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No. 61538-6-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

JUSTIN ENDICOTT,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

BRIEF OF APPELLANT ICICLE SEAFOODS, INC.

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I. INTRODUCTION

This case involves a personal injury claim under the Jones Act and under the general maritime law. Icicle Seafoods, Inc. (“Icicle”) asks this Court to review the trial court’s decision on two issues of significance to the practice of maritime law in Washington state courts, which include the defendant’s right to a jury trial and the availability of prejudgment interest. The remaining two issues involve the trial court’s rulings on certain evidentiary matters.

Whether a Jones Act defendant shares an equal right to demand a jury in Washington state courts is an issue of first impression for this Court. Icicle will argue that a Jones Act defendant shares equal rights to demand a jury based in part on the fact that there is no admiralty jurisdiction in state courts. The plain meaning of the Jones Act and substantive federal maritime law, as well as Washington constitutional law, all support a Jones Act defendant’s right to a trial by jury in Washington state courts. Icicle asserts that the trial court erred in denying Icicle’s timely jury demand and will ask this Court to remand this case for a jury trial.

Similarly, Icicle will argue that a plaintiff’s chosen forum, here state court, determines his entitlement, or lack thereof, to prejudgment

interest. Because state courts may never sit in admiralty, the rules regarding prejudgment interest in admiralty do not apply. Icicle will argue that both substantive federal maritime law and Washington law provide that prejudgment interest is not available in this case and that the trial court abused its discretion when it awarded prejudgment interest.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in denying Icicle's right to a jury trial and granting Endicott's motion to strike its jury demand by order dated July 9, 2007.
2. The trial court erred in awarding Endicott prejudgment interest in its Findings of Fact and Conclusions of Law dated January 11, 2008.
3. The trial court erred during the August 2007 trial by admitting and considering for the truth of the matter asserted the hearsay statement of witness Jason Jenkins.
4. The trial court erred during the August 2007 trial by rejecting and failing to fully consider relevant evidence regarding Endicott's mental health and addiction history.

B. Issues Pertaining to Assignments of Error.

1. Does a Jones Act defendant in a Washington state court, a court that does not have admiralty jurisdiction, have the right to request a jury given the plain language of the Act, given applicable substantive federal maritime and other state appellate law, and given Washington state constitutional law that strongly favors protection of each party's jury trial rights? (Assignment of Error 1.)

2. Federal maritime law does not allow prejudgment interest in mixed cases involving claims brought under the Jones Act and under the doctrine of unseaworthiness, but instead limits its availability to unseaworthiness claims brought in admiralty. Washington law requires that a claim for damages be liquidated for prejudgment interest to be available. Is a plaintiff who chooses to file his Jones Act and unseaworthiness claims in Washington state court, which is not an admiralty court, entitled to prejudgment interest at the state statutory rate when mandatory substantive federal maritime law would not entitle the seaman to prejudgment interest and when his damages are not liquidated? (Assignment of Error 2.)

3. During trial, Endicott offered and the trial court admitted the handwritten statement of a fellow crewmember, Jason Jenkins. The statement was dated after the Safety Manager's report of investigation and recounts various things about the accident including a quote of what Endicott allegedly stated. Neither Jenkins nor the Safety Manager was called at trial. While Endicott's counsel argued that the statement was not hearsay as it was part of the investigation and Jenkins was an agent of Icicle under ER 801(d), no evidence was presented to support that theory. The trial court relied on the statement in making its liability findings. Is the statement of Jason Jenkins non-hearsay under ER 801(d)(2)? (Assignment of Error 3.)

4. Also during trial, Icicle offered evidence regarding Endicott's addiction and mental health histories as an alternative explanation for his failure to return to the workforce during the four-year period from his injury to the date of trial as well as for its impact on his future earning capacity. Endicott objected under ER 403. While the trial court initially overruled that objection, it went on to reject and fail to consider evidence of Endicott's addiction and mental health issues. Is evidence of Endicott's mental health and addiction history relevant to his damage claims? (Assignment of Error 4.)

III. STATEMENT OF THE CASE

Respondent Justin Endicott (“Endicott”) filed a seaman’s complaint on January 20, 2006, in King County Superior Court pursuant to the saving to suitors clause. CP 3-6. In that complaint he made claims for personal injuries under the Jones Act and for unseaworthiness under the general maritime law for an arm injury he sustained while working for Icicle Seafoods, Inc. (“Icicle”) on May 1, 2003. CP 4. A bench trial was held in August 2007 before the Hon. Douglas McBroom. CP 114. Findings of Fact and Conclusions of Law were issued on January 11, 2008, in which the trial court awarded Endicott \$143,611 in damages and \$74,646.24 in prejudgment interest. CP 114-21; A-1. This timely appeal followed. CP 126-39.

Four assignments of error are raised in this appeal and the statements of fact (or statements of the case) are discussed below in conjunction with each separate issue. Because maritime cases are more commonly brought in federal district courts, a portion of this brief is devoted to the history and development of maritime law in state court settings in order to give this Court context and background.

IV. ARGUMENT

A. The Superior Court Erroneously Denied Icicle Its Right to a Jury Trial.

1. Summary of the Issue.

The trial court's order granting Endicott's motion to strike Icicle's jury demand contradicts Washington law and its reasoning is unsupported by federal law. A Jones Act plaintiff possesses the exclusive right to choose the forum: federal or state court. Once that choice is made, however, the laws of the forum determine whether a jury trial is allowed. For instance, if the plaintiff proceeds under the federal district court's admiralty jurisdiction, neither party may request a jury because there is no right to a jury in admiralty. See Fed. R. Civ. P. 38(d). However, if the plaintiff proceeds in a state court pursuant to the saving to suitors clause, the laws of the chosen jurisdiction dictate the parties' jury trial rights. This is in part because there is no admiralty jurisdiction in state courts.

Washington law strongly favors protection of the parties' jury trial rights. Article 1, section 21 of the Washington State Constitution unequivocally preserves the right to a jury trial for all "parties interested." Endicott's Jones Act case is an action at law pursuant to both the language of the statute as well as the fact that admiralty jurisdiction does not exist in Washington state courts. Thus, all parties enjoy the constitutionally

protected right to a jury trial in Jones Act cases tried in the Washington state courts. There is no distinction based on whether the party making the demand is a plaintiff or defendant. A Jones Act plaintiff's power to choose a non-jury trial exists only to the extent that he has the power to pursue his Jones Act claim in admiralty in federal district court.

Endicott cannot prohibit Icicle from demanding a jury trial when he elects to proceed at law in Washington state court because both plaintiffs and defendants are entitled to a jury trial in this forum. Thus, Endicott's initial complete control over whether his case will be tried by a judge or a jury comes only as a consequence of choosing his forum.¹ Once the plaintiff chooses his forum, the court's normal procedural regime, including any provision for a jury trial, applies.

2. Statement of Facts.

Prior to the August 2007 trial, Icicle made a timely jury demand according to the trial court case schedule on April 2, 2007. CP 11. Endicott moved to strike the jury demand and Icicle opposed that motion. CP 13-26; 29-31; 32-33; 35-50; and 51-55. The trial court granted

¹ See Hutton v. Consolidated Grain & Barge Co., 795 N.E.2d 303, 307 (Ill. App. 2003) (remarking that "The right to a trial by jury is merely an incident of proceeding at law.")

Endicott's motion to strike Icicle's jury demand on July 9, 2007. CP 56.

The trial court's reasoning was set forth as follows:

Rights of Seaman under the Jones Act to choose jurisdiction and forum² of trial is protected because Seaman were perceived to be required to bring personal injury actions in foreign jurisdictions and, as wards of the court, enjoyed the protections of the Jones [A]ct.

Id.; see also A-10.

3. Standard of Review.

Whether Icicle was entitled to a trial by jury pursuant to the Washington State Constitution and state and federal statutes "is a question of law and is reviewed de novo." State v. Norman, 145 Wn.2d 578, 589, 40 P.3d 1161 (2002) (construction of constitutional provision); AgriLink Foods, Inc. v. State Dep't of Revenue, 153 Wn.2d 392, 398, 103 P.3d 1226 (2005) (statutory construction).

4. Legal Analysis and Argument.

a. Maritime Claims Brought in State Courts.

(i) History and Development of the Law.

Article III, section 2 of the United States Constitution states in part

² It is unclear from the court's handwritten reasoning whether the word is "forum" or "form." This discrepancy has no bearing on this appeal.

that “[t]he judicial Power [of the United States] shall extend . . . to all Cases of admiralty and maritime jurisdiction. . . .” See also 28 U.S.C. § 1333(1). Cases brought in federal court pursuant to this grant of exclusive admiralty jurisdiction are tried to the bench because historically, there is no recognized right to a jury in admiralty. See Fed. R. Civ. P. 38(e); Wilmington Trust v. U.S. District Court, 934 F.2d 1026, 1029 (9th Cir. 1991). The federal district courts’ admiralty jurisdiction is “exclusive of the courts of the States.” 28 U.S.C. § 1333(1). This necessarily means that state courts do **not** have admiralty jurisdiction and can never decide Jones Act cases in admiralty. “Because admiralty jurisdiction is exclusively federal, a true ‘admiralty’ claim is never cognizable in state court....” Linton v. Great Lakes Dredge & Dock Co., 964 F.2d 1480, 1487 (5th Cir. 1992) (citing The Hine, 71 U.S. (4 Wall.) 555, 18 L. Ed. 451 (1866)).

Prior to 1966, the federal courts were divided into common law courts and admiralty courts. Wilmington Trust, 934 F.2d at 1029. In 1966, common law and admiralty courts were merged in the federal system. Id. Federal Rule 9(h) allows the pleader to elect “to proceed in admiralty on claims cognizable both in admiralty and the court’s general civil jurisdiction.” Id. (quoting Fed. R. Civ. P. 9(h) advisory committee’s

notes to 1966 amendment). “One of the most important procedural consequences [of this election] is that in a civil action either party may demand a jury trial, while in the suit in admiralty there is no right to a jury trial except as provided by statute.” Id. Thus, by pleading the case as one arising in admiralty under Rule 9(h), the plaintiff in federal court effectively has the right to preclude a defendant from having a jury trial.

The Jones Act was enacted in 1920 and allows an injured seaman to pursue negligence remedies in admiralty or at law, “with the right of a trial by jury.” 46 U.S.C. § 30104. The “‘new substantive rights’ created by the Jones Act consist solely of a ‘new’ maritime remedy whereby a seaman may choose to sue in negligence, and the right to file that suit either: (1) at law, with the attendant right to a trial by jury; or (2) in admiralty, where there is no right to a trial by jury.” Bowman v. American River Transp. Co., 838 N.E.2d 949, 955 (Ill. 2005), cert. denied, 547 U.S. 1040 (2006).

In addition to the Jones Act, an injured seaman may recover under the general maritime remedies of unseaworthiness and maintenance and cure. The doctrine of unseaworthiness allows the injured seaman to recover for injuries that result from conditions of or appurtenances to the vessel that are “not reasonably fit” for their intended purpose. Ribitzki v.

Canmar Reading & Bates, Ltd. Partnership, 111 F.3d 658, 664 (9th Cir. 1997). The doctrine of maintenance and cure is a “no-fault” system where the seaman who is injured or becomes ill in service to the vessel is entitled to maintenance (a set amount to cover room and board), cure (medical care until he reaches maximum cure), and unearned wages to the end of the voyage. Flunker v. U.S., 528 F.2d 239, 242 (9th Cir. 1975). Claims for unseaworthiness and maintenance and cure may be joined with a Jones Act claim in admiralty or in courts of law.

If Endicott wanted to preserve his exclusive right to determine jury or bench trial, he should have filed this action in the United States District Court, where that exclusive right exists. Instead, Endicott pursued this case in the common law courts of the state of Washington, where both Endicott and Icicle have the right to elect a trial by jury. The plaintiff “control[s] the choice between a bench and jury trial by using his choice of forum.”³ That is, the plaintiff desiring a bench trial may bring his case

³ Two of the most well respected admiralty scholars in the United States support this conclusion. In an article in 1999, Professors Sturley and Robertson analyzed this issue extensively and in 2004 published a follow-up article praising the Illinois decision. David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and In the Fifth and Eleventh Circuits*, 16 U.S.F. Mar. L.J. 147 (2003-04), hereinafter “Robertson and Sturley, Recent

in admiralty under 28 U.S.C. § 1333, as there, neither party is entitled to a jury trial.” Bowman, 838 N.E.2d at 956-57.

(ii) The Saving To Suitors Clause.

The saving to suitors clause, 28 U.S.C. § 1333(1),⁴ allows a state court to “adjudicate maritime causes of action in proceedings ‘in personam,’ that is, where the defendant is a person, not a ship or some other instrument of navigation.” Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1045 (9th Cir. 1997).

Therefore, a plaintiff with in personam maritime claims has three choices: He may file suit in federal court under the federal court’s admiralty jurisdiction, in federal court under diversity jurisdiction, . . . or in state court. The difference between these choices is mostly procedural; of greatest significance is that **there is no right to jury trial if general admiralty jurisdiction is invoked, while it is preserved for claims based in diversity or brought in state court.**

Developments.” See A-12. Articles published by Professors Sturley and Robertson include: *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. Mar. L. & Com. 649 (1999), hereinafter “Robertson and Sturley, The Right to a Jury Trial in Jones Act Cases” and *Understanding Panama R.R. Co. v. Johnson: The Supreme Court’s Interpretation of the Seaman’s Election Under the Jones Act*, 14 U.S.F. Mar. L. J. 229 (2001-02). A-94 and A-118, respectively.

⁴ “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.” 28 U.S.C. § 1333(1).

Id. (emphasis added); see also Williams v. Tide Water Associated Oil Co., 227 F.2d 791, 792 (9th Cir. 1955) (acknowledging plaintiff would possess an independent right to a jury trial on his unseaworthiness claim had he brought it in Washington state court). As noted below, both parties possess an independent right to a jury trial where the plaintiff pursues his Jones Act claim pursuant to the saving to suitors clause. Rachal v. Ingram Corp., 795 F.2d 1210, 1213 (5th Cir. 1986).

b. The Plain Language of the Jones Act Does Not Limit Icicle's Right to a Jury Trial in Washington State Courts.

By bringing this suit in Washington state court, Endicott preserved the right to a jury trial for both parties on his Jones Act and general maritime claims. See Hahn v. Nabors Offshore Corp., 820 So.2d 1283, 1285-86 (La. App. 2002). Although a Jones Act plaintiff enjoys the exclusive right to select the forum, the Jones Act does not prohibit a defendant from electing a jury trial in state court once that forum is chosen. The Jones Act states in relevant part, "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, **with the right of trial by jury.**" 46 U.S.C. § 30104 (emphasis added).

In using the words “**with *the right of trial by jury***,” instead of “**with *a right of trial by jury***,” the framers of the Jones Act refer to the normal right of parties proceeding at law to a jury trial. See Robertson and Sturley, *The Right to a Jury Trial in Jones Act Cases*, supra. A-94. The language of the Jones Act neither explicitly nor implicitly provides a plaintiff with a unilateral right to demand a jury trial when proceeding at law. This provision merely grants the Jones Act plaintiff the right to bring a case at law where a jury trial is available rather than in admiralty where no jury trial is available.

c. Federal Maritime Precedent Mandates Reversal for a Trial by Jury.

In *Panama R.R. Co. v. Johnson*, 289 F. 964, 969 (2d Cir. 1923), the Second Circuit recognized a Seventh Amendment right to a jury trial when a Jones Act plaintiff sues on the common-law side of federal court.⁵ “[W]hen a party came into the common-law court with a proceeding in personam, which he might have brought in the admiralty court, the cause was disposed of according to the procedure which governed that class of courts, and was tried to a jury.” Id. at 969. It follows that “once the Jones

⁵ The Second Circuit’s decision was affirmed by the Supreme Court at 264 U.S. 375 (1924).

Act plaintiff has made his forum choice, the Jones Act defendant has the same rights as any other defendant in the forum. **If defendants in the chosen forum normally have a right to a jury, then so does the Jones Act defendant.**” Robertson and Sturley, *The Right to a Jury Trial in Jones Act Cases*, A-94 (emphasis added). While the Seventh Amendment does not apply in state court, federal maritime law allows the Jones Act defendant to elect a jury trial where the state court provides such a right.

Endicott’s reliance below on Craig v. Atlantic Richfield Co., 19 F.3d 472 (9th Cir. 1994) overstates the holding in Craig and its application to this case. In fact, Craig supports Icicle’s position. The Craig decision did not address a defendant’s right to a jury in a Jones Act case proceeding in state court. See 19 F.3d at 475-76; see also Hutton, *supra*, 795 N.E.2d at 307. Rather, the Craig court’s holding was limited to whether a defendant has a right to demand a jury **in federal court** where the Jones Act is the “federal court’s **sole** basis for jurisdiction.” Craig, 19 F.3d at 475-76 (emphasis added).

Craig’s rejection of a defendant’s right to demand a jury trial was not absolute. The Craig court acknowledged that “both the defendant and the plaintiff have a right to demand a jury trial” when a case is brought pursuant to the federal court’s diversity jurisdiction. Craig, 19 F.3d at

476. Had the Ninth Circuit held that a Jones Act defendant never has a right to demand a jury, the diversity jurisdiction analysis would not have been necessary in reaching its holding. Craig's limited holding is inapplicable to this case and its recognition of the defendant's right to request a jury when the case is not solely under the court's admiralty jurisdiction fully supports Icicle's position.

The Craig court relied on Rachal, supra, 795 F.2d 1210. Craig, 19 F.3d at 476. In Rachal, the Fifth Circuit concluded that a plaintiff could withdraw a jury demand and designate the case as falling under Rule 9(h) without violating a defendant's Seventh Amendment jury trial right. 795 F.2d at 1216-17. Like the court in Craig, the Rachal court concluded that a defendant does not have a right to demand a jury trial in federal court where the court's **sole** basis for jurisdiction is the Jones Act. Id. at 1213-14. Nonetheless, this restriction was not absolute. In fact, "[w]hen there is diversity jurisdiction in Jones Act cases, **both parties have an independent basis for a jury trial if** the plaintiff has chosen to pursue his Jones Act claim through the 'saving to suitors' clause in a civil action." Id. at 1213 (emphasis added). It follows that both parties have an independent basis for a jury trial if the plaintiff chooses to pursue his

Jones Act claim through the saving to suitor clause in Washington's state courts.

Ultimately, the Rachal court simply recognized that no party has a right to a jury trial where the federal district court sits in admiralty. Neither Craig nor Rachal concluded that a Jones Act defendant could not demand a jury in state court. Indeed, both cases support Icicle's right to a jury in this case.

The Fifth Circuit's subsequent Linton decision demonstrates that state law dictates whether a Jones Act defendant has a right to a jury in state courts. As recognized by the Fifth Circuit, where a plaintiff elects to proceed "at law" on his maritime claims in a state court, "[p]rocedurally, whether he, **or the defendant**, would have a right to a trial by jury would depend on state civil procedure." Linton, supra, 964 F.2d at 1487 (citation omitted) (emphasis added). The Fifth Circuit refused to address arguments regarding whether a state civil rule requiring a bench trial violated the Louisiana constitution, noting that issue "is properly presented in Louisiana's courts." Linton, 964 F.2d at 1487 n.12.

In Linton, the Jones Act plaintiff elected to proceed in Louisiana state court pursuant to the saving to suitors clause and La. Code Civ. Proc. Ann., art. 1732(6). 964 F.2d at 1482. In an attempt to parallel federal

admiralty procedure, Louisiana enacted this statutory provision,⁶ to allow a plaintiff bringing a maritime action in Louisiana state courts to elect a bench trial. Linton, 964 F.2d at 1482-83 n.2. The defendant removed the case to the federal district court arguing that the plaintiff's art. 1732(6) election invoked "the exclusive admiralty jurisdiction of the federal courts." Id. at 1483. The district court refused to remand the case back to the state court. Linton, 964 F.2d at 1483.

On appeal to the Fifth Circuit, the plaintiff there challenged the propriety of the district court's refusal to remand. The Linton court decided that no federal bar denied "the Jones Act plaintiff in state court the right to a non-jury trial **if state procedure allows it.**" Linton, 964 F.2d at 1490 (emphasis added) ; see also Hutton, 795 N.E.2d at 307 (analyzing Linton). The Linton court ordered the case remanded to state court holding that art. 1732(6) had no jurisdictional affect. Id.

⁶ Former La. Code Civ. Proc. Ann., art. 1732(6) stated "A trial by jury shall not be available in: (6) A suit on an admiralty or general maritime claim brought under federal law that is brought in state court under a federal 'saving to suitors' clause, if the plaintiff has designated that suit as an admiralty or general maritime claim." Linton, 964 F.2d at 1483 n.1. Subsection (6) was amended in 1999 and the reference to maritime or admiralty claims was removed, leaving it to state "all cases where a jury trial is specifically denied by law." Art. 1732(6); Hahn, supra, 820 So.2d at 1285.

Although a Jones Act defendant's right to a jury trial in state court was not directly at issue in Linton, the court's consideration of a Louisiana procedural rule illustrates that Jones Act defendants are entitled to a jury in state courts, if a jury trial is allowed. Furthermore, Linton confirms that state law dictates the extent of the Jones Act defendant's right to a jury trial proceeding in state court. Had Rachal held that Jones Act defendants never have a right to a jury, Linton's consideration of Louisiana state law on the issue would have been superfluous, because a defendant's right to a jury would be settled.

d. Case Law From Other State Appellate Courts Provides Further Support for a Jones Act Defendant's Right to a Jury.

Although this issue is new to the appellate courts of Washington, appellate decisions in the states of Illinois and Louisiana are instructive. The Illinois Supreme Court recently affirmed a Jones Act defendant's right to demand a jury in state courts. Bowman, *supra*; see also Hutton, *supra*, (holding that "any right to jury trial (or nonjury trial) is governed by state law" where the case is brought in state court). After closely reviewing the plain language of the Jones Act and applying the "last antecedent" statutory construction principle, the Bowman court concluded:

[T]he phrase “at his election” modifies “may maintain an action for damages at law,” because the phrase “with the right of trial by jury,” is separated from the modifying phrase “at his election” by “maintain an action for damages at law.” Therefore, the rules of statutory construction clearly establish that the “election” referred to in the Jones Act is *not* the seaman’s election of a trial by jury, but his election to proceed “at law” rather than in admiralty.

838 N.E.2d at 954 (emphasis in original) (quoting Hutton) (internal citations and modifications omitted); see also Boeing Co. v. State Dep’t of Licensing, 103 Wn.2d 581, 587, 693 P.2d 104 (1985) (applying the “last antecedent” doctrine of statutory construction). Accordingly, the Bowman court held that a Jones Act defendant possessed a jury trial right in state court. Id.; see also Robertson and Sturley, Recent Developments, A-12.

In Hahn, the Jones Act plaintiff filed suit in Louisiana state court pursuant to the saving to suitors clause. 820 So.2d at 1284. There, the trial court denied the plaintiff’s motion to strike the defendant’s jury demand. Id. The Hahn court looked to state law and concluded that there was “no prohibition against” the defendant choosing a jury trial in state court, “regardless of the choice made by the plaintiff.” Id. at 1285. The Hahn court’s omission of any reference to Rachal and Linton, both of which originated in federal courts in Louisiana, illustrates that any

limitations on a Jones Act defendant's right to a jury simply do not apply in state courts.

As noted, this is an issue of first impression for Washington appellate courts and there is a split among the superior courts that have decided this issue. CP 16-26; CP 46-47; A-154. Several of those superior courts gave no reasoning for their decisions. Id. Those that decided the issue include Judge Michael Heavey, whose order noted that seaman have the right to proceed in admiralty or at law and if they choose law, the right to a jury follows. A-154. Judge Heavey correctly recognized that state superior courts do not have admiralty jurisdiction. Id.

The Bowman and Hahn cases and their harmony with federal maritime law, as discussed above, provide further support for this Court to determine that Jones Act defendants possess an independent right to demand a jury in Washington courts.

e. The Washington State Constitution and Statutory Provisions Protect the Right to a Jury Trial for All Parties.

Article 1, section 21 of the Washington State Constitution protects the right to a jury trial for all "parties interested" in state court civil proceedings. Sofie v. Fibreboard Corp., 112 Wn.2d 636, 644, 771 P.2d 711 (1989). Article I, section 21 provides:

The right to a trial by jury shall remain **inviolable**, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the **parties** interested is given thereto.

(Emphasis added). “[T]he term ‘inviolable’ connotes deserving of the highest protection[,]” meaning “that the right must remain the essential component of our legal system.” Sofie, 112 Wn.2d at 656. “From the earliest history of this state, the right to trial by jury has been **treasured** . . .” City of Pasco v. Mace, 98 Wn.2d 87, 99, 653 P.2d 618 (1982) (emphasis added). “The right to a jury trial in civil proceedings is protected solely by the Washington Constitution in article 1, section 21.” Sofie, 112 Wn.2d at 644. Therefore courts determining whether the right to a jury exists “must follow state doctrine [and be] based entirely on adequate and independent state grounds.” Id. at 644, n.4 (noting that even if the federal constitution applied, under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), the decision would be based on the Washington Constitution).⁷

⁷ Based on the Washington Supreme Court’s declaration that the right to a jury trial in Washington State courts is protected solely by the Washington Constitution and the federal constitution does not apply, a Gunwall analysis is not necessary to argue the protections of state law,

In determining whether the right to a jury trial exists under the Washington State Constitution, Washington courts “examine the right as it existed at the time of the adoption of our constitution in 1889.” Edgar v. City of Tacoma, 129 Wn.2d 621, 625, 919 P.2d 1236 (1996); Sofie, 112 Wn.2d at 645-46 (recognizing the jury’s constitutional role in determining damages in civil matters). The right to a jury trial attaches to those causes of action “in which a jury trial was available at common law as of 1889 and to actions created by statutes in force at this same time allowing for a jury.” Sofie, 112 Wn.2d at 648.

The right to a jury trial attaches to a Jones Act action despite the fact that it was not yet enacted in 1889. “If the right to a jury trial applies only to those *theories of recovery* accepted in 1889-rather than the types of actions that, at common law, were heard by a jury at that time-then the constitutional right to a jury trial would diminish over time.” Sofie, 112 Wn.2d at 648 (emphasis in original).

because only state law applies. Furthermore, as noted by the Washington Supreme Court in Sofie, even if federal law did apply, under Gunwall, the decision would be based on state law. Sofie, 112 Wn.2d at 644, n.4. Accordingly, Icicle will rely on Sofie to satisfy any Gunwall analysis necessary.

The right to a jury determination of a negligence claim is well established in Washington state courts. A personal injury claim based on negligence “presents the same cause of action for personal injury which was well recognized a century ago, and is therefore, a cause of action to which the right to a jury attaches.” Edgar, 129 Wn.2d at 627. “Whether negligence is established by a fair preponderance of the evidence, or whether the evidence is ‘equally balanced,’ is a factual determination reposed **exclusively** in the jury by the constitution and laws of this state.” Hawley v. Mellem, 66 Wn.2d 765, 773, 405 P.2d 243 (1965) (emphasis added) (citing Wash. Const. art. 1, sect. 21 and RCW § 4.44.090).

In Sofie, the Washington State Supreme Court found an act limiting the recovery amount of general damages to be unconstitutional because it encroached upon constitutional protections, “by denying litigants the essential function of the jury.” 112 Wn.2d at 651 (stating that “the legislature cannot intrude into the jury’s fact-finding function in civil actions.”). The Sofie court recognized that although the appellants asserted “newer” tort theories, the “heart” of their “cause of action was centered on negligence and willful or wanton misconduct resulting in personal injury.” Id. at 649-50. The Court noted that those “basic tort theories” existed at common law in 1889. Id.

Likewise, although it is a “newer” tort theory, the “heart” of a Jones Act action is “centered on negligence.” See Bowman, *supra*, 838 N.E.2d at 955. In fact, the plain language of the Jones Act itself provides “the right of a trial by jury.” 46 U.S.C. § 30104. Therefore, the parties both enjoy the right to a jury trial in a Jones Act action brought in Washington state courts.

Finally, several Washington state statutes emphasize the parties’ right to a jury trial. For instance, RCW § 4.40.060 provides, “[a]n issue of fact, in an action for the recovery of money only, or of specific real or personal property **shall** be tried to a jury, unless a jury is waived, as provided by law, or a reference ordered, as provided by statute relating to referees.” (emphasis added). Furthermore, RCW § 4.48.010 states that, “[**a**]ny party **shall** have the right in an action at law, upon an issue of fact, to demand a trial by jury.” (allowing for the referral to a referee upon consent of the parties) (emphasis added).

In sum, the plain language of the Jones Act, federal maritime jurisprudence, case law from other state appellate courts, and Washington State constitutional and statutory protections all mandate a Jones Act defendant’s right to a trial by jury.

B. The Superior Court Abused Its Discretion in Awarding Endicott Prejudgment Interest.

1. Summary of the Issue.

As with the jury demand issue addressed above, a plaintiff's choice of forum determines his entitlement, or lack thereof, to prejudgment interest. Prejudgment interest is generally available in suits brought in federal courts sitting in admiralty. While a state court may hear maritime claims pursuant to the saving to suitors clause, it can never sit in admiralty. As such, the rule regarding prejudgment interest "in admiralty" cannot apply.

A state court hearing Jones Act and unseaworthiness claims is bound to apply federal substantive law. Under federal maritime law, prejudgment interest is not authorized by the Jones Act and it is widely recognized that prejudgment interest is not available for Jones Act claims brought at law in either federal or state courts. In contrast, federal maritime law does authorize prejudgment interest for unseaworthiness claims brought "in admiralty." When Jones Act and unseaworthiness claims are combined in a single action, a number of federal courts have held that prejudgment interest is not available. Washington has joined these federal courts in finding that prejudgment interest should not be awarded in these mixed Jones Act and unseaworthiness cases.

Finally, to the extent that Washington law applies to this question, it, too, dictates that prejudgment interest is not available in a seaman's action for negligence and unseaworthiness. Washington law requires that a claim for damages be liquidated or readily determinable in order to qualify for prejudgment interest. Because claims such as Endicott's involve general damages, which can never be considered liquidated, prejudgment interest is not authorized under Washington law.

Because the trial court's decision to award prejudgment interest was contrary to both federal and state law, the trial court abused its discretion, and its decision must therefore be reversed.

2. Statement of Facts.

After the trial and the issuance of its preliminary opinions, the trial court ordered additional briefing on the issue of an award of prejudgment interest. CP 90-92; 100-112. The trial court issued its Findings of Fact and Conclusions of Law on January 11, 2008. CP 118; A-1. Citing Paul v. All Alaskan Seafoods, Inc., 106 Wn. App. 406, 24 P.3d 447 (Div. I, 2001), the trial court found that as a "successful general maritime plaintiff," Endicott was entitled to prejudgment interest at 12% per annum from May 1, 2003 (the date of injury) to August 29, 2007 (the date of the court's opinion). Id. The final judgment entered by the superior court therefore

included an award of \$143,611 (of this, \$110,000 was for general damages, \$3,000 for past medicals, and \$30,611 for past wage loss) and an additional \$74,646.24 for prejudgment interest. CP 118, 120, 123.

