

**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 Supreme Court decided two maritime cases during the 1997–1998 term. In the case of *California v. Deep Sea Research, Inc.*,<sup>1</sup> the Court clarified, and slightly narrowed, the states' Eleventh Amendment immunity from suits *in rem*,<sup>2</sup> sixteen years after *Treasure Salvors*<sup>3</sup> announced that immunity.<sup>4</sup> The Supreme Court's decision in *Dooley v. Korean*

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†. Judge, United States Court of Appeals for the Fifth Circuit.

1. 118 S. Ct. 1464 (1998).

2. *Deep Sea Research* held that Eleventh Amendment immunity did not apply when the state did not have possession of the res. *See id.* at 1473.

3. *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982).

4. *See Deep Sea Research*, 118 S. Ct. at 1472–73 (distinguishing *Treasure Salvors*, in which the property under dispute was in possession of the state, from the present case, in which it was not, and holding that the longstanding assumption of the federal courts' "in rem admiralty jurisdiction over vessels that are not in the possession of a sovereign" supports federal jurisdiction over the vessel despite the Eleventh Amendment).

*Air Lines Co.*,<sup>5</sup> a Death on the High Seas Act (DOHSA)<sup>6</sup> case, is more generally applicable. In *Dooley*, the Court standardized the law of maritime death cases, holding that there can be no action under general law for something that is disallowed under DOHSA.<sup>7</sup> The opinion serves as an interesting example of how the courts deal with multiple statutes, any of which could provide a vehicle for recovery.

## II. CHANGING NATURE OF MARITIME CASES

With the Supreme Court maintaining its traditional low profile, the responsibility for resolving the apparently unending flow of undecided maritime issues remains with the circuits, and the Fifth and Eleventh Circuits bear a disproportionate share of that responsibility.<sup>8</sup> The docket of the Fifth Circuit reflects, in part, the changing nature of maritime commerce and the way America uses the sea. Most significantly, the maritime docket seems to change from year to year with the economy, and especially the price of oil. The docket also changes as plaintiffs' lawyers, who have a choice of where to file, and defendants' lawyers, who can choose whether to remove cases to federal court, evaluate the friendliness (or perceived lack of same) of the Fifth Circuit to their clients' interests.

Recent disputes include whether offshore workers should be considered "seamen" under the Jones Act<sup>9</sup> and whether they should be covered under the Longshore Act.<sup>10</sup> Another issue is whether it makes sense for substantive standards of

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5. 118 S. Ct. 1890 (1998).

6. 46 U.S.C. app. §§ 761-767 (1994).

7. See *Dooley*, 118 S. Ct. at 1894-95.

8. During 1998, there were 12 maritime cases decided by the Fifth Circuit and 9 decided by the Eleventh Circuit.

9. 46 U.S.C. app. § 688 (1994). See, e.g., *Lane v. Grand Casino of Miss., Inc.*, 708 So. 2d 1377, 1382 (1998) (holding that a janitor on a riverboat casino is not a Jones Act seaman); *Texaco, Inc. v. Gulf Coast Contracting Serv., Inc.*, 613 So. 2d 1193, 1202 (Miss. 1993) (finding that a roustabout on a welding barge used to reconstruct an offshore fixed platform was not a Jones Act seaman).

10. See *Herb's Welding Inc. v. Gray*, 470 U.S. 414, 425 (1985) (holding that a welder working on a fixed offshore oil drilling rig platform in state territorial waters was not engaged in "maritime employment" within the meaning of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950 (1994)).

liability and damages to depend on such distinctions as whether an oilrig is floating or fixed to the sea bottom.<sup>11</sup>

Another example of how the circuits have had to cope with and recognize the legal problems attendant to the oil industry is the *Margate Shipping*<sup>12</sup> case. In that marine salvage case, an oil tanker rescued a cargo barge.<sup>13</sup> One of the factors used to determine the salvage award is the risk of peril to the salvor.<sup>14</sup> Our court recognized that the tanker crew faced not only the loss of the oil tanker and its cargo, but also potentially faced catastrophic environmental liability from an oil spill.<sup>15</sup>

Finally, courts have been forced to deal with the changing nature of maritime commerce, from loose cargo to containerization. This past year, in the *Anglia*<sup>16</sup> case, the Eleventh Circuit confronted the question of whether a contract for services in a container port could confer admiralty jurisdiction.<sup>17</sup> Specifically the court decided whether certain services provided in container ports could be considered "maritime in nature."<sup>18</sup> The answer was a qualified no.<sup>19</sup> Most of the cargo-handling activities, such as containerizing and breaking bulk, had no particular relationship to maritime shipping; rather, they could have been performed hundreds of miles inland.<sup>20</sup>

There are two points behind these examples. One is that while the Fifth and Eleventh Circuits are, and always have been, maritime-intensive, the nature of the maritime caseload continues to change. The other point is perhaps more important: The changing nature of how we do business

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11. *See id.* at 417 & n.2.

