and Jones Act remains unresolved.

Some of the confusion over the test for seaman status has arisen because the Jones Act does not define who is “any seaman” within the coverage of that statute.⁸⁷ In fact, it was the subsequent enactment by Congress of the LHWCA which determined the scope of the Jones Act, confining the Jones Act remedy to “a master or member of a crew of any vessel.”⁸⁸ The Supreme Court stated: “Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.”⁸⁹

The scope of the Jones Act has not just been a problem with claims of domestic maritime workers. The phrase “any seaman” could have been construed to extend American law “to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation—a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.”⁹⁰ Recognizing that the reach of the Jones Act should be limited to accommodate the interests of other nations, the Supreme Court has set forth several choice-of-law factors to determine whether the Jones Act applies to a particular injury.⁹¹ Another limiting factor is the

85. See *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535, 1538, 1997 AMC 1817, 1818 (1997).

86. See *id.*

87. The Jones Act provides coverage for “[a]ny seaman who shall suffer personal injury in the course of his employment . . .” 46 U.S.C. app. § 688(a) (1994).

88. Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 902(3)(G) (1994) (stating that “‘employee’ means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include . . . a master or member of a crew of any vessel”).

89. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 347, 1991 AMC 913, 920 (1991).

90. *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953).

91. See *id.* at 583–93. These factors include: place of the wrongful act, law of the flag, allegiance or domicile of the injured, allegiance of the defendant shipowner, place of contract, inaccessibility of a foreign forum, and the law of the forum. See *id.*; see also *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 308–

doctrine of forum non conveniens, recognized by the federal courts but not all state courts.⁹² When a Jones Act or a general maritime suit is brought in the court of a state that does not recognize the federal forum non conveniens doctrine, the Supreme Court has held the state court is not bound to apply the federal rule.⁹³

A conflict arises when litigation over a maritime accident is brought in several forums, including federal and state courts. If the federal court dismisses claims brought under American law on a choice-of-law basis, that adjudication is binding on a state proceeding, and the federal court would be authorized to issue an injunction against relitigating that claim in state court.⁹⁴ However, in *Baris v. Sulpicio Lines, Inc.*, the Fifth Circuit faced the question whether the dismissal by the federal court in Texas of foreign maritime claims on the basis of forum non conveniens should have preclusive effect on the same litigation in a Louisiana state court.⁹⁵ Although considering the plaintiffs' manipulation of forums in *Baris* to be "repugnant," the Fifth Circuit panel agreed with the

09, 1970 AMC 994, 996 (1970) (discussing *Lauritzen* factors; noting list not exhaustive). The shipowners' base of operations may also be applicable. *See id.* at 308-09, 1970 AMC at 996-97.

92. For example, Texas has enacted a forum non conveniens statute that permits dismissal of certain Jones Act actions. *See* TEX. CIV. PROC. & REM. CODE ANN. § 71.051(a) (West Supp. 1998). This section provides:

[I]f a court of this state, on written motion of a party, finds that in the interest of justice a claim or action . . . would be more properly heard in a forum outside this state, the court may decline to exercise jurisdiction under the doctrine of forum non conveniens and may stay or dismiss the claim or action in whole or in part on any conditions that may be just.

Id. However, the statute enacted in Louisiana does not apply to Jones Act actions. *See* LA. CODE CIV. PROC. ANN. art. 123(C) (West Supp. 1998) (stating that the article dealing with forum non conveniens does not apply "to claims brought pursuant to 46 [U.S.C.] § 688 or federal maritime law").

93. *See* *American Dredging Co. v. Miller*, 510 U.S. 443, 453-55, 1994 AMC 913, 921-22 (1994). "Just as state courts, in deciding admiralty cases, are not bound by the venue requirements set forth for federal courts in the United States Code, so also they are not bound by the federal common-law venue rule (so to speak) of *forum non conveniens*." *Id.* at 453, 1994 AMC at 921.

94. *See, e.g.,* *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150-51, 1988 AMC 1817, 1825 (1988). The Court did, however, note that "the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue." *Id.*

95. *See* *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 569-70, 1996 AMC 947, 950 (5th Cir.), *aff'd en banc*, 101 F.3d 367, 1997 AMC 549 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1432, 1460 (1997).

federal district court in Texas that Louisiana was free not to recognize the forum non conveniens doctrine and that the federal court in Texas should not issue an injunction to prevent the same suit from being litigated in Louisiana.⁹⁶ The Fifth Circuit agreed to grant a rehearing en banc.⁹⁷ Eight months later, however, the decision of the district court not to issue an injunction was affirmed by the equally divided en banc court, and the Supreme Court declined to hear the case.⁹⁸

An en banc Fifth Circuit did clarify an important issue for seamen's litigation in *Gautreaux v. Scurlock Marine, Inc.*⁹⁹ Gautreaux was hired to serve as relief captain on the inland push boat M/V *Brooke Lynn*.¹⁰⁰ About four months later he was injured when he was struck in the face by a manual crank handle that flew off while he was attempting to relieve tension on the vessel's towing wires.¹⁰¹ Gautreaux brought a suit against his employer, Scurlock Marine, claiming Scurlock was negligent in training him and that the vessel was unseaworthy.¹⁰² The jury found both Gautreaux (5%) and Scurlock (95%) negligent and assessed damages of \$854,000.¹⁰³ On appeal, Scurlock contended that "the district court erred by charging the jury that a Jones Act seaman need exercise only 'slight care' for his own safety."¹⁰⁴ Scurlock argued that all seamen should be held to the standard "of a reasonably prudent person exercising ordinary or due care under like circumstances."¹⁰⁵ Considering the slight care standard to be "settled law" in the Fifth Circuit,¹⁰⁶ the panel affirmed the district court's judgment.¹⁰⁷

96. *See id.* at 570, 573, 1996 AMC at 949 (quotations omitted).

97. *See id.* at 575.

98. *Baris v. Sulpicio Lines*, 101 F.3d 367, 368, 1996 AMC 367 (5th Cir. 1996) (en banc), *cert. denied*, 117 S. Ct. 1432, 1460 (1997).

99. 107 F.3d 331, 1997 AMC 1521 (5th Cir. 1997) (en banc). Seamen's claims are not limited to their employer and vessel owner. *See, e.g., Coumou v. United States*, 107 F.3d 290, 292 (5th Cir. 1997) (deciding vessel owner's claim against United States regarding vessel seizure and his incarceration in Haiti).

100. *See Gautreaux*, 107 F.3d at 333, 1997 AMC at 1522.

101. *See id.* at 333, 1997 AMC at 1523.

102. *See id.*

103. *See id.* The jury found the vessel to be seaworthy. *See id.* After remittitur and amendment, final judgment was entered in the amount of \$736,925. *See id.* at 333-34, 1997 AMC at 1524.

104. *Id.* at 334, 1997 AMC at 1524.

105. *Id.*

106. *See Gautreaux v. Scurlock Marine, Inc.*, 84 F.3d 776, 781 n.7, 1997 AMC 1534, 1539-40 n.7 (5th Cir. 1996), *aff'd in part, vacated in part*, 107 F.3d 331, 1997 AMC 1521 (5th Cir. 1997) (en banc).

107. *Gautreaux*, 107 F.3d at 334, 1997 AMC at 1524.

The en banc Fifth Circuit began by examining the language of the Jones Act, which affords seamen the remedy applicable to railway employees under the Federal Employers' Liability Act (FELA).¹⁰⁸ The FELA casts carriers in liability for injuries or deaths "resulting in whole or in part from the negligence of . . . such carrier."¹⁰⁹ The fact that the carrier's negligence need only cause the injury "in part" led the Supreme Court to adopt a "slightest" causation standard in FELA cases,¹¹⁰ which was then reiterated for Jones Act claims: "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."¹¹¹

The second step in the relaxation of the standard of care occurred when the Fifth Circuit began using the phrase "slight negligence" to describe the reduced standard for the *sufficiency of evidence* to support a jury verdict: "Guided by the Supreme Court, we had initially employed the phrase 'slight negligence' as a shorthand expression for the standard by which we measure, in our review of a jury verdict, the sufficiency of evidence establishing a causal link between an employer's negligence and a seaman's injury."¹¹² It was then only a short jump for the phrase "slight negligence" to be construed as referring "not only to the sufficiency of the evidence inquiry but also to that duty of care Jones Act employers owed to their employees."¹¹³ This led to the result that a seaman "could now reach the jury not only with 'slight

108. Federal Employers' Liability Act, 45 U.S.C. §§ 51-66 (1994). The FELA provides: "Every common carrier . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . or, in case of the death of such employee, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence . . ." *Id.* § 51. When a seaman is employed by a federal agency, like the Tennessee Valley Authority, the Federal Employees Compensation Act, 5 U.S.C. § 8116(c) (1994), has been held to be the exclusive remedy. See *Hutchins v. Tennessee Valley Auth.*, 98 F.3d 602, 603-04 (11th Cir. 1996).

109. 45 U.S.C. § 51.

110. *Gautreaux*, 107 F.3d at 335, 1997 AMC at 1526 (citing *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957)).

111. *Id.* (quotations omitted); *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523 (1957); *Rogers*, 352 U.S. at 506.

112. *Gautreaux*, 107 F.3d at 335, 1997 AMC at 1527.

113. *Id.*

evidence' of his employer's negligence, but also with slight evidence of his employer having been only 'slightly negligent.'"¹¹⁴ The final step was to apply this duty to the conduct of the seaman as well so that the worker had only a duty of "slight care" to protect himself from injury.¹¹⁵

The en banc Fifth Circuit found nothing in the Jones Act or the FELA which "suggests that the standard of care to be attributed to either an employer or an employee is anything different than ordinary prudence under the circumstances."¹¹⁶ Those cases that confused the standard "by ascribing to seamen a slight duty of care to protect themselves"¹¹⁷ and by "attributing to Jones Act employers a higher duty of care than that required under ordinary negligence"¹¹⁸ were overruled.¹¹⁹ The court concluded:

A seaman, then, is obligated under the Jones Act to act with ordinary prudence under the circumstances. The circumstances of a seaman's employment include not only his reliance on his employer to provide a safe work environment but also his own experience, training, or education. The reasonable person standard, therefore, [in] a Jones Act negligence action becomes one of the reasonable *seaman* in like circumstances.¹²⁰

The assessment of fault between the plaintiff and defendant is only one area of confusion recently addressed by the courts. In 1994 the Supreme Court adopted a proportionate share approach for allocating the liability of maritime tortfeasors in *McDermott, Inc. v. AmClyde*.¹²¹ Applying that rule to settlements, the Court held that when a joint tortfeasor settles with the plaintiff, the award of damages against the nonsettling tortfeasor is reduced by the

114. *Id.* at 335–36, 1997 AMC at 1527.

115. *See id.* at 336, 1997 AMC at 1527.

116. *Id.* at 338, 1997 AMC at 1531.

117. *See, e.g.,* Spinks v. Chevron Oil Co., 507 F.2d 216, 223, 1979 AMC 1165 (5th Cir. 1975), *modified on other grounds*, 546 F.2d 675 (5th Cir. 1977), *overruled by Gautreaux*, 107 F.3d 331, 1997 AMC 1521.