3. Standard of Review.

Under Washington law, a trial court's award of prejudgment interest is reviewed for abuse of discretion. Scoccolo Const., Inc. v. City of Renton, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).⁸ A trial court abuses its discretion when its decision is contrary to applicable law. In re Jannot, 110 Wn. App. 16, 22, 37 P.3d 1265 (Div. III, 2002).

4. Legal Analysis and Argument.

a. While Prejudgment Interest Is Generally Available in Federal Courts Sitting in Admiralty, a State Court Can Never Sit in Admiralty.

In federal courts sitting in admiralty, prejudgment interest is

⁸ It bears noting that federal courts also review an award of prejudgment interest for abuse of discretion, but review *de novo* the question of whether state or federal law determines the availability and amount of such an award. See, e.g., Oak Harbor Freight Lines, Inc. v. Sears Roebuck, & Co., 513 F.3d 949, 954 (9th Cir. 2008). At least one Washington jurist has agreed that the question of whether prejudgment interest is authorized in a given case is a question of law to be reviewed *de novo*. See Ernst Home Center, Inc. v. Sato, 80 Wn. App. 473, 492-94, 910 P.2d 486 (Div. I, 1996) (concurring opinion of J. Forrest). Icicle maintains that it was improper under either the abuse of discretion or *de novo* standard for the trial court to award prejudgment interest in this case.

awarded unless there are peculiar circumstances justifying its denial. City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 195, 115 S. Ct. 2091, 132 L.Ed.2d 148 (1995). As outlined above, admiralty jurisdiction is exclusive to the federal courts. U.S. Const., Art. III, Sec. 2; 28 U.S.C. § 1333(1). While state courts are granted authority to hear maritime cases under the saving to suitors clause, they may never exercise admiralty jurisdiction. Linton, 964 F.2d at 1487 (“Because admiralty jurisdiction is exclusively federal, a true ‘admiralty’ claim is never cognizable in state court; no ‘designation’ or state procedure can alter this.”) (citing The HINE, supra). Instead, maritime actions brought in state court must necessarily be at law. See, e.g., Mendez v. Ishikawajima-Harima Heavy Industries Co., Ltd., 52 F.3d 799, 800 (9th Cir. 1995) (“The saving-to-suitors clause allows claimants to pursue actions for maritime torts **at law** either in state courts or in federal courts pursuant to diversity jurisdiction.”) (emphasis added). Because a state court can only hear maritime claims brought at law and cannot sit in admiralty, it cannot predicate an award of prejudgment interest on the notion that it is acting in admiralty.

b. Prejudgment Interest Is Not Authorized under Federal Maritime Law for Cases Involving Jones Act and Unseaworthiness Claims.

(i) State Courts Hearing Maritime Cases Must Apply Substantive Federal Maritime Law.

Where a state court hears a case involving maritime claims, it is widely recognized that it is to apply federal substantive law. See, e.g., Militello v. Ann & Grace, Inc., 576 N.E.2d 675, 676 (Mass. 1991). While the states retain the ability to enact legislation that affects maritime commerce, state law is preempted by federal maritime law where it “contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations.” Southern Pac. Co. v. Jensen, 244 U.S. 205, 216, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).

Because prejudgment interest is a part of the measure of damages a plaintiff may recover, questions concerning its availability are a matter of substantive law. Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330, 335, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988). As such, state courts should apply federal maritime law with respect to the question of whether prejudgment interest is available. Militello, 576 N.E.2d at 678 (collecting

cases); Derouen v. Mallard Bay Drilling, LLC, 808 So.2d 694, 709 (La. App. 2001) (“An award of prejudgment interest in state maritime cases is substantive in nature such that federal law controls.”).

(ii) Prejudgment Interest Is Not Available under the Jones Act.

The Jones Act grants seamen the rights and remedies provided to railroad workers under the Federal Employers’ Liability Act (FELA). As noted earlier, the Jones Act provides:

Any seaman who shall suffer personal injury in the course of his employment may ... maintain an action for damages at law ... and in such action all such statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply [.]

46 U.S.C. § 30509. While prejudgment interest is generally available in claims brought under the general maritime law, the United States Supreme Court has held that prejudgment interest is not available under FELA and thus, by incorporation, under the Jones Act. In Monessen, the Court unequivocally held that railway workers who bring claims under FELA cannot recover prejudgment interest. 486 U.S. at 336-39. Moreover, the Court held that this prohibition against recovering prejudgment interest in FELA cases is a matter of substantive law. Id. at 335-36.

The Court's reasoning was based on the fact that at the time FELA was enacted, the common law did not allow for prejudgment interest in personal injury suits, and there was nothing in the statute to indicate that Congress intended otherwise. Id. at 337-38. The Court noted that FELA had been amended since its enactment, but Congress had never altered the statute to provide for prejudgment interest. Id. at 338-39.

As outlined above, the Jones Act expressly incorporates FELA by reference. 46 U.S.C. § 30509. The United States Supreme Court recognized this in its first Jones Act case, stating:

The reference, as is readily understood, is to [FELA] and its amendments. This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference.

Panama R. Co. v. Johnson, 264 U.S. 375, 391-92, 44 S. Ct. 391, 68 L. Ed. 748 (1924). More recent examples of the Supreme Court's continued recognition that the Jones Act incorporates FELA include American Dredging Co. v. Miller, 510 U.S. 443, 455-56, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994), and Miles v. Apex Marine Corp., 498 U.S. 19, 23-24, 111 S. Ct. 317, 112 L. Ed. 2d 275 (1990).

Because Congress intended to apply FELA's rules in Jones Act cases, it follows that judicial interpretations of FELA also apply to the

Jones Act.⁹ As the United States Supreme Court found in American Dredging, “the Jones Act adopts ‘the entire judicially developed doctrine of liability’ under FELA.” 510 U.S. at 456 (citation omitted); see also Miles, 498 U.S. at 32 (explaining that Congress’ incorporation of FELA unaltered into the Jones Act was intended to include the judicial “gloss” on FELA as well).

By incorporating FELA and its judicial interpretations, the Jones Act adopts the Monessen rule precluding an award of prejudgment interest as a matter of substantive law. Prejudgment interest is therefore unavailable in a Jones Act case brought at law, in either federal or state court. See Marine Solution Services, Inc. v. Horton, 70 P.3d 393, 412 (Alaska 2003) (“Prejudgment interest is generally not permitted on Jones Act claims.”). This is true despite the fact that prejudgment interest is

⁹ An exception to this general rule has been made in rare cases when a particular FELA rule is logically limited to the railroad context or logically inapplicable in the maritime context. See, e.g., The Arizona v. Anelich, 298 U.S. 110, 123-24, 56 S. Ct. 707, 80 L. Ed. 1075 (1936) (holding that FELA assumption-of-the-risk rule tied to railroad-specific Federal Safety Appliance Act does not apply under Jones Act). This exception is irrelevant here because prejudgment interest is theoretically possible in any type of case involving monetary damages for past losses. The FELA rule regarding the unavailability of prejudgment interest is therefore neither logically limited to the railroad context nor logically inapplicable in the maritime context.

generally available under principles of general maritime law. See Fuszek v. Royal King Fisheries, Inc., 98 F.3d 514, 516-17 (9th Cir. 1996) (finding that specific FELA provision regarding comparative negligence trumped general maritime law regarding comparative negligence in Jones Act case).

Thus, the only instance in which prejudgment interest is conceivably recoverable on a Jones Act claim is when such a claim is brought in a federal court sitting in admiralty, and even then, the federal courts disagree on whether it is available. The Fourth, Fifth and Ninth Circuits hold that prejudgment interest is recoverable on a Jones Act claim brought in admiralty. See Gardner v. National Bulk Carriers, Inc., 333 F.2d 676, 677 (4th Cir. 1964); Williams v. Reading & Bates Drilling Co., 750 F.2d 487, 491 (5th Cir. 1985); Vance v. American Hawaii Cruises, Inc., 789 F.2d 790, 794-95 (9th Cir. 1986). In such cases, an award of prejudgment interest is neither prohibited nor mandated, but is instead left to the discretion of the trial judge. Id. The Sixth Circuit has held that even when a Jones Act claim is brought in admiralty, prejudgment interest is not available, reasoning that prejudgment interest is not permitted under FELA and that the statute must control. Cleveland Tankers, Inc. v. Tierney, 169 F.2d 622, 626 (6th Cir. 1948).

By contrast, where a Jones Act claim is brought in federal court at law, the federal courts are in agreement that prejudgment interest is not available. See, e.g., Williams, supra; Petersen v. Chesapeake & Ohio Ry. Co., 784 F.2d 732, 740 (6th Cir. 1986); Moore-McCormack Lines, Inc., v. Richardson, 295 F.2d 583, 592 (2d Cir. 1961); see also Borges v. Our Lady of the Sea Corp., 935 F.2d 436, 443 n.1 (1st Cir. 1991) (agreeing in *dicta* that prejudgment interest is not available for claims brought at law).¹⁰ These courts have reasoned that the question of prejudgment interest is governed by statute and that the courts are not at liberty to award additional damages not authorized by statute. The United States Supreme Court, in Monessen, has so construed FELA.

In sum, the majority of courts that have considered the question have determined that the Jones Act does not authorize the recovery of prejudgment interest. As such, while prejudgment interest may be recoverable on a Jones Act claim brought in admiralty in federal court, it is not recoverable on Jones Act claims brought at law, and is therefore not available on a Jones Act claim brought in state court.

¹⁰ The remaining maritime circuit courts, namely the Fourth and Ninth Circuits, have not addressed the issue of availability of prejudgment interest in a Jones Act claim brought in federal court at law.

Endicott determined the answer to both the jury demand question and the prejudgment interest question when he chose to file suit in superior court. As the Texas Court of Appeals explained:

The general rule under the Jones Act is that, if a seaman elects to proceed in federal court under admiralty jurisdiction, he or she can have prejudgment interest but no jury; conversely, if the seaman elects to proceed in a state or federal court under legal jurisdiction, he can have a jury but must forgo prejudgment interest.

Ricardo N., Inc. v. Turcios de Argueta, 870 S.W.2d 95, 122 (Tex. App. 1993). A plaintiff, even a seaman who is a ward of the court, simply cannot have his cake and eat it, too. Rather, he is bound by his choice of forum. Because Endicott elected to proceed at law in state court, the right to a jury trial is available to both plaintiff and defendant and there is no right to prejudgment interest.

(iii) A Majority of Courts, Including Washington State Courts, Hold that Prejudgment Interest Is Not Available in Mixed Cases Involving Both Jones Act and Unseaworthiness Claims.

As explained above, prejudgment interest on a Jones Act claim is only recoverable in federal court sitting in admiralty. For unseaworthiness claims, however, prejudgment interest is generally available regardless of whether the claim is brought at law or in admiralty. Magee v. U.S. Lines, Inc., 976 F.2d 821, 822 (2d Cir. 1992) (noting that award for

unseaworthiness may be augmented by prejudgment interest while Jones Act award may not). When Jones Act and unseaworthiness claims are joined together in a single action, as they often are, the question becomes more complex. The majority of courts that have addressed the availability of prejudgment interest in these so-called mixed cases have concluded that prejudgment interest is not recoverable. While a minority of courts have held otherwise, Washington is among the state courts that have adopted the majority rule and prohibited the recovery of prejudgment interest in mixed cases.

As Division Two recognized in Foster v. State of Washington Dept. of Transp., 128 Wn. App. 275, 115 P.3d 1029 (2005), the majority rule is that prejudgment interest cannot be awarded in mixed cases involving both the Jones Act and unseaworthiness claims where the damages for the respective claims cannot be apportioned. 128 Wn. App. at 279 (citing Wyatt v. Penrod Drilling Co., 735 F.2d 951, 956 (5th Cir. 1984); see also Petersen v. Chesapeake & Ohio Ry. Co., 784 F.2d 732, 741 (6th Cir. 1986); Mihalopoulos v. Westwind Africa Line, Ltd., 511 So.2d 771, 781 (La. App. 1987); Cano v. Gonzalez Trawlers, Inc., 809 S.W.2d 238, 240 (Tex. App. 1990). The rationale behind these decisions is that since prejudgment interest is not available for a Jones Act claim,

unless the damage award in a mixed case is apportioned between the Jones Act and unseaworthiness claims in order to award prejudgment interest on the unseaworthiness portion only, prejudgment interest cannot be awarded at all. Wyatt, 735 F.2d at 956; see also Horton, supra, 70 P.3d at 412-413 (finding that because prejudgment interest is recoverable on unseaworthiness claims but not on Jones Act claims, damages in a mixed case involving both types of claims must be apportioned in order for prejudgment interest to be awarded on the unseaworthiness portion of damages only).

A minority view holds that apportionment is not necessary in mixed cases, and that prejudgment interest is recoverable even where it is impossible to determine whether damages were awarded on the plaintiff's Jones Act claim or his unseaworthiness claim. See, e.g., Magee, supra, 976 F.2d at 823 (reasoning that because Jones Act and unseaworthiness claims are "Siamese twins" and because recovery was the same under both counts, there was no reason to deny plaintiff prejudgment interest, absent special circumstances militating against such an award).

In its decision awarding Endicott prejudgment interest on his mixed Jones Act and unseaworthiness claims, the trial court relied on another Washington case, Paul v. All Alaskan Seafoods, Inc., supra. In

Paul, this Court determined that the plaintiffs, who recovered on their claims for unpaid wages brought pursuant to both federal and state law, were entitled to prejudgment interest. The court examined both federal maritime law and Washington state statutory law on the issue of prejudgment interest, and determined that the two were in direct conflict. 106 Wn. App. at 429. As such, the court held that state law was preempted, and that the fishermen were entitled to prejudgment interest under federal maritime law, which as noted above, provides that prejudgment interest is generally available absent special circumstances. Id. at 429-430.

However, Paul is distinguishable from the present case and from the authorities cited above regarding the majority rule on prejudgment interest in mixed cases. As noted, Paul involved a claim brought by crab fishermen for unpaid wages. The fishermen brought claims pursuant to both the general maritime law and Washington state law. As such, the Paul action was a type of “mixed” case involving two different types of claims. Under the general maritime law, the fishermen were entitled to prejudgment interest on their unpaid wage claim, just as seaman are entitled to prejudgment interest on an unseaworthiness claim. Similarly, the fishermen were not entitled to prejudgment interest on their state law

wage claim, just as seamen are not entitled to prejudgment interest in Jones Act claims brought at law. In Paul, the court was able to apportion the damages the fishermen recovered between the federal maritime claim and the state claim, and therefore limit the award of prejudgment interest to the federal maritime claim. This is completely consistent with the holdings outlined above – in mixed cases involving claims for which prejudgment is recoverable and claims for which it is not recoverable, prejudgment interest may be awarded on the portion of the award attributable to the general maritime claim, **where such damages are apportionable**. Because the trial court misinterpreted Paul to require an award of prejudgment interest in mixed cases where damages are not apportionable, it abused its discretion, and its decision should be reversed.

c. Prejudgment Interest Is Not Authorized under Washington Law Given the Damages Awarded in This Case.

As noted at the outset, the question of whether prejudgment interest is available in this case is a matter of substantive law that must be determined in accordance with federal maritime law. Nevertheless, to the extent this court looks to Washington law on the topic, the result is the same. In short, because Endicott's damages were not liquidated, he is not entitled to prejudgment interest under state law.

In Washington, whether prejudgment interest is awardable depends on whether the claim is a liquidated or readily determinable claim, as opposed to an unliquidated claim. Hansen v. Rothaus, 107 Wn.2d 468, 472, 730 P.2d 662 (1986). The critical factor in awarding prejudgment interest is that the amount of damages be “fixed and known.” Prier v. Refrigeration Engineering Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968). A liquidated claim is one where it is possible to compute the amount of damages “with exactness, without reliance on opinion or discretion.” Hansen, 107 Wn.2d at 473. Conversely, an unliquidated claim is one where the amount cannot be fixed, and must rest upon the opinion or discretion of the judge or jury. Id.

In Hansen, the Washington Supreme Court analyzed awards to a seaman for maintenance, cure and unearned wages to determine whether they were liquidated or unliquidated. Applying state law, the court held that settlements with injured crewmembers were unliquidated. 107 Wn.2d at 477-78. The court reasoned that maintenance rates vary over time, and therefore are not exact. Id. at 477. Similarly, with regard to cure, it is not enough that medical bills be paid – the amount must be reasonable. Therefore, the amount is not liquidated. Id. Finally, unearned wages may be liquidated, but in Hansen, one lump sum was paid for maintenance,

cure, and unearned wages, and therefore the exact amount of unearned wages were also not definite. Id. at 478. The Hansen court concluded that such a claim might be liquidated if the facts supporting the various claims were clarified and the amount of unearned wages was readily ascertainable. Id.

In the present case, Endicott was awarded \$110,000 in general damages, which was clearly unliquidated, as it was purely a matter of judicial discretion. CP 118. Similarly, the trial court awarded \$3,000 for past medical bills on the basis of what was “reasonable and necessary” and, following Hansen, this, too, is an unliquidated claim. Finally, the amounts awarded to Endicott for lost past wages were also unliquidated as they were determined based on various discretionary amounts for lost earning capacity and time frames in dispute. As none of these amounts were fixed or readily known, and all were subject to some measure of judicial discretion, they were unliquidated and thus not subject to prejudgment interest under Washington law.

d. If Awarded, Prejudgment Interest Is Limited to Amounts Recovered for Past Damages.

Should this Court determine, contrary to the case law outlined above, that Endicott is entitled to prejudgment interest, any such award

must be limited to amounts Endicott recovered for past damages and cannot include interest on future damages. Seamen are not entitled to prejudgment interest on future damages, regardless of whether the award is based upon a Jones Act or general maritime claim. Pickle v. Int'l Oilfield Divers, Inc., 791 F.2d 1237, 1241 (5th Cir. 1986); Borges, supra, 935 F.2d at 444-45; Columbia Brick Works, Inc. v. Royal Ins. Co. of America, 768 F.2d 1066, 1068 (9th Cir. 1985). The purpose of prejudgment interest awards in maritime cases is to make the plaintiff whole. City of Milwaukee, supra, 515 U.S. at 196. Awarding prejudgment interest on damages a seaman has yet to incur defies logic and runs contrary to this stated purpose. Consequently, no such interest is allowed on future damages.

C. The Trial Court Erred by Admitting the Hearsay Statement of Witness Jason Jenkins.

1. Statement of Facts.

During trial, and in lieu of finding or calling this witness, Endicott offered what is described as a handwritten statement apparently signed by Jason Jenkins, the other crewmember working in the freezer at the time of his May 1, 2003 injury with Icicle. Trial Exh. 48; RP 85-88; A-161. The statement, directed "To Whom It May Concern" and dated May 9, 2003, recounts various issues including a description of the location of the

accident in the freezer. Id. The statement includes what is apparently Jenkins quoting Endicott and Endicott's description of what happened. Id.

Endicott asserted that the statement was not hearsay under Evidence Rule 801(d)(2), either part (2) as a statement of which the party has manifested an adoption of belief in its truth, or part (4), a statement of the party's agent or servant acting within the scope of his authority. RP 87-88. Endicott's counsel sought to admit the statement "to ask Mr. Endicott if that's consistent with his recollection," asserting that the statement "was definitely an admission by their own people, their own employee." RP 86. Endicott's counsel argued the Jenkins' statement should be admitted because Jenkins was an agent of Icicle when asked to complete this statement as a part of the Safety Manager's overall investigation of the incident.¹¹ RP 86-88; Trial Exhibit 48.

Icicle objected and asserted Jenkins was not a speaking agent, and that the document lacked foundation and was hearsay. RP 85-87. Endicott did not depose either the Safety Manager or Jenkins and neither was called to testify at trial. RP 87. Icicle pointed out that the Jenkins'

¹¹ The investigation of the Safety Manager, although hearsay, was admitted by stipulation of the parties. Trial Exh. 48. Icicle, however, objected to the separate statement of Jenkins. RP 86.

statement, dated May 9, 2003, was apparently completed after the Safety Manager's investigation, which was dated May 3, 2003, and that there was no evidence presented at trial regarding the purpose of or request for the Jenkins' statement. RP 88; Trial Exh. 48. In effect, nothing was known about the statement. Id. Beyond the brief statement, it was mere speculation about why the statement was made, what Jenkins knew about the Endicott accident or what he meant by various things in the statement. Id. The trial court ruled this went to the weight and not admissibility of the Jenkins' statement and admitted it as non-hearsay. RP 88.

Endicott then read Jenkins' statement during trial, describing it as "dead on," except that "I didn't trip on the lip of the doorway...I wasn't even to the doorway yet...I was about 20 feet from the doorway." RP 89. The Jenkins' statement quotes Endicott as stating that he tripped at the entrance [of the freezer] and caught the coil [of the freezer] as he fell back. A-161. Endicott however later testified that his arm was caught on a steel pole 20 feet inside the freezer, which caused it to break. RP 78-79; RP 244. An Icicle safety representative testified she was not familiar with the Jenkins' statement, that it was not part of her accident file maintained in the Seattle office, and that she was not aware of it until early 2007. RP 496-497.

In its Findings of Fact and Conclusions of Law, the trial court found that Jenkins, who was pushing the cart in a freezer at the time of Endicott's accident, "should have been aware of Plaintiff's position relative to the cart...Plaintiff yelled for him to stop, but the other worker did not stop because he was either concentrating on keeping the cart from coming untracked or simply not paying attention." CP 116. The trial court determined Jenkins pushed the cart with Endicott pulling it into a pole, causing his injury. Id. The court concluded Icicle was negligent under the Jones Act in part by failing to provide adequate training to Endicott and to Jenkins. CP 119. The trial court also concluded the Icicle barge was unseaworthy in part based on the fact that Jenkins was insufficiently trained or focused on the cart at the time of the accident. CP 119.

2. Standard of Review.

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. Havens v. C & D Plastics, Inc., 124 Wn.2d 158, 168, 876 P.2d 435 (1994).

3. Legal Analysis and Argument.

a. Washington Law Regarding Hearsay and ER 801.

Under ER 802, hearsay statements are not admissible, except as provided by court rule or statute. ER 801 defines hearsay as a statement,

other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Subpart (d) of ER 801 further provides that certain types of statements are not considered hearsay if particular conditions are met. Endicott asserted two possible bases for admission of Jenkins' statement as non-hearsay under ER 801(d)(2). First, he claimed Jenkins' statement was admissible as a statement made by an agent or servant of Icicle acting within the scope of his or her authority to make the statement on Icicle's behalf under ER 801(d)(2)(iv). Alternatively, he argued that Jenkins' statement was admissible as a statement that Icicle had adopted or manifested its belief in the truth under ER 801(d)(2)(ii). Jenkins' statement does not qualify as non-hearsay under either of these portions of the rule.

In order to qualify as non-hearsay under the speaking agent exception provided in ER 801(d)(2)(iv), the party seeking to have the statement admitted must establish that the declarant had the requisite authority to speak on the party opponent's behalf. See State v. Nieto, 119 Wn. App. 157, 161, 79 P.3d 473 (Div. I, 2003). Washington follows the Restatement of Agency (2d) § 286, which requires an agent to have speaking authority. Codd v. Stevens Pass, Inc., 45 Wn. App. 393, 404, 725 P.2d 1008 (Div. I, 1986). Under the Restatement, it is not enough that

the principal is willing or permits the agent to speak. Rather, the speaking must be done in the capacity of agent and be connected with the business of the principal. Id. In other words, the agent must be authorized to make the particular statement at issue, or statements concerning the subject matter of the statement, on behalf of the party. Passovoy v. Nordstrom, Inc., 52 Wn. App. 166, 169-70, 758 P.2d 524 (Div. I, 1988).

If the agent lacks specific, express authority to make statements on the party's behalf, the requisite authority may be implied from the overall nature of the agent's authority to act for the party. Id. at 170. The out-of-court statement of the alleged agent alone cannot establish his agency. Rather, the party seeking to introduce the statement as non-hearsay under ER 801(d)(2)(iv) must establish the existence and scope of the agency by independent proof. Id. at 171-72. Moreover, apparent authority can only be established from the conduct of the principal, not the conduct of the agent. Donald B. Murphy Contractors, Inc. v. State, 40 Wn. App. 98, 110, 696 P.2d 1270 (Div. II, 1985).

In particular, Washington courts have repeatedly held that employees generally do not have speaking agent authority for their employer simply by virtue of their employment. For instance, in Codd, this Court determined that a ski patrolman who commented on a

hazardous slope where the plaintiff was injured had neither express nor implied authority to speak on the ski resort's behalf with regard to such hazards. Id. at 404-405. See also Blodgett v. Olympic Sav. & Loan Ass'n., 32 Wn. App. 116, 126, 646 P.2d 139 (Div. II, 1982) (finding statement made by carpenter employed on defendant's construction site was not admissible under ER 801(d)(2) absent any evidence that carpenter was speaking agent acting within scope of his authority at time of statement); Barrie v. Hosts of America, Inc., 94 Wn.2d 640, 644, 618 P.2d 96 (1980) (statement of bar manager inadmissible under ER 801(d)(2) where nothing in record showed that manager had authority to make statement on behalf of bar owner); Passovoy, supra, 52 Wn. App. at 172 (finding statement of store employee inadmissible absent independent evidence of existence and scope of agency); Murphy, supra, 40 Wn. App. at 110 (finding statements of state employees inadmissible under ER 801(d)(2) where employees lacked speaking authority).

b. The Trial Court Abused Its Discretion in Admitting the Statement of Jason Jenkins Because It Is Hearsay and Does Not Satisfy the Requirements for Non-hearsay Under ER 801.

Because the statement of Jason Jenkins is classic hearsay and does not satisfy the requirements for non-hearsay under ER 801, and no other

exceptions to the hearsay rule were raised and therefore have now been waived, the trial court abused its discretion in admitting it as evidence to prove the truth of the matters asserted therein.

Here, Endicott offered no independent evidence to establish that Jenkins had the requisite authority to speak for Icicle. Jenkins himself did not testify regarding any such agency relationship or the scope thereof, and as noted above, under Passovoy, the alleged agent's out-of-court statement alone is insufficient to establish an agency relationship. Nor is there any evidence from which it could be inferred that Jenkins had authority to speak on Icicle's behalf regarding the circumstances of Endicott's accident. To the contrary, an Icicle representative testified she was unfamiliar with the statement or its existence for some three years after the accident. Under Murphy, supra, only the conduct of the principal – in this case, Icicle – can be considered in establishing implied authority. There was no evidence whatsoever in the record indicating that Icicle granted speaking authority to Jenkins or viewed him as its agent with regard to workplace safety or anything else. Like the employees in the host of cases cited above, Jenkins was merely an Icicle employee with no particular authority to speak on Icicle's behalf.

Endicott likewise failed to offer any evidence indicating that Icicle adopted or manifested its belief in the truth of Jenkins' statement. The mere fact that such a statement was made, whether in the course of an in-house investigation or otherwise, does not demonstrate intent on Icicle's part to adopt it as a true recounting of the events in question. Under ER 801(d)(2)(ii), a statement that would otherwise be considered hearsay is admissible where it has been adopted by a party-opponent. A party-opponent can manifest adoption of a statement by words, gestures, or complete silence. State v. Cotten, 75 Wn. App. 669, 689, 879 P.2d 971 (Div. II, 1994). Typically a party's adoption of a statement will involve an affirmative act demonstrating the party's intent to make the statement his or her own. See, e.g., Momah v. Bharti, 182 P.3d 455, 466 (Div. I, 2008) (party's affirmative act of placing statements on his website demonstrate his adoption of them and his belief in their truth, making them admissible as non-hearsay under ER 801(d)(ii)). As noted, Endicott did not depose or offer the testimony of the Safety Manager at trial. Endicott's counsel merely speculated that the statement was made as a part of the accident investigation and that Icicle adopted it. Arguments of counsel are not evidence.

Moreover, Jenkins' statement is not sufficiently reliable to be admitted. As an employee with no speaking authority, Jenkins had no particular obligation to be truthful. And as Endicott himself testified, there was a glaring difference between his recollection of the events and the Jenkins' statement: the location of the accident. Endicott testified he believed he was some 20 feet from where Jenkins described the accident as having occurred. Endicott testified that he recalled only one pole and that it was at the location he said he was injured.

The Jenkins' statement is classic hearsay. Because the trial court deemed it non-hearsay and used it to formulate its overall conclusions regarding liability, the trial court must be reversed on this issue. Clearly cross-examination of Jenkins regarding his observations and his memory of the events surrounding the accident would have been both useful and necessary in determining the probative value of his statement. If Endicott wanted to present the testimony of Jenkins, then the only appropriate way to have done this was to find and call Jenkins at trial.

D. The Trial Court Also Erred When It Failed to Admit and Fully Consider Endicott's Mental Health and Addiction History Because It Is Relevant to the Issue of His Damages.

1. Statement of Facts.

On the morning of the first day of trial and despite Endicott's

previous stipulation in the Joint Statement of Evidence to all the records and testimony at trial, Endicott for the first time filed and served a motion to exclude all evidence of pre- and post-accident marijuana use and evidence of his mental health conditions and treatment. RP 7-16. Endicott asserted these were collateral matters intended to make the trial court not like him and were irrelevant and prejudicial under ER 403. RP 9; Supp.CP.

Beyond the procedural irregularities of this motion, Icicle argued in part that Endicott testified at his deposition his anxiety had gotten worse since his arm injury at Icicle and whether his attorney wanted to cast it differently at trial, at least Endicott believed it was an element of his damages and as such it was relevant. RP 10. Moreover, Icicle argued that Endicott's antisocial personality disorder and drug dependence were alternative explanations for why Endicott had not worked for the four years between his injury and the trial. RP 10. Endicott claimed disability from his arm injury and to the extent there was an alternative explanation for this, Icicle had the right to present such evidence. RP 10-11.

By way of background, in June 2004, one year after his injury, Endicott was admitted to the Northern Nevada Adult Mental Health Facility, where he was diagnosed with marijuana dependence and an

antisocial personality disorder. Trial Exh. 118. In this same timeframe, Endicott applied for medical marijuana programs in Oregon and Nevada associated with his Icicle injury. RP 11; RP 129-34. Icicle offered by deposition the testimony of Dawn Moore, Endicott's social worker at the Nevada facility. CP 66-68. There is no record that the trial court admitted this testimony. CP 88. A number of the records from that facility and from other treatment facilities were rejected and, as the trial proceeded, the court refused to admit exhibits and testimony regarding these issues. See, e.g., Trial Exhs. 123, 136, 151.

Ultimately, the trial court stated it would not consider Endicott's mental health issues and the Findings of Fact and Conclusions of Law make no reference to mental health or addiction issues. RP 388-89; CP 114-22. The trial court made no finding with respect to Icicle's affirmative defense of failure to mitigate. CP 7-10; CP 114-122.

2. Standard of Review.

A trial court's decision to admit or exclude evidence under Evidence Rules 401-403 is reviewed for manifest abuse of discretion. Bell v. State, 147 Wn.2d 166, 181-82, 52 P.3d 503 (2002).