12. *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976 (5th Cir. 1998).

13. *See id.* at 980.

14. *See id.* at 984 (citing *The Blackwall*, 77 U.S. (10 Wall.) 1, 14 (1869), for the six factors the Court used to determine the amount of salvage award: 1) Labor expended by the salvors in rendering the salvage service; 2) Promptitude, skill, and energy in rendering the service and saving the property; 3) Value of the property used by the salvors and the danger to which the property was exposed; 4) Risk of peril to the salvors; 5) Value of the property saved; and 6) Degree of danger from which the property was saved).

15. *See Margate Shipping*, 143 F.3d at 985.

16. *Inbesa Am., Inc. v. M/V Anglia*, 134 F.3d 1035 (11th Cir. 1998).

17. *See id.* at 1035-36.

18. *Id.* at 1036.

19. *See id.* at 1038.

20. *See id.* at 1037.

forces us to constantly redefine and reapply the ancient concepts of maritime law.

### III. MARITIME JURISPRUDENCE

Of course, not all novel issues of law stem from new ways of doing business. For example, the Fifth Circuit recently issued a pair of decisions that deal with the “delivery” standard under the Carriage of Goods by Sea Act (COGSA).<sup>21</sup> The *U.N./F.A.O. World Food Programme*<sup>22</sup> and *Servicios-Expoarma*<sup>23</sup> cases involved straightforward carriage contracts and uncontainerized cargo.<sup>24</sup> These cases presented factual situations no different from what one might have found fifty or a hundred years ago. For the first time, however, the court formulated a rule to determine precisely when “delivery,” as defined by the statute, had occurred.

Admiralty, of course, is one of the foremost areas in which federal judges engage in substantive rulemaking and, some might say, policymaking. General maritime causes of action require the courts to act like a state supreme court, vested with the power and duty to craft common law rules of civil liability. But even within the framework of what is nominally statutory interpretation, we must devise substantive rules and standards. For example, while the Jones Act covers only the crewmen of “vessels,”<sup>25</sup> it fails to define what a “vessel” is.<sup>26</sup> Does the term include a barge or a riverboat casino that never moves from its dock, or a floating oilrig?<sup>27</sup>

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21. 46 U.S.C. app. §§ 1300–1315 (1994).

22. *U.N./F.A.O. World Food Programme v. M/V Tay*, 138 F.3d 197 (5th Cir. 1998).

23. *Servicios-Expoarma, C.A. v. Industrial Maritime Carriers, Inc.*, 135 F.3d 984 (5th Cir. 1998).

24. *See id.* at 986–87; *U.N./F.A.O. World Food Programme*, 138 F.3d at 198–99.

25. Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 902(3)(G) (1994) (providing a compensation remedy for maritime workers, but excluding “member[s] of a crew of any vessel,” who are covered under the Jones Act); *see also* *Barrett v. Chevron, Inc.* 781 F.2d. 1067, 1070 (explaining that the LHWCA and case law have narrowed the Jones Act to apply only to the seaman of vessels).

26. 33 U.S.C. §§ 902(3)(G), 902(21) (the statute exempts “master[s] or member[s] of a crew of any vessel”, leaving this class of workers covered only by the Jones Act, yet LHWCA defines “vessel” as a vessel).

27. Several circuit courts have addressed what qualifies as a “vessel” under the Jones Act. The Ninth Circuit held that a barge in transit for a maximum of four days out of a five month period was not a “vessel in navigation.” *Delange v.*

The Fifth Circuit decides maritime cases in the context of its recent opinion in *Servicios-Expoarma, C.A.*,<sup>28</sup> a COGSA case. Although many attorneys' maritime practices are mostly, or even exclusively, in the area of personal injury rather than COGSA, the *Servicios* case highlights how the court balances and utilizes traditional maritime common law, the plain words of the statutes, and analogies to other areas of the law to reach a conclusion on an issue of first impression.