118. *See, e.g.,* Allen v. Seacoast Prods., Inc., 623 F.2d 355, 361, 1981 AMC 1341, 1348 (5th Cir. 1980), *overruled by Gautreaux*, 107 F.3d 331, 1997 AMC 1521.

119. *Gautreaux*, 107 F.3d at 339, 1997 AMC at 1532.

120. *Id.* Similarly, the court in *Ribitzki v. Canmar Reading & Bates, Ltd. Partnership*, 111 F.3d 658, 662–63, 1997 AMC 1841, 1843–46 (9th Cir. 1997), applied the standard of a reasonable seaman in like circumstances.

121. 511 U.S. 202, 1994 AMC 1521 (1994).

percentage of fault assessed against the settling tortfeasor.¹²² As a result of the adoption of the proportionate share approach in *McDermott*, the Supreme Court stated in the companion case, *Boca Grande Club, Inc. v. Florida Power & Light Co.*, that “actions for contribution against settling defendants are neither necessary nor permitted.”¹²³

In *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, two members of the crew of the dredge *Alaska*, owned by Great Lakes, were killed and several others were injured in a collision between the *Alaska* and the tanker *Robert Watt Miller*, owned by Chevron.¹²⁴ Both Great Lakes and Chevron settled with the estates of the deceased crewmembers and with the injured workers.¹²⁵ The remaining issue was Great Lakes’ contribution claim against Chevron.¹²⁶ Based on *McDermott* and *Boca Grande*, the Eleventh Circuit held that Great Lakes’ general contribution claims were barred;¹²⁷ however, Great Lakes was also seeking contribution for the maintenance and cure payments it made to the injured and deceased seamen.¹²⁸ The Eleventh Circuit could not simply apply a proportionate fault rule because the “shipowner is liable to provide maintenance and cure—food, medical care, and lodging—to sick or injured seamen in the ship’s employ, regardless of the cause of sickness or injury.”¹²⁹ Distinguishing *McDermott* and *Boca Grande*, the Eleventh Circuit reasoned: “A shipowner, unlike a nonsettling joint tortfeasor, will never receive the benefit of a proportionate share credit under *McDermott*; the *only* way to apportion the cost of maintenance and cure among all tortfeasors responsible for the harm to seamen is to allow claims for contribution.”¹³⁰ Concluding that *McDermott* did not affect contribution claims based on maintenance and cure, the Eleventh Circuit held that “Great Lakes’ claims based on

122. *Id.* at 217, 1994 AMC at 1532.

123. *Boca Grande Club, Inc. v. Florida Power & Light Co.*, 511 U.S. 222, 222, 1994 AMC 1536, 1536 (1994).

124. *See* *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 92 F.3d 1102, 1103, 1997 AMC 902, 903 (11th Cir. 1996).

125. *See id.*

126. *See id.*

127. *See id.* at 1106, 1997 AMC at 907.

128. *See id.* at 1103, 1997 AMC at 904.

129. *Id.* at 1107, 1997 AMC at 909–10.

130. *Id.* at 1107, 1997 AMC at 910.

maintenance and cure should have been allowed to proceed.”¹³¹

Although the payment of maintenance and cure has been an issue between the defendants, it is more often a subject of contention between the seaman and his employer. When the Supreme Court addressed the situation of arbitrary and willful failure to pay maintenance and cure in *Vaughan v. Atkinson*, the Court granted an award of attorneys’ fees but did not affirmatively state whether the maritime law would allow or reject an award of punitive damages to punish the same conduct.¹³² The circuit courts naturally came to different conclusions as to the effect of *Vaughan*, with the Fifth and Eleventh Circuits initially holding that punitive damages could also be awarded for arbitrary and willful failure to pay maintenance and cure.¹³³ Two years ago, the en banc Fifth Circuit changed course and rejected punitive damages for the employer’s willful and arbitrary failure to pay maintenance and cure.¹³⁴ In *Kasprik v. United States*, the Eleventh Circuit was presented with an injury to a seaman on a vessel owned by the United States.¹³⁵ Although the court did not permit the punitive damage action to proceed against the operator of the vessel on the ground that the seaman’s action was barred by the exclusivity provision of the Suits in Admiralty Act,¹³⁶ the court did state that the precedent of the

131. *Id.* For a discussion of the Fifth Circuit’s treatment of maintenance and cure and its effect on settling joint tortfeasors, see William L. Garwood & Kenneth G. Engerrand, *Recent Developments in Admiralty Law in the United States Supreme Court, the Fifth Circuit, and the Eleventh Circuit*, 18 HOUS. J. INT’L L. 709, 730–33 (1996).

132. See *Vaughan v. Atkinson*, 369 U.S. 527, 533–34 (1962).

133. Compare *Hines v. J.A. LaPorte, Inc.*, 820 F.2d 1187, 1189–90, 1988 AMC 1721, 1723–24 (11th Cir. 1987) (awarding punitive damages), and *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118, 1985 AMC 2024, 2034–35 (5th Cir. 1984) (same), with *Kraljic v. Berman Enters., Inc.*, 575 F.2d 412, 416, 1978 AMC 1297, 1303–04 (2d Cir. 1978) (awarding attorneys’ fees but not punitive damages).

134. See *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1512–13 1995 AMC 2409, 2433–35 (5th Cir. 1995) (en banc) (overruling *Holmes*), *cert. denied*, 116 S. Ct. 706 (1996).

135. See *Kasprik v. United States*, 87 F.3d 462–63, 1996 AMC 2508, 2509–10 (11th Cir. 1996).

136. Suits in Admiralty Act, 46 U.S.C. app. § 745 (1994). Section 745 provides in pertinent part:

Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim

Eleventh Circuit authorizing an award of punitive damages for arbitrary and willful denial of maintenance and cure “is consistent with traditional admiralty law which provides the highest safeguards for a seaman’s right to maintenance and cure.”¹³⁷

The defenses available to the seaman’s employer in a maintenance and cure action have provided some of the general maritime law’s most colorful moments.¹³⁸ Admiralty law has addressed claims arising out of sexually transmitted diseases,¹³⁹ HIV,¹⁴⁰ intoxication,¹⁴¹ and fighting.¹⁴² In *Silmon v. Can Do II, Inc.*, a crewmember of the Can Do II felt a pain in his back when he lost his balance while transferring supplies.¹⁴³ Surgery on his back revealed his pain was caused by an epidural abscess. Three doctors believed the abscess resulted from a bacterial infection that most likely was caused by the seaman’s illegal IV drug use.¹⁴⁴ The district court found that the seaman’s “injury was the result of a bacterial infection caused by illegal IV drug use and that

Id.

137. *Kasprick*, 87 F.3d at 464–66, 1996 AMC at 2510–12. The Fifth Circuit also addressed a seaman’s maintenance and cure claim arising out of an injury on a public vessel, but his claim was held to be untimely under the Suits in Admiralty Act. *See Rashidi v. American President Lines*, 96 F.3d 124, 127, 1997 AMC 262, 264–65 (5th Cir. 1996).

138. *See, e.g., Koistinen v. American Export Lines, Inc.*, 83 N.Y.S.2d 297, 298, 1948 AMC 1464, 1465, 1469 (N.Y. City Ct. 1948) (holding that seaman who went to a woman’s room “for purposes not particularly platonic” may recover maintenance and cure for injury sustained leaping out window when threatened “by the sudden appearance of a man who formidably loomed at the lintels”).

139. *See, e.g., Ressler v. States Marine Lines, Inc.*, 517 F.2d 579, 580, 1975 AMC 819, 820 (2d Cir. 1975); *Flynn v. United States*, 98 F. Supp. 991, 993 (S.D.N.Y. 1951).

140. *See, e.g., Bynum v. Premier Cruise Lines, Ltd.*, 1994 AMC 2185, 2186 (M.D. Fla. 1994).

141. *See, e.g., Bentley v. Albatross S.S. Co.*, 203 F.2d 270, 1953 AMC 645 (3d Cir. 1953).

142. *See, e.g., Gulleage v. United States*, 337 F. Supp. 1108, 1110, 1972 AMC 1187, 1187 (E.D. Pa. 1972), *aff’d*, 474 F.2d 1340 (3d Cir. 1973).

143. *See Silmon v. Can Do II, Inc.*, 89 F.3d 240, 241, 1997 AMC 618, 619 (5th Cir. 1996).

144. *See id.* at 241, 1997 AMC at 619–20. Even when the worker is impaired, recovery may be barred. *See, e.g., Robinson v. Global Marine Drilling Co.*, 101 F.3d 35, 37, 1997 AMC 638, 641–42 (5th Cir. 1996) (holding employer not liable under Americans with Disabilities Act because, although worker had asbestosis, there was no evidence of disability), *cert. denied*, 117 S. Ct. 1820 (1997).

such drug use was willful misconduct which forfeited his right to maintenance and cure.”¹⁴⁵

The standard for forfeiture of maintenance and cure is not one of negligence but of “willful misbehavior.”¹⁴⁶ The seaman contended that this standard would not preclude his right to recover maintenance and cure because his willful misbehavior in this case occurred before he began his employment with the defendant.¹⁴⁷ After reviewing a number of maintenance and cure decisions, however, the Fifth Circuit determined that “the cases consistently support the district court’s legal conclusion that when the illness is caused solely by the wilful misconduct of the seaman, regardless of when the wilful misconduct occurred, the shipowner will escape liability for maintenance and cure.”¹⁴⁸

B. Other Maritime Workers

While maintenance and cure continues to provide a constant source of discord between seamen and their employers, the compensation remedy under the LHWCA¹⁴⁹ also provides a stream of disputes for the Supreme Court and the circuit courts.¹⁵⁰ In *Metropolitan Stevedore Co. v. Rambo* the Supreme Court again intervened in the dispute between John Rambo and his employer, Metropolitan Stevedore Co., over the extent of Rambo’s disability.¹⁵¹ Rambo originally received an award that he be paid permanent partial disability as a result of an injury, but when he acquired new skills as a crane operator and began earning more than he was making prior to his injury, Metropolitan sought to modify

145. *Silmon*, 89 F.3d at 242, 1997 AMC at 620.

146. *See id.* (quoting *Warren v. United States*, 340 U.S. 523, 528 (1951)); *see also Aguilar v. Standard Oil Co.*, 318 U.S. 724, 730–31 (1943).

147. *See id.*

148. *Id.* at 243, 1997 AMC at 622.

149. 33 U.S.C. §§ 901–950 (1994). The LHWCA provides compensation for:

[D]isability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

Id. § 903(a).

150. Disputes are not confined to employers and employees. *See, e.g., Ceres Marine Terminal v. Director, OWCP*, 118 F.3d 387, 1998 AMC 304 (5th Cir. 1997) (discussing claims of employer for relief from Special Fund administered by the Director, Office of Workers’ Compensation Programs).