3. Legal Analysis and Argument.

The admissibility of evidence of plaintiff's addiction and mental health histories are governed by three Washington Rules of Evidence. ER 401 defines "relevant evidence" as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This relevancy threshold is low and even minimally relevant evidence is admissible. State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006).

With regard to evidence of a plaintiff's substance abuse in particular, a handful of Washington cases have addressed the admissibility of such evidence. In Palmer v. Waterman S.S. Corp., 52 Wn.2d 604, 328 P.2d 169 (1958), a seaman sued his employer for injuries suffered when he fell down a ladder while intoxicated. The seaman appealed from a judgment in favor of the employer, arguing, among other things, that the trial court erred in admitting testimony of two witnesses as to the seaman's prior intoxication. Id. at 607. The court held there was no error in admitting the testimony, finding that the evidence was properly admitted for the purpose of showing how it affected the appellant's ability to earn money by holding a steady job. Id. See also Lundberg v. Baumgartner, 5

Wn.2d 619, 621-22, 106 P.2d 566 (1940) (holding that evidence of decedent's habitual intoxication was relevant and admissible regarding mitigation of damages, since such a habit tends to lower earning capacity and shorten life expectancy). The same holds true for mental health issues impacting economic claims. See, e.g., Criez v. Sunset Motor Co., 123 Wn. 604, 606-07, 213 P. 7 (1923) (holding that evidence of plaintiff's treatment at mental asylum was admissible in personal injury action where it was up to jury to determine whether plaintiff's lost wages and incapacity were attributable to injuries sustained in car accident or to his mental health problems).

In his motion to exclude evidence of his substance abuse and mental health issues, Endicott relied on Kramer v. J.I. Case Mfg. Co., 62 Wn. App. 544, 815 P.2d 798 (Div. I, 1991). Kramer was a personal injury case in which the defendant manufacturer sought to introduce evidence of the plaintiff's drug and alcohol abuse, arguing it was relevant to the issue of plaintiff's damages because plaintiff's substance abuse affected his earning capacity and work-life expectancy. Id. at 556. The plaintiff argued that the evidence should be excluded because it was irrelevant and unfairly prejudicial. Id. Both parties filed motions *in limine* on the issue, and the trial court deferred its ruling on the motions pending expert

testimony establishing that substance abusers have decreased earning capacity and work-life expectancy. Id. The trial court ultimately ruled that evidence of substance abuse was relevant to work-life expectancy and was therefore admissible. Id. at 557. At trial, the plaintiff testified on cross-examination about his alcohol addiction and use of marijuana; however, the court refused to allow the defendant's expert to testify as to the effect of substance abuse on work-life expectancy. Id. at 557.

In considering whether the trial court abused its discretion in admitting this evidence, the court looked to Palmer, supra, and acknowledged its holding that evidence of substance abuse was relevant to a plaintiff's ability to hold a job, and noted that this is in accord with cases in other jurisdictions. Id. at 557-58. The Kramer court ultimately concluded that, under the facts of that case, the trial court had abused its discretion. The court's conclusion was based on the fact that the defendant had never made its promised offer of proof and in the absence of expert testimony on the effect of substance abuse on work-life expectancy, there was nothing establishing the probative value of the evidence. Id. at 559. The court also found there was nothing in the record indicating the plaintiff's substance abuse had affected his employment prior to the accident in question. As such, there was no basis to find that

the substance abuse had affected the plaintiff's earning capacity or work-life expectancy. Id.

The present case is readily distinguishable from Kramer. Unlike the defendant in Kramer, Icicle offered expert testimony, for example, on the connection between Endicott's mental health issues and reduced earning capacity. RP 738; RP 397-398. Furthermore, Icicle sought admission of this evidence not only to establish that Endicott's earning capacity was limited, but also to offer an alternative explanation for Endicott's failure to return to work for four years following his accident. Endicott maintained that the only reason he did not return to work for four years following his accident was because of the injury to his arm.

Moreover, cases from other jurisdictions interpreting the analogous federal rules of evidence with respect to this same issue have found evidence of a plaintiff's drug abuse relevant to the issue of damages. See, e.g., Furlong v. Circle Line Statue of Liberty Ferry, Inc., 902 F. Supp. 65, 69 (S.D.N.Y. 1995) (holding that if proper foundation were established, defendant could introduce medical records evidencing seaman's cocaine abuse because seaman's ability to work could be affected by his drug habit and because evidence of a drug problem could tend to make it less

probable that plaintiff's inability to work was caused by his alleged shipboard injury).

Finally, in a recent unpublished decision, the Ninth Circuit held that evidence of substance abuse was admissible on facts similar to those presented here. In Peake v. Chevron Shipping Co., Inc., 245 Fed. Appx. 680, 2007 WL 2399783, 2007 A.M.C. 2973 (9th Cir. 2007), the Ninth Circuit considered whether the district court improperly excluded evidence of a seaman's alcohol and drug use in his suit alleging negligence and unseaworthiness for injuries sustained on the defendant's vessel. Id. at 682. In particular, the court found that the evidence suggested a reason for the plaintiff's absences from work following the alleged incident other than the injuries he alleged were attributable to the defendant's negligence and unseaworthiness. Id. The court further found that the evidence of the plaintiff's substance abuse was not unfairly prejudicial, despite the fact that it involved illegal activity and had the potential to create a "sideshow" at trial. Id. at 683. Thus, the court found that the trial court had abused its discretion in not admitting the evidence. Id.

To provide clarity on this issue, Icicle asks that the trial court be instructed on remand that Endicott's mental health and addiction histories

are both relevant and admissible and that all evidence and testimony on the same be admitted.

V. CONCLUSION

The trial court erred in striking Icicle's timely jury demand and subsequently denying Icicle its right to a trial by jury. This Court must remand this matter for a new trial by a jury. See, e.g., Davis v. Early Const. Co., 63 Wn.2d 252, 260-61, 386 P.2d 958 (1963) (remanding case for jury trial).

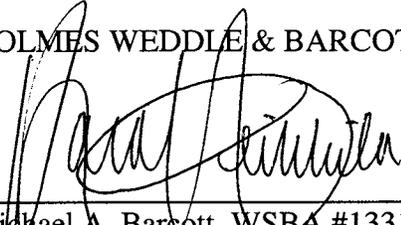
The trial court also erred in awarding prejudgment interest because Washington state courts are not admiralty courts. Moreover, state courts must apply substantive maritime law, which does not authorize prejudgment interest in a case like this. Nor would prejudgment interest be authorized under a pure Washington law analysis as Endicott's damages in this case were not liquidated. This Court is asked to remand for a jury trial with an instruction to the trial court that prejudgment interest is not available in this mixed Jones Act and unseaworthiness case.

Finally, the trial court abused its discretion on two evidentiary matters during trial, when it admitted the hearsay statement of Jason Jenkins and when it rejected and failed to fully consider evidence regarding Endicott's addiction and mental health histories. On remand,

Icicle asks that the trial court be instructed that the Jenkins' statement is inadmissible as hearsay and that the evidence regarding Endicott's mental health and addiction histories is relevant to his claims for damages and is fully admissible.

RESPECTFULLY SUBMITTED this 19 day of August, 2008.

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THE HONORABLE DOUGLAS MCBROOM

FILED
KING COUNTY, WASHINGTON

JAN 14 2008

**SUPERIOR COURT CLERK
GARY POVICK
DEPUTY**

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN ENDICOTT,

Plaintiff,

Case No. 06-2-03016-8 SEA

v.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

ICICLE SEAFOODS, INC.,

Defendant.

This cause came on for a non-jury trial on August 20, 2007, the Honorable Douglas McBroom presiding. Plaintiff was represented by Kurt Arnold and Cory Itkin of Arnold & Itkin LLP. Defendant was represented by Kara Heikkila and Thaddeus O'Sullivan of Holmes Weddle & Barcott. At the conclusion of trial, the Court took the matter under advisement. The Court has considered all trial testimony, exhibits admitted into evidence, the transcript or videotaped deposition testimony admitted, and the arguments of counsel.

On the basis of its own careful observations during trial, its credibility assessments of all witnesses appearing live at trial or by depositions, and the detailed consideration of all of the above materials, the Court now enters the following Findings of Facts and Conclusions of Law.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW -1

ARNOLD & ITKIN LLP
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1 **I. Introduction**

2 This case was originally filed on January 20, 2006. Plaintiff asserted a negligence
3 claim pursuant to the Jones Act and a claim for unseaworthiness pursuant to the General
4 Maritime Law of the United States. On August 20, 2007, counsel for both sides proceeded to
5 try the case to conclusion.

6 **II. Findings of Fact**

7 1. This case involves an arm injury sustained by Justin Endicott aboard the
8 BERING STAR.

9 2. At the time of trial, Plaintiff was 23 years old and living in Nevada. Plaintiff
10 grew up in Oregon, but did not graduate from high school. Instead, Plaintiff pursued his
11 dream of traveling to Alaska and worked on a fish processor barge.

12 3. Plaintiff began working for Defendant Icicle Seafoods, Inc. in January 2003.
13 Plaintiff was assigned to the BERING STAR and aided the BERING STAR in accomplishing
14 its mission. The BERING STAR is a processing barge.

15 4. At all relevant times, Defendant owned and operated the BERING STAR.

16 5. At all relevant times, Plaintiff was employed by Defendant as a Jones Act
17 seaman. Plaintiff worked as a seafood processor in the freezer on the BERING STAR. One
18 of Plaintiff's duties was to move a loaded fifteen hundred-pound cart in the freezer tunnels
19 with the assistance of another crewmember.

20 6. The cart was moved via an overhead rail system. The cart system in the
21 freezer where the Plaintiff was working mistracked at times. The Defendant knew or should
22 have known about the hazard, but failed to remedy the defect.

23 7. The preponderance of the evidence showed that there was a trip hazard
24 associated with the grating in the freezer where the Plaintiff was working. Defendant knew or
25 should have known about this hazard, but failed to fix the grating.

1 8. The crew in the freezer at the time of Plaintiff's accident was required to work
2 with undue haste to keep up with production. Defendant knew or should have known about
3 this hazard, but failed to provide more crewmembers.

4 9. Plaintiff received inadequate safety training for his job. Defendant knew or
5 should have known about this hazard, but failed to provide more adequate training.

6 10. On or about May 1, 2003, Plaintiff was using the cart's "pull bar" to pull the
7 cart when it started to come untracked from the overhead rail system. While Plaintiff
8 attempted to keep the cart on track, he stumbled when the heel of his boot caught on a lip
9 created by the freezer's uneven surface. This caused Plaintiff's elbow to jut out and come to
10 rest on a pole of angle support beam. Another Icicle employee, Jason Jenkins, was pushing
11 the cart from the other end. Jenkins should have been aware of Plaintiff's position relative to
12 the cart. Plaintiff yelled for him to stop, but the other worker did not stop because he was
13 either concentrating on keeping the cart from coming untracked or simply not paying
14 attention. Jenkins kept pushing the cart and crushed Plaintiff's arm between the cart and the
15 pole/angle support.

16 11. Immediately following the accident, Plaintiff felt severe pain. He was then
17 flown to Anchorage, Alaska, where he underwent a surgical repair. The surgeons implanted
18 several plates, screws, and clips in Plaintiff's arm to help it heal. Plaintiff needed a second
19 surgery to correct the malunion created by the improper healing from his first surgery which
20 caused his arm to "bow". Plaintiff underwent that second surgery in Seattle, Washington, in
21 April 2005.

22 12. Although the second surgery was a success, Plaintiff developed Chronic
23 Regional Pain Syndrome ("CRPS"). Plaintiff's pain is real. The surgeries and his CRPS
24 should not have prohibited the Plaintiff from gainful employment altogether, but inhibited his
25 ability to work during those recovery periods. The Plaintiff has no earning capacity or loss
26 after December 2005.

1 13. Plaintiff has experienced pain and discomfort as a result of the May 1, 2003
2 incident.

3 14. Plaintiff's injuries were caused by the cart incident in the freezer aboard the
4 BERING STAR on May 1, 2003.

5 15. Plaintiff's injuries would have been prevented if Icicle had used ordinary care.
6 Icicle should have: (1) fixed the overhead rail system; (2) fixed the uneven grating; and (3)
7 provided more adequate training.

8 16. The Court finds that Plaintiff would have earned \$5,767.00 from the time of
9 his injury until November 2003, but did not earn these wages due to his injuries.

10 17. The Court finds that the Plaintiff's pre-injury earning capacity was \$20,000 per
11 year. The Court also finds that Plaintiff suffered a 50% reduction in his earning capacity from
12 November 2003 to April 2005. This resulted in lost wages of \$13,328.00.

13 18. The Court finds that Plaintiff was completely disabled from gainful
14 employment from April 2005 (when he had his second surgery) until December 2005 (when
15 he fully recovered from the second surgery). Accordingly, he lost \$15,000 in wages.

16 19. The Court finds that Plaintiff lost \$34,095.00 in lost wages and diminished
17 earning capacity during the period May 2003 until December 2005.

18 20. The Court finds that Icicle, through The Alaska's Workman's Compensation
19 system, paid Plaintiff \$3,484.00 and is entitled to an offset or credit on the amount it owes
20 Plaintiff in lost wages and/or diminished earning capacity. Accordingly, Plaintiff sustained a
21 net \$30,611.00 in lost wages and/or diminished earning capacity during the period May 2003
22 to December 2005.

23 21. The Court finds that Plaintiff incurred reasonable and necessary medical
24 expenses for pain treatment from Dr. Thomas Purtzer in the amount of \$3,000.00. While
25 Dr. Purtzer's methods of treatment were questionable, \$3,000 of the total medical charges will
26 be paid by the Defendant.

FINDINGS OF FACT
AND CONCLUSIONS OF LAW -4

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1 433, 13 P.3d 642 (2000) (under the Jones Act, “legal cause is established when the
2 employer’s negligence was a cause, however slight, of his injuries.”) (citations omitted).

3 4. A vessel is unseaworthy if there is “an insufficient number of men assigned to
4 perform a shipboard task” and “actual or constructive knowledge of an unseaworthy condition
5 is not essential to [a vessel’s] liability.” *Ribitski v. Canmar Reading & Bates, Ltd.*
6 *Partnership*, 111 F.3d 658, 662 (9th Cir. 1997); *see also Havens v. F/T Polar Mist*, 996 F.2d
7 215, 217-18 (9th Cir. 1993) (“The failure of a piece of vessel equipment under proper and
8 expected use is sufficient to establish unseaworthiness.”). “This warranty of seaworthiness is
9 a species of liability without fault. The shipowner warrants that the vessel, together with its
10 gear and personnel, are reasonably fit” for the vessel’s purpose. *Miller v. Arctic Alaska*
11 *Fisheries Corp.*, 133 Wn.2d 250, 264 n.7, 944 P.2d 1005 (1997).

12 5. On an unseaworthiness claim, “[c]ausation is established by showing that the
13 unseaworthy condition was a substantial factor in causing the injury.” *Ribitski v. Canmar*
14 *Reading & Bates, Ltd. Partnership*, 111 F.3d 658, 662 (9th Cir. 1997).

15 6. Successful General Maritime plaintiffs are entitled to 12% prejudgment interest.
16 *See Paul v. All Alaskan Seafoods, Inc.*, 106 Wn. App. 406, 427, 24 P.3d 447 (2001).

17 7. The Court, taking all of these factors into consideration, has determined that
18 the Defendant is liable under the Jones Act and for unseaworthiness.

19 8. The Court also finds that the Defendant was negligent under the Jones Act in
20 failing to maintain the blast freezer, in allowing crew to work with undue haste, and by failing
21 to provide adequate training to the Plaintiff and Mr. Jenkins, his fellow crewmember.

22 9. The Court finds that the BERING STAR was unseaworthy based on (a) a
23 tripping hazard on the flooring of the blast freezer; (b) a faulty overhead rail system; and (c) a
24 fellow crewman who was insufficiently trained or focused on the cart. Consequently, the
25 Court finds that Plaintiff has met his burden to establish an unseaworthy condition aboard the
26

1 vessel, by a preponderance of the evidence. The Court also finds that the vessel's
2 unseaworthiness was a substantial factor in causing Plaintiff's injuries.

3 10. A seaman is comparatively negligent if he fails to act with ordinary prudence
4 under the circumstances. *Peterson v. Great Hawaiian Cruise Line, Inc.*, 33 F. Supp. 2d 879,
5 885-86 (D. Hawaii 1998). The evidence showed no contributing negligence on the part of the
6 Plaintiff and, as such, the Court assesses one hundred percent (100%) negligence to
7 Defendant.

8 11. The Court finds that Defendant has not unreasonably withheld maintenance or
9 cure in the past and that any such past or future claim is subsumed by Plaintiff's offer of
10 uncontroverted past losses, and his future damages. Thus, the Court declines to award any
11 further maintenance or cure, beyond the medical losses assessed.

12 12. At the time of his injury, the Court concludes Plaintiff was a "seaman" as that
13 term is legally defined under the Jones Act, and was employed by Defendant Icicle Seafoods,
14 Inc.

15 13. The Court concludes that the injuries and consequent damages sustained by
16 Plaintiff were 100% proximately caused by Defendant in negligently failing to act as a
17 reasonable maritime employer under like circumstances.

18 14. The Court concludes that the barge (BERING STAR) was unseaworthy, and
19 that such unseaworthiness was a substantial factor and proximate cause of Plaintiff's injuries.

20 15. The Court concludes that Plaintiff has proximately sustained net Special
21 Damages of \$33,611.00. The Court further concludes that Plaintiff has sustained General
22 Damages in the amount of \$110,000.00. In addition, Plaintiff is awarded pre-judgment
23 interest at the rate of twelve percent (12%) per annum from May 1, 2003 to August 29, 2007.
24 Plaintiff is also entitled to six and thirty-five one hundredths percent (6.35%) future interest
25 until time of payment in full of this Judgment, together with all properly taxable costs of
26 court.

1 16. To the extent that any foregoing Findings of Facts constitutes a Conclusion of
2 Law, it is adopted as such. To the extent that any foregoing Conclusions of Law constitutes a
3 Finding of Fact, it is adopted as such.

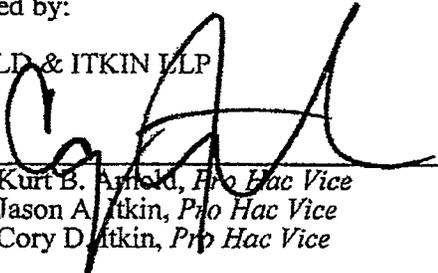
4 IT IS SO ORDERED.

5 DONE at Seattle, Washington, this the 11 day of Jan, 2008

6
7 Douglas McBroom
The Honorable Douglas McBroom

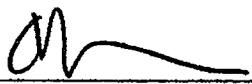
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23 Attorneys for Defendant Icicle Seafoods, Inc.

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FINDINGS OF FACT
AND CONCLUSIONS OF LAW -8

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1 16. To the extent that any foregoing Findings of Facts constitutes a Conclusion of
2 Law, it is adopted as such. To the extent that any foregoing Conclusions of Law constitutes a
3 Finding of Fact, it is adopted as such.

4 IT IS SO ORDERED.

5 DONE at Seattle, Washington, this the _____ day of _____, 2007.

6
7 _____
8 The Honorable Douglas McBroom

9 Presented by:

10 ARNOLD & ITKIN LLP

11 By: _____
12 Kurt B. Arnold, *Pro Hac Vice*
13 Jason A. Itkin, *Pro Hac Vice*
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FINDINGS OF FACT
AND CONCLUSIONS OF LAW -8

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FILED
KING COUNTY, WASHINGTON

The Honorable Douglas McBroom
July 3, 2007
Without Oral Argument

JUL 09 2007

SUPERIOR COURT CLERK
BY ANDREW T. HALLS
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JUSTIN ENDICOTT, an individual,

Plaintiff,

v.

ICICLE SEAFOODS, INC., an Alaska
corporation,

Defendant.

No. 06-2-03016-8 SEA

~~[PROPOSED]~~ ORDER GRANTING
PLAINTIFF'S MOTION TO STRIKE
DEFENDANT'S JURY DEMAND

[CLERK'S ACTION REQUIRED]

This matter came on for consideration on Plaintiff's Motion to Strike Defendant's Jury Demand. The Court has considered Plaintiff's Motion, Defendant's Response, if any, and Plaintiff's Reply, if any. Being duly advised in the premises, the Court hereby ORDERS that Plaintiff's Motion to Strike Defendant's Jury Demand is GRANTED.

The Court further ORDERS that Defendant's Jury Demand is STRICKEN.

Dated this 9 day of July, 2007. *Rights of Seaman under the Jones act to chose jurisdiction and form of trial is protected because Seaman were perceived to be required to bring personal injury action in foreign jurisdictions and, as words of the court, enjoyed the protections of the Jones act.*

Douglas J. McBroom
The Honorable Douglas McBroom

ORDER GRANTING PLAINTIFF'S MOTION TO STRIKE
DEFENDANT'S JURY DEMAND - Page 1

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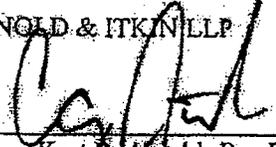
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Page 1

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University of San Francisco Maritime Law Journal
2003-2004

Article

***147 RECENT DEVELOPMENTS IN
ADMIRALTY AND MARITIME LAW AT THE
NATIONAL LEVEL AND IN THE FIFTH AND
ELEVENTH CIRCUITS [FNal]**

David W. Robertson [FNd1]
Michael F. Sturley [FNaa1]

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Maritime Law Journal; David W. Robertson;
Michael F. Sturley

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***152 I. Procedural Developments at the National Level**

A. The ongoing controversy over 'unpublished' opinions.

Two years ago [FN1] we wrote about *Anastoff v. United States*, [FN2]--Judge Richard Arnold's remarkable opinion declaring that the Eighth Circuit's local rule restricting the precedential value of unpublished opinions was unconstitutional. [FN3] We also wrote about the immediate aftermath of that decision. Last year, [FN4] we continued to develop the theme by speculating about the potential effects of West Publishing Company's new Federal Appendix, which collects circuit-level federal decisions not deemed important enough for publication.

The flap over whether (and to what end) 'unpublished' opinions should be cited continues. In November 2002, the Advisory Committee on Appellate Rules passed a measure (with one member dissenting) that would allow the citation of unpublished opinions. In May 2003, the Committee signed off on specific wording for a proposed new Federal Rule of Appellate Procedure:

No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent' or the like. This proposed rule will be submitted for public comment for six months. It then

will go back to the Advisory Committee and then to a standing committee of the Judicial Conference. If the full Judicial *153 Conference and the Supreme Court approve the rule, it will go to Congress and take effect unless Congress acts to change or reject it. The process could take two years or more.

The Advisory Committee's proposal does not directly address the precedential value of unpublished opinions, but it is difficult to see how such opinions can be freely citable and yet not be treated as having at least some precedential value.

The whole matter is highly controversial. The Advisory Committee's proposal seems to have originated in a suggestion by former Solicitor General Seth Waxman. But the current Solicitor General, Theodore Olsen, abstained from the Advisory Committee vote. Perhaps the most vocal opponent of the proposal is Ninth Circuit Judge Alex Kozinski. Senior Judge Richard Arnold strongly supports it, stating: 'I don't know what judges [who oppose it] are afraid of.'

B. December 1, 2003, amendments to the Federal Rules of Civil Procedure

Unless there is contrary congressional action, on December 1 a package of amendments to the Federal Rules of Civil Procedure ('FRCP') will go into effect. These FRCP amendments include a number of changes to Rule 23 (class actions), expansion of Rule 51 (jury instructions), revision of Rule 53 (special masters), and minor revisions of Rule 54(d)(2)(D) (regarding reference of attorneys'

fees issues to special masters) and Rule 71A(h) (regarding trial of federal eminent domain claims).

C. ABA report on selection of state judges

On June 13, 2003, an American Bar Association panel released a report recommending that state judges be appointed rather than elected and suggesting that an appointed judge should serve for a single term of at least fifteen years or until reaching a specified age. Alternatively--in recognition of the reality that most people seem to prefer an elective system--the report sets forth a number of suggestions for reforming judicial elections. This report was scheduled to be considered by the ABA House of Delegates at the ABA's Annual Meeting in San Francisco in August 2003.

*154 II. The Work of the Supreme Court

A. State governmental immunity

Our 2000 [FN5] and 2001 [FN6] papers treated the Court's recent expansions (in a series of 5-4 non-maritime decisions) of the immunity conferred upon the states by the 'structure of the original Constitution' [FN7] and the Tenth and Eleventh Amendments. Last year's paper [FN8] presented three more decisions in the series. This go-around, we have a somewhat surprising new case, Nevada Dep't of Human Resources v. Hibbs. [FN9] The Court's previous decisions had developed the principle that Congress may abrogate states' Eleventh Amendment immunity from unconsented suits in federal courts if it makes its intention to abrogate unmistakably clear in the language of the statute and if the statute was a valid exercise of Congress's power under section 5 of the Fourteenth Amendment. [FN10] Despite previous indications of how difficult and rare it is for Congress to comply with these criteria, the six-member majority in Hibbs (in an opinion by Chief Justice Rehnquist) concluded that Congress had succeeded in the provision of the Family Medical Leave Act ('FMLA'), [FN11] authorizing suit against public employers. [FN12] This decision was a victory for a Nevada state employee, William Hibbs, who had sued his employing agency because it refused to give him leave to care for his ailing wife. [FN13] The Chief Justice wrote:

By creating an across-the-board, routine employment benefit [up to 12 weeks of unpaid family-care leave] for all eligible employees, Congress sought to ensure that family-care leave would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men. By *155 setting a minimum standard of family leave for all eligible employees, irrespective of gender, the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes. [FN14] Justices Scalia, Kennedy, and Thomas dissented.

B. Damages for emotional suffering: fear of future disease

In last year's paper, [FN15] we noted the grant of certiorari in a case in which men who had contracted asbestosis as a result of their exposure to asbestos while working for the defendant railroad sought recovery under the Federal Employers' Liability Act ('FELA'), [FN16] for their emotional injuries consisting in fear of developing cancer. The Court has now handed down its decision in Norfolk & Western Railway Co. v. Ayers. [FN17] By a 5-4 margin (Justice Ginsburg writing for the majority), the Court held that the asbestosis disease sustained by the plaintiffs counted as a physical injury and that the plaintiffs' claims for fear of future cancer should therefore be classified as seeking recovery for emotional pain and suffering 'parasitic' to a compensable physical injury (as opposed to claims for stand-alone emotional suffering). [FN18] For such parasitic emotional distress claims, the Court held that there is no requirement that the emotional distress be manifested by physical symptoms; the only requirements are that it be reasonable, genuine, and serious. [FN19] The Court did not answer the much-debated question whether there is a physical-symptom-manifestation requirement for stand-alone emotional distress claims. Justice Kennedy wrote a dissent that was joined by Chief Justice Rehnquist and Justices O'Connor and Breyer.

C. Joint and several liability

Another issue in Norfolk & Western was

whether the workers' recoveries against the defendant-employer should be for the workers' full damages or instead apportioned (diminished) to reflect the fact that other *156 tortfeasors-- e.g., subsequent employers or asbestos manufacturers or suppliers--had probably also contributed to the injuries. [FN20] Here the Court was unanimous in holding that FELA defendants are subject to the traditional rule of joint and several liability, meaning no apportionment. [FN21] In reaching this conclusion about FELA, the Court strongly reaffirmed that the general maritime law of the United States adheres to the rule of full joint and several liability. [FN22] It did this in three ways: 1) by relying heavily on the maritime decision in *Edmonds v. Compagnie Generale Transatlantique*, [FN23] for the proposition that the 'established [admiralty] principle of comparative negligence' includes the rule of joint and several liability, [FN24] 2) by citing *The ATLAS*, [FN25] as 'an . . . admiralty case' showing 'that joint and several liability is the traditional rule,' [FN26] and 2) by quoting from the 1908 congressional debates on FELA a statement that FELA was intended to 'brin[g] our jurisprudence up to the liberal interpretations that . . . now prevail in the admiralty courts of the United States.' [FN27]

D. The preemptive effect of the 1971 Federal Boat Safety Act ('FBSA') [FN28]

Our 2001 paper explained the controversy over whether the FBSA's omission of a propeller-guard requirement should be read to preempt state-law or general maritime law products liability claims. [FN29] Last year's paper [FN30] noted the grant of certiorari to review the decision of the Illinois Supreme Court in *Sprietsma v. Mercury Marine*, [FN31] giving preemptive effect to the FBSA. The Court has now handed down its unanimous decision in *Sprietsma v. Mercury Marine*, [FN32] holding that the husband of a woman who died after falling overboard and being struck by the propeller of a boat on an inland lake spanning the Kentucky-Tennessee border is entitled to go forward with a state-law products liability suit against the manufacturer of *157 the boat's outboard motor. [FN33] Justice Stevens began the opinion by noting that the defendant's argument that the case should be governed by federal maritime law had been waived. [FN34] He then held that (1) the FBSA's express preemption clause did not

preempt *Sprietsma's* state-law claims, (2) the Coast Guard's decision not to require propeller guards in its regulations issued under the FBSA did not preempt *Sprietsma's* claims, and (3) the FSBA did not impliedly preempt *Sprietsma's* state law claims. [FN35] (Both the Solicitor General and the Coast Guard had advised the Court that the Coast Guard did not view its refusal in 1990 to regulate propeller guards or any of its subsequent regulatory activities as having a preemptive effect.) [FN36]

E. Punitive damages

State Farm Mutual Automobile Ins. Co. v. Campbell, [FN37] is the latest in a series of non-maritime decisions [FN38] in which the Supreme Court has seemingly been looking for ways to control the amount of punitive damage awards. A majority of the Justices have come to the view that the Due Process Clause of the Fourteenth Amendment protects tortfeasors against grossly excessive or arbitrary punishments. In a case against a liability insurance company alleging fraud, bad-faith refusal to settle, and intentional infliction of emotional distress, the Utah Supreme Court upheld a \$145 million punitive award in a case in which the compensatory damages were \$1 million. [FN39] Reversing and remanding because the amount was too large, the six-member majority [FN40] (in an opinion by Justice Kennedy) stated that:

courts reviewing punitive damages [must] consider three guideposts: (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive *158 damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. [FN41] Perhaps the most widely noted feature of *Campbell* is the Court's discussion of the second Gore guidepost. Here the Court reiterated its reluctance to identify a concrete constitutional limit on the ratio between harm to the plaintiff and a punitive award, but it suggested that 'in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.'