This case raised at least two issues of first impression. The first, and more significant, is when "delivery," as used in COGSA, occurs for purposes of triggering the one-year period allowed for filing suit for damage to goods.<sup>29</sup> The second issue is the question of which side, the consignee/plaintiff or the carrier/defendant, bears the burden of showing the extent of damage to each package for purposes of the \$500 per package limit set forth in the statute.<sup>30</sup>

The facts of the case are simple. The carrier unloaded the cargo, which was transferred into a customs warehouse before the consignee had access to it.<sup>31</sup> The goods remained in the customs warehouse for ten days.<sup>32</sup> When the consignee took actual possession, the extensive damage to the goods was discovered.<sup>33</sup>

The consignee and shipper did not file suit promptly.<sup>34</sup> The statute states that the carrier is not liable "unless suit is brought within one year after delivery of the goods."<sup>35</sup> Suit was filed more than a year after the carrier placed the goods in the warehouse, but less than a year after the consignee

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Dutra Constr. Co., 153 F.3d 1055, 1057 (9th Cir. 1998); *see also* Kathriner v. Unisea, Inc. 975 F.2d 657, 660 (9th Cir. 1992) (holding that a floating fish processing plant is not a "vessel in navigation"). The Fifth Circuit held that a "workover rig" was a vessel, a floating dockside casino moored indefinitely was not a vessel, and a "midstream bulk cargo transfer barge" was not a vessel. *See* Manuel v. P.A.W. Drilling & Well Serv., Inc., 135 F.3d 344, 351 (5th Cir. 1998); Pavone v. Mississippi Riverboat Amusement Corp., 52 F.3d 560, 570 (5th Cir. 1995); Burchett v. Cargill, Inc., 48 F.3d 173, 178 (5th Cir. 1995).

28. 135 F.3d at 984 (Smith, J.).

29. 46 U.S.C. app. § 1303(6) (1994).

30. *See id.* § 1304(5).

31. *See Servicios-Expoarma*, 135 F.3d at 986–87.

32. *See id.*

33. *See id.* at 987.

34. *See id.*

35. 46 U.S.C. app. § 1303(6) (1994).

received the goods and had an opportunity to inspect them for damage.<sup>36</sup>

Naturally, the key question became what the statute means by the word “delivery.”<sup>37</sup> Surprisingly, no federal court of appeals had yet decided when delivery occurs under this statutory section.

The court began by looking to other areas of maritime law. Most limitations periods begin running when the cause of action accrues.<sup>38</sup> For example, under the Jones Act, suit must be commenced “within three years from the day the cause of action accrued.”<sup>39</sup>

Fortunately for the maritime personal injury plaintiffs’ lawyers, the court did not alter the well-established “discovery rule,” which provides that a cause of action should not accrue until the plaintiff has actual or constructive knowledge of its existence.<sup>40</sup> Instead, the court observed that the COGSA limitations period makes no reference to when the cause of action accrues, but instead pegs the running of limitations to an extrinsic event: when the goods were delivered.<sup>41</sup> Actual receipt by the consignee is irrelevant.<sup>42</sup> This is solely a matter of statutory interpretation.

The *Servicios-Expoarma* case is indicative of the growing trend by the Fifth Circuit and the Supreme Court to take statutes at face value. There is, therefore, a noticeable tendency away from trying to enact policy or trying to interpret the intent of Congress if it had squarely confronted the disparity between the Jones Act accrual standard<sup>43</sup> and the COGSA extrinsic event standard.<sup>44</sup> The Fifth Circuit

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36. See *Servicios-Expoarma*, 135 F.3d at 987.

37. 46 U.S.C. app. § 1303(6).

38. See *Servicios-Expoarma*, 135 F.3d at 988.

39. 45 U.S.C. § 56 (1994) (stating the statute of limitations under the Jones Act).

40. See *Servicios-Expoarma*, 135 F.3d at 988. The court described the discovery rule as “[a] cause of action under the Jones Act and general maritime law accrues when a plaintiff has a reasonable opportunity to discover his injury, its cause, and the link between the two.” *Id.* (quoting *Crisman v. Odeco, Inc.*, 932 F.2d 413, 415 (5th Cir. 1991)).

41. See *id.*; see also 46 U.S.C. app. § 1303(6).

42. See *Servicios-Expoarma*, 135 F.3d at 988.

43. 45 U.S.C. § 56 (1986).

44. 46 U.S.C. app. § 1303(6) (stating that “the carrier . . . shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods”).

decided this issue despite the fact that, in some cases, the result is to deny a reasonable opportunity to inspect.

In interpreting the meaning of the word delivery, The court also looked to what it perceived as the common understanding of the words delivery<sup>45</sup> and receipt.<sup>46</sup> It concluded that delivery is an act of the carrier, while receipt is an act of, quite naturally, the recipient.