151. *See Metropolitan Stevedore Co. v. Rambo*, 117 S. Ct. 1953, 1959, 1997 AMC 2288–89 (1997).

the award.¹⁵² In the first appeal,¹⁵³ the Supreme Court held that Metropolitan was entitled to a modification based on the claimant's increase in earning capacity, even though there was no change in the claimant's physical condition.¹⁵⁴ On remand, the Ninth Circuit declined to terminate compensation payments despite the lack of any loss of wage earning capacity and instead remanded the case for the issuance of a nominal or "de minimis" award.¹⁵⁵ The Supreme Court again agreed to hear the case.¹⁵⁶

In *Metropolitan Stevedore Co. v. Rambo*¹⁵⁷ the Supreme Court recognized that for unscheduled¹⁵⁸ or general injuries, disability under the LHWCA is based on economic harm from decreased ability to earn wages,¹⁵⁹ and section 8(h) of the Act provides that the claimant's actual post-injury wages are presumptive of his earning capacity if they fairly and reasonably represent his earning capacity.¹⁶⁰ These

152. See *id.* Even though a worker has a permanent physical disability resulting from a general injury, he is not entitled to compensation for that disability when his employer takes him back in a modified position within his restrictions. See *Darby v. Ingalls Shipbuilding, Inc.*, 99 F.3d 685, 688, 1997 AMC 1816 (5th Cir. 1996) (providing only summary in AMC).

153. For the importance of proper timing of the filing of the notice of appeal, see *Aetna Cas. & Surety Co. v. Director, OWCP*, 97 F.3d 815 (5th Cir. 1996).

154. See *Metropolitan Stevedore Co. v. Rambo*, 515 U.S. 291, 301, 1995 AMC 1872, 1879 (1995).

155. See *Rambo v. Director, OWCP*, 81 F.3d 840, 844-45, 1996 AMC 1384, 1389-90 (9th Cir. 1996).

156. *Metropolitan Stevedore Co. v. Rambo*, 117 S. Ct. 504 (1996).

157. 117 S. Ct. 1953, 1997 AMC 2288 (1997).

158. Scheduled injuries are compensated without regard to economic loss. See 33 U.S.C. § 908(c)(1)-(20), (22) (1994). "In all other cases in the class of disability, the compensation shall be 66 2/3 per centum of the difference between the average weekly wages of the employee and the employee's wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of partial disability." *Id.* § 908(c)(21).

159. See *Metropolitan Stevedore*, 117 S. Ct. 1953, 1957-58, 1997 AMC 2288, 2290-91 (1997).

160. See *id.* at 1958, 1997 AMC at 2291. Section 908(h) of the LHWCA provides:

The wage-earning capacity of an injured employee in cases of partial disability under subsection (c)(21) of this section or under subsection (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual

provisions present a potential conflict in the situation in *Metropolitan Stevedore*, where the claimant has no current economic loss, but his physical disability may result in economic loss at a later date. If the award is modified to reflect no current loss of wage earning capacity and compensation payments cease, the claimant has only one year to modify the order.¹⁶¹ A decline in earnings after a year would leave the claimant without compensation.¹⁶² Further, section 8(h) states that “the effect of disability as it may naturally extend into the future”¹⁶³ may be considered in determining whether a claimant’s actual earnings fairly and reasonably represent the claimant’s earning capacity.¹⁶⁴ Reading these provisions together, the Court agreed with Rambo that there must “be a cognizable category of disability that is potentially substantial, but presently nominal in character.”¹⁶⁵

As the LHWCA makes no provision for the issuance of nominal awards, it was not enough for the Supreme Court merely to permit such awards. The Court also had to promulgate standards and procedures for the issuance of a nominal award of compensation. First, the Court had to determine the potential for future disability to justify a current compensation award. The Court held “that a worker is entitled to nominal compensation when his work-related injury has not diminished his present wage-earning capacity under current circumstances, but there is a significant potential that the injury will cause diminished capacity under future conditions.”¹⁶⁶ The next step involved the allocation of the burden of persuasion. When a claimant is seeking compensation, the Court placed the burden on the claimant to show by a preponderance of the evidence “that the odds are significant that his wage-earning capacity will

employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

33 U.S.C. § 908(h).

161. *See id.* § 922 (“Upon his own initiative or upon the application of any party in interest . . . the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, . . . issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation.”).

162. *See Metropolitan Stevedore*, 117 S. Ct. at 1960, 1997 AMC at 2294.

163. 33 U.S.C. § 908(h).

164. *See Metropolitan Stevedore*, 117 S. Ct. at 1960, 1997 AMC at 2294–95.

165. *Id.* at 1960, 1997 AMC at 2295.

166. *Id.* at 1963, 1997 AMC at 2299.

fall below his pre-injury wages at some point in the future.”¹⁶⁷ When an employer is seeking a modification of a prior award, the employer has the initial burden of “showing that as a result of a change in capacity the employee’s wages have risen to a level at or above his pre-injury earnings.”¹⁶⁸ If the employer satisfies its burden, “the burden shifts back to the claimant to show that the likelihood of a future decline in capacity is sufficient for an award of nominal compensation.”¹⁶⁹

In its past term, the Supreme Court also addressed the relationship between an LHWCA compensation claim¹⁷⁰ and a “third-party” claim in *Ingalls Shipbuilding, Inc. v. Director, OWCP*.¹⁷¹ The Court described the relationship between the two remedies: “Section [933] of the [LHWCA] gives the ‘person entitled to compensation’ two avenues of recovery: Such a person may seek to recover damages from the third parties ultimately at fault for any injuries and still recover compensation under the [LHWCA] from the covered worker’s employer as long as the worker’s employer gives its approval before the person settles with any of the third party tortfeasors.”¹⁷² Failure to obtain this approval results a in

167. *Id.* at 1963, 1997 AMC at 2300.

168. *Id.* at 1964, 1997 AMC at 2300.

169. *Id.*

170. A worker must file a compensation claim within one year of the injury or death or, if payment has been made without an award, within one year after the date of the last payment. See 33 U.S.C. § 913(a) (1994); *Ceres Gulf, Inc. v. Director, OWCP*, 111 F.3d 17, 20, 1997 AMC 2703, 2703 (5th Cir. 1997) (barring workers’ compensation claim for failure to timely file claim). The discovery rule applies to compensation claims. See 33 U.S.C. § 913(a) (1994).

171. 117 S. Ct. 796, 799, 1997 AMC 913, 916 (1997). Previously, *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 102 F.3d 1385, 1997 AMC 1276 (5th Cir. 1996) questioned the procedure for asserting its section 933(g) defense. In *Ingalls*, the claimant filed an LHWCA compensation claim and then entered into third-party settlements with asbestos manufacturers and distributors without *Ingalls*’ approval. See *id.* at 1389, 1997 AMC at 1281. *Ingalls* requested the LHWCA claims be transferred to the Office of Administrative Law Judges (OALJ) for trial, but two years later, the claimant in *Ingalls* requested the District Director to allow him to withdraw his claim without prejudice. See *id.* at 1387–88, 1997 AMC at 1277–78. The District Director permitted the withdrawal, and *Ingalls* appealed. See *id.* at 1388, 1997 AMC at 1278. The Fifth Circuit held the District Director was “obligated” to transfer the claim to the OALJ, “the failure to transfer the claim denied *Ingalls* a procedural right to which it was entitled,” and “the District Director injured *Ingalls*” by this failure. *Id.* at 1389–90, 1997 AMC at 1280–81.

172. *Ingalls*, 117 S. Ct. at 799, 1997 AMC at 914.

forfeiture of benefits under the LHWCA.¹⁷³ In *Ingalls*, Jefferson Yates, who worked as a shipfitter for Ingalls, was exposed to asbestos and was diagnosed with pulmonary disease resulting from his asbestos exposure.¹⁷⁴ Yates brought a lawsuit against twenty-three manufacturers and suppliers of asbestos and settled with eight of them before his death.¹⁷⁵ His wife, Maggie Yates, joined the settlements and released her consortium claim.¹⁷⁶ Six of the eight settling defendants required her to release any wrongful death cause of action that might occur after her husband's death.¹⁷⁷ Ingalls did not approve any settlement.¹⁷⁸

After Mr. Yates died, Mrs. Yates filed a claim for death benefits under the LHWCA, but Ingalls asserted that her claim was barred because she had entered into third-party settlements without Ingalls' approval.¹⁷⁹ The case squarely presented the question "whether an injured worker's spouse, who may be eligible to receive death benefits under the Act after the worker dies, is a 'person entitled to compensation' when the spouse enters into a settlement agreement with a third party before the worker's death."¹⁸⁰

As Mrs. Yates did not have any right to benefits under the LHWCA prior to her husband's death, the Supreme Court stated that "she was not a person entitled to compensation at [the time she entered into the third-party settlements] and was therefore not obligated to seek Ingalls' approval to preserve her entitlement to statutory death benefits."¹⁸¹

173. See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482, 1992 AMC 2113, 2123 (1992).

174. See *Ingalls*, 117 S. Ct. at 799, 1997 AMC at 914.

175. See *id.* 333

176. See *id.* at 799, 1997 AMC at 914-15.

177. See *id.*

178. See *id.* at 799, 1997 AMC at 915.

179. Mr. Yates' death was stipulated to be related to asbestos exposure while employed by Ingalls. See *id.*

180. *Id.* The Court in *Ingalls* also clarified an issue related to "the 'standing' of the Director, OWCP, to appear before the courts of appeals as a respondent in cases in which there are already two adverse litigants." *Id.* at 804, 1997 AMC at 919. The Director may not "appeal from a decision of the Benefits Review Board when the Board's decision did no more than 'impai[r] [the Director's] ability to achieve the Act's purposes and to perform the administrative duties the Act prescribes.'" *Id.* at 805, 1997 AMC at 920 (quoting *Director, OWCP v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 129, 1995 AMC 1167, 1174 (1995)). However, in *Ingalls* the Court held that the Director may appear as a respondent before the appellate courts. See *id.* at 807-08, 1997 AMC at 928-29.

181. *Id.* at 802, 1997 AMC at 919 (quotations omitted). For a discussion of whether the claimant actually settled the third-party claim, see Mallott &

Ingalls argued that the language of section 933(g) mandated a contrary conclusion because section 933(g) only affords a bar to the compensation claim if the claimant enters into a third-party settlement for an amount that is less than the compensation that the claimant “would be entitled” to under the LHWCA.¹⁸² From this language Ingalls argued that section 933 “encompasses a broad forward looking concept that effectively brings any person who would be entitled to compensation within its purview.”¹⁸³ The Court, however, rejected Ingalls’ reading of the LHWCA because that interpretation would result in the worker’s spouse being considered entitled to compensation before her husband’s death, even though she might become ineligible to receive compensation before his death for reasons such as divorce or predeceasing him.¹⁸⁴

A more difficult argument was that Ingalls might not receive any credit toward his LHWCA compensation exposure under section 933(f) because, like section 933(g), the credit available under section 933(f) is only provided for the net amount recovered by a person entitled to compensation.¹⁸⁵ The Court first responded that it did not have to decide if the phrase “person entitled to compensation” means the same thing in sections 933(f) and 933(g).¹⁸⁶ Even if it does, however, the Court did not consider the possibility of a double recovery “to be so absurd or glaringly unjust as to warrant a departure from the plain language of the statute.”¹⁸⁷ Therefore, the Court held:

Peterson v. Director, OWCP, 98 F.3d 1170, 1997 AMC 9 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1842 (1997).

182. *Ingalls*, 117 S. Ct. at 802, 1997 AMC at 919–20.

183. *Id.* at 802, 1997 AMC at 920 (quotations omitted).

184. *See id.* at 802–03, 1997 AMC at 920.