[FN42]

F. Statutes establishing evidentiary privileges.

46 U.S.C. § 6308 (2000) provides generally that Coast Guard marine casualty investigation reports are not admissible as evidence or subject to discovery in civil litigation. The unanimous non-maritime decision in *Pierce County v. Guillen* [FN43]--which upholds the constitutionality (under the Commerce Clause) of 23 U.S.C. § 409 (2000), establishing a similar evidentiary privilege for highway-safety data collected by the states under the federal Hazard Elimination Program--is therefore of tangential interest. [FN44] Justice Thomas's opinion for the Court includes the provocative statement that '[w]e have often recognized that statutes establishing evidentiary privileges must be construed narrowly because privileges impede the search for truth.' [FN45]

G. Foreign Sovereign Immunities Act (FSIA).

28 U.S.C. § 1441(d) (2000) provides that '[a]ny civil action brought in a State court against a foreign state as defined in [FSIA, 28 U.S.C. § 1603(a) (2000)] may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending.' 28 U.S.C. § 1603(a) (2000) defines 'foreign state' to include an 'agency or instrumentality of a foreign state.' 28 U.S.C. § 1603(b) (2000) in turn defines 'agency or instrumentality' to include corporations 'a majority of whose shares . . . is owned by a foreign state ' In the non-maritime case of *Dole Food Co. v. Patrickson*, [FN46] the *159 Court was unanimously behind Justice Kennedy's opinion in holding that 'agency or instrumentality' status is to be determined at the time suit is filed. [FN47] Justices Breyer and O'Connor dissented from Justice Kennedy's more significant holding that a corporate subsidiary of a government-owned instrumentality is not itself an instrumentality: '[o]nly direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.' [FN48]

III. Selected Decisions From Around the Country

A. Admiralty jurisdiction.

1. Determining a waterway's navigability

The court in *In re Strahle*, [FN49] found that the Wabash River is a navigable stream from West Lafayette, Indiana, to its junction with the Ohio River and accordingly upheld admiralty jurisdiction over a limitation petition filed by the owner of a jet-ski respecting a fatal accident on that stretch of the river. [FN50] The court noted that navigation-blocking dams upstream of the accident site were irrelevant to the navigability inquiry. [FN51] The controlling question is whether commercial traffic is feasible from the accident site to another state. [FN52]

2. The Admiralty Extension Act

In *Scott v. Trump Indiana, Inc.*, [FN53] the plaintiff was hurt at the conclusion of a life raft drill that he had been supervising (in his capacity as a safety expert) for a gambling ship. [FN54] The drill was finished, and the life raft was being lifted from the water by a shore-based crane to be placed on a truck for transport to a land facility where it would be inspected and repackaged for return to the gambling ship. [FN55] The plaintiff was standing on *160 the pier. [FN56] A gust of wind caused the raft to sway, and it struck the plaintiff in the head. [FN57] The court upheld the trial judge's determination that the plaintiff's suit against the crane operator was not within admiralty jurisdiction, holding that the locality element of the test for admiralty jurisdiction was not satisfied. [FN58] The tort occurred on the pier--thus precluding the plaintiff from satisfying the locality requirement in the usual way--and the Admiralty Extension Act ('AEA') [FN59] did not supply an alternative because the injury was not 'caused by a vessel on navigable water' in the sense required by the AEA. [FN60] The court's AEA analysis entailed the conclusions that the crane was certainly not an appurtenance of the vessel and that '[g]iven the unique facts of this case, . . . the life raft . . . could no longer be considered an appurtenance' of the gambling ship. [FN61] (Perhaps having some misgivings about its 'appurtenance' reasoning respecting the life raft, the court gave an alternative argument: the life raft did not 'proximately' cause the injury because it was not alleged to have been defective.) [FN62]

We think Scott gets the right answer on poor

reasoning. If bags of beans on a pier are appurtenances--as seems to have been the thinking in the Supreme Court's leading AEA decision, *Gutierrez v. Waterman S.S. Corp.* [FN63]--then it seems difficult to exclude a life raft that has recently left the ship and is headed (albeit in a roundabout way) back to the ship. A much better basis for excluding AEA coverage would have been the view that the AEA does not contemplate actions against nonvessel defendants. [FN64]

3. The requirements of a substantial relationship to traditional *161 maritime activity ('SRTMA') and the potential to disrupt maritime commerce ('PDMC')

In *Wallis v. Princess Cruises*, [FN65] the plaintiff's husband (a passenger) disappeared from a cruise ship near the Greek coast. [FN66] The plaintiff brought a claim for the intentional infliction of emotional distress, alleging that during the search period, the ship's master told her that her husband was probably dead and that his body would have been sucked under the ship, chopped up by the propellers, and probably not recovered. [FN67] She also alleged that the cruise line failed to provide legal assistance while she was being questioned by the Greek authorities and failed to provide emotional counseling when she became hysterical. [FN68] She sought the application of California law, arguing that there was no admiralty jurisdiction because the verbal conduct of the master and other cruise line employees was not part of the search and thus not 'substantially related to traditional maritime activity.' [FN69]

The Wallis court concluded that the plaintiff's view of the relevant 'activity' was too narrow:

[T]he relevant activity in this case is not simply the crewmembers' verbal conduct or the omitted legal and psychological assistance, but a cruise ship's treatment of passengers generally. A cruise line's treatment of paying passengers clearly has potential to disrupt commercial activity, and certainly has substantial relationship to traditional maritime activity. Hence, the district court did not err in [finding admiralty jurisdiction] and applying general maritime law to plaintiff's claim for intentional infliction of emotional distress. [FN70] In

Onebeacon Ins. Group. v. Great Lakes Inn Mgmt., Inc., [FN71] a subrogated insurer sued a marina in tort and for breach of contract for the loss of a boat stolen from its berth and burned offshore. [FN72] The court held that the tort claim is within the admiralty jurisdiction because the loss was *162 consummated on navigable water (thus satisfying the locality element of the test for jurisdiction); [FN73] the burning and sinking posed a risk to commercial shipping (thus satisfying the PDMC element); [FN74] and the navigation of the boat and her storage at the marina were substantially related to traditional maritime activity (thus satisfying the SRTMA element). [FN75]

Lewis v. Sea Ray Boats, Inc. [FN76] was a products liability suit arising from asphyxiation injuries from the escape of carbon monoxide during an overnight outing in a Sea Ray pleasure boat tied up at an isolated location on Lake Mead. [FN77] The Nevada Supreme Court held that the trial court had erred in trying the case under maritime law. [FN78] While the claim arose on navigable interstate waters, the court saw no potential for the disruption of maritime commerce and so remanded the case for trial under presumably more defendant-friendly Nevada law. [FN79]

4. Determining admiralty jurisdiction in contracts cases

In *Commercial Union Ins. Co. v. Blue Water Yacht Club Ass'n*, [FN80] subrogated insurers of boats destroyed by fire while in a marina's indoor storage facility brought breach of contract and tort claims against the marina. [FN81] The marina contested subject matter jurisdiction. [FN82] Noting that the storage contract 'required mandatory winterizing and servicing of [the] boats,' the court held that 'this storage and service agreement sufficiently relates to ships in navigable waters to establish admiralty jurisdiction. [FN83] ' [B]ecause the remaining tort claims arise from the same nucleus of operative facts as the contract claim, the Court has supplemental jurisdiction over those claims.' [FN84]

*163 B. Preemption of state law by federal maritime law.

1. State law displaced

City of Charleston v. A Fisherman's Best, Inc., [FN85] involved a local ordinance denying access to public piers for commercial fishing vessels that use pelagic longline tackle to catch swordfish. [FN86] The ordinance was passed in the interest of sportsfishermen. [FN87] The majority of the Fourth Circuit panel concluded that the ordinance was not a mere regulation of local real estate but was in effect a regulation of fishing, and that it was not exclusively concerned with state waters because it prevented the landing of fish harvested in federal waters. [FN88] Therefore, the ordinance was federally preempted. [FN89] The catching of fish, including swordfish, is extensively regulated by federal law, including a latent authority of the Secretary of Commerce to regulate it in state waters if necessary to implement a federal Fishery Management Program. Dissenting, Judge Luttig argued that the ordinance was not governmental regulation at all but merely a proprietary action of the municipality, 'a decision by the City, as a participant in the market, as to how it will manage its own property.' [FN90]

In *Gibbs v. Carnival Cruise Lines*, [FN91]--a suit involving an injury to a cruise line passenger--Judge Becker noted that the federal maritime doctrine of equitable estoppel 'is not materially different from the New Jersey standard of estoppel cited by the parties.' [FN92] But he nevertheless took pains to insist that '[s]ince we conclude that this case sounds in admiralty, we apply federal admiralty law and not the law of New Jersey or any other state.' [FN93] In light of Judge Becker's opinion in *Calhoun v. Yamaha Motor Corp.*, [FN94] his routine acceptance in *Gibbs* of the preemptive force of the *164 general federal maritime law is interesting. (In *Yamaha*, Judge Becker seemed to take the view that '[u]nless applying state law would be inconsistent with, or would frustrate the operation of, a particular federal maritime rule of decision, . . . [federal maritime law] should not displace state law rules of decision . . .') [FN95]

In *McMellon v. United States*, [FN96]--an action by recreational boaters against the owner of a dam for failure to mark it--the Government's effort to invoke the defense provided by the West Virginia 'recreational use' statute was rebuffed:

Although there are many similarities between the various state recreational use statutes, there are significant differences as well. For example, the West Virginia statute provides that liability [of a landowner who throws the land open for recreational use to one injured on the land in such use] may be imposed only for deliberate, willful, or malicious actions, while the South Carolina statute allows liability to be imposed for gross negligence. In Georgia, the statute does not apply if the plaintiff is injured in an off-limits area within an otherwise open recreational area, while the statute would apply in those circumstances in Indiana. Thus, application of the recreational use statute of the state where a maritime accident happened to occur would lead to disparate results based only on the fortuity of geography and would frustrate the goal of developing a uniform body of maritime law. Accordingly, we conclude that state recreational use statutes cannot be applied in admiralty actions. [FN97] The court did not explain why dam owners or recreational boaters need the predictability of uniform federal law.

In *Wallis v. Princess Cruises*, [FN98] the court held that despite the lack of any 'established maritime standard for evaluating' claims for the intentional infliction of emotional distress, the court should 'develop maritime law' (by following the general guidance of Restatement (Second) of Torts § 46 (1965)) rather than applying state law. [FN99] (The court went on *165 to hold that the defendant's conduct, [FN100] was not outrageous enough to lead to liability, upholding summary judgment for the defendant.) [FN101]

Patrick Pike was hurt while working as a seaman aboard a research vessel and sued the vessel's owner/operator under the Jones Act and general maritime law. [FN102] The owner/operator, the famous Woods Hole Oceanographic Institution, raised as an affirmative defense a Massachusetts statute capping the liability of charitable organizations at \$20,000. [FN103] In *Pike v. Woods Hole Oceanographic Institution*, [FN104] the court held that the statute clashes with the unlimited damage recovery provisions of the Jones Act and cannot be applied. [FN105]

2. State law applied

Without discussing whether the statute was inconsistent with any potentially preemptive features of federal maritime law, the court in *Johnson v. Virgin Islands Port Authority*, [FN106] retroactively applied a statute capping the liability of the Port Authority ('VIPI') for negligently-inflicted personal injury or death at \$25,000. [FN107] The statute was enacted more than a year after the plaintiff's husband's fatal injuries incurred when his small boat collided with an unmarked mooring line. [FN108] The court said the statute could apply retroactively because it 'does not regulate the activities of VIPI' and moreover does not 'take[] away any rights [the plaintiff] possessed under prior law.' [FN109] (Under the language of the statute, the result might have been different had the plaintiff filed suit before the statute's enactment.)

Raskin v. Allison, [FN110] stemmed from a pleasure boat collision 'in the ocean waters off Cabo San Lucas, Mexico.' [FN111] The defendant boat operator and the two plaintiffs--victims in the other boat--were all minors from *166 Kansas. [FN112] Applying Kansas choice-of-law principles (*lex loci delicti*), the court held that Mexican law governed. [FN113] The court did so despite the belief that Mexican law contains damages limitations and a total-bar contributory negligence defense that are foreign to Kansas law. [FN114]

Would the Raskin plaintiffs have been better off in admiralty court (or even in state court) arguing for the application of general maritime choice-of-law principles? Maybe. [FN115]

Evidently giving no thought to admiralty jurisdiction or maritime law, the court in *Solar v. Kawasaki Motors Corp.*, [FN116] applied state law in granting summary judgment for the defendant in a products liability suit arising from a jet-ski fatality on Lake Michigan. [FN117] There is no indication that the plaintiffs argued for the application of maritime law, and there is no reason to believe that applying maritime law would have improved the plaintiffs' chances.

C. Seaman status.

The plaintiff in *Scott v. Trump Indiana, Inc.*,

[FN118] was an experienced seaman who served in the Coast Guard for over twenty years before taking a job with Total Marine Safety Center, an company engaged in the business of helping owners of marine vessels fulfill safety requirements. [FN119] Scott was hurt while overseeing a life raft drill for a gambling ship client of Total Marine. [FN120] He testified that he spent about 25% of this time on clients' vessels, either 'servicing or doing needs analysis, developing training or doing on-site training.' [FN121] The district court granted Total Marine's motion *167 to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), concluding that the plaintiff 'failed to make any allegations of facts that could arguably establish jurisdiction under the Jones Act.' [FN122] The plaintiff did not appeal.

D. The rights of seamen.

1. Maintenance and cure: 'inappropriate' class action for failure to pay maintenance

Noonan v. Indiana Gaming Co., [FN123] holds that a seaman, who alleged that she and others of the defendant's employees had their maintenance cut off and were forced back to work on light duty pursuant to a policy or practice of the defendant, did not state a basis for an appropriate class action because of the intensely factual nature of claims of failure to pay maintenance. [FN124]

2. Unpaid wages. Penalties.

In *Madeja v. Olympic Packers, LLC*, [FN125] the court held that a shipowner is not liable in personam for wages owed by a bareboat charterer to its crew. [FN126] It further held that the vessel was not liable in rem for statutory penalty wages stemming from the charterer's late payment of wages, explaining:

46 U.S.C. § 10313(g) imposes liability only on the vessel's 'master or owner.' While courts have permitted in rem maritime liens against vessels to satisfy penalty wage debts, [[FN127]] such in rem liens must stem from wage payment delays exacted by the vessel's 'owner or master.' [FN128] Given that Olympic was not the [FIERCE PACKER's] 'owner' during the . . . charter period, the [FIERCE PACKER] is not liable in rem for

penalty wages which accrued during the . . . charter period. [FN129] *168 Finally, the Madeja court held that: [the vessel's master] is statutorily ineligible for penalty wages under 46 U.S.C. § 10313. Masters typically are not eligible for § 10313's penalty wage remedies.[[FN130]] While courts occasionally have held that masters are eligible for relief under § 10313, such eligibility has been found only when the 'master' in fact performs the tasks of a regular seaman. [FN131]The record here does not support such a finding. [FN132]

3. Does the plaintiff have an exclusive right to a jury trial in Jones Act cases?

Seventeen years ago, the Fifth Circuit decided *Rachal v. Ingram Corp.*, [FN133] which invented a radical new doctrine to limit the defendant's right to a jury trial in Jones Act cases on the law side. [FN134] (If the plaintiff sues in admiralty, of course, neither party has the right to a jury trial.) [FN135] According to the *Rachal* panel, when a Jones Act case is heard on the law side on the basis of diversity jurisdiction, then both parties have a Constitutional right to a jury trial. [FN136] But when a Jones Act case is heard on the law side on the basis of federal question ('arising under ') jurisdiction, then only the plaintiff is entitled to demand a jury trial. [FN137] This conclusion entailed at least two conceptual errors: 1) the unprecedented notion that the right to jury trial turns on the particular grounds on which federal-court subject matter jurisdiction is invoked rather than on the nature of the cause of action, and 2) the facially astonishing notion that diversity cases are somehow worthier of Seventh Amendment protection than federal question cases. [FN138]

*169 Unfortunately, the *Rachal* mistake has been influential. It was subsequently reiterated by the Fifth Circuit, [FN139] adopted by the Ninth Circuit, [FN140] and followed in several state court cases. [FN141] Indeed, we have twice noted that no reported case since *Rachal* has corrected the Fifth Circuit's mistake. [FN142]

Hutton v. Consolidated Grain & Barge Co. [FN143] finally breaks this trend. The plaintiff had brought his case in state court under the 'saving to suitors' clause, and the defendant had filed a jury demand. [FN144] The trial court granted the

plaintiff's motion to strike the jury demand (following state appellate authority from the neighboring district), but certified the issue for immediate appeal. [FN145] The Appellate Court correctly determined that the phrase 'at his election' in the Jones Act gives a plaintiff the option of proceeding at law (no longer limiting him to his action in admiralty). [FN146] It does not give the plaintiff an exclusive right to elect a jury trial. [FN147] The defendant was therefore entitled to a jury trial under the normal state procedural rules. [FN148] This decision has now created a clear conflict between two appellate districts in the state. Perhaps this will encourage the Illinois Supreme Court to review the issue, and ultimately be the first step in correcting the *Rachal* mistake in the Fifth and Ninth Circuits.

*170 E. Carriage of goods.

1. The one-year time-for-suit provision

Under the fourth paragraph of section 3(6) of the Carriage of Goods by Sea Act ('COGSA'), the carrier is discharged from all liability for cargo loss or damages unless suit is filed within one year of the date that the cargo was delivered. [FN149] Unfortunately, COGSA does not define 'delivery,' and the courts have struggled with the issue for years. [FN150] The Fifth Circuit analyzed the problem in detail in *Servicios-Expoarma, C.A. v. Indus. Maritime Carriers*, [FN151] and offered sensible guidance on the question, but no other court of appeals has yet addressed the issue.

In *America & Asia Trading Co. v. Star Trans Container Line*, [FN152] the shipper contracted with an NVOCC [FN153] to carry a shipment from Dalian, China, to Oakland, California. [FN154] The NVOCC then subcontracted with an ocean carrier. [FN155] The vessel arrived in Oakland on September 1, 2000. [FN156] The cargo was then unloaded and transferred to a bonded warehouse, but it is unclear exactly when this happened. [FN157] The customs broker retrieved the shipment on September 5 and cleared it through customs. [FN158] A trucker delivered the cargo to the shipper's facility in Hayward, California, on *171 September 7. [FN159] On September 13, a cargo survey established that a portion of the cargo had been damaged by wetting and mildew. [FN160] Approximately one year later, on September 4,

2001, the shipper filed this action against the NVOCC. [FN161] The defendant moved for summary judgment on the ground that the suit was untimely, having been filed more than one year after the ship's arrival in Oakland. [FN162]

The district court denied the motion. [FN163] It considered the Fifth Circuit's rule that "[d]elivery" occurs when the carrier places the cargo into the custody of whomever is legally entitled to receive it from the carrier. [FN164] But the court preferred an interpretation of "delivery" that had developed in the district courts prior to *Servicios*. [FN165] Three elements are required: 1) the discharge of the goods, 2) notice to the consignee, and 3) an opportunity for the consignee to receive the goods. [FN166] The NVOCC had failed to show when delivery took place under this test. [FN167] It did "not show that [the shipper/consignee] had notice of the ship's actual arrival on September 1, 2000, or that the goods were unloaded at that time, or that [the shipper/consignee] had an opportunity to receive the cargo on that date." [FN168]

It appears that the district court may have been asking the wrong question entirely in *America & Asia Trading* (although from the facts given in the opinion it is impossible to know for certain). Because the present suit was brought against the NVOCC under its contract with the shipper, the relevant delivery should be the NVOCC's delivery to the shipper/consignee. The ocean carrier's delivery to the NVOCC under their contract is almost irrelevant (except to the extent that the NVOCC could not make its delivery until the ocean carrier had delivered the cargo to it). Nothing in the opinion indicates when the NVOCC made delivery under its bill of lading. If the NVOCC hired the trucker, perhaps the relevant *172 delivery occurred on September 7, 2000, thus making the suit timely by three days. (If this were true, however, the NVOCC's contract with the shipper should have been from Dalian to Hayward, rather than Oakland. But perhaps there had been an agreed alteration.) If the NVOCC arranged for the warehouse, which is plausible, then perhaps the relevant delivery occurred on September 5, when the customs broker retrieved the goods, thus making the suit timely by one day. Or perhaps the delivery to and by the NVOCC both occurred on September 1, and the suit was untimely. In resolving the issue,

however, the district court should focus on the proper question and thus on the relevant delivery.

In *Petroleos Mexicanos Refinacion v. M/T KING A*, [FN169] the district court was called upon to consider how broadly the one-year time-for-suit provision applies. Plaintiff Pemex and the owners of a vessel chartered to Pemex disagreed about the amount of compensation due to Pemex for some cargo damage, and the matter went to arbitration. [FN170] The owner's P&I club issued a letter of undertaking to secure any award up to approximately \$600,000 (including attorneys' fees). [FN171] In return, Pemex promised to "refrain from arresting the vessel for Pemex's claim for [cargo] damage . . . except to the extent that Pemex's claim exceeded the amount of security provided in the [letter of undertaking]." [FN172] Nine years later, Pemex threatened to arrest the vessel. [FN173] The owner's P&I club issued a second letter of undertaking, this time for over \$700,000 plus interest, costs, and attorneys' fees. [FN174] The defendant then moved to vacate the warrant of arrest and cancel the substitute security on the ground that action was now time-barred. [FN175] The court rejected the argument, holding that the plaintiff's in rem claim against the vessel was "closely intertwined" with the pending (and timely) in personam claim before the arbitrators. [FN176] Indeed, the in rem claim was simply seeking further security for the in personam claim, as the parties had anticipated when the first letter of undertaking was issued and as the Second Circuit had recognized in *Thyssen, Inc. v. Calypso Shipping Corp., S.A.* [FN177]

*173 In *Macsteel International USA Corp. v. M/V IBN ABDOUN*, [FN178] the carrier argued that part of the shipper's claim should be time-barred because a second survey of the damaged cargo was not completed "until . . . well more than one year after the cargo was discharged." [FN179] The court quickly rejected this argument: "[section 3(6) of COGSA] states only that [the plaintiff] was required to initiate this lawsuit-- not necessarily to spell out the precise nature of its damages--within one year of discharge." [FN180] This is not a surprising result. Under section 3(6), suit is brought when the complaint is filed, even if process is not served until some time later. If section 3(6) does not even require process to be served, it should be self-evident that the

plaintiff is not required to complete its case within the one-year period.

2. The measure of damages

The Second Circuit's holding in *Jessica Howard Ltd. v. Norfolk Southern Railway Co.*, [FN181] was narrow, but the case is a useful reminder of the normal method for calculating damages in a cargo case. The defendant railroad admitted liability for having lost 1243 ladies' garments on the inland leg of a multimodal shipment from China to the East Coast. [FN182] The only issue was how the damages should be calculated. [FN183] The railroad claimed that its liability was limited to approximately \$15,000, the cost of acquiring the goods in Shanghai. [FN184] The plaintiff claimed that it was entitled to recover over \$62,000--the actual market value of the goods at the destination. [FN185] The district court granted summary judgment for the railroad, in the process accepting the argument that a contractual term in the railroad's circular limiting the railroad's liability to 'the actual physical loss or damage to the cargo,' [FN186] referred in this context to the cost of acquiring the goods.

On appeal, the Second Circuit vacated and remanded. [FN187] Although *174 the court left open the question whether the contractual language in this case might refer to the cost of the goods at the place of shipment, it found that the district court erred in reaching this conclusion as a matter of law. [FN188] On the contrary, a phrase such as 'the actual physical loss or damage to the cargo' usually refers to the fair market value of the goods at destination:

The term 'actual loss' has a long history in carriers' liability provisions and has most frequently been measured by the fair market value of the lost or damaged goods at destination. The Supreme Court has noted the common law rule that '[t]he measure of the shipper's recovery is normally the market value of the goods at destination,' and has described this default measure as the shipper's 'actual loss' [FN189] Only in an unusual case would the plaintiff's replacement cost be the appropriate measure of damages. [FN190]

The district court had also concluded that the railroad, as the beneficiary of a broad Himalaya clause, could rely on a clause in the ocean carrier's bill of lading limiting liability to the plaintiff's 'net invoice cost, plus freight and insurance premium, if paid.' [FN191] The court of appeals did not directly address this conclusion, but it did note that the COGSA language limiting a carrier's liability to 'the amount of damage actually sustained,' [FN192] was ordinarily interpreted 'to measure damages at 'the market price of the cargo at the place of destination . . . on the date when it should have arrived.'" [FN193] To the extent that the ocean carrier's bill of lading purported to limit liability to an amount less than the market value at destination (and less than COGSA's \$500 per package), the clause would presumably fail under section 3(8) of COGSA, [FN194] which explicitly prohibits a carrier from 'lessening [its] liability otherwise than as provided in [the] chapter.'

Levi Strauss & Co. v. Sea-Land [FN195] was held to be one of the unusual *175 cases in which the plaintiff's replacement cost would be the appropriate measure of damages. The plaintiff's container of men's jeans was stolen in transit. [FN196] Although the carrier admitted liability, it argued that the damages should be measured by the cost of manufacturing the jeans rather than their market value at destination. [FN197] The district court recognized that the market value rule was the norm under COGSA, but held that the plaintiff had the burden of showing that it could not have mitigated its loss by manufacturing replacement goods. [FN198]

3. Deviation

For many years now, the doctrine of deviation has been in disfavor. Professors Gilmore and Black describe it as 'a doctrine of doubtful justice under modern conditions, of questionable status under [COGSA], and of highly penal effect.' [FN199] Over sixty years ago, Judge Learned Hand suggested that deviations should be treated in the same way as other breaches of contract. [FN200] Thus it is no surprise that modern courts generally indicate an unwillingness to extend the deviation doctrine. It is well-established that even gross negligence and recklessness do not constitute unreasonable deviations. [FN201] Many courts have strictly limited the deviation doctrine to

geographic deviation and unauthorized deck carriage. [FN202] Some have held that it does not apply even to the corrupt or criminal misdelivery of the goods. [FN203]

The Ninth Circuit has been out-of-step with this general trend. In *Vision Air Flight Service, Inc. v. M/V NATIONAL PRIDE*, [FN204] the court extended the deviation doctrine to cover a carrier's intentional destruction *176 of the cargo. [FN205] In *Jindo America, Inc. v. M/V TOLTEN*, [FN206] a district court in the circuit appears to have extended the doctrine even further. The plaintiff shipped 385 empty containers from Shanghai to Long Beach, California, and Vancouver, Washington. [FN207] The carrier transported them across the Pacific in six-tier stacking. [FN208] When some of the cargo was unloaded in Long Beach, the carrier did not re-stow the containers into a uniform three tiers, but left some in six-tier stacks with gaps. [FN209] Sixty-five of these were seriously damaged. [FN210] The plaintiff alleged that the carrier knew that with this unsafe stowage, the cargo was certain (or at least substantially certain) to be damaged. [FN211] Accepting the plaintiff's allegations as true for the purposes of the defendant's motion for partial summary judgment on the package limitation, the court held that these facts were enough to establish a quasi-deviation. [FN212]

A more representative example of the modern trend can be seen in *American Home Assurance Co. v. M.V. TABUK*, [FN213] in which the Second Circuit held that the on-deck stowage of a shipment of guided missiles was not even a deviation, let alone an unreasonable deviation. [FN214]

4. Third parties and Himalaya clauses

In *Levi Strauss & Co. v. Sea-Land*, [FN215] a container was stolen from the custody of the inland motor carrier. [FN216] The ocean carrier, as the issuer of a through bill of lading that covered the inland leg, was liable to the shipper for almost \$250,000, and it brought a third-party claim against the motor carrier that was primarily responsible for the loss. [FN217] The motor carrier argued that its liability was limited to \$100,000 under its own tariff. [FN218]

An inland carrier generally cannot rely on its own tariff when the *177 cargo owner sues it

directly because the cargo owner did not contract with the inland carrier, and thus is not bound by its tariff. But there is generally no reason why a subcontracting inland carrier cannot rely on its tariff in an action by the head carrier that hired it. In this case, however, the ocean carrier and the inland carrier had never entered into a written contract of carriage for the inland leg, and the inland carrier had not issued its own bill of lading. [FN219] Under these circumstances, the tariff did not apply. Similarly, the inland carrier could not rely on a clause in the ocean carrier's through bill of lading declaring that a 'participating land carrier's . . . tariffs [would] . . . govern and control the possession and carriage of the goods by such participating carrier.' [FN220] The inland carrier was not a party to the through bill of lading (and the court did not consider the possibility that it might be a third-party beneficiary [FN221] of that contract). [FN222] As a result, the ocean carrier was able to recover the full damages that it had paid to the shipper. [FN223]

5. Forum selection and arbitration clauses in carriage contracts

In *Thyssen, Inc. v. Calypso Shipping Corp., S.A.*, [FN224] the plaintiff argued that it would violate section 3(8) of COGSA [FN225] to refer its in rem claims to London arbitration. Section 3(8) prohibits contractual provisions that avoid or limit a carrier's liability except as permitted by the Act. [FN226] Because London arbitrators lack in rem jurisdiction, the plaintiff viewed the arbitration as a violation of this prohibition. [FN227] The court questioned whether the lack of an in rem cause of action could ever be considered a violation of COGSA. [FN228] This dictum raises doubts about some district court authority in the circuit. [FN229] In any event, COGSA § 3(8) was not violated *178 here because the plaintiff's in rem rights were fully protected by a letter of undertaking that secured its in personam claim. Because vessels' insurers routinely issued letters of undertaking when vessels are arrested (or even when arrest is threatened), this holding effectively makes the in rem argument irrelevant whenever a plaintiff challenges a forum selection or arbitration clause.

The plaintiff also argued that the defendant had waived its right to arbitrate by waiting too long to raise the issue. [FN230] Starting with the principle

that a waiver will not be lightly inferred, the court found that there had been no waiver here. 'The key to waiver analysis is prejudice,' [FN231] and plaintiff did not show prejudice. Despite the delay, it did not face excessive costs because no substantial motion practice or discovery occurred during that time. There is no per se rule requiring a defendant to raise arbitration in its answer. And there was no substantive prejudice, despite the fact that the claim was time-barred when it got to arbitration, because the time period had effectively expired before the defendant had answered.

Finally, the plaintiff argued that, because the arbitrator lacked jurisdiction over the in rem claim, it could pursue that claim in litigation after it lost on the in personam claim in arbitration. [FN232] The court quickly rejected this argument, explaining that the in rem claim is simply 'a way of making sure that a plaintiff can recover if it wins in arbitration.' [FN233]

In *Vogt-Nem, Inc. v. M/V TRAMPER*, [FN234] the plaintiff contracted with a freight forwarder under an agreement described as the 'frame contract.' [FN235] This contract included a forum selection clause requiring disputes to be resolved by the competent court in Rotterdam. [FN236] The freight forwarder then contracted on the plaintiff's behalf with an ocean carrier for the shipment of power plant components from Korea to California. [FN237] This contract of carriage included a forum selection clause specifying Amsterdam. [FN238] During shipment, the cargo shifted in stow and suffered \$4.7 million in damages. [FN239] The plaintiff sued the ocean carrier, which filed a third-party complaint against the freight forwarder under Rule 14(c) of the Federal Rules of Civil Procedure. [FN240] The freight forwarder moved to dismiss on the basis of the forum selection clause. [FN241]

When a defendant impleads a third-party defendant under Rule 14(c), 'the action shall [FN242] proceed as if the plaintiff had commenced it against the third-party defendant.' [FN243] The Rule can thus create a direct relationship between the plaintiff and the third-party defendant. [FN244] The claim must then be decided in the same way that it would have been decided if the plaintiff had sued the third-party defendant directly. In *Vogt-Nem*, if the plaintiff had sued the freight

forwarder directly, the case would have been dismissed under the forum selection clause. The same result follows here.