The opinion then addressed the legislative history.<sup>47</sup> In theory, where the text of a statute is plain, a review of legislative history is unnecessary.<sup>48</sup> Justice Scalia's view is that using legislative history is like walking into a cocktail party and glancing around the crowd to find your friends.<sup>49</sup> However, once it is determined that the statute is plain and unambiguous, it is legitimate to consult legislative history, and if it supports the plain language of the statute, then to cite it as supportive material.

In COGSA's legislative history, the Fifth Circuit found some friends at the cocktail party, especially from a committee hearing.<sup>50</sup> The court also examined consistent pre-COGSA caselaw from the circuit, stretching all the way back

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45. See *Servicios-Expoarma*, 135 F.3d at 989 (quoting BLACK'S LAW DICTIONARY 1268 (6th ed. 1990) to define "receive" as to "take into possession and control; accept custody of; collect," and "delivery" as "[t]he act by which the res or substance thereof is placed within the actual or constructive possession or control of another").

46. See *id.* (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY 1894 (1986) which defines "receive" as "to take possession or delivery of," and "deliver" as to "give, transfer, yield possession or control of, make or hand over").

47. See *id.* at 990 (examining the legislative history of COGSA).

48. See *id.* at 990 & n.7.

49. See *id.*; see also ANTONIN SCALIA, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS (1997), reprinted in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 36 (1997) (expressing Justice Scalia's view that legislative intent should not be used to interpret a statute because it is too extensive and there is something in it for everyone).

50. See *Servicios-Expoarma*, 135 F.3d at 992.

One committee member pointed out that in such a case, the consignee does not know of the damage and cannot avail himself of the three-day-notice burden-shifting provision, unless the three days begins when the consignee receives the goods. . . . "Should not it be three days after the receipt of the goods by the person entitled to them?" The answer was unequivocal: "No, sir." So, consistently with the principles of *Russo*, the committee seemed to agree that under COGSA, "delivery" was accomplished by relinquishing the goods to the land carrier, who is not necessarily the ultimate consignee.

*Id.*

to 1930.<sup>51</sup> Nonetheless, the legislative history was, on the whole, inconclusive.<sup>52</sup>

Yet, one matter remained to be decided. Having determined that delivery is the triggering event, the court needed to state when that delivery occurred. For this, it looked to the “custom of the port doctrine.”<sup>53</sup> The court stated that “while contract and maritime law generally will dictate into whose custody an ocean carrier is required to deliver cargo, such law will be overridden by the established law or custom of the port of delivery.”<sup>54</sup> Here the record reflected that the custom and laws of the Venezuelan port at issue “require ocean carriers to deliver cargo to an authorized customs warehouse pending clearance.”<sup>55</sup>

Having reached this tentative result, the court finally addressed whether that approach is fair.<sup>56</sup> Here, it recognized that the result was arguably harsh.<sup>57</sup> The opinion observed, however, that under the particular facts of this case, the result was not unfair, as the plaintiffs knew of the damage early on and simply waited too many months before suing.<sup>58</sup>

Having made its categorical pronouncements, the court included a footnote saying that if the facts had been dramatically different, and the goods had languished in the customs warehouse for over a year, making it literally impossible for the plaintiffs to discover the damage, the court might have used equitable tolling.<sup>59</sup> The court reserved this question for another day. This approach is consistent with the general notion that courts should not decide issues more broadly than required to decide the particular case at hand.

Another issue of first impression addressed in the *Servicios* case was only applicable to COGSA cases. The question was which side had the burden of proof to show the damage sustained by each of the packages in question, given

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51. *See id.* at 991.

52. *See id.* at 992.

53. *Id.* at 993 (citing *Tan Hi v. United States*, 94 F. Supp. 432, 435 (N.D. Cal. 1950) (defining “custom of the port doctrine” as “the common law requirements of proper delivery . . . modified by the custom, regulations, or law of the port of destination”).

54. *Id.*

55. *Id.*

56. *See id.* (explaining how limitation periods exist for the sole benefit of defendants).

57. *See id.*

58. *See id.* at 993–94.