185. *See id.* at 803, 1997 AMC at 920–21. Section 933(f) provides in pertinent part:

[T]he employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the net amount recovered against such third person. Such net amount shall be equal to the actual amount recovered less the expenses reasonably incurred by such person in respect to such proceedings (including reasonable attorneys’ fees).

33 U.S.C. § 933(f) (1994).

186. *See Ingalls*, 117 S. Ct. at 803, 1997 AMC at 921.

187. *Id.* at 804, 1997 AMC at 922. The Court noted that Ingalls was not without remedy and could seek indemnity against a third party by a tort action

[B]efore an injured worker's death, the worker's spouse is not a "person entitled to compensation" for death benefits within the meaning of LHWCA § [933(g)], and does not forfeit the right to collect death benefits under the Act for failure to obtain the worker's employer's approval of settlements entered into before the worker's death.¹⁸⁸

Prior to 1972, longshoremen were afforded an unseaworthiness remedy in third-party actions against the vessel.¹⁸⁹ The 1972 Amendments to the LHWCA eliminated the unseaworthiness action and substituted a negligence remedy.¹⁹⁰ The confusion resulting from the failure of Congress to enact any guidelines or definitions in the LHWCA for the negligence remedy¹⁹¹ led the Supreme Court to define the standard of care in *Scindia Steam Navigation Co. v. De los Santos*.¹⁹² In *Scindia*, the Court set forth three duties: a "turnover duty," related to the condition of the vessel when the vessel owner turns it over to the stevedore or independent contractor; a duty with regard to areas under "the active control of the vessel," or when the vessel owner "actively involves itself in cargo operations;" and a "duty to intervene" when the stevedore or contractor is engaged in an activity that is "obviously improvident."¹⁹³ As usual, the Supreme Court has had to return to the area to clarify its standard,¹⁹⁴ and the circuit courts face a never-ending stream of cases

in state or federal court. *See id.* (citing *Pallas Shipping Agency, Ltd. v. Duris*, 461 U.S. 529, 538, 1983 AMC 1724, 1731 (1983); *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 412-14, 1969 AMC 745, 750-52 (1969)).

188. *Ingalls*, 117 S. Ct. at 804, 1997 AMC at 922.

189. *See, e.g.*, *Italia Societa v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964); *Waterman S.S. Corp. v. Dugan & McNamara, Inc.*, 364 U.S. 421 (1960); *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563 (1958); *Alaska S.S. Co. v. Petterson*, 347 U.S. 396 (1954); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

190. Longshoreman's and Harbor Workers' Compensation Act Amendment of 1972, Pub. L. No. 92-576, § 18(a), 86 Stat. 1263 (1972) (codified at 33 U.S.C. § 905(b) (1994)).

191. *See* Kenneth G. Engerrand & Richard L. Rogers, *The Continuing Conflict Between Congress and the Supreme Court Over the Standard of Care in Longshore Third Party Cases*, 22 S. TEX. L.J. 423, 423 (1981).

192. 451 U.S. 156, 1981 AMC 601 (1981).

193. *Id.* at 166-67, 175-76, 1981 AMC at 609-10, 616-17.

194. *See* *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92, 106, 1994 AMC 1817, 1828 (1994).

involving application of the *Scindia* standard.¹⁹⁵ In fact the past year has yielded three reported decisions on the standard of care from the Fifth Circuit.

1. The United States was held not liable for an injury to a welder employed by an independent contractor engaged in repair of a public vessel. The entire vessel was turned over to the contractor a month before the accident, and the government did not retain control over the work or vessel merely because four government employees worked from a shoreside office to inspect the job for conformity with specifications.¹⁹⁶

2. The owner of an offshore vessel was held not liable to a sandblaster who tripped on a sandblasting hose extending from the vessel to a fixed platform to which the vessel was moored. The deck of the vessel was not under the control of the vessel, the condition of the line was open and obvious, and the contractor could have easily remedied the hazard.¹⁹⁷

3. A jury verdict in favor of a longshoreman was reversed and judgment was rendered for the shipowner. An allegedly malfunctioning brake on a ship's crane injured the longshoreman. If the crane was defective, there was no evidence that the stevedore was forced to continue the operation or that the shipowner had actual knowledge that the stevedore was operating the crane with a defective brake.¹⁹⁸

The recent decisions reflect that the standard of care under section 905(b) is difficult for injured workers to satisfy, but there are other hurdles that workers often face in seeking

195. See, e.g., *Serbin v. Bora Corp.*, 96 F.3d 66, 68, 1997 AMC 2237, 2237-38 (3d Cir. 1996) (deciding negligence action brought by longshoreman injured while moving snatch block on hatch cover under *Scindia* negligence analysis). This area only becomes more complex in situations like that in *Hodgen v. Forest Oil Corp.*, 87 F.3d 1512, 1997 AMC 140 (5th Cir. 1996), when the offshore platform owner is also the charterer of the vessel on which the worker is injured. See *id.* at 1517-21, 1997 AMC at 145-50 (applying comparative negligence to parties having control over the accident).

196. See *Fontenot v. United States*, 89 F.3d 205, 208-10, 1996 AMC 2472, 2475-76 (5th Cir. 1996).

197. See *Manuel v. Cameron Offshore Boats, Inc.*, 103 F.3d 31, 34-35, 1997 AMC 1226, 1229-30 (5th Cir. 1997).

198. See *Greenwood v. Societe Francaise de Transportes Maritime*, 111 F.3d 1239, 1244-49, 1997 AMC 2141, 2147-54 (5th Cir.), *cert. denied*, 118 S. Ct. 558 (1997).

to recover for workplace accidents. One example is the borrowed servant doctrine, by which a general contractor is held to have borrowed the employee from another contractor, the general contractor becomes an employer of the worker, and the general contractor therefore receives immunity from a tort suit under the applicable workers' compensation statute, such as the LHWCA.¹⁹⁹ Although the borrowed servant rule may be a defense to the third-party tort suit, it may not be successfully asserted without consequences.

In *Total Marine Services, Inc. v. Director, OWCP*, Wayne Arabie was formally employed by CPS Staff Leasing, a temporary labor service that supplied workers to customers such as Total Marine.²⁰⁰ CPS dispatched Arabie to work for Total Marine at Total Marine's repair facility, where Arabie injured his neck.²⁰¹ Arabie sought and received LHWCA compensation from CPS and its insurer, which then sought reimbursement of those payments from Total Marine on the basis that Total Marine was Arabie's "employer" under the LHWCA.²⁰² Agreeing with CPS, the Fifth Circuit held that "a borrowing employer is required to pay the compensation benefits of its borrowed employee, and, in the absence of a valid and enforceable indemnification agreement, the borrowing employer is required to reimburse an injured worker's formal employer for any compensation benefits it has paid to the injured worker."²⁰³

IV. CARGO AND COLLISION

In light of the different laws applicable throughout the world to international trade and carriage of goods, the choice of

199. See, e.g., *West v. Kerr-McGee Corp.*, 765 F.2d 526, 529-31, 1986 AMC 150, 152-57 (5th Cir. 1985). Numerous issues arise out of the complex relationships involved in offshore drilling and exploration. See, e.g., *Dupre v. Chevron U.S.A., Inc.*, 109 F.3d 230, 231 (5th Cir. 1997) (discussing effect of Minerals Management Service regulations on action brought by the widow of a worker who was killed on an offshore platform). Other complexities arise when statutory preemption issues are raised. See, e.g., *Lewis v. Brunswick Corp.*, 107 F.3d 1494, 1497, 1505-06, 1997 AMC 1921, 1921-22, 1934-35 (11th Cir.) (discussing effect of Federal Boat Safety Act on products liability claim against boat engine manufacturer; holding claims impliedly preempted based on Coast Guard exclusive authority over boat safety standards), *cert. denied*, 118 S. Ct. 439 (1997).

200. See *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 774-75, 1996 AMC 2258, 2259 (5th Cir. 1996).

201. See *id.* at 775, 1996 AMC at 2259.

202. See *id.*

203. *Id.* at 779, 1996 AMC at 2265.

applicable law to a dispute or loss can be crucial.²⁰⁴ In *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, the Supreme Court declined to nullify foreign arbitration clauses in contracts for carriage of cargo as a lessening of the carrier's liability under the Carriage of Goods by Sea Act (COGSA).²⁰⁵ Of course, the decision in *M/V Sky Reefer* did not put an end to litigation over this issue.²⁰⁶

In *Mitsui & Co. (USA) v. Mira M/V*, Mitsui's cargo of steel was damaged during carriage from Russia to New Orleans on the *M/V Mira*.²⁰⁷ After the cargo was loaded on the vessel, Mitsui received the bill of lading, the terms of which were not negotiated, containing a forum selection clause requiring resolution of disputes in London and a choice of law clause making the COGSA applicable.²⁰⁸ Mitsui brought suit in federal court in New Orleans, and the charterer moved to dismiss the suit based on the forum selection clause.²⁰⁹ Based on *M/V Sky Reefer*, the Fifth Circuit considered the clause presumptively valid, but Mitsui asserted three reasons to overcome the presumption:

204. See, e.g., *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–15, 1972 AMC 1407, 1415–18 (1972) (upholding forum selection clause in international shipping contract; concluding that such clauses should be upheld unless absent “strong” evidence that they should be set aside).

205. *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541, 1995 AMC 1817, 1827 (1995). COGSA is codified at 46 U.S.C. app. §§ 1300–1315 (1994). Section 1303(8) limits a carrier's ability to contractually limit his own liability for damage to goods resulting from his negligence. *Id.* § 1303(8). That section provides:

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

Id.

206. See, e.g., *Dole Ocean Liner Express v. Georgia Vegetable Co.*, 93 F.3d 166, 167, 1997 AMC 404, 405 (5th Cir. 1996) (discussing judicial review of arbitration panel decisions).

207. See *Mitsui & Co. (USA) v. Mira M/V*, 111 F.3d 33, 34, 1997 AMC 2126, 2126 (5th Cir. 1997).

208. See *id.* at 34–35, 1997 AMC at 2126.

209. See *id.* at 35, 1997 AMC at 2127.

(1) the clause contravenes § 1303(8) of the COGSA;²¹⁰ (2) the bill of lading is a contract of adhesion and the clause should not be enforced because it was not freely negotiated; and (3) the doctrine of *forum non conveniens* dictates the matter be tried in the forum where the cargo was discharged because to be forced to try the matter in England would effectively extinguish Mitsui's claim.²¹¹

The Fifth Circuit rejected all of Mitsui's arguments.²¹² Although the Fifth Circuit and other circuits had, prior to *M/V Sky Reefer*, invalidated forum selection clauses as violative of COGSA,²¹³ the rationale of the previous cases was rejected in *M/V Sky Reefer*.²¹⁴ Mitsui then sought to confine the holding in *M/V Sky Reefer* to foreign *arbitration* clauses like the clause in *M/V Sky Reefer* requiring arbitration in Tokyo.²¹⁵ However, as the Supreme Court's reasoning in *M/V Sky Reefer* was broad and was not limited to arbitration clauses, the Fifth Circuit stated that "Mitsui's attempt to distinguish *SKY REEFER* must fail."²¹⁶

While the bill of lading in *Mitsui* was a contract of adhesion which was not negotiated, the Fifth Circuit was not concerned about subjecting Mitsui, "a sophisticated international shipper/consignee well versed in this type of transaction," to a provision "not uncommon in bills of lading."²¹⁷ Nonetheless, the court held "that, by filing a lawsuit for damages under the bill of lading, Mitsui has accepted the terms of the bill of lading, including the unnegotiated forum selection clause."²¹⁸

Mitsui's final argument was that the selection of London as a forum was inconsistent with the choice of American law, COGSA, to govern the dispute.²¹⁹ Mitsui read these clauses

210. 46 U.S.C. app. § 1303(8).