Recognizing the inconvenience of having the claim against the freight forwarder proceed in the Netherlands while the claim against the ocean carrier proceed in California, the district court sua sponte dismissed the action against the ocean carrier on forum non conveniens grounds. [FN245] Although both parties were willing to waive the forum selection clause in their contract calling for litigation in Amsterdam, the court nevertheless saw this as strong evidence that the entire dispute could readily be resolved in the Netherlands. [FN246]

Heli-Lift Ltd. v. M/V OOCL FAITH, [FN247] offers an interesting perspective on the proper application of the Supreme Court's decision in *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*. [FN248] Although the SKY REEFER Court held that forum selection clauses in bills of lading are presumptively enforceable, it declared in dicta that 'were we persuaded that 'the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy.' [FN249] The meaning of this part of the opinion is somewhat obscure, but the Court's apparently favorable citation of the British House of Lords' decision in *The Hollandia*, [FN250] suggests that if the plaintiff is able to show that the chosen forum would not recognize the substantive legal rights that would be protected by the U.S. court, then the forum selection clause would be invalid under section 3(8) of COGSA (which prohibits any clause lessening the carrier's liability). [FN251]

In *Heli-Lift*, the plaintiff shipped a helicopter from Seattle, Washington, to England. [FN252] The helicopter was carried on deck, resulting in seawater corrosion, under a bill of lading clause giving the carrier the option of on-deck stowage. [FN253] The defendant sought to enforce a forum selection clause requiring litigation in Hamburg, Germany. [FN254] The court concluded that the on-deck stowage clause would be unenforceable in the United States, thus permitting the plaintiff to break the package limitation under the deviation doctrine and recover its entire loss. [FN255] In

Germany, on the other hand, the plaintiff's recovery would be subject to unit limitation unless the plaintiff could show that the carrier acted either recklessly or in deliberate disregard of known risks. [FN256] In this context, therefore, the forum selection clause would operate to deprive the plaintiff of its substantive legal rights, and the clause was unenforceable.

6. Liability for freight

Under U.S. law, a carrier has a maritime lien on cargo to secure the payment of freight. In *Hawspere Shipping Co. v. Intamex, S.A.*, [FN257] the carrier asserted this lien because it had not received the freight due on a shipment of aluminum. [FN258] (The shippers that owned the cargo counterclaimed for wrongful arrest and the carrier added an in personam *181 claim against the shippers.) [FN259] The shippers had arranged the carriage through a consolidator and had paid the consolidator, expecting the consolidator to forward the payment to the carrier. [FN260] When the consolidator failed to do so, the issue was starkly presented: 'should [the shippers] have to pay twice, or should [the carrier] instead receive no payment at all?' [FN261]

The circuits are divided on the proper rule to apply. In *Strachan Shipping Co. v. Dresser Industries, Inc.*, [FN262] the Fifth Circuit adopted the 'assumption of risk' view, under which the shipper remains liable to the carrier--notwithstanding the payment to the consolidator--unless it can demonstrate that the carrier actually released it. [FN263] In *National Shipping Co. of Saudi Arabia v. Omni Lines*, [FN264] the Eleventh Circuit followed *Strachan*. The Sixth and Eighth Circuits, in contrast, follow an 'equitable estoppel' view, under which the shipper escapes liability if the circumstances indicate that the carrier led the shipper to believe that the payment to the consolidator would satisfy the obligation to the carrier. [FN265]

In *Hawspere*, the Fourth Circuit followed the Fifth and Eleventh Circuits in adopting the assumption of risk approach. "Should the shipper wish to avoid liability for double payment, it must take precaution to deal with a reputable [cargo consolidator] or contract with the carrier to secure its release." [FN266]

7. Incorporation of charter party terms in a bill of lading

A preliminary issue in *Hawspere Shipping Co. v. Intamex, S.A.*, [FN267] treated above, was whether U.S. or English law applied. The shippers based their claim that English law governed on the argument that the bills of lading incorporated a charter party clause calling for the application of English law. [FN268] But the Fourth Circuit majority held that the charter party's *182 terms were not successfully incorporated into the bills of lading because the date of the charter party was not included in the appropriate spaces on the bills of lading. [FN269]

Judge Niemeyer, dissenting on this issue, would have held that the charter party was effectively incorporated. He found the omission of the date to be irrelevant because there was only one charter party for the vessel in question, and thus there could be no ambiguity about which charter party was intended. [FN270]

F. Marine insurance.

In *International Multifoods Corp. v. Commercial Union Insurance Co.*, [FN271] the Second Circuit addressed several issues under an all-risks policy, [FN272] including the scope of the war exclusion clause in the context of a peacetime seizure. [FN273] The plaintiff had shipped a cargo of frozen chicken and meat products to Russia that were insured by the defendant under an all-risks policy. [FN274] Shortly after the vessel arrived in St. Petersburg, the vessel and all of the tangible assets on the vessel were arrested by the Russian authorities incident to a criminal investigation involving a different shipper. [FN275] The plaintiff was ultimately unable to recover its entire cargo, and thus filed a claim with the defendant insurer. [FN276] The insurer declined to pay, and the present litigation ensued. [FN277]

The most relevant policy clauses were standard Institute Clauses. First, the 'War Exclusion Clause' (which was so identified in bold print) provided:

6. In no case shall this insurance cover loss damage or expense caused by
6.1 war civil war revolution rebellion
insurrection, or civil strife arising therefrom,

or any hostile act by or against a *183 belligerent power 6.2 capture seizure arrest restraint or detention (piracy excepted), and the consequences thereof or any attempt threat 6.3 derelict mines torpedoes bombs or other derelict weapons of war. [FN278] Second, a 'Special Note' at the end of the form provided: 'This insurance does not cover loss damage or expense caused by . . . rejection prohibition or detention by the government of the country of import or their agencies or departments' [FN279]

In denying coverage, the defendant insurer relied on both of these clauses.

The first issue was whether the plaintiff had suffered a fortuitous loss. The defendant argued that the plaintiff did not prove a fortuitous loss 'because the evidence does not specifically explain what happened to the goods after the seizure by the Russian authorities and therefore does not prove a 'loss.' ' [FN280] Rejecting this argument, the Second Circuit held that the plaintiff had carried its 'relatively light' burden of showing it had suffered a loss (which was undoubtedly fortuitous) when it had shown that it was unable to recover the insured cargo despite substantial good-faith effort. [FN281]

The defendant then argued that, even there had been a 'loss,' it was protected by the War Exclusion Clause. [FN282] The plaintiff argued that the language and context of the clause demonstrate that it was intended to apply only to events during wartime (or one of the other conflicts listed in clause 6.1). [FN283] Although the Second Circuit appeared to find this argument highly persuasive, it held that the clause was sufficiently ambiguous that the plaintiff could not escape it at the summary judgment stage. [FN284] It remanded the case to the district court to consider the intent of the parties. [FN285] The appellate court particularly stressed that the district court should consider evidence of custom and usage (and that it had erred in failing to consider it initially). [FN286]

*184 Finally, the defendant argued that the 'Special Note' either excluded the loss from coverage or explained why the War Exclusion Clause excluded the loss from coverage. [FN287] Once again, the Second Circuit held that the clause

was sufficiently ambiguous that the plaintiff could not escape it at the summary judgment stage, and remanded the case for the district court to consider the intent of the parties. [FN288]

G. The Longshore and Harbor Workers' Compensation Act (LHWCA). [FN289]

1. Coverage: The status requirement

Section 2(3) of Longshore and Harbor Workers' Compensation Act ('LHWCA'), [FN290] provides coverage over 'any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker.' *Scott v. Trump Indiana, Inc.*, [FN291] holds that a man injured on a pier while performing his regular job for a company engaged in the business of fulfilling safety requirements for owners of marine vessels--a job that took him on ships about 25% of his time conducting safety training and analysis--was not engaged in 'maritime employment' within the meaning of section 2(3). [FN292] The court did not explain why the worker was not squarely encompassed in the 'harbor-worker' category. It relied on an isolated dictum from *Herb's Welding, Inc. v. Gray*, [FN293] stating that while the section 2(3) list of categories of covered maritime employment is not exhaustive, a worker seeking LHWCA coverage must show some 'connection with the loading or construction of ships.' [FN294] This was an unfortunate dictum-- on the face of the statute, ship repair is also covered, as the *Herb's Court* itself acknowledged a few sentences later--and the *Scott* application of the *Herb's* dictum is even more questionable. It makes no sense to say that work done in maintaining ships' safety equipment and programs is not maritime. (It is a tougher question whether the worker in *Scott* was taken *185 out of the covered maritime employment category by the so-called 'vendor exception' of LHWCA § 2(3)(D), [FN295] as the trial court in *Scott* had held.) [FN296]

Northeast Marine Terminal Co. v. Caputo, [FN297] holds that LHWCA covers workers whose jobs require them to spend 'at least some of their time in indisputably longshoring operations.' [FN298] In *Maher Terminals, Inc. v. Director*, [FN299] the claimant fell within that rule. '

Because Riggio spent half of his time as a checker and his overall duties included assignment as a checker, an indisputably longshoring job, he is covered under the Act even though he worked as a delivery clerk on the day of his injury.' [FN300]

2. Coverage: the situs requirement

Section 3(a) of LHWCA, [FN301] provides for coverage of accidents '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 of building a vessel).' Walker v. Metro Machine Corp., [FN302] held that the 'front parcel' of the employer shipyard's Mid-Atlantic facility (the 'back parcel' of which abutted navigable water) was not a covered situs under section 3(a). [FN303] The two 'parcels' were separated by a fenced jogging path (a City of Norfolk easement) and connected by a gravel road across the jogging path with gate access to both areas during working hours. [FN304] The court said its decision was compelled by the 'virtually indistinguishable' decision in Jonathan Corp. v. Brickhouse. [FN305]

3. Calculating LHWCA compensation benefits

Custom Ship Interiors v. Roberts, [FN306] was a 2-1 decision holding that regular per diem payments made to employees incurring no room and *186 board expenses should be included as wages in determining an injured worker's average weekly wage. The majority relied to some extent on James J. Flanagan Stevedores, Inc. v. Gallagher. [FN307]

4. Timeliness of LHWCA claim

Section 13(b)(2) of LHWCA provides in pertinent part:

[A] claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the

disease, and the death or disability [FN308] In Bath Iron Works Corp. v. United States Department of Labor, [FN309] a widow who filed for death and funeral benefits more than three years after the cancer-caused death of her husband, a retired shipyard worker, was successful in invoking the discovery rule embedded in section 13(b)(2) of LHWCA. [FN310] The ALJ credited the widow's claim that she did not learn that the cancer may have been caused by her husband's workplace exposure to asbestos until shortly before filing. [FN311] The court upheld the BRB's determination that because there was substantial evidence in the record to support the ALJ's 'reasonable diligence' determination, the claim was timely. [FN312]

5. Penalty for late payment

In Hanson v. Marine Terminals Corp., [FN313] the District Director issued an order confirming the settlement of a LHWCA claim on Sept. 18, 1998. [FN314] The employer tried to deliver the payment to the worker by Federal Express on September 24, but Federal Express did not succeed because the worker had inadvertently supplied the District Director with the wrong *187 address. [FN315] Delivery did not occur until September 30. [FN316] The worker then filed a request for a late payment penalty of \$7,452--20% of the settlement amount--which the District Director granted. [FN317]

In the worker's district court suit, filed pursuant to section 18(a) of the LHWCA [FN318] to enforce the late payment penalty order, the district court held that the worker was equitably estopped from receiving the penalty. [FN319] The Ninth Circuit reversed, noting that section 14(f) of LHWCA [FN320] provides in pertinent part that "[i]f any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid . . . in addition to' the original award amount.' [FN321] The appellate court noted that section 14(f) 'is self-executing and does not grant discretion to the District Director of the DOL when evaluating whether a penalty is due.' [FN322] It went on to hold that 'the district court has no

authority to consider equitable factors' in enforcing a section 14(f) penalty. [FN323] The court stated that '[i]n so holding we agree with the Third, Fifth, and Eleventh Circuits.' [FN324]

6. The 'last employer' rule

Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [FN325] holds that in a claim filed under LHWCA, the last responsible employer is solely liable for the compensation due in an on-going traumatic injury situation (here, a knee injury aggravated by the employee's work as a forklift operator), even where the claimant worked for the last employer for only one day and had already scheduled knee surgery prior to that date. [FN326]

*188 The facts and legal issues in *New Haven Terminal Corp. v. Lake*, [FN327] were complicated, but for present purposes the case can be summarized as follows: While working for Employer A in 1993, the worker sustained a back injury. [FN328] In 1997, an accident at the workplace of Employer B aggravated the 1993 injury. [FN329] Among the issues presented was the responsibility of Employer A for compensation following the 1997 accident. [FN330] The court provided the following helpful discussion of the last employer rule: [FN331]

[Employer A] argues that [Employer B] is solely responsible for Lake's disability benefits after the [1997 accident], even for injuries that aggravated the 1993 injury. The aggravation rule, a branch of the last employer rule, assigns liability to the last employer in workers' compensation cases where a disability results from cumulative or multiple injuries. . . The last employer rule generally applies to occupational diseases, while the aggravation rule applies to multiple discrete and exacerbating injuries and is also known as the 'two-injury' rule. . . The aggravation rule is not a defense for first or earlier employers, but rather, an extension of liability that promote administrative efficiency and guarantees full recovery for injured workers. . . Permitting the prior employer to use the aggravation rule as a defense to limit full recovery would frustrate the statute's goal of 'complete recovery for

injuries.' [FN332] The court went on to indicate that Employer A would be entitled to a credit for any compensation the worker had received from Employer B for the same injury. [FN333]

7. Participation in vocational rehabilitation program justifies worker's refusal of alternative employment

*Newport News Shipbuilding & Dry Dock Co. v. Director, Office of *189 Workers' Compensation Programs*, [FN334] found that an ALJ's determination that a claimant was 'unable' to accept alternative employment because of his participation in a vocational rehabilitation program was supported by substantial evidence. [FN335] The court held that the claimant was thus entitled to receive total disability benefits while participating in the program, even though he was capable of performing suitable alternative employment that would have paid more than he was expected to earn after rehabilitation. [FN336]

8. District court lacks subject matter jurisdiction to punish the filing of a fraudulent claim before an ALJ as contempt of court

Section 27(b) of LHWCA provides in relevant part:

If any person in proceedings before a deputy commissioner or Board disobeys or resists any lawful order or process . . . the deputy commissioner or Board shall certify the facts to the district court having jurisdiction . . . which shall thereupon in a summary manner hear the evidence as to the act complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for contempt committed before the court . . . [FN337] In *A-Z Intern. v. Phillips*, [FN338] an ALJ issued a decision recommending sanctions against an employee for having filed a fraudulent claim. [FN339] The Ninth Circuit rebuffed the employer's effort to use section 27(b) to get the district court to enforce the sanctions, holding that the filing of a fraudulent claim does not amount to 'disobeying or resisting a lawful order or process' within the language

of the statute. [FN340] The court noted that:

The LHWCA has specific provisions that deal with fraud before the ALJ, such as 33 U.S.C. § 931(a) [criminal sanctions] and § 948 [authorizing the employer to fire the worker] These provisions demonstrate that Congress did not intend to permit an employer to seek a contempt citation in order to recover damages resulting from the filing of fraudulent claims. We will not rewrite or engraft new *190 remedies upon the provisions Congress has affirmatively and specifically enacted. [FN341] 8. Claimants' attorneys' fees

In *Richardson v. Continental Grain Co.*, [FN342] the employer voluntarily paid compensation for a worker's separate knee and back injuries. [FN343] When the employer stopped paying on the back injury--contending that the injury was faked--the worker filed a claim for compensation. [FN344] The employer made no immediate response to the claim. [FN345] Subsequently the employer stopped making voluntary payments on the knee injury. [FN346] Then the employer offered to settle both claims for \$5000. [FN347] The worker refused. [FN348] The BRB eventually determined that the worker was entitled to receive an additional \$932 for the knee injury and that--although it had not been faked--no additional payments were due on the back injury. [FN349]

The worker in *Richardson* then sought attorneys' fees regarding the back injury under section 928(a) of LHWCA, [FN350] which provides:

If the employer . . . declines to pay any compensation on or before the thirtieth day after receiving written notice of a claim for compensation . . . on the ground that there is no liability . . . and the person seeking benefits shall thereafter have utilized the services of an attorney at law in the successful prosecution of his claim, there shall be awarded . . . a reasonable attorney's fee [FN351] The court held: (1) the voluntary payments the employer made prior to the employee's filing the claim did not prevent the availability of attorneys' fees under section 28(a), by the statute's plain

terms, the relevant 'decline[d] to pay' period is the 30-day period after written notice of the claim; (2) The fact that the employer did not overtly 'decline'--instead *191 making no response at all--cannot defeat the availability of fees under section 928(a), 'otherwise, employers could easily evade fee liability by failing to decline payment formally,' [FN352] and (3) But here the worker has failed to satisfy the 'successful prosecution' requirement. [FN353] The BRB's holding that *Richardson* did not fake his back injury is not the kind of success contemplated by the statute; successful prosecution of a claim means getting an order that 'causes the defendant's behavior to change for the benefit of the plaintiff.' [FN354]

The *Richardson* claimant also sought attorneys' fees on the knee injury claim under section 928(b), [FN355] which provides that an LHWCA worker who turns down a settlement offer and thereafter uses an attorney to achieve an award that is greater than the settlement offer is entitled to 'a reasonable attorney's fee based solely upon the difference between the amount awarded and the amount tendered.' [FN356] The court held that this provision is of no help to *Richardson*. [FN357] He argued that the portion of the \$5000 settlement offer applicable to the knee injury was less than \$932, but he offered no evidence in support of that argument. [FN358] 'The burden of proof is on the party seeking the attorney fee award.' [FN359]

H. Limitation of Liability

1. Privity or knowledge of the shipowner

Goodman v. Williams, [FN360] holds that merely by pleading that a boating accident that occurred while he was operating his own boat was caused by 'an unknown source,' the 'shipowner' could file a jurisdictionally sound Petition for Exoneration or Limitation of Liability. [FN361] Whether the court's reasoning is sustainable in light of *Lewis v. Lewis & Clark Marine, Inc.*, [FN362] is a close question. [FN363]

*192 2. Venue

Federal Rules of Civil Procedure Supplemental

Rule F(9) ('Rule F(9)') sets out a four-step hierarchy of venue rules for shipowners' complaints seeking limitation of liability, providing in pertinent part that such a complaint:

shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district, then the complaint may be filed in any district. [FN364]

Rule F(9) goes on to state:

For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. [FN365] Rule F(9) provides a six-month statute of limitations for shipowners' limitation of liability claims. The shipowner in *In re Mike's Inc.*, [FN366] waited until the last week to file for limitation in the U.S. District Court for the Eastern District of Missouri, where the vessel was located. [FN367] But Kristopher Tinnon had earlier brought a state-court seaman's suit in Madison County, Illinois. [FN368] The shipowner took the position that venue was proper where the vessel was located because the state-court suit was not contemplated by Rule F(9)'s language placing venue 'in any district in which the owner has been sued,' [FN369] arguing that the word 'district' in the statutory phrase meant a federal district court. [FN370]

The district court in *Mike's* concluded that Rule F(9) placed venue *193 for the limitation action in the Southern District of Illinois, which includes Madison County. [FN371] The district court accordingly dismissed the action for improper venue. [FN372] Dismissal meant that the statute of

limitations had run, however transfer would have kept the limitation action alive. [FN373] On appeal, the Eighth Circuit (in an opinion by Judge Morris Arnold) affirmed in all respects; [FN374] Judge Arnold said that the meaning of the Rule F(9) phrase 'any district in which the owner has been sued' was a question of first impression in the Eighth Circuit but that it is pretty clear that the word 'district' in that usage means a geographical area. [FN375] For this conclusion, he relied on *In re American River Transp. Co.*, [FN376] and *In re Chevron U.S.A., Inc.*, [FN377] stating that Judge McNamara's opinion in *American River Transp.* was 'particularly instructive.' [FN378]

Judge Arnold also said that the trial court's decision to dismiss rather than transfer the action was certainly not an abuse of discretion, pointing out that counsel for *Mike's* waited until the last week to file, didn't argue for transfer in the district court, and failed to bring the statute of limitations problem to the district court's attention. [FN379] 'Our intuition is that these decisions reflect a calculated trial strategy of *Mike's* counsel.' [FN380]

I. Salvage: pure salvage vs. contract salvage.

A pair of district court cases illustrate the importance of the distinction between pure salvage and contract salvage. In *LaPlante v. Sun Coast Marine Services*, [FN381] it was held that a boat owner who signed an agreement with a salvor agreeing 'to payment in full of all charges' was liable for a contract salvage award even though the boat became a total loss due to no negligence of the salvor. [FN382] (No pure salvage award could have been made in such circumstances, because one of the criteria for a pure *194 salvage award is success.) Contrastingly, in *Smit Americas, Inc. v. M/V MANTINA*, [FN383] a grounded oil tanker entered into what it thought was a salvage contract but ended up being liable for a (presumably larger) pure salvage award on the view that the contract was only for the salvage master to provide advice. [FN384] When the salvage master found the ship in more peril than the 'advice' contract contemplated, his successful efforts thereafter went beyond advice and met the criterion of 'voluntariness,' thus entitling him to a pure salvage award. [FN385]

J. Passengers' suits against cruise lines.

In *Gibbs v. Carnival Cruise Lines*, [FN386] a minor was hurt on a cruise. [FN387] His parents did not bring suit on his behalf until almost two years later. [FN388] Under 46 U.S.C. § 183b(a) (2000), a carrier may contractually impose a one-year time-bar, and such a provision was included in the boy's ticket. [FN389] However, section 183b(c) tolls the one-year period for injured minors. [FN390] The clock starts running only when the minor's 'legal representative has been appointed,' provided that appointment occurs within three years of the injury. [FN391] Reversing the district court, the Third Circuit held that the *Gibbs* action was timely because the boy's mother did not become his 'legal representative' until beginning to serve as guardian ad litem after filing the suit. [FN392] The most interesting issue in the case was whether the plaintiff should have been estopped from relying on the representative-appointment tolling provision because his lawyer wrote to the cruise line over a year before filing suit and claimed that the mother was the boy's 'guardian ad litem.' [FN393] Insisting that this issue must be determined by federal maritime law rather than the New Jersey law apparently relied upon *195 by the defendant, [FN394] Judge Becker (writing for a unanimous panel) concluded no estoppel because no detrimental reliance had been shown. [FN395]

In upholding summary judgment for the defendant cruise line in *Ilan v. Princess Cruises, Inc.*, [FN396] the court noted that the standard of care owed by a carrier to a passenger is the general maritime law's 'reasonable care under the circumstances' duty and held that *Princess Cruises* lacked actual or constructive notice of the presence of the spider which allegedly bit the plaintiff passenger. [FN397] Perhaps this case illustrates the importance of the rule excluding passengers from the protection of the unseaworthiness doctrine.

Wallis v. Princess Cruises, [FN398] treated five potentially significant legal issues. Two of these issues--the court's treatment of the criteria for admiralty jurisdiction and of the principles controlling the displacement of state law by federal general maritime law--are treated in an above section. [FN399]

The plaintiff and her husband were passengers

on a cruise when the husband disappeared from the ship near the Greek coast. [FN400] His drowned body was eventually recovered. [FN401] The plaintiff brought an action under the Death on the High Seas Act, (DOHSA) [FN402] alleging negligent search. [FN403] The trial court granted the defendant's motion for partial summary judgment that its liability, if any, was limited to approximately \$60,000 in accordance with a clause printed on the back of the ticket contract that stated:

Carrier shall be entitled to any and all liability limitations, immunities and rights applicable to it under the 'Convention Relating to the Carriage of Passengers and Their Luggage by Sea' of 1976 ('Athens Convention') which limits the Carrier's liability for death or [for] personal injury to a Passenger to no more than the applicable amount of Special *196 Drawing Rights as defined therein, and all other limits for damage or loss of personal property. [FN404] In the Ninth Circuit, the first issue was whether 46 U.S.C. § 1292(a)(3) (2000) provided it with jurisdiction over the plaintiff's interlocutory appeal from the trial judge's ruling upholding the damages limitation. [FN405] Concluding that it did, the court criticized decisions of the Third, Fourth, and Fifth Circuits for reading section 1292(a)(3) 'too narrowly.' [FN406] (The Fifth Circuit decision in question was *Bucher-Guyer AG v. M/V INCOTRANS SPIRIT*. [FN407])

The second issue confronted by the Ninth Circuit in *Wallis* was whether the liability-limiting provision of the passage contract was prohibited by 46 U.S.C. app. § 183c(a) (2000), which prohibits 'any vessel transporting passengers between ports of the United States or between any such port and a foreign port' from contractually imposing damages limitations on personal injury and death claims. [FN408] The court held that section 183c(a) on its face did not apply because the cruise ship did not touch a U.S. port. [FN409] Moreover, 'the legislative history . . . suggests a congressional intent . . . to regulate all foreign carriers within the waters of the United States, but not to regulate foreign vessels in foreign waters.' [FN410]

The third issue was whether the ticket's

reference to the Athens Convention was a clear enough communication of the approximately \$60,000 limit to satisfy the Ninth Circuit's 'reasonable communicativeness' test. [FN411] The answer was no: The incorporation-by-reference approach was, under the circumstances, too vague. [FN412]

K. Litigation against the federal government: intercircuit conflicts.

In *McMellon v. United States*, [FN413] four recreational boaters were injured when their two jet skis went over a dam on the Ohio River and fell *197 25 feet. [FN414] They sued the Government (Army Corps of Engineers), alleging inadequate warnings. [FN415] The trial court granted the Government's motion for summary judgment. [FN416] Reversing, the two-member majority of the Fourth Circuit announced its disagreement with other circuits on two significant points. [FN417]

First, in the Fourth Circuit, the 'discretionary function' exception of the Federal Tort Claims Act (FTCA), [FN418] is not read into the Suits in Admiralty Act (SAA). [FN419] On this point, the panel said it was obliged to follow *Lane v. United States*. [FN420] The panel acknowledged that all of the other circuits that have considered the point disagree with the Fourth, citing cases from the First, [FN421] Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits, including *Mid-South Holding Co. v. United States*, [FN422] and *Baldassaro v. United States*. [FN423]

Second, some courts have bought the argument the Government made here--that 33 C.F.R. § 207.300(s) (2002) imposes a duty on boaters but not on the Government. [FN424] That regulation states:

Restricted areas at locks and dams. All waters immediately above and below each dam, as posted by the respective District Engineers, are hereby designated as restricted areas. *198 No vessel or other floating craft shall enter any such restricted area at any time. The limits of the restricted area at each dam will be determined by the responsible District Engineer and marked by signs and/or flashing red lights installed in conspicuous and appropriate places. [FN425]

Disagreeing with Pearce, the McMellon court held that the third sentence of the regulation states a duty to post appropriate warnings. [FN426]

Judge Niemeyer dissented on a number of points, arguing most forcefully that the Fourth Circuit should get into line on the discretionary function point. [FN427]

L. Punitive damages.

Last year's paper [FN428] treated the Ninth Circuit's decision in *In Re Exxon Valdez*, [FN429] rejecting as excessive the \$5 billion in punitive damages the district court had awarded against Exxon in the fishermen's suit for economic damages resulting from the 1989 oil spill from the M/V EXXON VALDEZ. [FN430] On remand, the district court (with apparent reluctance) reduced the award to \$4 billion while insisting that the \$5 billion was not a violation of due process. [FN431] This decision predated the Supreme Court's new decision in *State Farm v. Campbell*. [FN432] On August 18, 2003, the Ninth Circuit vacated the \$4 billion award and remanded the case to the district *199 court to try again. [FN433] On remand the district court found 'State Farm adds no new, free-standing factor to the constitutional analysis of punitive damages that the court might 'tie onto' its previous order. It is the court's view that State Farm, while bringing the BMW guideposts into sharper focus does not change the analysis.' [FN434] Thus the district court held that the \$5 billion would not violate State Farm or violate the oil company's due process rights and in order to comply with the court of appeals order the award would be reduced to \$4.5 billion. [FN435]

IV. The Work of the Courts in the Fifth and Eleventh Circuits

A. Admiralty jurisdiction.

1. The basic (Grubart) test for admiralty jurisdiction in tort

Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., [FN436] holds that a proponent of admiralty jurisdiction in a torts case must show (a) that the tort occurred on navigable water or was caused by a vessel on navigable water (the 'L'

requirement); (b) that the general features of the incident in suit were likely to disrupt or had the potential of disrupting maritime commercial activity (the 'PDMC' requirement); and (c) that the general character of the activity giving rise to the incident in suit shows a substantial relationship to traditional maritime activity (the 'SRTMA' requirement). [FN437]

2. The L requirement

Perhaps because the phrase 'navigable waters of the United States' permeates the maritime law in other contexts, lower courts occasionally misstate (and thus misapply) the first element--the locality element--of the Grubart test by requiring the tort to occur on the high seas or in U.S. territorial water. In *St. Pierre v. Maingot*, [FN438] the Magistrate Judge made this mistake, holding that a pleasure-craft fatality in Cayman Islands waters did *200 not satisfy the locality requirement. [FN439]

3. The SRTMA and PDMC requirements

In *Wall v. Calcasieu Parish Police Jury*, [FN440] the widow of a swimmer killed by being struck by an unidentified watercraft sued the Parish Police Jury as operator of the designated swimming area for having allowed the buoy line protecting the area from boat traffic to deteriorate. [FN441] The defendant argued against admiralty jurisdiction, pointing to language in several Supreme Court opinions suggesting that injured swimmers do not have much of a connection to traditional maritime affairs. [FN442] The court rejected this argument, indicating that swimmers hit by boats easily meet the SRTMA requirement. [FN443] The court also noted that the presence of an injured or killed swimmer in navigable waters has the potential of disrupting maritime commerce, thereby satisfying the PDMC requirement of Grubart. [FN444]

4. The Admiralty Extension Act (AEA)

A recent exhaustive analysis of the Admiralty Extension Act (AEA) [FN445] reveals a great deal of confusion in the jurisprudence interpreting that statute and proposes a number of simplifying and clarifying steps that are within the reach of the lower courts. [FN446] This study demonstrates that the AEA was never intended to apply in actions against defendants other than vessels, their crews,

and their operating personnel, [FN447] and that the AEA therefore has no legitimate application unless a defect in the vessel or its appurtenances or the negligence of vessel-operating personnel is alleged to have been a cause of the injury in suit. [FN448]

Under the proposed interpretation of the AEA, there would have been no admiralty jurisdiction in *Anderson v. United States*. [FN449] Anderson *201 was a civilian employee of a government contractor working on land at the Cerro Matias Observation Post at the Atlantic Fleet Weapons Training Facility (AFWTF) when he was injured by a badly aimed bomb fired by an aircraft that had been launched from the USS John F. Kennedy during a training exercise at Vieques Island, Puerto Rico. [FN450] Anderson's suit alleged the negligence of the government in placing him in an unsafe working environment, of the Range Control Officer, and of the pilot. [FN451] Anderson did not allege any defect of the plane or the vessel, and he did not allege any negligence of vessel-operating personnel. [FN452] Nevertheless, the 11th Circuit upheld the trial judge's determination that the AEA covered the case, simply because an appurtenance of the vessel (the airplane) was a cause of the injury. [FN453]

B. Preemption of state law by federal maritime law.

1. State law displaced

Henegan v. Cooper/T. Smith Stevedoring Co., [FN454] illustrates the practical importance of the generally accepted rule that cases of admiralty jurisdiction are normally governed by the federal maritime law rather than state law. This was an action for asbestos-related disease by the widow of a man whose exposure to asbestos occurred in part while working as a deckhand aboard a fleet of derrick barges. [FN455] Under the court's interpretation of maritime law, the plaintiff has the benefit of a rule of liability--strict liability for a product that is unreasonably dangerous per se--and a rule of damages appointment--joint and several liability, with the defendant being credited for the percentage share of a settling tortfeasor *202 but otherwise held fully liable. [FN456] Both of these rules were more plaintiff-friendly than current Louisiana law.