59. *See id.* at 994 n.23.

the \$500 per-package limit imposed by the statute.<sup>60</sup> Here, the court engaged in common-law law making, using basic concepts from tort law. Under COGSA, the plaintiff has the obligation to show the damages sustained by each package, although the defendant has the burden of establishing the availability of the \$500 limitation.<sup>61</sup>

The *Afram Carriers*<sup>62</sup> case examines how courts deal with binding case law even in the face of harsh results. In that case, the Fifth Circuit addressed the propriety of a choice of forum clause in a settlement agreement related to a Limitation Act proceeding, in an appeal from Judge Rainey's court in Houston.<sup>63</sup>

The facts are sad indeed. A ship arrived at a Peruvian port and was ordered to be fumigated.<sup>64</sup> Mr. Panta, a security guard, died inhaling the fumes from the fumigation operation.<sup>65</sup> Panta's survivors entered into a settlement, releasing all claims against the owner and operator of the ship in both Peruvian and American courts, in exchange for the Peruvian equivalent of \$2,000, about one year's wages for Mr. Panta.<sup>66</sup> Importantly, the agreement contained Peruvian choice of law and forum selection clauses stating that "any issue arising out of this Agreement will be subject to the exclusive jurisdiction of the Peruvian courts applying Peruvian law."<sup>67</sup>

At about the time of the settlement, the shipowner initiated Limitation Act proceedings in federal court and served all claimants, except Panta's survivors who were involved in the settlement.<sup>68</sup> When the Pantas finally found out about the Limitation Act proceeding, they sought to intervene and assert a wrongful death claim.<sup>69</sup> Judge Rainey

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60. *See id.* at 994–95; 46 U.S.C. app. § 1304(5).

61. *See Servicios-Expoarma*, 135 F.3d at 994–95 (describing the defendant's burden as the following: "[T]he burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him." (quoting *The Vallescura*, 293 U.S. 296, 303 (1934))).

62. *Afram Carriers, Inc., v. Moeykens*, 145 F.3d 298 (5th Cir. 1998).

63. *See id.* at 300.

64. *See id.*

65. *See id.*

66. *See id.*

67. *Id.* at 300 & n.1.

68. *See id.* at 300.

69. *See id.*

denied intervention, citing the forum selection clause to which the Pantas had agreed.<sup>70</sup>

The Pantas argued that the settlement was procured through fraud, duress, and overreaching, and that by inference, the forum selection clause was similarly procured.<sup>71</sup> The court rejected that argument, using binding circuit precedent and the policies underlying forum selection clauses, especially the interest in comity and deference to the integrity of foreign courts.<sup>72</sup> The conclusion was that unless the forum selection clause itself was procured by fraud, the court would require the parties to go to the selected forum and let those courts decide the validity of the settlement.<sup>73</sup>

The Pantas also argued that enforcing the forum selection clause would thwart the Limitation Act's goal of "equitable resolution" of disputes.<sup>74</sup> On one hand, the Limitation Act calls for resolving all claims at one time, by one court.<sup>75</sup> On the other hand, the Act favors promoting settlement and subsidizing shipbuilders, as a matter of worldwide competitiveness.<sup>76</sup> Because the settlement with the Pantas served one of these goals, the court determined that the overall intent of the Limitation Act had not been thwarted.<sup>77</sup>

#### IV. RECENT DECISIONS IN THE ELEVENTH CIRCUIT

The Eleventh Circuit case of *Broughton v. Florida International Underwriters, Inc.*<sup>78</sup> is another significant case. It raises the question of the application of the Supreme Court's decision in *Grubart* on the issue of conferring

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70. *See id.* at 300 & n.1.

71. *See id.* at 301.

72. *See id.* "The Supreme Court has . . . instructed American courts to enforce [forum-selection] clauses in the interests of international comity and out of deference to the integrity and proficiency of foreign courts." *Id.* (quoting *Mitsui & Co., Inc., v. MIRA M/V*, 111 F.3d 33, 35 (5th Cir. 1997) (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985))).

73. *See Afram Carriers, Inc.*, 145 F.3d at 302 & n.3. This principle is explained in the recent Fifth Circuit case of *Haynsworth v. The Corporation*, 121 F.3d 956, 963 (5th Cir. 1997) (stating that claims of fraud and overreaching must be specific to the forum selection clause in order to invalidate it).

74. *Afram Carriers, Inc.*, 145 F.3d at 302.

75. *See id.* at 303.

76. *See id.* at 302.

77. *See id.* at 302-03.

78. 139 F.3d 861 (11th Cir. 1998).

maritime jurisdiction over business torts, such as fraud.<sup>79</sup> The Eleventh Circuit said there was no maritime jurisdiction, because the claim failed the location test.<sup>80</sup> The claim failed because the alleged tort, the breach of duty by an insurance broker to provide coverage from a solvent insurer, had occurred entirely on land.<sup>81</sup> The result of this decision is to limit or deny admiralty jurisdiction over most business torts, as distinguished from contracts.