211. *Mitsui*, 111 F.3d at 35, 1997 AMC at 2128.

212. *See id.* at 37, 1997 AMC at 2129.

213. *See, e.g.,* Conklin & Garrett, Ltd. v. M/V Finnrose, 826 F.2d 1441, 1444, 1988 AMC 318, 322 (5th Cir. 1987) (stating that COGSA prevents inequalities in bargaining power and the lessening of the carrier's liability); *Indussa Corp. v. S.S. Ranborg*, 377 F.2d 200, 203-04 (2d Cir. 1967) (en banc) (same).

214. *See Mitsui*, 111 F.3d at 36, 1997 AMC at 2128 (citing *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 534-35, 1995 AMC 1817, 1820 (1995)).

215. *See id.* at 36, 1997 AMC at 2129.

216. *Id.*

217. *Id.*

218. *Id.*

219. *See id.* at 37, 1997 AMC at 2130.

as intending disputes arising in England to be resolved in England and disputes arising in the United States to be resolved in American courts.²²⁰ The Fifth Circuit, however, did not find the clauses inconsistent as all disputes would be resolved in English courts, and the English courts would simply apply COGSA to any dispute.²²¹ Mitsui's argument could essentially be reduced to a *forum non conveniens* argument that the dispute could be better resolved in the United States and "that Mitsui's claim would effectively be extinguished by enforcement of the clause"²²² Declining to accept an attitude of "American parochialism" for international parties and an international transaction, the Fifth Circuit agreed to enforce the forum selection clause and dismiss Mitsui's American suit against the charterer, stating: "Increased cost and inconvenience are insufficient reasons to invalidate foreign forum-selection or arbitration clauses."²²³

Another bill of lading provision which has engendered considerable dispute between shippers and carriers is the stamped notation "Freight Prepaid." In *National Shipping Co. v. Omni Lines, Inc.*, the carrier transported newsprint from Canada to Saudi Arabia pursuant to a bill of lading marked "Freight Prepaid."²²⁴ The shipper paid the freight in the amount of \$67,794.62 to the freight forwarder, which went out of business without paying the carrier.²²⁵ Both the shipper and carrier had performed, and the question was whether the carrier would not be paid or whether the shipper would pay twice.²²⁶ Faced with this "Hobson's choice," some courts have held that the term "Freight Prepaid" was meant to act as an extension of credit by the carrier to the freight forwarder (so the carrier's only recourse was against the freight forwarder) or that the term was meant as an extension of credit to the shipper (so the shipper remained liable).²²⁷ Other courts have applied equitable estoppel theories to bar

220. *See id.*

221. *See id.*

222. *Id.*

223. *Id.* However, in *Seguros Commercial America S.A. de C.V. v. American President Lines, Ltd.*, 105 F.3d 198, 199, 1997 AMC 1556, 1556 (5th Cir. 1996), the Fifth Circuit found no reason for not applying the *forum non conveniens* doctrine to a cargo claim brought under diversity jurisdiction.

224. *See National Shipping Co. v. Omni Lines, Inc.*, 106 F.3d 1544, 1545, 1997 AMC 1708, 1708-09 (11th Cir. 1997).

225. *See id.* at 1545, 1997 AMC at 1709.

226. *See id.*

227. *See id.*

recovery from shippers who are justified in believing that the carrier has been paid, or have applied semi-strict liability, in which the shipper remains liable unless the carrier intended to release the shipper from its duty to pay.²²⁸ In *Strachan Shipping Co. v. Dresser Industries, Inc.*, the Fifth Circuit adopted a rule that the shipper remains liable unless the carrier releases it.²²⁹ Agreeing with the Fifth Circuit in *Strachan*, the Eleventh Circuit in *National Shipping* stated “that the *Strachan* approach—the shipper is liable unless released by the carrier—is the best rule.”²³⁰ The Eleventh Circuit was persuaded by the reasoning in *Strachan* for adopting “a rebuttable presumption in favor of shipper liability:”

[W]e think that our result comports with economic reality. A freight forwarder provides a service. He sells his expertise and experience in booking and preparing cargo for shipment. He depends upon the fees paid by both shipper and carrier. He has few assets, and he books amounts of cargo far exceeding his net worth. Carriers must expect payment will come from the shipper, although it may pass through the forwarder’s hands. While the carrier may extend credit to the forwarder, there is no economically rational motive for the carrier to release the shipper. The more parties that are liable, the greater the assurance for the carrier that he will be paid.²³¹

Although the Eleventh Circuit considered the phrase “Freight Prepaid” and the carrier’s initial collection efforts against the freight forwarder to be indications of a release, the court noted that both were present in *Strachan*, in which the Fifth Circuit held the shipper was not released.²³² The carrier pointed to local custom and a provision in the bill of lading to support its interpretation. The Eleventh Circuit consequently remanded the case for a factual resolution of the issue.²³³

Two years ago the Supreme Court addressed a damages issue in maritime collision law in *City of Milwaukee v. Cement*

228. See *id.* at 1546, 1997 AMC at 1710–11.

229. See *Strachan Shipping Co. v. Dresser Indus., Inc.*, 701 F.2d 483, 490, 1984 AMC 237, 248 (5th Cir. 1983).

230. *National Shipping*, 106 F.3d at 1546–47, 1997 AMC at 1711.

231. *Id.* (quoting *Strachan*, 701 F.2d at 490, 1984 AMC at 248) (alteration in original).

232. See *id.* at 1547, 1997 AMC at 1712.

233. See *id.*

*Division, National Gypsum Co.*²³⁴ After that case dragged on for 15 years and resulted in a settlement of \$1,677,541.86, the question remained whether the plaintiff-vessel owner was entitled to \$5.3 million in prejudgment interest. The Court held “that neither a good-faith dispute over liability nor the existence of mutual fault justifies the denial of prejudgment interest in an admiralty collision case.”²³⁵

In *Probo II London v. Isla Santay M/V* the Fifth Circuit addressed the amount of prejudgment interest owed as a result of the collision of two vessels on the Pacific approach to the Panama canal.²³⁶ The liability issue was tried and the parties eventually stipulated to the magistrate judge’s apportionment of seventy percent of the fault to the *Isla Santay*, twenty percent to the Panama Canal Commission, whose pilot was on the *Probo Baro*, and ten percent to the *Probo Baro*.²³⁷ They also stipulated to damages but left the issue of prejudgment interest for resolution by the magistrate judge who ruled that the *Isla Santay* should only pay interest from the date of judicial demand because the *Probo Baro* had improperly delayed prosecuting its claim, there was a good faith dispute over liability, and there were equitable considerations surrounding the Commission’s share of the interest.²³⁸

The decision in *City of Milwaukee* had not been issued at the time of the magistrate judge’s ruling, so the reliance on a good faith dispute over liability was improperly made; however, the magistrate judge was entitled to consider the undue delay in pursuing the suit.²³⁹ Therefore, the Fifth Circuit remanded the case for reconsideration of the interest award in light of *City of Milwaukee*.²⁴⁰

The *Isla Santay* also appealed the amount of the award of prejudgment interest.²⁴¹ The Commission is immune on grounds of sovereign immunity from paying prejudgment interest,²⁴² so the *Isla Santay* was ordered to pay

234. 515 U.S. 189, 190, 1995 AMC 1882, 1882 (1995).

235. *Id.* at 199, 1995 AMC at 1889.

236. *See Probo II London v. Isla Santay M/V*, 92 F.3d 361, 1997 AMC 657 (5th Cir. 1996).

237. *See id.* at 362, 1997 AMC at 658.

238. *See id.* at 362–63, 1997 AMC at 659.

239. *See id.* at 364, 1997 AMC at 660–61.

240. *See id.* at 366, 1997 AMC at 664–65.

241. *See id.* at 363, 1997 AMC at 659.

242. *See id.* at 363 n.1, 1997 AMC at 659 n.1.

prejudgment interest on the damages attributable to the Commission's fault (for the fault of the pilot on the *Probo Baro*).²⁴³ The Fifth Circuit responded that interest is "an element of the plaintiff's damages necessary to make the plaintiff whole."²⁴⁴ It would require a "logical leap" to hold that no tortfeasor could then be liable for that interest just because one tortfeasor was immune.²⁴⁵ However, in view of the fact that the fault of the Commission pilot occurred at the helm of the plaintiff *Probo Baro*, the court concluded: "Given that the 20% of the fault apportioned to the Commission is properly imputable to the PROBO BARO, the SANTAY interests ought not in equity be held accountable for interest on that portion of the damages apportioned to the Commission."²⁴⁶

Just as a decision of the Supreme Court can be expected to engender further litigation, so too can the Mississippi River be expected to provide the Fifth Circuit with an opportunity to discuss apportionment of liability of vessels in a collision. *Burma Navigation Corp. v. Reliant Seahorse M/V* involved the collision of the M/V *Alaska* and M/V *Reliant Seahorse* in heavy fog at the Southwest Pass in the Mississippi River.²⁴⁷ The district court found each vessel fifty percent at fault, and both parties appealed, with the *Reliant Seahorse* contending that the district court improperly apportioned fault because it failed to properly apply The Pennsylvania Rule or the Narrow Channel Rule.²⁴⁸

The Pennsylvania Rule shifts the burden of proof for a vessel that has violated a navigation rule to establish not only that its violation did not cause the collision, but that it could not have caused the collision.²⁴⁹ The *Reliant Seahorse* contended that the district court's failure to make specific findings with regard to violations of navigational rules undermined its application of The Pennsylvania Rule. The Fifth Circuit, however, agreed with the M/V *Alaska* that The Pennsylvania Rule is not used to "determine a party's ultimate share of liability for a loss" but is simply a burden of

243. *See id.* at 363, 1997 AMC at 659.

244. *Id.* at 364, 1997 AMC at 662.

245. *Id.* at 364-65, 1997 AMC at 662.

246. *Id.* at 366, 1997 AMC at 664.

247. *See Burma Navigation Corp. v. Reliant Seahorse M/V*, 99 F.3d 652, 654, 1997 AMC 2184, 2185 (5th Cir. 1996).

248. *See id.* at 656, 1997 AMC at 2188. The Pennsylvania, 86 U.S. (19 Wall.) 125, 134, 136, 138 (1874). The Narrow Channel Rule is set forth in 33 U.S.C. § 2009(a)(i) (1994).