In *St. Paul Fire & Marine Ins. Co. v. SSA Gulf Terminals*, [FN457] a multifaceted dispute arose

over a policy of insurance on a floating structure moored in the Mississippi River and used for the processing of rice and grain. [FN458] Judge Fallon determined that the structure was not a vessel; that the policy of insurance was nevertheless a maritime contract; and that, given the 'abundant . . . federal [case-law] authority' on all of the points in dispute, 'there is no need to turn to state law.' [FN459]

Viewed broadly, *Miles v. Apex Marine Corp.*, [FN460] stands for the proposition that no nonpecuniary damages are recoverable in wrongful death actions by the survivors of seamen. [FN461] *Sea-Land Services, Inc. v. Gaudet*, [FN462]--which the Miles Court pointedly did not overrule--holds that a longshoreman's widow can recover nonpecuniary damages (for loss of society) under the general maritime law. [FN463] And *Yamaha Motor Corp. v. Calhoun*, [FN464] holds that nonpecuniary damages may be available under state law in actions for the maritime deaths of nonseafarers. [FN465] What a mess. There is much room for confusion and disagreement.

One ongoing debate is whether the family members of seamen who seek wrongful death recovery from a defendant other than an employer/shipowner are subject to the Miles preclusion. The courts and other analysts who answer negatively contend that the seaman status of the victim has no legitimate relevance in litigation that does not involve the victim's employer or a vessel on which the victim worked. In *Scarborough v. Clemco Industries*, [FN466] Judge Berrigan took the other view, concluding that the family of a man who died as a result of his work as a seaman were precluded by Miles from recovering nonpecuniary damages (for loss of society) under state law in an action against manufacturers/distributors of *203 sandblasting equipment. [FN467]

Citing *Exxon Co. v. Sofec*, [FN468] as its guidepost, the court in *Shofstahl v. Board of Commissioners*, [FN469] held that the negligence of the plaintiffs in running their boat into the defendant's unlighted pier on Lake Ponchartrain was the sole proximate cause of the accident. [FN470] There is no good reason for thinking the outcome would have been different under state law, but the court seemed to think it would have been, stating:

In the present case, plaintiffs' actions are the superseding and the sole proximate cause of their injuries. While the defendants' unlit pier may be a cause in fact of the plaintiffs' injuries, cause in fact liability is not sufficient to justify a recovery using negligence principles of general maritime law. We recognize that this is different from most state tort law systems, where percentages of fault are allocated (whether they be proximate causes or causes in fact) and recovery is permitted according to the percentage of fault times the damages. Nevertheless, due to the situs and maritime nature of this accident, substantive general maritime law applies. [FN471]

The plaintiff in *Fishbones, Inc. v. Southern Boat Service*, [FN472] bought the M/V DISCOVERY and converted it to a floating hotel for use by sportsfishermen. [FN473] The defendant was hired to tow the floating hotel from Venice, Louisiana, to Breton Island. [FN474] Through the defendant's negligence, the vessel/hotel was destroyed. [FN475] The court calculated damages under the federal general maritime law and rejected the plaintiff's efforts to use a more generous Louisiana-law measure that might have permitted an award for the destruction of the plaintiff's contemplated hotel business. [FN476]

[F]ederal maritime law clearly provides that consequential damages such as loss of use or lost profits are not available when the vessel is deemed a total loss . . . Fishbones' attempt *204 to distinguish its business destruction claim from a claim for loss of use of the vessel is meritless. The destruction of business claim is damage consequential to the loss of the vessel . . . [FN477] In *Wall v. Calcasieu Parish Police Jury*, [FN478] the court's view of the required vertical choice-of-law process in saving clause cases (admiralty cases brought at the plaintiff's option in a nonadmiralty court) gave the plaintiff everything she needed. She was suing the Police Jury for having let a buoy line that was supposed to protect swimmers from boats deteriorate. [FN479] Her husband was swimming when killed by an unidentified boat. [FN480] The court's

conclusion that the case fell within admiralty jurisdiction led to the further conclusion that the general maritime law of comparative fault and joint-and-several liability--whereby the plaintiff would be entitled to full recovery of her damages diminished only by any negligence of the decedent and by the negligence of any putative tortfeasor with whom the plaintiff has settled--preempted the application of Louisiana law principles which would have further reduced the plaintiff's recovery to reflect the negligence of the unidentified boater. [FN481] However, the court also held that the general maritime law principles governing the categories of damages recoverable in wrongful death actions--which may well preclude recovery for loss of society--could be supplemented by the more generous provisions of Louisiana law. [FN482]

In *Texas A&M Research Foundation v. Magna Transportation, Inc.*, [FN483] the plaintiff sought the benefit of a Texas statute that permitted a party seeking to recover for a breach of contract to 'recover reasonable attorney's fees.' [FN484] The Fifth Circuit held 'that the general rule of maritime law that parties bear their own costs, coupled with the need for uniformity in federal maritime law, precludes the application of state attorneys' fee statutes . . . to maritime contract disputes.' [FN485] In reaching this conclusion, *205 the court followed decisions of the First and Third Circuits. [FN486]

2. State law applied [FN487]

In *Daybrook Fisheries, Inc. v. Ketnor*, [FN488] a fishing boat captain decided to leave one fishery for another, and he may have persuaded another captain to go with him. [FN489] The former employer sued him for breach of contract and for tortious interference with contract. [FN490] In upholding a judgment for the defendant on both counts, the court said that while maritime contracts are ordinarily interpreted under the general maritime law, 'there are no settled principles of maritime law controlling the interpretation of employment between a captain and a vessel owner. In the absence of a specific and controlling federal rule, state law governs maritime contracts. []' [FN491]

Turning to Louisiana law, the Daybrook court said that the case was governed by Louisiana Civil Code article 2747: 'A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause.' [FN492]

The plaintiff in *Elmer v. Speed Boat Leasing, Inc.*, [FN493] was a 70-year-old woman who went on a commercial 'thrill ride' on a speedboat off South Padre Island and was injured on the trip. [FN494] She went to trial under Texas law and lost when the jury found her negligence at 65% and the defendant boat operator's at 35%. [FN495] Under the general maritime law of pure comparative negligence, she would have been entitled to 35% of her damages. But she 'concede[d] in her brief that the application of substantive maritime law herein was waived. The application of substantive maritime law is a choice of law determination that can be *206 waived.[]' [FN496]

Louisiana Revised Statutes section 34:1055 limits the liability of compulsory pilots to cases in which the plaintiff can 'prove by clear and convincing evidence that the damages arose from the pilot's gross negligence or willful misconduct.' [FN497] In *Belala v. Coastal Towing Co.*, [FN498] Judge Fallon granted a pilot's motion for summary judgment on the basis of the statute, finding that the plaintiff (alleging personal injury in an allision) had not alleged and would not be able to prove gross negligence. [FN499]

C. Seaman status.

1. The 30% rule

Chandris, Inc. v. Latsis, [FN500] indicates that seaman status generally requires a showing of vessel-attached work for at least 30% of the worker's time with the employer, but recognized a change-of-assignment doctrine whereby the 30% clock will be restarted if the employer changes the worker's assignment from land-based to vessel-based work. [FN501] The plaintiff in *Becker v. Tidewater, Inc.*, [FN502] was a college student working as a summer intern for an oilfield service company. [FN503] After spending some time working on land, Becker was assigned to a vessel as a member of its crew for a relatively short voyage,

and he was seriously hurt soon after beginning that assignment. [FN504] The trial judge granted judgment on a jury *207 verdict awarding damages under the Jones Act. [FN505] Reversing, the Fifth Circuit panel rejected the plaintiff's change-of-assignment argument and held that the 30% inquiry should address the whole summer. [FN506] The panel credited the defendant's testimony that the student would have been put back to work on land at the conclusion of the short voyage if he had not been disabled. [FN507]

2. Seaman status issues in the removal context

Jones Act cases brought in state court are not removable to federal court. [FN508] When a defendant removes an ostensible Jones Act case, the federal district court should generally remand it. However, 'in certain circumstances defendants may pierce the pleadings to show that the Jones Act claim has been fraudulently pleaded to prevent removal.' [FN509] 'The removing party must show that there is no possibility that plaintiff would be able to establish a [Jones Act] cause of action.' [FN510]

In *Anglin v. Diamond Offshore Drilling, Inc.*, [FN511] Judge Zainey followed the Burchett approach and remanded the case on concluding that 'there is a reasonable basis that plaintiff may establish that he was a seaman under the Jones Act.' [FN512] The plaintiff was a drilling mud technician who might be able to satisfy the 30% rule by proving up his work on Diamond's fleet of semi-submersible drilling rigs. [FN513]

Hogans v. Elmwood Marine Services, Inc., [FN514] came out the other way. Here, the plaintiff claimed seaman status by virtue of work aboard a floating dry dock. [FN515] This assertion of seaman status was deemed 'fraudulently' pleaded and the case accordingly remanded on the view that '[a] dry dock is not a vessel, and it may not be cited as a vessel as required *208 to establish seaman status for purposes of a Jones Act claim.' [FN516]

3. When is a vessel 'out of navigation'?

The plaintiff in *Carter v. Bisso Marine Co.*, [FN517] did much of his work in connection with a 28-foot survey vessel with twin outboard engines that was hauled overland by trailer from project to

project. [FN518] His injuries were incurred hitching or unhitching the boat trailer to the company truck. [FN519] The defendant moved for summary judgment denying seaman status on the view that the plaintiff could not satisfy the 30% rule of thumb because the plaintiff did not spend enough time on the boat in the water and his time dealing with the boat on land could not count. [FN520] In denying this motion, Judge Duval stated that '[t]he work Carter performed on the Bulls Eye while it was on land may well be relevant to the issue of seaman status provided the Bulls Eye remained in navigation during these times, which is itself a factual determination.' [FN521] On similar reasoning, Judge Duval denied the defendants' motion to dismiss Carter's unseaworthiness claim. [FN522]

D. The rights of seamen.

1. The wards of the admiralty

In last year's paper [FN523] we treated *Karim v. Finch Shipping Co.* [FN524] The aftermath of that decision has been Judge Fallon's application of the equitable powers of a court of admiralty to sort out a dispute between the Bangladeshi seaman plaintiff and his lawyers. [FN525] The contingent fee agreement between Karim and his lawyers gave the lawyers 40% of the gross award (of ca. \$410,000, arrived at through the application of Bangladeshi law) and obligated Karim to meet all litigation expenses out of his 60%. Applying the contract would have left Karim with nothing. Noting that seamen are wards of the admiralty, Judge Fallon used his equitable powers to reform the contract by subtracting the litigation *209 expenses first and then splitting the balance. [FN526] Thus, Karim and his lawyers (who worked on the case for seven years) each netted about \$56,000. [FN527]

2. Establishing 'employee' status under the Jones Act and the doctrine of maintenance and cure

An employer-employee relationship between the plaintiff seaman and the defendant is essential to recovery under both the Jones Act and the law of maintenance and cure. In *Corsair v. Stapp Towing Co.*, [FN528] the employer required the seaman to sign a preprinted form declaring that he was an independent contractor, not an employee, and directing that no income and social security taxes be

withheld from his wages. [FN529] Denying the employer's motion for summary judgment, Judge Kent brushed aside the form as 'nothing more than a contrivance, the sole and obvious purpose of which is to avoid the obligations of the Jones Act.' [FN530] Thus, the form was void as a matter of public policy. [FN531] Moreover, said Judge Kent:

[F]ailure to withhold income taxes and to make deductions for social security or unemployment insurance is not determinative of employee status. [] Therefore, even if the form were not void, it would not be decisive in determining whether Corsair was an employee or an independent contractor. [FN532] Whether Corsair was the defendant's employee depended on 'who controlled the details of Corsair's work and what the Parties' understanding of the relationship was.' [FN533]

3. Maintenance and cure: the shipowner's right to stop paying maintenance when maximum possible cure has been achieved

In *Bloom v. Weeks Marine, Inc.*, [FN534] the shipowner apparently argued that its right to stop paying maintenance once maximum possible cure had *210 been achieved entailed a right to compel the plaintiff to submit to a medical examination that was not constrained by Federal Rules of Civil Procedure Rule 35(a) (governing 'physical and mental examinations of persons '). [FN535] The Magistrate Judge disagreed, holding that the shipowner would have to use Rule 35(a). [FN536]

4. Maintenance and cure: applicability of the defense of claim preclusion

In *Brooks v. Raymond Dugat Co.*, [FN537] a seaman brought an action against his employer for maintenance and cure necessitated by a slip and fall he suffered on a vessel. [FN538] He then voluntarily dismissed his claim with prejudice. [FN539] Later he refiled for maintenance and cure based on the same slip and fall. [FN540] Upholding the trial court's grant of summary judgment for the defendant, the court held that, while serial actions for maintenance and cure may be brought, this claim was precluded because it was identical to the earlier action and a dismissal with prejudice is equivalent to a judgment on the merits.

[FN541]

5. Maintenance and cure: the employer may have to prepay for medical treatment

In *Gorum v. Ensco Offshore Co.*, [FN542] a physician recommended arthroscopy of a seaman's injured knee and was apparently unwilling to provide the service until paid. [FN543] The employer resisted prepayment, citing *Dominguez v. Maritime Transport Management Co.*, [FN544] where the court stated that it was 'unable to find a single precedent requiring that the maritime employer must guarantee to pay for tests prior to such tests being done.' [FN545] Judge Vance rejected this argument, citing *Guevara v. Maritime *211 Overseas Corp.*, [FN546] and *Sullivan v. Tropical Tuna, Inc.*, [FN547] for the proposition that a seaman's employer's 'cure obligations involves taking reasonable steps to assure that plaintiff receives the recommended surgery, including providing assurance of payment in advance if that is necessary.' [FN548]

6. Maintenance and cure: the intentional concealment defense

One of the employer's affirmative defenses to the injured or ill seaman's right to maintenance and cure is 'sickness or infirmity intentionally concealed when the engagement is entered into.' [FN549] The Fifth Circuit gloss on this portion of *Warren* includes *McCorpen v. Central Gulf S.S. Corp.*, [FN550] which was explained as follows by Judge Vance in *In re Rene Cross Construction, Inc.* [FN551]

[W]hen the shipowner requires a prospective seaman to undergo a pre-hiring medical examination, and the seaman either intentionally misrepresents or conceals material medical facts, then the seaman is not entitled to an award of maintenance and cure. The shipowner is entitled to this defense only when (1) the seaman has intentionally misrepresented or concealed medical facts; (2) the misrepresented or concealed facts were material to the employer's hiring decision; and (3) there exists a causal link between the pre-existing disability that was concealed and the disability incurred during the voyage.

[FN552] Judge Vance went on to grant the employer's motion for summary judgment dismissing the claim for maintenance and cure of a seaman who sustained injuries to his back, neck, and knee after having concealed from the employer's medical examiner that he was at the time of the examination being treated for back, neck, and knee problems stemming from a previous accident. [FN553]

*212 7. Forum choices available to Jones Act seamen: the down side

The seaman plaintiff in *Russell v. Jack Jackson, Inc.*, [FN554] brought a combined Jones Act/maintenance and cure suit on the law side of federal court, predicated subject matter jurisdiction on 28 U.S.C. § 1331 (federal question jurisdiction) and demanding a jury trial. [FN555] When he suffered an adverse interlocutory ruling by the trial judge (the opinion does not reveal what the ruling was), the seaman sought to appeal. [FN556] The Fifth Circuit held that there is no appellate jurisdiction. [FN557] Had the action been brought in admiralty, interlocutory appeal would presumably have been available pursuant to 28 U.S.C. § 1292(a)(3). [FN558] But this provision is confined to 'admiralty cases,' and the plaintiff is stuck with the consequences of his choice of a non-admiralty forum.

8. Punitive damages

In *Guevara v. Maritime Overseas Corp.*, [FN559] the court held that seamen are not entitled to recover punitive damages for willful nonpayment of maintenance and cure. [FN560] The Guevara court did not explicitly hold that punitive damages are unavailable in Jones Act suits, but it so assumed, making that assumption a major step in its reasoning process. [FN561] Some academic analysts insist that the Guevara decision is erroneous as a matter of history, doctrine, and policy. [FN562] It is nevertheless the law of the circuit, and the district courts are regularly taking it to preclude the availability of punitive damages in seamen's actions generally. [FN563]

*213 9. The innocent shipowner/employer's right to indemnity from the tortfeasor for maintenance and cure outlays

In *Durgin v. Crescent Towing & Salvage, Inc.*, [FN564] a defective mooring line of the foreign-flag vessel *Pantodinamos* popped and injured a seaman on the M/V *LOUISIANA*. [FN565] The seaman sued and subsequently settled his claims against the owners/operators of each vessel. [FN566] In the settlement agreement, Crescent (the employer) reserved its right to seek indemnity for maintenance and cure payments from West of England, the insurer of the *Pantodinamos*. [FN567] Crescent then asserted a claim for about \$270,000 against West. [FN568] The court held that while general principles of public policy unquestionably favor indemnification in situations involving an innocent shipowner/employer--so that Crescent is clearly entitled to indemnity for maintenance and cure--about \$69,000 of the amount sought was voluntary payments, not maintenance and cure, and there is no basis for indemnification as to those sums. [FN569]

10. No primary duty doctrine in the Fifth Circuit?

Last year's paper [FN570] treated a 'primary duty doctrine' of the Ninth Circuit whereby some types of fault--generally speaking, fault entailed in deliberately breaching a duty that the employee consciously assumed as a condition of his employment--may sometimes operate as a total-bar defense to any recovery by an injured seaman. In *Sanders v. Diamond Offshore Drilling, Inc.*, [FN571] Judge Vance denied a Jones Act employer's motion for summary judgment that was based principally on a 'primary duty' argument. [FN572] Noting the tension between the primary duty doctrine and the normal Jones Act rule of pure comparative fault, Judge Vance pointed out that she had 'found no case in which the Fifth Circuit embraced the 'primary duty' rule' and that in *Gautreaux v. Scurlock Marine, Inc.*, [FN573] a *214 'primary duty' argument by the employer was seemingly resolutely ignored by the court. [FN574] Judge Vance concluded:

Fifth Circuit precedent indicates that a plaintiff's negligence in failing to perform a duty assumed in the course of employment may reduce, but does not bar, plaintiff's recovery, unless plaintiff's negligence is the sole cause of his injury. So long as the injury was caused at least in part by the negligence

of the employer, the employer is exposed to liability. [FN575]

E. Carriage of goods.

1. The plaintiff's prima facie case and burdens of proof

The burden-of-proof structure in COGSA cases has sometimes been analogized to a ping-pong game because the burden moves back and forth between the plaintiff and the defendant. In *Nitram, Inc. v. Cretan Life*, [FN576] the Fifth Circuit clearly stated the four main burden-of-proof stages as follows:

[1.] The plaintiff . . . must establish a prima facie case by proving both delivery of the goods to the carrier in good condition and outturn by the carrier in damaged condition. [2. If plaintiff does that, the carrier] . . . bears the burden of showing that the loss or damage falls within one of the COGSA exceptions set forth in 46 U.S.C.A. § 1304(2) [3.] Once that burden is satisfied, the burden shifts back to the plaintiff to show that the carrier's negligence contributed to the damage or loss. [4. If the plaintiff satisfies that burden], the burden then shifts to the carrier to segregate the portion of the damage due to the excepted cause from that portion resulting from its own negligence. [FN577] In sum, the claimant has the initial burden of establishing its prima facie case (stage one). Once that prima facie case has been established, the burden shifts back and forth between the parties like a ping-pong ball.

Unfortunately, *Nitram's* relatively clear statement has been obscured *215 by a subsequent line of cases that appears to revise the second-stage burden by giving the carrier a choice of proving either 'that it . . . exercised due diligence to prevent the damage' or 'that the loss was caused by one of the exceptions set out in [COGSA § 4(2)].' [FN578]

The apparent revision of the second-stage burden did not cause problems in the cited cases. In *Sun Co. and Blasser Brothers*, the carriers made no attempt to rely on the new option of proving their exercise of 'due diligence to prevent the damage.' [FN579] They instead relied on specific exceptions

in COGSA § 4(2) in their efforts to overcome the plaintiffs' prima facie cases. [FN580] In *Tenneco Resins*, the first two burden-of-proof stages were not even at issue. The focus of the case was on cargo's third-stage effort to prove carrier negligence. [FN581]

In *Tubacex*, the apparent revision of the second-stage burden was harmless because the court interpreted the new option in a non-problematic way. When explaining stage two in greater detail, the court explained that the carrier had a choice of relying either on section 4(2)(q)'s 'catch-all' defense or on one of the exceptions in section 4(2)(a)-(p). [FN582] Section 4(2)(q) was singled out for special treatment because it explicitly imposes the burden on the carrier of showing 'that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.' [FN583] In other words, the court apparently equated the carrier's new option of proving its exercise of 'due diligence to prevent the damage' with section 4(2)(q)'s requirement of proving that its negligence did not contribute to the loss or damage. [FN584]

If this is all the new option means, then it is unnecessary but benign. The carrier's option can be restated as either to show that the loss or damage falls within COGSA § 4(2)(q) or to show that the loss or damage falls within COGSA § 4(2)(a)-(p). [FN585] This, of course, is the same as *216 *Nitram's* clearer statement that the carrier at stage two must show 'that the loss or damage falls within one of the COGSA exceptions set forth in § 4(2).' [FN586] Moreover, there is little justification in giving section 4(2)(q) special treatment. It is true enough that the Q clause imposes an explicit burden of proof on the carrier. But COGSA § 4(2)(c), the perils of the sea exception, has also been construed (at least in the United States) to include an implicit requirement that the carrier prove its lack of negligence, and the fire exception in section 4(2)(b) has long had its unique burden-of-proof rules. Fortunately, the *Nitram* statement of the four main burden-of-proof stages is adequate to deal with all of these variations. Once the plaintiff has established its prima facie case, the burden shifts to the carrier to show 'that the loss or damage falls within one of the COGSA exceptions set forth in § 4(2).' [FN587] What the carrier must do in order to make this showing will depend on the particular

exception claimed. In some cases, such as those arising under section 4(2)(c) or 4(2)(q), the carrier will have more to prove than it does in others, but the general rule remains the same.

In *Steel Coils, Inc. v. M/V LAKE MARION*, [FN588] the court ultimately reached a plausible conclusion--but its reliance on the expanded statement of the carrier's second-stage options resulted in an unduly complicated analysis that may cause more serious problems in future cases. The plaintiff was seeking to recover on a shipment of rust-damaged steel against the carrying vessel, its owner, its manager, and the time charterer. [FN589] In stage one, the plaintiff (relying on mates receipts, bills of lading, and a cargo survey) proved that the steel had been loaded in good condition, and (relying on survey reports and chemists' expert testimony) proved that the steel was delivered in damaged condition. [FN590] The vessel interests challenged this conclusion on appeal, but the Fifth Circuit held that the district court had correctly allocated the burden of proof and that ample evidence supported the district court's holding. [FN591]

Proceeding to stage two, the *Steel Coils* court did not treat the carrier's option 'to prove that [it] exercised due diligence to prevent the damage' as an invitation to invoke the section 4(2)(q) catch-all defense, as *217 the *Tubacex* court had done. [FN592] It instead announced that 'a defendant may escape liability if it shows that it exercised 'due diligence . . . to make the ship seaworthy.'" [FN593] When the carrier interests were unable to carry this burden, [FN594] the court went on to consider whether they could rely on COGSA § 4(2)(c), the perils of the sea exception, or on COGSA § 4(2)(p), the latent defects exception. [FN595] Because the carrier interests failed in these attempts, as well, the court's reliance on the expanded statement of a carrier's second-stage options probably did not affect the result. [FN596] But this new wrinkle in the analysis may cause more serious problems in future cases.

It is true that the carrier ultimately bears the burden of proving its due diligence to make the ship seaworthy--if the issue becomes relevant. But stage two is not the time when this issue is relevant. Under the proper analysis, in stage two the carrier should seek to prove 'that the loss or

damage falls within one of the COGSA exceptions set forth in § 4(2),' just as *Nitram* explained. [FN597] If a carrier succeeds in stage two, then cargo bears the third-stage burden 'to show that the carrier's negligence contributed to the damage or loss,' just as *Nitram* explained. [FN598] One way that cargo might do this would be to show that the vessel was unseaworthy and that the unseaworthiness was at least a concurrent cause of the loss. Only when unseaworthiness has thus become an issue does the carrier need to show its due diligence. In such cases, it might be helpful to think of stage three as having two separate parts. In stage three-A, cargo must prove that unseaworthiness contributed to the loss, while in stage three-B the carrier must prove its due diligence to make the ship seaworthy (which, under COGSA § 4(1), would excuse the carrier from liability for unseaworthiness). [FN599]

If we take the *Steel Coils* analysis at face value, it gives carriers an extra right that they did not have under *Nitram's* statement of the four main *218 burden-of-proof stages. Under *Steel Coils*, a carrier can apparently rebut a plaintiff's prima facie case even if it is unable to show that the loss or damage falls within one of the COGSA § 4(2) exceptions (as *Nitram* required)--so long as it can prove due diligence to make the ship seaworthy. Thus a carrier would no longer be liable for completely unexplained losses (so long as it could prove due diligence to make the ship seaworthy). Even when the cause of the loss is known (so long as it is not unseaworthiness that could be traced to the carrier's lack of due diligence), the carrier could apparently escape liability without regard to whether the cause is included in section 4(2)'s catalogue. Section 4(2)(q) would become irrelevant, as no carrier would bother trying to prove that the cause of the loss arose without the fault or privity of the carrier or its agents and servants (as section 4(2)(q) requires) when the same result could be achieved more easily by proving due diligence to provide a seaworthy ship, even if unseaworthiness had nothing to do with the loss. This is completely inconsistent with the basic risk allocation that COGSA seeks to establish, and thus it would be very surprising if the *Steel Coils* analysis were taken at face value in a case that turned on this issue.

Moving the carrier's burden to prove due diligence to provide a seaworthy ship forward to

stage two might instead have a different unintended consequence that carriers would find more alarming. Under the Harter Act, [FN600] the carrier had an overriding obligation to show its due diligence to provide a seaworthy ship before it could rely on any of the other defenses that the Act allowed--even if unseaworthiness did not contribute to the loss. [FN601] One of COGSA's goals (indeed, one of the few specific ways in which COGSA and the corresponding Hague Rules were intended to benefit carriers) was to overrule *The Isis*, eliminate the overriding obligation, and permit a carrier to rely on the COGSA § 4(2) (Hague Rules article 4(2)) exceptions without showing its due diligence to provide a seaworthy ship--so long as the loss cannot be traced to unseaworthiness. [FN602] But English and Commonwealth courts (starting in an era when English judges refused to consider the travaux préparatoires of an international convention) have continued to apply the 'overriding obligation' analysis. [FN603] This outdated analysis has influenced some U.S. *219 decisions. [FN604] There may thus be a risk that what the *Steel Coils* court presented as the carrier's option of proving due diligence to provide a seaworthy ship instead of relying on a section 4(2) defense will instead become the carrier's obligation of proving due diligence before being permitted to rely on a section 4(2) defense. Although this analysis would not undermine the entire COGSA scheme (as a literal reading of *Steel Coils* would), it would nevertheless be a mistake that would defeat a specific purpose of COGSA and the Hague Rules.

In *Levi Strauss & Co. v. Tropical Shipping & Construction Co.*, [FN605] the district court restates the second-stage burden in yet a different way:

Because [the plaintiff] presented a prima facie case, [the carrier] must prove either that it exercised due diligence to prevent damage or loss by properly handling, stowing, and caring for the cargo, or that the harm resulted from one of the exception clauses contained in [COGSA § 4(2)]. [FN606] This variation on the Fifth Circuit's revision of the second-stage burden avoids the *Steel Coils* problem. It instead clarifies, as the *Tubacex* court did, that the 'due diligence' burden relates not to the seaworthiness of the ship but instead to the carrier's care of the cargo. In other words, it relates to the 'catch-all'

exception of the Q clause, COGSA § 4(2)(q). [FN607]

In *Levi Strauss*, the carrier was not able to carry its Q-clause burden. [FN608] During the inland portion of the transport, a trucker was moving a loaded container of men's jeans from Miami, Florida, to Little Rock, Arkansas, when the truck and container were stolen from a hotel parking lot in the middle of the night. [FN609] The court concluded that the drivers (the carrier's agents under section 4(2)(q)) had not taken adequate precautions, and thus the carrier could not defeat the plaintiff's prima facie case. [FN610]

Of course, the second-stage burden of proof is not the only issue to *220 arise in litigation. In *American Home Assurance Co. v. Dampskibsselskabet AF 1912*, [FN611] the plaintiff was unable to establish its prima facie case. The goods were delivered to the carrier at the port of loading in a sealed container with three separate high security seals. [FN612] After the ocean voyage, the carrier delivered the container, with all three high security seals intact, at the port of discharge. [FN613] When the consignee opened the container (three days after delivery at the port of discharge), it discovered that most of the cargo was gone and that sand had been substituted in its place. [FN614] None of the various inspections during the process revealed any indication of any problem, and the time of the theft was a mystery. [FN615] The district court held that the plaintiff had carried its burden of proving that the goods were delivered to the carrier in good condition (the first half of the prima facie case), but concluded that it had not shown that the goods were lost or damaged at the time the carrier delivered them at the port of discharge. [FN616] Thus the plaintiff failed to establish its prima facie case, and the carrier was not liable for the loss. [FN617]

2. COGSA as a basis for federal jurisdiction

In *Neutax, S.A. v. Global Freight Services, Inc.*, [FN618] the plaintiff had filed suit in state court to recover damages for cargo stolen from the carrier's custody outside of the tackle-to-tackle period. [FN619] The carrier had removed the case to federal court, claiming that it was governed by COGSA, and the plaintiff moved to remand to state court. [FN620] In deciding the remand motion, the

district court believed that it needed to determine whether the bill of lading's clause paramount had extended COGSA to the pre-loading and post-discharge periods. [FN621] When the court concluded that the clause paramount was adequate to extend COGSA inland, it held that this voluntary extension of COGSA's reach was sufficient to confer federal *221 jurisdiction. [FN622]

The brief opinion in *Neutax* is more remarkable for what it does not address. Most obviously, the court does not consider how the parties can confer jurisdiction on the court by agreement. Few points are more basic in the law of federal courts than the proposition that the parties may not confer jurisdiction on the court by agreement. Yet the application of COGSA outside the tackle-to-tackle period is based on nothing more than the agreement of the parties as recorded in the bill of lading. [FN623]

The court also fails to address why COGSA itself provides a basis for federal question jurisdiction on the law side, although this is a difficult and interesting issue even in cases to which COGSA clearly applies with the force of statute. [FN624] Most authorities, including the relevant decisions within the Fifth and Eleventh Circuits, however, hold that COGSA does provide a basis for federal question jurisdiction. [FN625]

Ultimately, the immediate dispute in *Neutax* was irrelevant--although neither the parties nor the court appeared to realize it. The plaintiff argued that the clause paramount did not extend COGSA to the pre-loading and post-discharge periods, and thus COGSA could not provide a basis for federal question jurisdiction. [FN626] But the court recognized that if COGSA did not apply under the clause paramount, then the Harter Act would apply, because the Harter Act--unlike COGSA--applies from receipt to delivery. [FN627] If COGSA provides a basis for federal question jurisdiction, then the Harter Act must as well. [FN628] Moreover, the Harter Act *222 applies with the force of statute, not by agreement of the parties. This avoids the concern, which arises if the court relies on the applicability of COGSA, that the parties are conferring jurisdiction on a federal court by agreement.