The inapplicability of the discovery rule to COGSA cases was discussed earlier.<sup>82</sup> In the case of *White v. Mercury Marine, Inc.*,<sup>83</sup> the Eleventh Circuit applied the discovery rule to the general maritime statute of limitations.<sup>84</sup> The plaintiff incurred hearing loss through exposure to noisy outboard motors.<sup>85</sup> He sued long after he learned he was losing his hearing, but he argued a continuing violation because of continued exposure to the noise.<sup>86</sup> As noted earlier in the discussion of COGSA, the general maritime limitations statute requires personal injury actions to be filed within three years of when the cause of action "accrues."<sup>87</sup> In this instance, the application of the discovery rule helped the defendant, because the statute was deemed to begin running when the plaintiff learned of the injury.<sup>88</sup> The growing consensus among the courts is that the concept of accrual generally incorporates the discovery rule.<sup>89</sup>

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79. See *id.* at 865; see also *Jerome B. Grubart, Inc., v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (stating the two part test, location and connection with maritime activity, used to determine if a party can assert federal admiralty jurisdiction over tort claims).

80. See *Broughton*, 139 F.3d at 865.

81. See *id.*

82. See *supra* note 40 and accompanying text.

83. 129 F.3d 1428 (11th Cir. 1997).

84. See *id.* at 1435; 46 U.S.C. app. § 763a (1994).

85. See *Broughton*, 129 F.3d at 1429.

86. See *id.* at 1429-30.

87. See 46 U.S.C. app. § 763a. The statute states, "Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued." *Id.*

88. See *White*, 129 F.3d at 1435. The discovery rule is a "cause of action under the Jones Act and general maritime law accrues when a plaintiff has had a reasonable opportunity to discover his injury, its cause, and the link between the two." See *Crisman v. Odeco, Inc.*, 932 F.2d 413, 415 (5th Cir. 1991) (citing *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984)).

89. See, e.g., *White*, 129 F.3d at 1434; *Clay v. Union Carbide Corp.*, 828 F.2d 1103, 1105-06 (5th Cir. 1987).

In the area of maintenance and cure, the Eleventh Circuit case of *Aksoy v. Apollo Ship Chandlers, Inc.*<sup>90</sup> is instructive. A wine steward on a cruise ship brought an action for maintenance and cure and sought recovery, not only for his wages and the tips guaranteed by his contract, but also for the substantially higher amount he actually earned from higher tips.<sup>91</sup> The court agreed, reiterating the controlling principle that a seaman should be placed in the same position he would have been in had he continued to work.<sup>92</sup> Thus, the court looked to the expectations of the parties, as established by custom and practice.<sup>93</sup>

#### V. RECENT DECISIONS IN THE FIFTH CIRCUIT

As to the question of which water-going structures may be considered “vessels” for purposes of the Jones Act, the Fifth Circuit case of *Manuel v. P.A.W. Drilling & Well Service, Inc.*<sup>94</sup> is instructive. The court held that a “spud barge” was a vessel.<sup>95</sup> A spud barge is a barge without means of propulsion, navigational aids, or crew quarters that is towed from jobsite to jobsite and “spudded” to the bottom.<sup>96</sup> Instead of looking to the twelve or so factors, the court’s opinions have mentioned from time to time,<sup>97</sup> it concentrated on only two: “the purpose for which the craft is constructed and the business in which it is engaged.”<sup>98</sup> The panel found that the barge was a vessel because it met both tests: it was

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90. 137 F.3d 1304 (11th Cir. 1998).

91. *See id.* at 1305 (discussing the background facts and causes of action in the case).

92. *See id.* at 1306 (citing *Flores v. Carnival Cruise Lines*, 47 F.3d 1120 (11th Cir. 1995)).

93. *See id.*

94. 135 F.3d 344 (5th Cir. 1998).

95. *Id.* at 346, 351 (noting that the spud barge in this case, Rig 3, was indistinguishable from special purpose crafts the court had previously concluded were vessels).

96. *See id.* at 346.

97. *See Gremillion v. Gulf Coast Catering Co.*, 904 F.2d 290, 293 (5th Cir. 1990) for an example of several other factors the Fifth Circuit has previously examined.