249. *The Pennsylvania*, 86 U.S. at 136.

proof rule to establish fault.²⁵⁰ Once fault is established under The Pennsylvania Rule, the liability is then divided by comparative fault principles as required by *United States v. Reliable Transfer Co.*²⁵¹ The district court did not err by using comparative fault to divide liability.²⁵²

The Narrow Channel Rule requires each vessel proceeding in a narrow channel or fairway to keep to her starboard side.²⁵³ The district court found that the accident likely occurred on the western side of the channel, which would be a violation of this Rule by the inbound *Alaska*.²⁵⁴ The *Reliant Seahorse* therefore contended that it was entitled to presume that the *Alaska* would keep to her own side and that the *Alaska* should be considered at fault for *all* resulting damages for violating the Rule.²⁵⁵ However, the district court found that the captain of the *Reliant Seahorse* did not maintain contact with the *Alaska* and chose a course of conduct which put his vessel in a path perpendicular to the *Alaska*.²⁵⁶ The captain of the *Reliant Seahorse* did not see the *Alaska* or receive or acknowledge his mate's reports on the location of the *Alaska*.²⁵⁷ This was sufficient to support the district court's apportionment of fault to both vessels.²⁵⁸

V. PRACTICE AND PROCEDURE

Admiralty judges routinely face lawsuits that arise from incidents occurring throughout the world.²⁵⁹ These disputes

250. See *Burma Navigation*, 99 F.3d at 656–57, 1997 AMC at 2188 (quoting *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1472, 1994 AMC 1034, 1042 (5th Cir. 1991)).

251. See *id.* at 657, 1997 AMC at 2190 (discussing *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975)).

252. See *id.*

253. See 33 U.S.C. § 2009(a)(i) (1994) (“A vessel proceeding along the course of a narrow channel or fairway shall keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable.”).

254. See *Burma Navigation*, 99 F.3d at 658, 1997 AMC at 2191.

255. See *id.* at 657, 1997 AMC at 2190.

256. See *id.* at 658, 1997 AMC at 2191.

257. See *id.*

258. See *id.*

259. See, e.g., *Aktepe v. United States*, 105 F.3d 1400, 1997 AMC 1553 (11th Cir. 1997) (suit brought by and on behalf of 300 Turkish Navy sailors injured or killed when vessel struck by missiles fired from U.S.S. *Saratoga* during North Atlantic Treaty Organization training exercises), *cert. denied*, 118 S. Ct. 685 (1998). The breadth of the disputes that arise around the waterfront is exemplified by the contrasting federal statutes that are interpreted, such as

often test the limits of procedural rules as well as substantive principles of admiralty law. In *World Tanker Carriers Corp. v. M/V Ya Mawlaya*, the parties at interest with the *Ya Mawlaya* were sued in New Orleans by the owners of the *New World* and various cargo and personal injury claimants as a result of a collision between the *Ya Mawlaya* and *New World* in international waters off the coast of Portugal.²⁶⁰ The *Ya Mawlaya* interests objected to the in personam jurisdiction of the federal court in Louisiana, and the district court dismissed the case because of a lack of minimum contacts between the *Ya Mawlaya* interests and the state of Louisiana. The question presented to the Fifth Circuit was whether jurisdiction could be established against the *Ya Mawlaya* interests based not only on their contacts with Louisiana, but with the United States as a whole.²⁶¹

The national contacts argument is based on Rule 4(k)(2) of the Federal Rules of Civil Procedure which provides:

If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.²⁶²

Under this rule, the federal court may assert personal jurisdiction over a foreign defendant “for claims *arising under federal law* when the defendant has sufficient contacts with the nation as a whole to justify the imposition of U.S. law but without sufficient contacts to satisfy the due process concerns of the long-arm statute of any particular state.”²⁶³ The question in *World Tanker Carriers* was “whether admiralty actions arise under federal law, an issue of first impression for this Court.”²⁶⁴ In *Romero v. International Terminal Operating Co.* the Supreme Court held that

statutes involving loan guarantees, *see, e.g.*, Kirby Corp. v. Peña, 109 F.3d 258, 1997 AMC 2074 (5th Cir. 1997) (discussing review of loan guaranties under Title XI of Merchant Marine Act), and discharges into wetlands, *see, e.g.*, United States v. Banks, 115 F.3d 916 (11th Cir. 1997) (discussing violations of Clean Water Act), *cert. denied*, 66 USLW 3297, 66 USLW 3470, 66 USLW 3472 (U.S. Jan. 20, 1998) (No. 97-602).

260. *See* *World Tanker Carriers Corp. v. M/V Ya Mawlaya*, 99 F.3d 717, 719, 1997 AMC 305 (5th Cir. 1996).

261. *See id.* at 723, 1997 AMC at 313.

262. FED. R. CIV. P. 4(k)(2).

263. *World Tanker Carriers*, 99 F.3d at 720, 1997 AMC at 308.

264. *Id.*

maritime claims are not within the federal question jurisdiction which applies to civil actions “arising under the Constitution and laws of the United States.”²⁶⁵ However, the Fifth Circuit in *World Tanker Carriers* held that the phrase “arising under federal law” in Rule 4(k)(2) “refers not only to federal question cases as understood in [section] 1331 but to all substantive federal law claims.”²⁶⁶ Considering maritime law to be federal law, the Fifth Circuit “conclude[d] that federal law includes admiralty cases for the purposes of Rule 4(k)(2).”²⁶⁷ Therefore, the court remanded the case for “the plaintiff to make a *prima facie* showing of defendant’s nationwide minimum contacts.”²⁶⁸

The holding in *Romero* that admiralty claims do not fall within the federal question jurisdiction, has led to confusion when admiralty claims interface with other federal jurisdictional statutes. Thus, the Fifth Circuit has held that admiralty claims cannot be removed under the section of the removal statute²⁶⁹ which allows removal of “[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States”²⁷⁰ However, the removal statute also permits removal of “any civil action brought in a State court of which the district courts of the United States have original jurisdiction”²⁷¹ as long as “none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.”²⁷² Considering that federal courts have original jurisdiction over admiralty claims,²⁷³ the Fifth Circuit has stated that admiralty claims

265. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 377–80 (1959) (interpreting 28 U.S.C. § 1331 (1994)).

266. *World Tanker Carriers*, 99 F.3d at 722, 1997 AMC at 311.

267. *Id.* at 723, 1997 AMC at 313.

268. *Id.* at 723, 1997 AMC at 312. In connection with diversity jurisdiction under 28 U.S.C. § 1332, the Fifth Circuit held in *Torres v. Southern Peru Copper Corp.*, 113 F.3d 540, 544 (5th Cir. 1997), that “a corporation incorporated in the United States with its principal place of business abroad is solely a citizen of its ‘State’ of incorporation.”

269. See *In re Dutile*, 935 F.2d 61, 63, 1991 AMC 2979, 2981 (5th Cir. 1991).

270. 28 U.S.C. § 1441(b) (1994).

271. *Id.* § 1441(a).

272. *Id.* § 1441(b).

273. See *id.* § 1333. Section 1333(1) provides: “The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.” *Id.* § 1333(1).

“are ‘removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which the action is brought.’”²⁷⁴

The offshore drilling and exploration industry provides an area in which admiralty law and jurisdiction must interface with another federal statute, the Outer Continental Shelf Lands Act (OCSLA).²⁷⁵ For mineral exploration and development on the Outer Continental Shelf,²⁷⁶ the OCSLA provides a sweeping “assertion of national authority . . . at the expense of both foreign governments and the governments of the individual states.”²⁷⁷ The OCSLA contains a broad grant of jurisdiction to the federal district courts over “cases and controversies arising out of, or in connection with . . . any operation conducted on the outer Continental Shelf which involves exploration, development, or production of the minerals, of the subsoil and seabed of the outer Continental Shelf”²⁷⁸ The Fifth Circuit has recognized that, as the federal courts have original jurisdiction over outer Continental Shelf disputes, suits arising out of oil and gas activities on the outer Continental Shelf may also be removed to federal court.²⁷⁹ In *Tennessee Gas Pipeline v. Houston Casualty Insurance Co.* the Fifth Circuit addressed a suit by the owner of a fixed platform against the insurer of a tug whose towed vessel allided with the platform while the tug’s helmsman read a novel.²⁸⁰ The suit asserted maritime claims and was brought in Louisiana state court.²⁸¹ When the insurer removed the case to federal court, the platform owner moved to remand the case because the suit alleged only

274. *Dutile*, 935 F.2d at 63, 1991 AMC at 2982 (quoting 28 U.S.C. § 1441(b)).

275. Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356 (1994). For a discussion of the relationship between the OCSLA and state statutes with regard to liens arising out of drilling activities on the outer Continental Shelf, see *Gardes Directional Drilling v. U.S. Turnkey Exploration Co.*, 98 F.3d 860 (5th Cir. 1996).

276. The outer Continental Shelf is defined as “all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.” 43 U.S.C. § 1331(a).

277. *Tennessee Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 153, 1996 AMC 2296, 2299 (5th Cir. 1996).

278. 43 U.S.C. § 1349(b)(1).

279. See *United Offshore Co. v. Southern Deepwater Pipeline Co.*, 899 F.2d 405 (5th Cir. 1990); *Amoco Prod. Co. v. Sea Robin Pipeline Co.*, 844 F.2d 1202 (5th Cir. 1988).

280. See *Tennessee Gas Pipeline v. Houston Cas. Ins. Co.*, 87 F.3d 150, 152, 1996 AMC 2296 (5th Cir. 1996) (providing only summary in AMC).

281. See *id.*

maritime claims and no claims were alleged under the OCSLA.²⁸²

Even though admiralty law applied and was not displaced by the OCSLA, the Fifth Circuit treated the jurisdictional issue separately from the choice-of-law issue. In a broad sense, as the allision arose out of the platform owner's search for minerals on the OCS at the time of the allision, the original jurisdiction provision in the OCSLA was met.²⁸³ The next question was whether the case fell within the removal statute as a case arising under the laws of the United States or as a case over which the federal courts have original jurisdiction. Although as a maritime claim the case could not be removed under the section of the removal statute permitting removal of claims arising under federal law, the Fifth Circuit was not so sure that, as an OCSLA case, the case could not be removed under the "arising under" section of the statute: "Given the national interests that prompted Congress to pass OCSLA and grant broad jurisdiction under 43 U.S.C. § 1349, Congress arguably intended to vest the federal courts with the power to hear any case involving the OCS, even on removal, without regard to citizenship."²⁸⁴ The Fifth Circuit did not have to reach this issue because the defendant was a Texas citizen and the suit was brought in Louisiana.²⁸⁵ Since the defendant was not a citizen of the state in which the action was brought, the case could be removed under the "original jurisdiction" section of the removal statute, which permits removal of suits over which the district court would have original jurisdiction, because the federal court would have had original jurisdiction over the suit under the jurisdictional grant in the OCSLA.²⁸⁶

282. *See id.*

283. *See id.* at 154–55, 1996 AMC at 2301–02.

284. *Id.* at 156, 1996 AMC at 2303–04. The Fifth Circuit has previously held that there is "arising under" removal jurisdiction for injuries within areas of exclusive federal sovereignty. *See, e.g., Mater v. Holley*, 200 F.2d 123, 125 (5th Cir. 1952). The OCSLA extends "[t]he Constitution and laws and civil and political jurisdiction of the United States" to the OCS "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state . . ." 43 U.S.C. § 1333(a)(1) (1994).

285. *See Tennessee Gas Pipeline*, 87 F.3d at 156, 1996 AMC at 2303.

286. *See id.* For procedural issues arising out of the assertion of a lack of in personam jurisdiction in removed cases, see *Allen v. Okam Holdings, Inc.*, 116 F.3d 153, 154 (5th Cir. 1997) (holding the Fifth Circuit lacked appellate jurisdiction to review interlocutory order dismissing a defendant for lack of

After resolving preliminary jurisdictional issues, admiralty courts can turn to more unique features of maritime practice and procedure, such as admiralty's early version of tort reform, the Limitation of Vessel Owner's Liability Act.²⁸⁷ In *Suzuki of Orange Park, Inc. v. Shubert*, Suzuki, a seller of recreational watercraft, invited customers to an event on navigable waters demonstrating its recreational watercraft.²⁸⁸ A passenger on a Seadoo Explorer owned by Suzuki was injured when he fell off the watercraft on a slalom course and was struck by another watercraft.²⁸⁹ After the passenger brought a suit against Suzuki in state court, Suzuki brought a limitation action in federal court.²⁹⁰ The district court granted the passenger's motion for summary judgment, denying Suzuki limitation, because the passenger sought to hold Suzuki liable for its president's (Jerry Blount) negligent supervision during the demonstration of the Seadoo Explorer²⁹¹ and, as a corporation, Suzuki would have "privity or knowledge"²⁹² of its president's actions.²⁹³

The Eleventh Circuit agreed "that Suzuki necessarily possesses privity and knowledge with respect to all of the acts of Blount."²⁹⁴ However, the Eleventh Circuit was not willing "to assume that Suzuki can be held vicariously liable

personal jurisdiction); *Marathon Oil Co. v. Ruhrgas, A.G.*, 115 F.3d 315, 318 (5th Cir.) (declining to adopt a mandatory order in which jurisdictional issues must be decided), *cert. denied*, 118 S. Ct. 413 (1997).

287. Limitation of Vessel Owner's Liability Act, 46 U.S.C. app. §§ 181-189 (1994).

288. *See Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1061, 1997 AMC 457 (11th Cir. 1996).

289. *See id.* at 1062, 1997 AMC at 459.

290. *See id.*

291. *See id.*

292. 46 U.S.C. app. § 183(a) (1994). Section 183 of the Limitation of Vessel Owner's Liability Act provides:

The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

Id.

293. *See Suzuki*, 86 F.3d at 1065, 1997 AMC at 463.

294. *Id.*

only through Blount.”²⁹⁵ The court could “envision a set of circumstances under which Suzuki could be exposed to liability based on the actions of someone other than Blount.”²⁹⁶ If Suzuki could be held liable for actions of someone whose privity or knowledge did not bind the corporation, then “Suzuki’s rights under the Limitation Act may be in jeopardy” because it would be “possible that Suzuki [would] have to pay damages exceeding the limitation fund for acts occurring without its privity or knowledge.”²⁹⁷ The fact that the passenger had not pled any theory other than the negligence of Blount did not prevent the passenger from amending his pleadings to assert other theories, and there was no reason that other defendants in the case could not file cross claims against Suzuki asserting other theories of liability.²⁹⁸ Therefore, the Eleventh Circuit remanded the case to determine whether any stipulations would protect Suzuki’s interests.²⁹⁹

One of the unique features of maritime practice is the in rem action.³⁰⁰ In *Beauregard, Inc. v. Sword Services L L C*, the holder of the first preferred ship mortgage arrested the vessel *Dragon I* in an in rem proceeding.³⁰¹ Two other entities then intervened in the seizure and also arrested the vessel to assert their maritime liens.³⁰² Each of the three parties which

295. *Id.*

296. *Id.* at 1066, 1997 AMC at 464.

297. *Id.* at 1066, 1997 AMC at 465.

298. *See id.*

299. *See id.* at 1066–67, 1997 AMC at 466. In *Bouchard Transportation Co. v. Florida Department of Environmental Protection*, 91 F.3d 1445, 1996 AMC 2889 (11th Cir. 1996), the Eleventh Circuit remanded the limitation action to the district court to determine whether the Florida Department of Environmental Protection was entitled to Eleventh Amendment immunity from a shipowner’s limitation action when the department was seeking to pursue oil pollution claims on behalf of the state of Florida. *See id.* at 1448–49, 1996 AMC 2892–94.

300. *See* FED. R. CIV. PROC. SUPP. C.

301. *See* *Beauregard, Inc. v. Sword Servs. L L C*, 107 F.3d 351, 352, 1997 AMC 1788, 1788 (5th Cir. 1997).

302. *See id.* In *Trico Marine Operators, Inc. v. Falcon Drilling Co.*, 116 F.3d 159, 162–63, 1997 AMC 2546, 2549–50 (5th Cir. 1997), the Fifth Circuit held that supply boat services to a drilling vessel (transporting supplies for the crew, and equipment and supplies for drilling activities conducted by the drilling vessel) were necessaries under the Maritime Lien Act, 46 U.S.C. § 31342(a)(1) (1994), so as to provide a maritime lien. The Fifth Circuit also held that Century Offshore Management Corp., which entered into a Daywork Drilling Contract with the owner of the drilling vessel and which ordered the services, had authority to procure necessaries for the drilling vessel. *See Trico Marine Operators*, 116 F.3d. at 162, 1997 AMC at 2549.

seized the vessel was ordered to pay a third of the custodia legis expenses.³⁰³ Sword Services was then allowed to intervene in the seizure but declined to pay a share of the custodia legis expenses.³⁰⁴ The mortgagee moved the court to dismiss the intervention, but the district court instead ordered Sword Services to seize the vessel and share the expenses of its custody.³⁰⁵ Sword failed to comply with the order, and the district court dismissed its intervention.³⁰⁶

The Fifth Circuit initially noted that the district court had the power to place conditions on the intervenor's participation in the seizure.³⁰⁷ However, Sword Services pointed out that maritime lienors have often been permitted to intervene in in rem actions without being required to seize the property or share in the custodia legis expenses.³⁰⁸ The Fifth Circuit responded that "at most" this showed "that the district court was not *required* to condition intervention on Sword seizing the vessel, and sharing in the cost of maintaining her."³⁰⁹ The Fifth Circuit concluded that "in its inherent powers to manage this litigation properly, the district court had the discretion to order a party to seize the vessel and divide the cost of the ship's maintenance among all the parties."³¹⁰

If the seized vessel or property is not released by the posting of security, it is subject to a judicial sale. In *Latvian Shipping Co. v. Baltic Shipping Co.*, the M/V *Sverdlouk* was attached and numerous creditors intervened to assert claims.³¹¹ ARE Shipping Limited was the highest bidder at the auction at \$3.7 million, but four parties later objected to confirmation of the sale, alleging inadequacy of ARE's bid,

303. See *Beauregard*, 107 F.3d at 352 & n.1, 1997 AMC at 1788 & n.1.

304. See *id.* at 352, 1997 AMC at 1788-89.

305. See *id.*

306. See *id.* at 352, 1997 AMC at 1789. Another dismissal of a lienor's intervention was involved in *Isbrandtsen Marine Services v. M/V Inagua Tania*, 93 F.3d 728, 1997 AMC 912 (11th Cir. 1996). The order of the district court, rejecting an intervention on behalf of the crew of the vessel and other related parties, which was filed on the date the vessel was scheduled for sale, was reversed because the district court did not give sufficient consideration to the seamen as wards of the court. See *id.* at 733-35.

307. See *Beauregard*, 107 F.3d at 353, 1997 AMC at 1790.

308. See *id.*

309. *Id.*

310. *Id.* The Fifth Circuit also found authority for the district court's order in 28 U.S.C. § 1921 and in the district court's "broad equitable authority over the administration of maritime seizures." *Id.* at 354, 1997 AMC at 1791.

311. See *Latvian Shipping Co. v. Baltic Shipping Co.*, 99 F.3d 690, 691-92 & n.1, 1997 AMC 328, 329 & n.1 (5th Cir. 1996).

and one offered an upset bid of \$4.7 million.³¹² The district court denied ARE's motion to confirm the sale, and a second auction was held at which ARE was the top bidder for \$5.25 million.³¹³ The district court confirmed the second sale subject to ARE's reservation of rights to appeal the denial of confirmation of the first sale.³¹⁴

In reviewing the district court's denial of confirmation of the first sale for abuse of discretion, the Fifth Circuit stated: "Until confirmation, an auction sale in admiralty may be set aside at any time, but extreme caution should be used in such actions."³¹⁵ The court recognized fraud, collusion, and gross inadequacy as grounds to set aside the sale, and added: "Absent fraud or collusion, the highest bid at a judicial sale should not ordinarily be rejected, yet the court does have power to do so if the price is so grossly inadequate as to shock the conscience."³¹⁶ Rather than basing its decision to deny confirmation on a substantial disparity between the sale price and the upset bid, the district court denied the confirmation because of the "inadequacy of the price as compared to the third-party claims against the vessel."³¹⁷ As this was not a proper application of the confirmation standard, the Fifth Circuit took the opportunity to review the confirmation request and denial de novo.³¹⁸

312. *See id.* at 692, 1997 AMC at 329.

313. *See id.*

314. *See id.* at 692, 1997 AMC at 329-30.

315. *Id.* at 692, 1997 AMC at 330.

316. *Id.*

317. *Id.* at 693, 1997 AMC at 331 (quotations omitted). There was no allegation of fraud or collusion in *Latvian Shipping Co.* The subject of sanctions was, however, raised in several other cases. *See, e.g.,* *Carroll v. The Jaques Admiralty Law Firm*, 110 F.3d 290, 294 (5th Cir. 1997) (affirming monetary sanction against defendant attorney "for his offensive and intimidating conduct, his disruption of discovery proceedings, and his lack of respect for the judicial process"); *Burma Navigation Corp. v. Reliant Seahorse M/V*, 99 F.3d 652, 658, 1997 AMC 2184, 2192 (5th Cir. 1996) (stating party cannot complain on appeal of district court failure to sanction party unless proper motion filed under FED. R. CIV. P. 11); *Galveston County Navigation Dist. No. 1 v. Hopson Towing Co.*, 92 F.3d 353, 356, 360, 1996 AMC 2850, 2854, 2860 (5th Cir. 1996) (reversing award of attorneys' fees assessed against vessel owners for willful and persistent failure to pay amounts plainly owed plaintiff based on a lack of support for "any determination that the defense position in or conduct of the litigation was so egregious and in bad faith as to authorize an award of attorneys' fees" in contravention of "American Rule" that the prevailing party ordinarily does not collect attorneys' fees from the loser).

318. *See Latvian Shipping Co.*, 99 F.3d at 693, 1997 AMC at 331.

The district court did not determine the fair market value of the vessel, but even if that value were as high as one estimate of \$8.7 million, the first sale price (\$3.7 million) was still 42.5% of the value, which is a higher percentage than those that other decisions found *not* to be grossly inadequate.³¹⁹ Moreover, the disparity between the \$3.7 million sale price and the \$4.7 million upset bid (27% greater) was far from the level found to be sufficient in other cases denying confirmation.³²⁰ Consequently, the Fifth Circuit reversed the district court and remanded the case with instructions to confirm the sale to ARE for \$3.7 million.³²¹

VI. ALLOCATION OF LOSS

Allocation of loss in the maritime sphere changed markedly after the enactment of anti-indemnity statutes in Texas³²² and Louisiana.³²³ The parties now litigate extensively

319. *See id.* at 694, 1997 AMC at 332–33.

320. *See id.* at 694, 1997 AMC at 333.