98. *Id.* at 347. (quoting *The Robert W. Parsons*, 191 U.S. 17, 30 (1903)). The Court discussed the divergent lines of cases which emerged in applying these two factors. *See id.* In one line of cases the court concluded that special purpose vessels, including spud barges, are vessels as a matter of law despite their work platform function. *See id.* & n.2. The court concluded in the second line of cases that when a structure is predominantly used as a work platform it is not considered a vessel. *See id.* & n.3.

intended to move over water to various jobsites,<sup>99</sup> and it was in fact engaged in that business.<sup>100</sup>

The Fifth Circuit case of *Crawford v. Falcon Drilling Co.*,<sup>101</sup> is an important interpretation of the 1997 Fifth Circuit *en banc* case of *Gautreaux v. Scurlock Marine, Inc.*,<sup>102</sup> which abolished the “slight negligence” standard.<sup>103</sup> In *Crawford*, the panel held that *Gautreaux* is to be applied retroactively to injuries that occurred before *Gautreaux* was decided and to cases where the district court ruled before *Gautreaux* was decided.<sup>104</sup>

The panel that decided *Crawford* also decided *Marceaux v. Conoco, Inc.*<sup>105</sup> Whereas *Gautreaux* increased a seaman's duty, *Marceaux* appears to limit it.<sup>106</sup> The panel held that a seaman has the duty to keep a work area safe only in the limited circumstances where he is solely responsible for that area.<sup>107</sup>

In regard to the LHWCA,<sup>108</sup> the Fifth Circuit heard oral argument *en banc* in May 1998 in *Bienvenu v. Texaco, Inc.*,<sup>109</sup> regarding LHWCA coverage.<sup>110</sup>

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99. *See id.* at 351.

100. *See id.* (noting specifically that Rig 3 was engaged in the business of “plugging and abandoning old wells situated at various locations in navigable waters”).

101. 131 F.3d 1120 (5th Cir. 1997).

102. 107 F.3d 331 (5th Cir. 1997).

103. *Id.* at 339.

104. *See Crawford*, 131 F.3d at 1124. The court stated, “When this court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.” *Id.* (quoting *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 97 (1993)).

105. 124 F.3d 730 (5th Cir. 1997). The panel in both cases consisted of Circuit Judges DeMoss and Dennis and District Judge Lee. *See id.* at 732; *Crawford*, 131 F.3d at 1124.

106. Compare *Gautreaux*, 107 F.3d at 336 (holding that the historical standard of ordinary prudence applied to seaman), with *Marceaux*, 124 F.3d at 735 (finding that “an additional contributory negligence instruction referencing the plaintiff’s alleged duty to make the workplace safe or to inspect the premises” is not warranted unless the “plaintiff was the only individual responsible for making sure the premises were safe”).

107. *See Marceaux*, 124 F.3d at 735 (noting that the *Kendrick* charge regarding contributory negligence would only be proper if the jury could have found that the injury in question “was due solely to the plaintiff’s failure to carry out his duty to his employer” (quoting *Matthews v. Ohio Barge Line, Inc.*, 742 F.2d 202, 205 (5th Cir. 1984))).

108. 33 U.S.C. §§ 901–950 (1994).

On the question of situs, the Fifth Circuit in *Sisson v. Davis & Sons, Inc.*<sup>111</sup> considered whether a heliport located one mile from the Gulf of Mexico and fifty yards from a navigable waterway could be within LHWCA coverage under what the statute calls an “adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.”<sup>112</sup> The court noted that the helicopters were not vessels, and because they shuttled men and supplies to and from fixed platforms, they were not engaged in loading or unloading vessels.<sup>113</sup> Therefore, the situs test was not met.<sup>114</sup>

The Fifth Circuit decided *Green v. Vermilion Corp.*<sup>115</sup> The plaintiff was injured on a boat while working for a company that provided services to a duck camp.<sup>116</sup> The question was whether compensation was provided under the LHWCA, general maritime law, or state workers' compensation.<sup>117</sup> The court held that the plaintiff was excluded from the LHWCA by the statute's “club/camp” exclusion.<sup>118</sup> On the other hand, the court found a sufficient admiralty nexus to state a claim for unseaworthiness under general maritime law.<sup>119</sup> More importantly, the court held that the general maritime claim was not precluded by the existence of the state workers' compensation scheme, which expressly purported to exclude such claims.<sup>120</sup> In effect, the panel held that federal common-law prevailed over state statutory law.

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109. 164 F.3d 901 (5th Cir. 1999) (en banc).

110. *See id.* at 908–10 (holding that a workman who is aboard a vessel fortuitously, even if in the course of employment, does not enjoy coverage under LHWCA, but work aboard the vessel is sufficient to trigger LHWCA coverage for injuries sustained on navigable waters).