321. *See id.* at 694, 1997 AMC at 334.

322. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 127.001–127.007 (Vernon 1997). Section 127.003 provides:

- (a) Except as otherwise provided by this chapter, a covenant, promise, agreement, or understanding contained in, collateral to, or affecting an agreement pertaining to a well for oil, gas, or water or to a mine for a mineral is void if it purports to indemnify a person against loss or liability for damage that:
 - (1) is caused by or results from the sole or concurrent negligence of the indemnitee, his agent or employee, or an individual contractor directly responsible to the indemnitee; and
 - (2) arises from:
 - (A) personal injury or death;
 - (B) property injury; or
 - (C) any other loss, damage, or expense that arises from personal injury, death or property injury.

Id. § 127.003.

323. *See* LA. REV. STAT. ANN. § 9:2780 (West 1997). Section 2780 provides in pertinent part:

It is the intent of the legislature by this Section to declare null and void and against public policy of the state of Louisiana any provision in any agreement which requires defense and/or indemnification, for death or bodily injury to persons, where there is negligence or fault (strict liability) on the part of the indemnitee, or an agent or employee of the indemnitee, or an independent contractor who is directly responsible to the indemnitee.

Id. § 9:2780(A).

on the questions of whether the contract is subject to state³²⁴ or federal law³²⁵ and, when state law applies, as to methods of avoiding the particular statute.³²⁶ However, some litigation still occurs over traditional maritime agreements.³²⁷

In *Gaspard v. Offshore Crane & Equipment, Inc.*, a roustabout employed by Nabors Drilling Company was injured on the deck of a cargo ship, which was tied to a platform, while he helped unload drill pipe.³²⁸ The accident occurred when a crane on the platform malfunctioned causing the headache ball to fall on the worker.³²⁹ The time charter of the vessel from Seacor Marine to Chevron required Seacor to indemnify Chevron for:

“[A]ll liabilities . . . for personal injury or death . . . arising out of or in any way directly or indirectly connected with the performance of service under this agreement or the . . . carrying of cargo [or] loading or unloading of cargo [or] loading or unloading of passengers . . . , and whether or not caused or

324. See, e.g., *Roberts v. Energy Dev. Corp.*, 104 F.3d 782, 783, 786–87 (5th Cir. 1997) (remanding for choice of law determination as the contract contained choice of law provision for application of general maritime law and Texas law but accident occurred in Louisiana waters).

325. Judge Garwood indicated that he was “troubled by the tension, or perhaps outright inconsistency, between many of our opinions in this area.” *Thurmond v. Delta Well Surveyors*, 836 F.2d 952, 957, 1988 AMC 2763, 2771 (5th Cir. 1988) (Garwood, J., concurring).

326. See, e.g., *Hodgen v. Forest Oil Corp.*, 115 F.3d 358, 361, 1997 AMC 2701 (5th Cir. 1997) (providing only summary in AMC)(barring, under Louisiana Act, platform owner/vessel charterer found 85% liable from recovering defense costs under indemnification agreement, “even those incurred in defending a legal theory under which it was found not liable”); *Greene’s Pressure Testing & Rentals, Inc. v. Flourney Drilling Co.*, 113 F.3d 47, 51–52 (5th Cir. 1997) (holding indemnity provision void because of noncompliance of supporting insurance provisions with Texas Anti-Indemnity Act); *Roberts*, 104 F.3d at 785 (finding oral work order to install safety systems on platforms in Louisiana state waters pertains to well within the Louisiana Oilfield Indemnity Act); *Lloyds of London v. Transcontinental Gas Pipe Line Corp.*, 101 F.3d 425, 430 (5th Cir. 1996) (finding indemnity agreement in contract for sandblasting and painting services covering an injury at a meter off Texas coast pertained to well and was void under Louisiana Oilfield Anti-Indemnity Act).

327. For a typical insurance donnybrook after a marine accident, see *Reliance Ins. Co. v. Louisiana Land & Exploration Co.*, 110 F.3d 253 (5th Cir. 1997).

328. See *Gaspard v. Offshore Crane & Equipment, Inc.*, 106 F.3d 1232, 1234, 1997 AMC 1858, 1859 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 691 (1998).

329. See *id.*

contributed to by the negligence, strict liability or fault of Charterer”³³⁰

The contract also required Seacor to purchase protection and indemnity insurance naming Chevron as an additional insured and omitting language limiting Chevron’s “coverage to damages incurred ‘as owner of the vessel.’”³³¹ The policy purchased by Seacor from Anglo-American Insurance Company contained a provision deleting the “as Owner” clause as may be contractually required.³³²

The Fifth Circuit has repeatedly addressed indemnification provisions in charters of vessels by platform owners and has held “that indemnification for any claim that ‘arises out of or is incident to performance’ of a time charter agreement does not apply to liability for a platform crane operator’s negligence.”³³³ In *Gaspard*, however, the indemnity clause contained a “definite change” in scope by the inclusion of the “loading or unloading” language.³³⁴ The Fifth Circuit reasoned: “In response to Fifth Circuit case law, Chevron went out of its way to include ‘loading or unloading’ in the indemnification agreement. It also went out of its way to state unambiguously that Chevron’s own negligence would not stand in the way of indemnification.”³³⁵ Consequently, the court held “that Seacor’s agreement to indemnify Chevron embraces Chevron’s liability for the negligent operation of its platform crane while unloading the [vessel].”³³⁶

Prior Fifth Circuit cases have denied to platform owners the benefit of the vessel’s P&I insurance “unless there is ‘some causal operational relation between the vessel and the resulting injury.’”³³⁷ Chevron also modified the insurance provision to omit the “as Owner” language in response to Fifth Circuit decisions. The Fifth Circuit reasoned:

330. *Id.* at 1234, 1997 AMC at 1859 (omissions and second and third alterations in original).

331. *Id.*

332. *See id.* The failure to procure contractually required insurance can lead to liability of the broker and insurance consultant. *See Huval v. Offshore Pipelines, Inc.*, 86 F.3d 454, 459, 1996 AMC 2765, 2771 (5th Cir. 1996).

333. *Gaspard*, 106 F.3d at 1235, 1997 AMC at 1861 (quoting *Smith v. Tenneco Oil Co.*, 803 F.2d 1386, 1389, 1987 AMC 1681, 1685 (5th Cir. 1986)); *see also Lanasse v. Travelers Ins. Co.*, 450 F.2d 580, 1972 AMC 818 (5th Cir. 1971).

334. *Gaspard*, 106 F.3d at 1235, 1997 AMC at 1862.

335. *Id.* at 1236, 1997 AMC at 1862.

336. *Id.* at 1236–37, 1997 AMC at 1863–64.

337. *Id.* at 1237, 1997 AMC at 1864 (quoting *Lanasse*, 450 F.2d at 584, 1972 AMC at 823).

When Chevron went out of its way to omit the clause, and when Anglo-American consented to including Chevron as an additional insured without limiting coverage to Chevron's liabilities sustained "as owner" of the Long Island, the parties created a protection and indemnity policy that could be interpreted to extend coverage to Chevron's vessel-related negligence committed as platform operator.³³⁸

Consequently, the court held: "The deletion of the 'as owner' clause created at least a genuine issue of material fact as to whether Anglo-American's policy covered vessel-related liabilities involving Chevron's negligence in its capacity as a platform operator."³³⁹

The application of state law in marine insurance disputes can lead to a complex partnership between state and federal authority.³⁴⁰ In 1970 Louisiana enacted the Insurance Guaranty Association Law, creating the Louisiana Insurance Guaranty Association (LIGA) to pay claims in the event members of LIGA became insolvent.³⁴¹ However, "ocean marine insurance" was excluded from LIGA's obligations.³⁴² When the Louisiana Supreme Court addressed the issue whether a claim for maritime related injuries, brought on a Standard Workmen's Compensation and Employers' Liability insurance policy, involved "ocean marine insurance, the court held that it did not so that the claim was not excluded from coverage by LIGA."³⁴³ The Louisiana statute was quickly amended to add a definition that would include within the exclusion of ocean marine insurance any form, "regardless of

338. *Id.* at 1238, 1997 AMC at 1867.

339. *Id.* at 1239, 1997 AMC at 1867.

340. For example, when an insurer denies coverage to an insured in connection with an injury claim against the insured, the coverage dispute between the insurer and insured may be stayed pending arbitration; but, under Louisiana law, the injured worker is not subject to the arbitration clause and may proceed with his direct action against the insurer. *See Zimmerman v. International Cos. & Consulting, Inc.*, 107 F.3d 344, 347, 1997 AMC 1812, 1814 (5th Cir. 1997).

341. *See* LA. REV. STAT. ANN. §§ 22:1375-1394 (West Supp. 1995). The LIGA "is a private nonprofit unincorporated legal entity" which requires insurers to "remain members of the association as a condition of their authority to transact insurance in [Louisiana]." *Id.* § 22:1380(A).

342. *Id.* § 22:1377.

343. *Deshotels v. SHRM Catering Serv., Inc.*, 538 So.2d 988, 993 (La. 1989).

the name, label or marketing designation of the insurance policy, which insures against marine perils or risks.”³⁴⁴

In *Blair v. Sealift, Inc.* the Fifth Circuit dealt with an action against LIGA for the settlement and cost of defending a Jones Act suit initially brought in 1984.³⁴⁵ The dispute with LIGA was “appealed to [the Fifth Circuit]; consolidated with a number of similar cases; forwarded by [the Fifth Circuit] together with a certified case to the Louisiana Supreme Court; decided by [the Fifth Circuit] on the basis of the answer to the question certified; remanded to the district court; and, now, appealed once again to [the Fifth Circuit].”³⁴⁶ After more than a decade of litigation, the Fifth Circuit departed from its prior decision, applied the supervening amendment to the Louisiana statute, and held that LIGA was not obligated to cover the claim.³⁴⁷

VII. CONCLUSION

The past several terms of the Supreme Court have brought a number of decisions from the Court addressing important questions facing admiralty judges, such as the tests for admiralty jurisdiction and seaman status, the standard of care in longshore third-party cases, and the allocation of damages between maritime tortfeasors. The law in these areas had reached a point of confusion as the Supreme Court allowed the maritime law to develop by “sifting” through the lower courts.³⁴⁸ The decisions of the Court have not always immediately resulted in “placid waters,”³⁴⁹ however. Nonetheless, the admiralty judges of the Supreme Court and the circuit courts will continue to develop admiralty and maritime law within the jurisdiction described by Justice Story:

[T]hat maritime jurisdiction, which commercial convenience, public policy, and national rights, have contributed to establish, with slight local differences, over all Europe; that jurisdiction, which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon

344. LA. REV. STAT. ANN. § 1379(9).

345. See *Blair v. Sealift, Inc.*, 91 F.3d 755, 757 (5th Cir. 1996).

346. *Id.*

347. See *id.* at 762.

348. See *Moragne v. States Marine Lines*, 398 U.S. 375, 408, 1970 AMC 967, 993 (1970).

349. *Id.*

commended itself to all the maritime states; that jurisdiction, in short, which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable Consolato del Mare, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind.³⁵⁰

350. *De Lovio v. Boit*, 7 F. Cas. 418, 443, 1997 AMC 550 602-03 (C.C.D. Mass. 1815) (No. 3,776).