111. 131 F.3d 555 (5th Cir. 1998).

112. *Id.* at 557 (quoting 33 U.S.C. § 903a (1994)).

113. *See id.* at 557–58.

114. *See id.* at 558.

115. 144 F.3d 332 (5th Cir. 1998).

116. *See id.* at 334.

117. *See id.* at 334, 336.

118. *Id.* at 334–35 (noting that the plaintiff was excluded from LHWCA coverage because he was “employed solely to render services to promote and maintain a duck camp”).

119. *See id.* at 336. The court used four factors to determine whether a sufficient nexus to maritime activity was met: “the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law.” *Id.*

120. *See id.* at 337–38.

The Fifth Circuit decided a case involving post injury earning capacity in *Avondale Industries, Inc. v. Pulliam*.<sup>121</sup> The employer showed forty-four jobs for which the injured worker was qualified.<sup>122</sup> The administrative law judge calculated the plaintiff's earning capacity by averaging the salaries of five jobs for which the plaintiff did not apply, despite the employer's contention that it was being penalized for finding so many jobs.<sup>123</sup> The panel held that the administrative law judge was permitted, but not required, to use such averaging methodology.<sup>124</sup> This is an example of the considerable deference the court gives to an administrative law judge's factual determinations.

In a collision case<sup>125</sup> the Fifth Circuit seems to have weakened the applicability of the Pennsylvania rule.<sup>126</sup> It was undisputed that barges were moored in a way that violated the Rivers and Harbors Act.<sup>127</sup> The panel held, however, that the statutory violation did not give rise to liability, because the mooring was not "a substantial and material factor in causing the collision."<sup>128</sup> It will be interesting to see what effect this decision will have on future cases.

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121. 137 F.3d 326, 327 (5th Cir. 1998) (analyzing the proper method of computing the earning capacity when the employer finds several suitable jobs for the claimant).

122. *See id.*

123. *See id.* at 327-29 (rejecting the employer's arguments that the administrative law judge should have considered all 44 jobs in his calculation).

124. *See id.* at 328.

125. *See American River Trans Co. v. Kavos Kaliakra SS*, 148 F.3d 446 (5th Cir. 1998).

126. *See The Steamship Pennsylvania v. Troop*, 86 U.S. 148, 151 (1873) (holding that when a ship is committing a statutory violation at the time of a collision it is considered to be at fault unless it shows "not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been"). The Fifth Circuit stressed that the Pennsylvania Rule is not a rule of ultimate liability but only affects who bears the burden of proof. *Kaliakra*, 148 F.3d at 450. Furthermore, the rule cannot be used to "justify a division of damages when the accident was undoubtedly due to the negligence of an offending vessel whose actions could not be anticipated." *Id.* (quoting *Dow Chemical Co. v. Dixie Carriers, Inc.*, 463 F.2d 120, 122 n.5 (5th Cir. 1972) (quoting *Webb v. Davis*, 236 F.2d 90, 93 (4th Cir. 1956))).

127. *See id.* at 449 & n.1 (assuming for purposes of the court's analysis that the plaintiff's permits were insufficient and hence in violation of the Rivers and Harbors Act, 33 U.S.C. § 403 (1994), which prohibited any obstruction in navigable waters not affirmatively authorized by Congress).

128. *Id.* at 450 (quoting *Inter-Cities Navigation Corp. v. United States*, 608 F.2d 1079, 1081 (5th Cir. 1979)).

Finally, in the *Margate Shipping*<sup>129</sup> case, the court modified but upheld the largest marine salvage award in history and provided extensive analysis of the current state of salvage law.<sup>130</sup> The case is interesting because the cargo that was saved was an external fuel tank for NASA's space shuttle on its way to Cape Canaveral.<sup>131</sup> The court engaged in a persuasive economic analysis of how to value the labor expended to complete the salvage.<sup>132</sup> The court reiterated that the purpose of salvage value calculation is roughly to approximate the amount the parties would have agreed on, had they contracted with each other prior to the occurrence.<sup>133</sup>

## VI. CONCLUSION

Maritime law is a combination of statutory imperatives, the gloss of Supreme Court and circuit caselaw, and an overriding jurisprudence of custom and practice unique to this very fascinating area of the law.

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129. *Margate Shipping Co. v. M/V JA Orgeron*, 143 F.3d 976 (5th Cir. 1998).

130. *See id.* at 979–80, 986–87.

131. *See id.* at 980.

132. *See id.* at 986–87.

133. *See id.* at 986.