3. Perils of the sea

Under COGSA § 4(2)(c), the carrier is not liable for cargo damage caused by 'perils, dangers, and accidents of the sea. . .' [FN629] This has long been a problematic defense for carriers. English and Commonwealth courts have been fairly generous to carriers, permitting them to rely on the perils of the sea defense in a broad range of circumstances. [FN630] The U.S. courts have generally been more strict, declining to find foreseeable risks to be 'perils of the sea.' [FN631]

In *Steel Coils, Inc. v. M/V LAKE MARION*, [FN632] the Fifth Circuit continued the prevailing strict approach. The carrier argued that section 4(2)(c) applied because the ship had 'encountered very rough weather during the journey, with strong winds that occasionally reached Beaufort Scale Force 10 and, at their peak, reached force 11 to 12 for approximately two hours.' [FN633] The carrier relied heavily on the Second Circuit's decision in *J. Gerber & Co. v. S.S. SABINE HAWALDT*, [FN634] but the Fifth Circuit distinguished the present case on the ground that the storm was less severe and that the vessel itself suffered no damage. [FN635] The court held that the perils of the sea defense did not apply. [FN636]

4. The measure of damages

As noted above, the measure of damages under COGSA is normally based on the market price of the cargo at the time and place of destination, although different rules might apply in exceptional circumstances. [FN637] In *223 *United States v. Texas American Shipping Corp.*, [FN638] the carrier argued that the case involved exceptional circumstances justifying a different measure of damages. [FN639] The federal government, in some cases on behalf of the Agency for International Development and in some cases as the assignee of two private relief agencies, was suing for the loss or damage of several foreign aid cargoes shipped to Africa under the government's 'Food for Peace' program. [FN640] The carrier argued that the market price of the cargo was inappropriate because the food had been removed from the stream of commerce, and was not allowed to be resold. [FN641] Moreover, the private relief agencies suffered no financial loss (because they had received the food from the government free of charge), and thus had no claims to assign. [FN642]

The district court had little difficulty rejecting these arguments, most obviously because the Fifth Circuit had allowed the government to recover full damages in essentially the same context in *United States v. Ocean Bulk Ships, Inc.* [FN643] More fundamentally, the commodities that were lost or damaged had a market value at the time and place of destination. [FN644] The relief organizations suffered a loss that can be measured with reference to that market value, even if these particular cargoes were not a part of that market and even if the private relief agencies had not paid for the goods. [FN645]

5. The package limitation

Under section 4(5) of COGSA, the carrier's liability is limited (in the absence of a declaration of higher value) to \$500 per 'package' or, for goods not shipped in packages, per 'customary freight unit.' [FN646] Unfortunately, the Act does not define either 'package' or 'customary freight unit,' and the meaning of these terms has been a potent source of litigation for many years. In *MacClenny Products, Inc. v. Tropical Shipping & Construction Co.*, [FN647] the court had to decide whether a 40-foot *224 container was a single 'package,' or whether each of the individually wrapped jackets on hangers inside the container was a 'package.' [FN648] The state trial court, following *Fishman & Tobin, Inc. v. Tropical Shipping & Construction Co.*, [FN649] had granted summary judgment for the carrier. [FN650] Reversing, the state appellate court held that unanswered factual issues precluded summary judgment. [FN651] In *Fishman & Tobin*, which had involved the same parties and the same issue, the Eleventh Circuit had found that the bill of lading and the shipping invoices were ambiguous, but that the ambiguity was resolved by other documents. [FN652] These other documents were not used in this case, and thus the ambiguity had to be resolved from other evidence on remand. [FN653]

6. Fair opportunity

Although section 4(5) of COGSA gives the carrier an unconditional right to limit its liability to \$500 per package (in the absence of a declaration of higher value), several U.S. courts have restricted this right under a judicial invention known as the 'fair opportunity doctrine.' [FN654] Under this

doctrine, the carrier must give the shipper a 'fair opportunity' to declare the true value of the shipment. The precise definition of 'fair opportunity' varies among the circuits that have adopted the requirement, but the penalty for failing to satisfy the requirement is always the loss of the right to rely on the package limitation. [FN655]

Over the years, imaginative cargo claimants have attempted to expand the fair opportunity doctrine on several fronts. Some have argued that they were denied a fair opportunity to declare a higher value because the carrier's ad valorem rates were prohibitively high. [FN656] In the first such attempt, the Second Circuit concluded that a 10% rate was not high enough *225 to justify such an argument. [FN657] Furthermore, the shipper was in no position to make the argument because it had not even attempted to make an excess value declaration. [FN658] In *Industrial Maritime Carriers (Bahamas), Inc. v. Siemens Westinghouse Power Corp.*, [FN659] the cargo claimant attempted the same argument with even weaker facts. Siemens had shipped two generators, each worth over three million dollars and each qualifying as a single COGSA package. [FN660] When the hold in which the generators were stowed flooded, each was a total loss. [FN661] Siemens therefore argued 'that the 6% ad valorem rate was so unreasonably high that it effectively deprived Siemens of its opportunity to declare a higher value and avoid COGSA's limitation.' [FN662] The district court, following the Second Circuit's decision, quickly rejected this argument. The evidence showed that Siemens never had any intention of declaring a higher value, this had been its policy for over twenty years, the policy had been implemented on the basis of the company's own cost-benefit analysis long before this particular shipment was even contemplated, and that Siemens protected itself by obtaining cargo insurance (which cost only 0.2365% of the cargo's value). [FN663]

7. Third parties and Himalaya clauses

In *Robert C. Herd & Co. v. Krawill Machinery Corp.*, [FN664] the Supreme Court held that the package limitation in section 4(5) of COGSA protects only the 'carrier,' as defined in section 1(a), and does not protect an agent of the carrier, such as a stevedore. With a valid Himalaya clause, a bill of lading can extend the benefit of section

4(5) to third parties--but in the absence of a valid Himalaya clause the carrier's agents remain liable for their own negligence, without the benefit of the carrier's limitations and defenses. The Fifth Circuit applied this well-established doctrine in *Steel Coils, Inc. v. M/V LAKE MARION*. [FN665] The plaintiff sought to recover on a shipment of rust-damaged steel against the carrying vessel, its owner, and *226 its managing agent. [FN666] The recovery against the vessel and its owner was subject to the COGSA package limitation, but the managing agent was liable for the full extent of the damages. [FN667] The court was unimpressed with the manager's argument that this result allowed the plaintiff 'to circumvent not only the package limitation, but all of COGSA.' [FN668] Not only could the managing agent have bound itself to the contract of carriage (thus qualifying as a 'carrier'), [FN669] it could have been protected by a Himalaya clause. [FN670]

Altadis USA, Inc. v. Navieras NPR, Inc., [FN671] presents a more unusual case against a third party. The shipper contracted with an ocean carrier to move a container of cigars from Puerto Rico to Jacksonville, and then to Tampa. [FN672] The ocean carrier subcontracted with a trucking company for the inland carriage from Jacksonville to Tampa, and the container was stolen during this inland leg. [FN673] Although the trucker collected over \$375,000 from its insurer for the loss, it refused to compensate the shipper. [FN674] Instead of suing the trucker in tort, the shipper sued in contract, claiming as a third-party beneficiary under the trucker's contract with the ocean carrier. [FN675] The district court permitted the action to proceed. [FN676]

In last year's paper, [FN677] we reported on the Eleventh Circuit's decision in *James N. Kirby, Pty. Ltd. v. Norfolk Southern Railway Co.*, [FN678] which held that the Himalaya clause in a FIATA multimodal bill of lading was inadequate to protect an inland carrier. [FN679] In January 2003, Norfolk Southern petitioned the Supreme Court for certiorari. [FN680] In April, the Court invited the Solicitor General to express the views of the federal *227 government. The Supreme Court finally granted certiorari in early 2004. [FN681]

8. Forum selection and arbitration clauses in carriage contracts

In *Cargill Ferrous International v. SEA PHOENIX MV*, [FN682] a shipper of steel coils brought suit against the vessel owner and the time charterer for rust damage, and each defendant demanded arbitration. [FN683] The district court stayed the action against the time charterer. But denied the vessel owner's motion to compel arbitration, conducted a two-day bench trial and entered judgment for the shipper. [FN684]

The Fifth Circuit dismissed the shipper's appeal against the time charterer, [FN685] reasoning that under section 16(b)(1) of the Federal Arbitration Act, [FN686] no appeal lies from an interlocutory order staying an action to permit arbitration (except to the extent provided in the Interlocutory Appeals Act). [FN687]

The owner's appeal from the district court's order denying its motion to compel arbitration was more complicated. [FN688] The owner had time chartered the vessel to the time charterer, which had then entered into a voyage charter party with the shipper. [FN689] The time charterer had also issued bills of lading to the shipper, but these bills of lading had not been negotiated to a third party. [FN690] The Fifth Circuit first considered whether the bills of lading incorporated the voyage charter party's arbitration clause. [FN691] The majority concluded that the bills of lading would have been inadequate if they had been negotiated to a third party because the spaces provided for identifying the charter party were left blank, but this was not a problem when the bills of lading were still in the shipper's hands. [FN692] As one of the parties to the voyage charter, the shipper does not need to rely on a bill of lading to identify it. [FN693]

*228 Later in the opinion, however, the majority responds to one of the dissent's arguments by explaining how a bill of lading issued under a charter party is not a contract of carriage so long as it remains in the shipper's hands, and that it only becomes a contract of carriage when it is negotiated to a third party. [FN694] Prior to negotiation, the bill of lading is simply a receipt, and the charter party forms the contract between the bill of lading parties. [FN695] The majority relied on this analysis to show that negotiated bills of lading are different from bills of lading that have not been negotiated, and thus to explain why the standards for incorporation are different in the two contexts.

[FN696] But the majority never considers the implications of its statements. If the bills of lading are not contracts at all, how can they be contracts between the owner and the shipper? Presumably the owner is deemed to have ratified these bills of lading, so that they are contracts after all, but the court never addresses the issue. If they are not contracts, what difference can it make whether they incorporate the charter party? And if they are not contracts, what is the contract between the owner and the shipper? The owner suggested, in an alternative argument, that 'the voyage charter served as the contract' between the shipper and itself (although the shipper and the time charterer entered into the voyage charter), but the court never addressed this possibility, either. [FN697]

Having concluded that that owner was entitled to arbitration, the court considered the shipper's argument that the owner had waived its right by participating in the litigation rather than pursuing an interlocutory appeal. [FN698] The shipper apparently suggested that the owner was seeking two bites at the apple, claiming a right to arbitration only after it had lost on the merits at a trial. The Fifth Circuit rejected this argument. [FN699] The owner had made a timely demand for arbitration, and there was no requirement to pursue an interlocutory appeal in order to preserve an issue for appeal after a final judgment. [FN700] The proper test is whether the shipper was prejudiced. The court held that the shipper was not prejudiced by the fact that its arbitration claim was now time-barred. [FN701] The claim had been time-barred *229 before the district court had ruled on the owner's motion to compel arbitration. Nor did it find the costs of litigation to have been prejudicial because the owner had been subject to the same costs. [FN702] It was clearly not pursuing litigation as a strategic matter, holding the arbitration argument in reserve in case it was found liable, for the win in arbitration would be automatic. [FN703]

In *Hartford Ins. Co. of the Southeast v. Hapag-Lloyd Container Line*, [FN704] the district court faced a straight-forward question of contractual interpretation. The defendant invoked a forum selection clause stating:

Except as otherwise provided specifically herein any claim or dispute

arising under the [bill of lading] shall be . . . determined in the Hamburg courts to the exclusion of the jurisdiction of the courts of any other place. In case the Carrier intends to sue the Merchant the Carrier has also the option to file a suit at the Merchant's place of business. In the event this clause is inapplicable under local law then jurisdiction . . . shall lie in either the Port of Loading or Port of Discharge at Carrier's option. [FN705]

If the clause had included only the first sentence (without the opening clause), there could have been little basis for dispute. But the plaintiff argued that the second and third sentences, read in conjunction with the opening clause of the first sentence, meant that the forum selection clause was 'permissive,' not 'exclusive.' [FN706] In other words, Hamburg was merely a permissible forum in which a party was entitled to bring suit, not the sole forum in which a party was required to bring suit. The plaintiff was accordingly entitled to maintain the present action in Florida instead. After reviewing the case law distinguishing permissive and mandatory forum selection clauses, the court ruled that this clause required the present suit to be brought in Hamburg. [FN707] The clause on its face was clear, and neither of the events that would trigger the second or third sentence was applicable on these facts. [FN708]

*230 In *Kanematsu USA, Inc. v. M/V OCEAN SUNRISE*, [FN709] a Japanese forum selection clause required the district court to address the proper application of *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*. [FN710] The principal issue here, [FN711] like the issue before the court in *Heli-Lift Ltd. v. M/V OOCL FAITH*, [FN712] was whether the forum selection clause would operate to deprive the plaintiff of its substantive legal rights, thus making the clause unenforceable. [FN713] After reviewing competing affidavits of two Japanese lawyers, the court concluded 'that a forum selection clause cannot be enforced when there is substantial uncertainty as to whether a foreign court will recognize multiple carriers when such parties would clearly be carriers under U.S. COGSA.' [FN714] In this case, it appeared that Japanese law would not recognize the vessel owner as a COGSA carrier. [FN715]

F. Marine insurance

When marine insurance lawyers discuss the decisions from the Fifth Circuit, it is sometimes suggested that the courts are too willing to 'bend' the law in order to protect the interests of consumers and other unsophisticated insureds. [FN716] The recent case *Jefferson Insurance Co. v. Stephens*, [FN717] demonstrates that tendencies in this direction do not apply in every case. When Jimmy Stephens's houseboat sank at the marina three days after Christmas, 2000, the surveyor (presumably retained by the insurer) 'concluded that there was extensive rust on the pontoons of the vessel and that this rusting was 'the primary cause of the vessel sinking.'" [FN718] Although the report recognized the possibility that an external force could *231 have contributed to the sinking, Mr. Stephens (appearing pro se) submitted no evidence of any such force. [FN719] The insurer filed an action for a declaration of non-liability (based on a policy exclusion for 'rust') and moved for summary judgment (based on the surveyor's report). [FN720] In granting the summary judgment motion, the district court noted that "[t]he requirement that the claimant demonstrate proximate causation is . . . a stringent one in the marine insurance context." [FN721]

The plaintiff in *Antillean Marine Shipping Corp. v. Through Transport Mutual Insurance, Ltd.*, [FN722] had obtained insurance coverage from the defendant TT Club for its international marine cargo handling facility operations. [FN723] When the Club denied coverage for approximately \$700,000 in losses, the plaintiff filed the present action in state court. [FN724] The Club removed the action to federal court, and moved to compel arbitration in London as required in the insurance contract's arbitration clause. [FN725] The plaintiff argued that, under the principles of *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, [FN726] the case was governed by Florida law-- notwithstanding the English choice-of-law clause in the insurance contract. [FN727] Rejecting this argument, the court held that the case was governed by the International Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which Congress enacted as chapter 2 of the Federal Arbitration Act. [FN728] The Convention and the Act required the enforcement of the arbitration clause. [FN729]

G. The Longshore and Harbor Workers' Compensation Act (LHWCA) [FN730]

1. Coverage

Section 3(a) of LHWCA, [FN731] extends LHWCA coverage over injuries *232 '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 or loading, unloading, repairing, dismantling, or building a vessel).' In *Bianco v. Georgia Pacific Corp.*, [FN732] the court upheld a BRB decision (in turn upholding an ALJ determination) that a sheet-rock production department within a gypsum processing facility was not a covered situs, even though other portions of the facility would have qualified. [FN733]

In *Boomtown Belle Casino v. Bazor*, [FN734] the chief engineer of the land-based operations of a soon-to-be operational floating casino--whose work included getting the building completed and helping get the boat finished--suffered a work-stress-induced stroke. [FN735] The ALJ awarded LHWCA benefits, and the BRB affirmed. [FN736] The Fifth Circuit, reversing, held that coverage is excluded by section 2(3)(B), [FN737] which takes 'individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet' out of the category of maritime employment. Coverage is also excluded by section 3(a), [FN738] because no maritime operations had as yet taken place in the building where the injury occurred.

2. Evidentiary standards/burdens of proof

Ortco Contractors, Inc. v. Charpentier, [FN739] arose from the death of a maritime painter who died of a heart attack about fifteen minutes after arriving for work one morning. [FN740] (The heart attack started at home the night before, but the man did not recognize the symptoms.) [FN741] The ALJ denied the widow's claim for general death benefits and funeral expenses. [FN742] The BRB reversed. [FN743] In reversing the BRB and holding that the ALJ was *233 correct to deny the claim, Judge Weiner's opinion for the unanimous panel gave a good summary of what is evidently the settled burden-of-proof structure for LHWCA claims in the Fifth Circuit:

Under the LHWCA, a claimant like Charpentier has the burden of proving [by substantial evidence] a prima facie case for coverage, viz., that (1) an injury was suffered, and (2) the injury occurred in the course of employment or was caused, aggravated, or accelerated by conditions at the work place. A claimant's proof of these two predicates triggers [the section 20(a), 33 U.S.C. § 920(a)] presumption that the injury is work-related and that the claimant is entitled to coverage. To avoid coverage, the employer must affirmatively rebut this presumption with 'substantial evidence to the contrary.' We have repeatedly held that this evidentiary standard [the substantial evidence standard, which applies to both the employee's prima facie case and the employer's rebuttal case] is less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of the evidence. [FN744] Using this standard, the court concluded that the BRB erred in finding that the employer's rebuttal case had failed because the doctors the employer relied on said they could not 'rule out' a work-related cause for the heart attack. [FN745] Requiring the employer to 'rule out' a work relationship is far too demanding to comport with the substantial evidence standard, said the court. [FN746] The opinion includes an admonition to the BRB and ALJs:

We continually affirm the BRB and ALJs on the substantial evidence standard; they must learn to apply that standard to employers as well as to employees [FN747] 3. The 'anti-alienation' provision of LHWCA

Section 16 of LHWCA, [FN748] provides that '[n]o assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, *234 execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.' In *Cigna Property & Casualty v. Ruiz*, [FN749] the court held that this provision did not prevent a state court from ordering an

insurer to pay a portion of a father's LHWCA benefits to his ex-wife for child support. [FN750] The court reasoned that Florida law does not classify a child support claim as 'a claim of creditor' or as a 'debt.' [FN751] Thus, said the court, 'it is clear on its face that the statute on which Cigna relies is inapplicable to Ruiz's child support obligation.' [FN752]

4. Last exposing employer owes full benefits without any credit for worker's settlements with previous employers

In *New Orleans Stevedores v. Ibos*, [FN753] Mr. Ibos worked for various steamship and stevedoring companies for almost fifty years. His last three employers were Valor Stevedoring, Anchor Stevedoring, and New Orleans Stevedores (NOS). [FN754] When Ibos developed symptoms of mesothelioma caused by workplace exposure to asbestosis, he stopped working and filed for LHWCA disability benefits. [FN755] Subsequently, he died from the mesothelioma. His widow continued his disability claim and her own claim for survivor's benefits against the last three employers. [FN756] She then entered into ALJ-approved settlements with Valor and Anchor. [FN757] The ALJ then awarded full benefits to the widow in her action against NOS. [FN758] But he held that NOS was entitled to a credit for the net settlement proceeds the widow had received from Valor and Anchor. [FN759] The BRB affirmed. [FN760]

The Fifth Circuit agreed with the ALJ and BRB that the law (the 'last exposing employer' rule) obligated NOS to full comp benefits:

Under [LHWCA § 2(2), 903 U.S.C. § 902(2)], there are two prongs to the statutory definition of a compensable injury: (1) *235 accidental injury arising out of and in the course of employment; and (2) such occupational disease or infection (a) as arises naturally out of such employment or (b) as naturally or unavoidably results from such accidental injury. The Director [FN761] interprets the 'arises naturally out of' language of § 2(2) to require only that the conditions of the employment be of a kind that produces the occupational injury. This interpretation is consistent with

congressional intent, as it was first interpreted by the Second Circuit in *Travelers Ins. Co. v. Cardillo*. [FN762] In *Cardillo*, the Second Circuit found, as a matter of legislative interpretation, that Congress intended full liability on the last exposing employer, regardless of the absence of actual causal contribution by the final exposure. We agree with *Cardillo's* legislative interpretation. [FN763] The Fifth Circuit disagreed with the ALJ and BRB on the credit point, holding that NOS was not entitled to a credit to reflect the widow's settlements with *Valor* and *Anchor*. [FN764] The court reasoned that the settlements were alternatives to an entire award against either one of the settling employers, who could have been held liable for a full award if found to be the worker's last responsible employer. [FN765] As such, the settlements were not subject to the rule of *Strachan Shipping Co. v. Nash*, [FN766] which allows credit for the amount of a prior scheduled award against a later scheduled award based on a later injury to the same scheduled member. Judge Jones dissented on the credit point, arguing that '[t]he majority . . . too lightly disregards *Nash* [T]here is no persuasive reason to distinguish last employer rule cases and aggravation rule cases.' [FN767]

*236 5. The potential tort liability of LHWCA 'vessels'

Section 2(21) of LHWCA, [FN768] defines the term 'vessel' broadly to include 'any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter [sic] or bare boat charterer, master, officer, or crew member.' Section 5(b), [FN769] allows LHWCA workers to seek tort recovery for injuries 'caused by the negligence of a vessel.'

In *Howlett v. Birkdale Shipping Co.*, [FN770] and *Scindia Steam Nav. Co. v. De Los Santos*, [FN771] the Court articulated a relatively limited meaning of the term 'negligence' in section 5(b), stating that it entailed the presence of three general

duties owed by shipowners to LHWCA workers: (a) turn the ship over in reasonably safe condition for the commencement of LHWCA operations; (b) use reasonable care to prevent injuries to LHWCA workers in areas that remain under the vessel's active control; and (c) intervene if the LHWCA operations are obviously unsafe. In *Johnson v. Louisiana Dock Co.*, [FN772] the court held a tugboat company liable for a ship repair worker's trip and fall injury on the vessel's deck, indicating that '[t]he vessel's liability is based on the general maritime law of negligence' and not specifying which of the three general duties were violated. [FN773] (On the facts, the most likely candidate was the 'turnover' duty.)

In *In re Kirby Inland Marine, L.P.*, [FN774] Judge Kent granted summary judgment for the defendant barge owner on concluding that an open and obvious hopper on the barge did not constitute a breach of the turnover duty. [FN775] The opinion notes that before falling into the hopper the worker had been 'able to perform his work--walking about the deck of the barge--for thirteen hours without incident.' [FN776]

*237 H. Maritime liens.

In *Stevens Shipping & Terminal Co. v. JAPAN RAINBOW II MV*, [FN777] the plaintiff claimed a maritime lien for agency and stevedoring services rendered to a vessel under a time charter. The charter party contained a prohibition of liens clause. [FN778] Knowing that the time charterer was having financial problems, the vessel owner undertook to transmit a notice of the prohibition of liens clause to every agent listed in the time charterer's voyage instructions. [FN779] This would allow the vessel owner to rely on the general rule that a party with actual knowledge of a prohibition of liens clause prior to supplying goods or services to the vessel cannot thereafter claim a maritime lien for those goods or services. [FN780] The vessel faxed the notice to the plaintiff almost a month before the vessel arrived at the relevant port, and a fax confirmation showed that the transmission was successful. [FN781] The plaintiff, however, denied that it had ever received the fax. [FN782] The Fifth Circuit held 'that the fax confirmation sheet created a rebuttable presumption that [the vessel owner] delivered the notice and that [the plaintiff] received it.' [FN783] As the court

explained:

Neither party disputes that facsimiles are a reliable and customary method of communicating in the shipping business. To quote the district court, in such an industry, '[t]he law simply cannot allow a supplier to deny knowledge of a no lien clause when it was delivered in a manner that was both customary and reliable in the shipping business.' [FN784] Because the plaintiff was unable to rebut the presumption, it was not able to assert the lien. [FN785]

In *Chembulk Trading LLC v. Chemex, Ltd.*, [FN786] two vessel owners were each seeking to recover \$31,000 that was owed to their common *238 creditor. [FN787] The first owner, Chembulk, had chartered a vessel to Chemex, which thereafter defaulted owing over \$180,000. [FN788] The second owner, Novorossiysk Shipping Co., had chartered a second vessel to Chemex, which thereafter defaulted owing approximately \$500,000. [FN789] When Chembulk discovered that a company whose cargo had been carried on the second vessel owed Chemex \$31,000, it attached the funds under Rule B. [FN790] The previous day, Novorossiysk had asserted a lien on the same funds, relying on a clause in its charter party with Chemex that gave it 'a lien upon all cargoes and all freights for any amount due under this charter.' [FN791] Three days later, Novorossiysk also sought a Rule B attachment 'in an abundance of caution.' [FN792] The two actions were consolidated, the funds were paid into court, and the issue for the court was which claimant had priority. [FN793] If Novorossiysk was entitled to a lien, it had priority over Chembulk's Rule B attachment. If Novorossiysk was not entitled to a lien, Chembulk's earlier Rule B attachment had priority over Novorossiysk's later Rule B attachment. The court held that Novorossiysk was not entitled to a lien because the lien clause in the charter party gave it a lien only on 'freights,' and these funds were 'sub-freights.' [FN794]

I. The Outer Continental Shelf Lands Act (OCSLA) [FN795]

When the court in *Coulter v. Texaco, Inc.*, [FN796] applied Louisiana law--as surrogate federal law via 43 U.S.C. § 1333(a)(2)(A)--and

exonerated the owner of a drilling platform from liability for injuries to the employee of an independent contract, [FN797] it did not consider whether federal Minerals Management Service (MMS) regulations constituted superseding federal law within the meaning of section 1333(a)(2)(A). The plaintiff in *Fruge v. Parker Drilling Co.*, [FN798] argued that the platform owner was subject to (and liable for violating) MMS regulations that have come into force *239 since *Coulter*. [FN799] In upholding the trial court's grant of summary judgment in favor of the platform owner (and several independent contractors), the court again applied Louisiana law. [FN800] It rejected the MMS regulations as irrelevant for two reasons: First, the MMS regulations in place at the time of the *Coulter* decision were not greatly different from the new ones relied on by the *Fruge* plaintiff, so that '[n]othing in the 2002 regulations preempts *Coulter*, and *Coulter* is therefore still precedent.' [FN801] Second, '[t]his Court has held that a violation of the MMS regulations does not give rise to a private cause of action.' [FN802]

J. Collision

In *In re Luhr Bros., Inc.*, [FN803] a tank ship allided with a dry dock and claimed that it was the fault of a large flotilla that was hogging the channel. The Magistrate Judge conducted a bench trial and ultimately assigned 67% of the fault to the tank ship and 33% to the tug. [FN804] Affirming, the Fifth Circuit panel emphasized 'the highly deferential review afforded bench trials of admiralty actions,' [FN805] and ultimately concluded that 'we have no 'definite and firm conviction' that the trial court has made a mistake.' [FN806]

The plaintiff in *Sunderland Marine Mutual Insurance Co. v. Weeks Marine Construction Co.*, [FN807] was the subrogated insurer of a shrimp boat that got caught in a fog and allided with the defendant's unlit barge that was secured to a mooring buoy in open water. [FN808] In upholding the trial court's conclusion that this was an equal-fault allision (with damages divided *240 50/50), the court noted that the shrimp boat captain 'had a trace of cocaine in his system.' [FN809] The major dispute was whether the barge was subject to the navigational rules governing the lights and sound signals required of anchored vessels. [FN810] Holding yes, the court rejected the defendant's

argument that the barge should be treated as moored rather than anchored, finding that its location in open water meant that '[t]he barge was . . . not moored in the traditional sense. It was not connected to a permanent location, such as a dock or a pier' [FN811]

In *Trico Marine Assets Inc. v. Diamond B. Marine Services Inc.*, [FN812] the court upheld the trial judge's assignment of all of the fault in a Mississippi River collision between a northbound crewboat and a southbound supply vessel to the crewboat, which was proceeding at full speed in thick fog without lookout, without running lights, with engine noise so loud the captain could not hear the radio, and with a captain who did not know how to operate the radar. [FN813] Among the court's interesting pronouncements was the statement that 'the 'line of sight' rule [which describes the speed at which a vessel can safely travel as being the speed which allows the vessel to come to a halt within half the distance of its line of sight] is not a rigid one that must be followed in all situations.' [FN814] (The crewboat owner was trying to invoke the line-of-sight rule against the supply boat, but the court found that the latter was proceeding at bare steerage, i.e. the slowest speed it could run without losing control.) [FN815]

K. Limitation of Liability.

1. The shipowner's privity or knowledge

The gist of *Trico Marine Assets Inc. v. Diamond B Marine Services Inc.*, [FN816] is captured in the following excerpt:

The district court found that Diamond B had privity and knowledge of [Captain] Bennett's negligence and participated in the negligence that caused the collision. The district *241 court's findings were that Diamond B: (1) failed to provide a lookout; (2) failed to train Bennett to use a radar; (3) failed to evaluate the [MISS BERNICE]'s seaworthiness or Bennett's competence . . . ; (4) failed to inspect the vessel logs; (5) failed to employ a safety manager; and (6) failed to provide safety training or safety manuals. The district court additionally found that 'Diamond B knew the [MISS BERNICE] had operated in the fog and would continue to do

so, yet employed a captain without the proper qualifications and without adequate policies or procedures to guide him.' Based on these findings, the district court had no difficulty in concluding that Diamond B should be denied any limitation on its liability. . . [T]he facts in this case go far beyond mere navigational errors. Diamond B knew, or should have known, that the [MISS BERNICE] was unseaworthy and that its captain was improperly trained. Therefore, the district court's decision is affirmed. [FN817] 2. Injunction-lifting stipulations: a circuit split

As a general rule a single claimant against a shipowner who has filed in admiralty court a petition for limitation of or exoneration from liability can get the automatic anti-suit injunction lifted and thus pursue litigation in a saving clause court by entering into a set of stipulations sufficient to protect the exclusive jurisdiction of the admiralty court over the limitation issues. In *In re Kirby Inland Marine, L.P.*, [FN818] the single victim--a personally injured longshoreman--provided an adequate set of stipulations as far as his claim was concerned, but he was unable to persuade other parties who were seeking indemnification, contribution, costs, and attorneys' fees from the shipowner to join in the stipulations. [FN819] It appears to be settled Fifth Circuit law that all claimants--including parties seeking indemnification, etc.--must agree to the required stipulations. [FN820] In *Kirby*, Judge Kent applied circuit law to conclude (with some apparent reluctance) that he could not lift the injunction. [FN821] He noted that the Second and Eleventh Circuits have a more lenient rule whereby stipulations like *242 those in *Kirby* would suffice for lifting the injunction. [FN822]

L. Federal maritime tort law.

1. Proximate cause

In *Crear v. Omega Protein, Inc.*, [FN823] Judge Fallon granted the defendant's motion for summary judgment on the view that any negligence of the defendant shipowner/employer in bringing about a seaman's head injury was--as a matter of law--not a proximate cause of the seaman's murdering his grandmother with a hatchet thirteen months later. [FN824] Judge Fallon did not decide whether to

apply general maritime tort law or Mississippi law, deeming them the same in all relevant respects. [FN825]

In *Trico Marine Assets Inc. v. Diamond B Marine Services Inc.*, [FN826] the court denied all recovery to a Jones Act seaman (the master of a crewboat) against a shipowner/employer because of the master's negligence in failing to wear a seatbelt while '[p]lowing through the water at top speed in the fog, without the benefit of a look-out or the ability to hear other vessels' fog signals or the radio We . . . affirm the district court's findings that Bennett's own negligence was the sole or proximate cause of his injuries, preventing his recovery.' [FN827]

2. Borrowed employee status

Guilbeau v. Grasso Production Management, Inc., [FN828] might be cited in aid of the proposition that '[p]arties may not contractually prevent a legal status, such as that of a 'borrowed employee,' from arising.' [FN829]

*243 3. Settling tortfeasors' rights

In *McDermott, Inc. v. AmClyde*, [FN830] the Court made it fairly clear that in the typical situation in which one of several putative tortfeasors settles with and is released by the plaintiff, the settling tortfeasor (who is of course protected by the settlement from contribution claims is in turn precluded from seeking contribution from the other putative tortfeasors, who remain exposed to the plaintiff. [FN831] The Eleventh Circuit acknowledged and applied this rule in *Murphy v. Florida Keys Electric Cooperative Association*. [FN832] The *Murphy* opinion seemed to make an easy case into a hard-looking one by choosing to tell the tortuous story of the Eleventh Circuit's pre-*AmClyde* 'decision on contribution in admiralty cases [which] lurched back and forth like a drunken sailor.' [FN833]

4. Damages in wrongful death actions

The Death on the High Seas Act (DOHSA) limits recovery in wrongful death actions to 'pecuniary loss.' [FN834] This language excludes recovery for loss of society. In the area of its coverage (the high seas) DOHSA preempts state

wrongful death law. [FN835] It also forecloses any action for loss of society under general maritime law. [FN836]

Respecting deaths in territorial waters, there is a general maritime law cause of action for wrongful death. [FN837] This cause of action permits the dependent widow of a longshoreman killed at work to recover for loss of society. [FN838] But it is not available to the survivors of deceased seamen. [FN839] Nor is state law of any help to the survivors of deceased seamen. [FN840] But some survivors of some 'nonseafarers' can get loss of society recovery under state law. [FN841]

Can the family of a 'nonseafarer' killed in territorial waters recover *244 for loss of society under the general maritime law? In *Tucker v. Fearn*, [FN842] a unanimous panel concludes no. [FN843] The court reasoned that the uniformity aspirations of *Miles* should control, and that *Gaudet* should be narrowly limited to its facts (dependent survivor of longshoreman). [FN844] Thus, the father of a pleasure boater killed in a collision between the victim's 19-foot power boat and a 36-foot sailboat in Alabama territorial water had his claim for loss of society under general maritime law stricken from his complaint. [FN845] In the interlocutory appeal in *Tucker*, the court did not reach the issue of the father's right to seek loss-of-society damages under state law. [FN846]

5. Ryan indemnity

So-called 'Ryan indemnity' began with the decision in *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, [FN847] whereby a shipowner held liable to an injured longshoreman under the strict liability doctrine of unseaworthiness was entitled to be indemnified by the stevedoring contractor whose fault brought about the injury on the basis of an implied warranty [FN848] of workmanlike performance (or workmanlike service) in the contract between the shipowner and the stevedoring contractor. [FN849] 'Ryan indemnity' might have disappeared from the law when the 1972 revision of the Longshore and Harbor Workers' Compensation Act abolished both the injured longshoreman's right to recover on the basis of unseaworthiness and the shipowner's right to recover over from the stevedoring contractor. [FN850] Instead it lived on in other contexts.

More recently courts around the country have been in some disagreement about the extent to which the general maritime law's wholesale and strong commitment to the principles of pure comparative *245 fault [FN851] should limit the Ryan indemnity doctrine. One logical limit would be to insist that the would-be indemnitee be free of fault; when there is fault on the part of both the putative indemnitee and indemnitor, comparative fault percentages afford a better way to apportion damages.

In *Vierling v. Celebrity Cruises*, [FN852] the court took a robust view of Ryan indemnity. It held that a cruise line's negligence contributing to the injury of a passenger attempting to board a ship did not preclude a Ryan indemnity action by the cruise line against the Port Authority whose breach of its warranty of workmanlike performance was also a cause of the injury. [FN853] The court showed no respect for the line of authority requiring a would-be indemnitee to be free of fault and disposed of the Port Authority's argument for comparative fault treatment on the formulaic ground that Ryan indemnity is 'contractual,' with the result that tort principles have nothing to do with it. [FN854]

6. Special limitations applicable to claims of vicarious liability for shoreside medical malpractice

In *Carter v. Bisso Marine Co.*, [FN855] Judge Duval held that allegations by a putative seaman that his employer provided inadequate medical treatment for workplace injuries were in substance claims of vicarious liability for shoreside medical malpractice, subjecting the claims to the provisions of 46 U.S.C. app. § 183(g). [FN856] The statute provides the defendant in such cases with the benefit of 'any and all statutory limitations of liability' applicable to the health care provider and led Judge Duval to conclude that the claims were time-barred under La. Rev. Stat. Ann. §9:5628(A) (West 1999), a one-year statute of limitations on medical malpractice actions. [FN857]

*246 M. Maritime contracts.

Last year's paper [FN858] treated Diesel 'Repower', Inc. v. Islanders Investments Ltd., [FN859] in which the Eleventh Circuit addressed the limitations on liability-limiting clauses in

maritime contracts. In *Merrill Stevens Dry Dock Co. v. M/V YEOCOMICO II*, [FN860] the court applied the three-step test of Diesel 'Repower', [FN861] to determine whether the exculpatory clauses in a ship repair contract were valid. [FN862] The principal issue was whether the clauses 'clearly and unequivocally indicate the parties' intention.' [FN863] Reversing the district court's conclusion that the clauses were ambiguous because they appeared to conflict, the Eleventh Circuit held that they could be interpreted consistently. [FN864]

N. Salvage: state court jurisdiction.

There is a fair amount of bad law out there to the effect that state courts lack subject matter jurisdiction over in personam suits for salvage. [FN865] In *Phillips v. Sea Tow/Sea Spill*, [FN866] the Supreme Court of Georgia acknowledged a split of authority on the issue and chose the wrong side, holding that 28 U.S.C. § 1333 confines salvage cases to admiralty court because 'marine salvage cannot be characterized as a 'common law remedy' that the 'common law is competent to give.' [FN867]

O. Horizontal choice of law.

In personal injury actions by seamen against their employers, the question of whether to apply the law of the United States or of some other country is governed by the multi-factor 'test' emanating from *Lauritzen v. Larsen*, [FN868] *Romero v. International Terminal Operations Co.*, [FN869] and *Hellenic *247 Lines v. Rhoditis*. [FN870]

Rhoditis held that United States law must apply in that case although the plaintiff, the ship's flag, and the shipowner were all Greek, because the shipowner actually operated his company from a base in the United States. [FN871] Since Rhoditis, locating and weighing the importance of the shipowner's base of operations has often been the pivotal inquiry in these cases.

Can a shipowner maintain a base of operations in the United States and still avoid U.S. law if all of its employees are non-Americans and if its ships never call at U.S. ports? The Ninth Circuit's decision in *Vilar v. Crowley Marine Corp.*, [FN872] might be read to suggest yes. But a panel the

Eleventh Circuit has disagreed, holding in *In re Fantome, S.A.*, [FN873] that the Jones Act applied against a Miami man and his children who owned seven Caribbean cruise ships--each of which was formally owned by a separate foreign corporation--none of which called in a U.S. port. (Many crew members of one of the ships were lost when it tried to outrun a hurricane.) [FN874]

In *Vasquez v. Bridgestone/Firestone, Inc.*, [FN875]--a nonmaritime case arising from a car wreck in Mexico--the court applied Texas choice-of-law principles--the 'most significant relationship' test--to conclude that Mexican law should control Mexican victims' action against U.S. manufacturers of allegedly defective tires. [FN876]

P. Forum selection clauses.

1. In general

In *Elliott v. Carnival Cruise Lines*, [FN877] the plaintiff sued Carnival Cruise Lines in Texas despite a forum selection clause ('essentially identical to the clause analyzed by the United States Supreme Court in *248 *Carnival Cruise Lines v. Shute* [[FN878]]' that required suit in Florida. [FN879] The district court enforced the clause, but the more interesting aspect of the opinion is the court's discussion of the route to be followed. [FN880] Carnival filed a motion to dismiss under Fed. R. Civ. P. 12(b)(3) (improper venue) or 12(b)(6) (failure to state a claim). [FN881] Venue was proper in the Texas court, however, and thus Rule 12(b)(3) was inappropriate. [FN882] Under the forum selection clause, it was for the Florida court to determine whether the plaintiff had stated a claim. [FN883] The appropriate vehicle to enforce the clause, therefore, was 28 U.S.C. § 1404(a), which governs transfers between federal district courts. [FN884]

The availability of 28 U.S.C. § 1404(a) provides a convenient solution when one federal district court needs to enforce a forum selection clause calling for suit in another federal district court. But when the chosen forum is a state court or a foreign court, 28 U.S.C. § 1404(a) does not apply, and it is more difficult to determine the proper analysis for enforcing the clause. [FN885]

2. The personal injury context

In *Speed v. Omega Protein, Inc.*, [FN886] Judge Kent gave predominant weight to a forum selection clause in a seaman's contract of employment in granting the defendant's motion to transfer the case pursuant to 28 U.S.C. § 1404(a) to the Western District of Louisiana. [FN887] In rejecting the plaintiff's argument that the clause was unenforceable because it conflicted with the forum's strong public policy of protecting seamen, Judge Kent noted:

Despite the special protection afforded to seamen, the Fifth Circuit has held that forum-selection clauses are enforceable even in seamen's contracts. . . Thus, the judicial system's policy of protecting seamen alone is not enough to find that *249 an otherwise enforceable forum-selection clause in a seaman's employment contract is invalid. [FN888] Another argument by the plaintiff was that the employment contract was entered into in Louisiana and that the forum-selection clause was therefore void under the Louisiana anti-forum-clause statute, [FN889] and *Sawicki v. K/S STAVANGER PRINCE*. [FN890] Judge Kent's opinion in *Speed* does not address this argument.

Last year's paper [FN891] noted *Sawicki v. K/S STAVANGER PRINCE*, [FN892] which held that the 1999 amendment to La. Rev. Stat. Ann. § 23:921(A), effectively outlawing forum-selection clauses and choice-of-law clauses in seamen's employment contracts, could be applied retroactively respecting a forum selection clause. [FN893] *Keramidas v. Profile Shipping Ltd.*, [FN894] is a decision applying *Sawicki*. A Greek seaman brought the present Jones Act suit in Louisiana before the 1999 amendment to La. Rev. Stat. Ann. § 23:921, and the defendant moved for summary judgment based on a forum selection clause requiring suit in Cyprus. [FN895] Prior to the *Sawicki* decision, the motion was granted. [FN896] After a remand from the Louisiana Supreme Court for reconsideration in light of *Sawicki*, the state court of appeal held that *Sawicki* controlled on every issue. [FN897] The statute applied retroactively, and there was no constitutional objection. [FN898] Thus the forum selection clause could no longer be enforced, and the case was remanded for further *250

proceedings. [FN899]

In *Norwegian Cruise Line, Ltd. v. Clark*, [FN900] a passenger injured in a slip-and-fall accident brought suit in Pinellas County, Florida, despite a forum selection clause requiring suit in Dade County. [FN901] The defendant cruise line moved to dismiss, or alternatively to transfer the action to Dade County. [FN902] The trial court refused to enforce the forum selection clause because the passengers had not received notice until it was too late to cancel the trip (except on payment of a penalty). [FN903] The appellate court, applying *Carnival Cruise Lines v. Shute*, [FN904] reversed. [FN905]

3. The commercial context

See prior discussion [FN906] of *Hartford Ins. Co. v. Hapag-Lloyd Container Line* [FN907] and *Kanematsu USA, Inc. v. M/V OCEAN SUNRISE*. [FN908]

Q. Arbitration agreements.

1. U.S. seamen's claims are not subject to compulsory arbitration

Section 1 of the Federal Arbitration Act, [FN909] exempts from arbitration 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' In *Buckley v. Nabors Drilling USA, Inc.*, [FN910] Judge Kent rejected the defendant's argument that a seaman is not protected from compulsory arbitration by that provision unless he can show that he was 'engaged in foreign or interstate commerce,' [FN911] concluding that the quoted phrase modifies only the 'other class of workers' [FN912] category and not the categories of seamen and railroad *251 employees. [FN913] In *Brown v. Nabors Offshore Corp.*, [FN914] Judge Engelhardt chose to follow the Buckley reasoning and thus rejected an identical argument by a Jones Act defendant. [FN915] The Fifth Circuit has now affirmed, Judge Engelhardt's decision holding that the seaman's exclusion protected a roustabout on a jack-up rig from compulsory arbitration regardless of whether his work had engaged him in interstate commerce. [FN916]

2. Removability and compulsory arbitration of foreign seamen's injury claims

In last year's paper, [FN917] we treated *Francisco v. STOLT ACHIEVEMENT MT*, [FN918] which held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [FN919]--together with the implementing legislation, 9 U.S.C. §§ 201-208, known as the Convention Act--trumps the seamen's exclusion in the Federal Arbitration Act, [FN920] so that a Filipino seaman's state-court personal injury suit against his employer could first be removed to federal court on the authority of 9 U.S.C. § 205 [FN921] and then dismissed in favor of compulsory arbitration.

After the foregoing decision was handed down, the seaman filed another state-court action stemming from the same accident but against different defendants. Once again, the defendants removed the case to federal court pursuant to 9 U.S.C. § 205. In *Francisco v. STOLT-NIELSEN, S.A.*, [FN922] the seaman argued for remand to state court on the view that the case did not 'relate to' an arbitration agreement because the *252 removing defendants were not signatories. [FN923] Denying this motion, Judge Vance concluded that a sufficient relation was present, noting that 'a non-signatory to an arbitration agreement can, in limited circumstances, compel arbitration against a signatory-plaintiff.' [FN924] Turning to the defendants' motion to compel arbitration, Judge Vance said that *Grigson v. Creative Artists Agency, L.L.C.*, [FN925] 'identified two circumstances where principles of equitable estoppel act so as to bar a signatory-plaintiff's lawsuit against non-signatory defendants.' [FN926] Grigson stated:

First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory. . . . Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. [FN927] Judge Vance concluded that the present case fell

within the second of the enumerated circumstances, granted the defendants' motion to compel arbitration, and dismissed the suit. [FN928]

In *Dahiya v. Talmidge International, Ltd.*, [FN929] Judge Feldman classified an arbitration agreement in a foreign seaman's employment contract as a forum selection clause and thus as subject to the analysis of forum selection clauses that flows from *THE BREMEN v. Zapata Off-Shore Co.*, [FN930] and its progeny. [FN931] The *BREMEN* decision affirmed that forum selection clauses in international contracts are presumed valid, but held that the presumption of validity can be overcome by a clear showing that the clause is 'unreasonable under the circumstances.' [FN932] The Fifth Circuit gloss *253 on *BREMEN* provides that a forum selection clause is unreasonable if, inter alia, 'enforcement of the clause would contravene a strong public policy of the forum state.' [FN933] The Louisiana legislature has sought to invalidate forum selection clauses in domestic and foreign employment contracts. [FN934] Invoking the forum-state 'strong public policy' evinced by this statute, [FN935] Judge Feldman remanded an Indian seaman's personal injury suit to state court and denied the defendants' motion to compel arbitration. [FN936]

In *Maranan v. LMS Ship Management, Inc.*, [FN937] Judge Berrigan noted her disagreement with Judge Feldman's reasoning in *Dahiya* and predicted that 'the *Dahiya* appeal will clarify [the] issue' of the applicability of the Bremen-derived 'reasonableness' criteria to arbitration clauses covered by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. [FN938]

In *Velchez v. Carnival Corp.*, [FN939] a Filipino sailor whose employment contract contained an arbitration clause brought a state court suit and Carnival removed to federal court on the basis of 9 U.S.C. § 205 (2000). [FN940] The federal court then remanded the case based on technical procedural defects under 28 U.S.C. § 1446. [FN941] The Eleventh Circuit held that 28 U.S.C. § 1447(d) deprives the appellate court of any jurisdiction to review such a remand order. [FN942]

3. Waiver of arbitration [FN943]

Cargill Ferrous International v. HIGHGATE MV, [FN944] reinforces the principles that there is a presumption against a waiver of arbitration, that the key to waiver analysis is 'prejudice,' and that mere delay is not enough *254 to constitute waiver. [FN945] Indeed, this was a weak case for waiver. Although the defendants now seeking a stay pending arbitration had not responded to the plaintiff's correspondence for five and half months or nominated an arbitrator, they did demand arbitration in their answer. [FN946]

4. Arbitration clauses in marine insurance contracts

Refer to prior discussion in article regarding *Antillean Marine Shipping Corp. v. Through Transport Mutual Insurance, Ltd.* [FN947]

R. Forum non conveniens.

1. Seamen's actions

For many years, the Fifth Circuit operated under a rule that forum non conveniens dismissal was precluded in seamen's personal injury and death cases in which the application of the *Lauritzen-Rhoditis* test would call for the application of U.S. law. But the en banc court reached out in a footnote in a nonmaritime case to repudiate that rule, overruling sixteen of its cases in order to do so. [FN948]

The Eleventh Circuit seems [FN949] to be continuing to follow the earlier rule, not heeding the *Air Crash* footnote. In *In re Fantome, S.A.*, [FN950] a Caribbean cruise ship learned of an approaching hurricane, was sent to Belize to discharge passengers, and then was directed to put to sea to try to outrun the storm. [FN951] Thirty-one crew members perished. [FN952] The surviving family members brought state-court suits in Florida against the Miami-based owners of the foreign corporations that in turn operated the relevant seven-vessel *Windjammer Fleet* of Caribbean cruise ships, none of which ever called in U.S. ports. [FN953] The owners then petitioned for Limitation of Liability, which put the state-court litigation in abeyance and forced all of *255 the victims to come into federal court. [FN954] The owners then moved for forum non conveniens dismissal of the cases, advocating Panama as the appropriate forum. [FN955] The

district judge agreed, but the Eleventh Circuit panel reversed, concluding (a) that U.S. law would apply under the Lauritzen-Rhoditis test and (b) that therefore forum non conveniens dismissal was precluded. [FN956]

The plaintiff in *Holmes v. Energy Catering Services, LLC* [FN957] brought suit under the Jones Act and the general maritime law for injuries suffered while working as a galley hand on a drilling vessel. [FN958] The defendants sought under various theories to have the case moved to Louisiana. [FN959] Although the court announced that '[t]he doctrine of forum non conveniens is an improper method of transfer in this instance because Defendants seek to have this case transferred to another federal district court,' [FN960] its application of 28 U.S.C. § 1404(a) was essentially the same as the doctrine. Indeed, it is common to think of section 1404(a) as a statutory version of the forum non conveniens doctrine.

2. In general

Elsewhere we have argued that, while trial judges' grants of motions to dismiss for forum non conveniens are properly reviewed and occasionally properly reversed under the prevailing abuse of discretion standard, a trial court's exercise of its discretion to deny a motion to dismiss for forum non conveniens should virtually never be reversible. [FN961] A panel of the Eleventh Circuit evidently did not see things that way in the nonmaritime case of *Ford v. Brown*. [FN962] Ford was a Hong Kong barrister who allegedly got smeared and ultimately disbarred in Hong Kong as a result of his efforts to establish Exxon's responsibility for the explosion of *256 the Castle Peak 'B' Power Station on August 28, 1992. [FN963] He sued Exxon and its employee Brown in Florida, where Brown lived, asserting claims for defamation, intentional interference with business relations, and intentional infliction of emotional distress. [FN964] The district judge engaged in the standard multi-factored inquiry before deciding to deny the defendants' motion to dismiss for forum non conveniens. [FN965] In reversing, the Eleventh Circuit panel emphasized the case's center of gravity in Hong Kong, noted that some of the witnesses were in England and others in Texas, and stated: 'Florida is relevant only because one alleged Exxon employee, defendant Brown, happened to live in Florida at the

time Plaintiff took a notion to sue. Of all possible forums, Florida is unquestionably the worse.' [FN966]

In the nonmaritime case of *Vasquez v. Bridgestone/Firestone, Inc.*, [FN967] the court upheld the forum non conveniens dismissal of an action by the estates of Mexican citizens killed in a car wreck in Mexico against the U.S. manufacturers of allegedly defective tires. [FN968] However, the case had to be remanded because the trial judge omitted to include a 'return jurisdiction clause . . . permitting [the plaintiffs] to return to the dismissing court should the lawsuit become impossible in the foreign forum.' [FN969] In accordance with the normal pronouncements in cases of this type, the court said that Mexico's severe damages caps and lack of a strict liability theory doesn't render the Mexican forum inadequate. [FN970] It also said that the plaintiffs' effort to tie the case to Texas by pointing out that the tires were designed in Texas 'reaches back too far in the accident's causal chain.' [FN971]

S. Antisuit injunctions.

In the non-maritime case of *Vasquez v. Bridgestone/Firestone, Inc.*, [FN972] the trial court used Texas choice-of-law principles to conclude that Mexican law should govern an action arising from a car wreck in *257 Mexico. [FN973] The trial court then granted the motion of the defendant U.S. manufacturers for forum non conveniens dismissal and enjoined the plaintiffs from further state-court litigation. [FN974] The Fifth Circuit held that the injunction was too broad. [FN975] The 'relitigation exception' of the Anti-Injunction Act, 28 U.S.C. § 2283, enables the trial court to protect its choice-of-law decision from relitigation elsewhere, but there is no similar protection for the forum non conveniens dismissal because such a procedural dismissal 'does not resolve the substantive merits and therefore falls outside the relitigation exception.' [FN976] This conclusion was based on *American Dredging Co. v. Miller*, [FN977] and *Chick Kam Choo v. Exxon Corp.* [FN978]

T. Eleventh Amendment.

Using a three-factor analysis, the court in *Vierling v. Celebrity Cruises*, [FN979] concluded

that the Port Everglades (Fla.) Port Authority was not an arm of the state entitled to Eleventh Amendment immunity. [FN980] '[A]ll three factors point away from Eleventh Amendment immunity here. First, Florida law treats the Port Authority as an entity of the county and not of the state. . . . Second, the state has no control over the operations of the Port Everglades facilities. . . . Finally, and most importantly, the Port Authority is a totally self-sufficient enterprise that receives no financial support from the state.' [FN981]

U. Procedural issues.

1. Personal jurisdiction

For a court to assert personal jurisdiction over a defendant, 'there must be enough of a relationship between the defendant and the forum to justify the conclusion that the defendant can be 'haled into court' there without offending the constitutional guarantees of due process.' [FN982] The *258 issue in *Nuovo Pignone, SpA v. STORMAN ASIA M/V*, [FN983] was whether an Italian carrier could be 'haled into' a Louisiana court. [FN984] The carrier had agreed to furnish a heavy-lift vessel to transport the plaintiff's 771-metric-ton reactor from Italy to Louisiana. [FN985] When the reactor was damaged on arrival in New Orleans, the plaintiff filed the present suit against the carrier and other defendants, and served process on the carrier by mail at its offices in Milan. [FN986] The carrier moved to dismiss for lack of personal jurisdiction and insufficiency of process. [FN987]

The Fifth Circuit held that the district court had personal jurisdiction over the carrier based on its minimum contacts with Louisiana through its contract with the plaintiff. [FN988] 'By agreeing to secure a vessel with a satisfactory onboard loading crane that it knew would be used to unload cargo in Louisiana, [the carrier] reasonably should have anticipated that its failure to meet its contractual obligations might subject it to suit there.' [FN989] The fact that the carrier never set foot in Louisiana, but instead performed its duties through subcontractors, was irrelevant. 'As a voluntary member of the economic chain that brought the reactor to Louisiana, [the carrier] purposely has availed itself of the privilege of conducting business in that state.' [FN990]

The court of appeals agreed with the carrier that service by mail was inadequate under article 10(a) of the Hague Convention on Service Abroad, [FN991] and thus inadequate under Rule 4(f)(1) of the Federal Rules of Civil Procedure. [FN992] Rule 10(a) allows parties to 'send' judicial documents by mail, but the circuits are divided on whether this allows parties to 'serve' documents by mail. In reaching this conclusion, the Fifth Circuit joins the Eighth Circuit, [FN993] and rejects the views of the Second Circuit, [FN994] to *259 hold that article 10(a) does not permit service by mail. [FN995]

In *Benson v. Norwegian Cruise Line Ltd.*, [FN996] the plaintiffs alleged that their child died as a result of medical malpractice aboard a cruise ship that was then 11.7 nautical miles east of the Florida shore. [FN997] The defendant doctor, a South African national who did not reside in Florida, moved to dismiss for lack of personal jurisdiction. [FN998] The plaintiffs responded that Florida's eastern boundary extends to the edge of the Gulf Stream, which was 14 nautical miles east of the Florida shore at that point. [FN999] Thus the tortious act occurred in Florida, giving its courts personal jurisdiction over the tort-feasor. [FN1000] The doctor replied that the federal Submerged Lands Act prohibited a state from claiming a territorial sea wider than three nautical miles. [FN1001] The state court of appeal rejected this interpretation of the Submerged Lands Act, and held that the Florida courts had personal jurisdiction over the doctor. [FN1002]

2. Litigating against the federal government: the procedural pitfall of the Admiralty Extension Act

The gist [FN1003] of the Admiralty Extension Act (AEA), [FN1004] is very familiar to most admiralty practitioners. Many practitioners are less familiar with the second paragraph of that statute, which includes the following provision:

[N]o suit [alleging damage or injury to person or property caused by a vessel on navigable water] shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the *260 Federal agency owning or operating the vessel causing the injury or damage. [FN1005]

Admiralty suits against the government are subject to the requirements of the Public Vessels Act (PVA), [FN1006] or the Suits in Admiralty Act (SAA), [FN1007] both of which have a two-year statute of limitations. [FN1008] But the effect of the six-month requirement of the AEA is to shorten the two-year statute to eighteen months in cases falling within AEA coverage, because the plaintiff has to wait six months after presenting the claim and still file suit within two years.

In *Anderson v. United States*, [FN1009] the plaintiff was hurt on land by a bomb fired from an aircraft. [FN1010] He filed a written claim with the Navy Legal Services Office that would have been timely under the relevant provision of the Federal Tort Claims Act (FTCA). [FN1011] But the court determined that the AEA extended admiralty jurisdiction over the case, taking it out of the coverage of the FTCA and into the coverage of the PVA and AEA. [FN1012] The case was therefore dismissed as time-barred. [FN1013] The PVA's two years ran out on April 19, 2001, which meant that the claim with the Navy needed to be filed by October 19, 2000; it did not get filed until March 21, 2001. [FN1014]

3. Impleader under FRCP 14(c)

Rule 14(a) of the Federal Rules of Civil Procedure, which applies in admiralty and nonadmiralty cases, declares the general rule of third-party practice: a defendant can bring into the lawsuit 'a person not a party to the action who is or may be liable to the [the defendant] for all or part of the plaintiff's claim against the [the defendant].' Rule 14(c) permits an admiralty defendant to bring into the lawsuit a party 'who may be wholly or partly liable, either to the plaintiff or to the [defendant].' [FN1015] The full text *261 of Rule 14(c) provides:

When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or claimant, as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the

same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff. In *Texas A&M Research Foundation v. Magna Transportation, Inc.*, [FN1016] the plaintiff contracted with the defendant for the delivery of time-sensitive cargo. [FN1017] The defendant, in turn, contracted with another carrier, which contracted with the ocean carrier. When the cargo was not delivered in time, the plaintiff sued the defendant and the defendant impleaded the two subsequent carriers under Rule 14(c). [FN1018] The defendant sought indemnification, but it never 'demand[ed] judgment against the third-party defendant[s] in favor of the plaintiff.' [FN1019] The district court nevertheless held the defendant and the third-party defendants jointly and severally liable to the plaintiff. [FN1020] The Fifth Circuit held that this was error. [FN1021] Because the defendant never made the demand that triggers the application of the second sentence of Rule 14(c), the district court should not have treated the third-party defendants as if the plaintiff had sued them directly. [FN1022]

*262 4. Attachment of property under FRCP Supplemental Rule B

Attachment and garnishment under Federal Rules of Civil Procedure Supplemental Rule B are available only when 'the defendant shall not be found within the district.' [FN1023] In *Katerina Navigation Co. v. United Orient & Atlantic Lines, Ltd.*, [FN1024] Judge Fallon vacated a garnishment on concluding that even though the defendant had no appointed agent for service of process within the district, it was nevertheless to be 'found' there because it had an office where service could be made on an officer or managing or general agent. [FN1025]

V. Miscellany.

In *Tampa Bay Shipbuilding & Repair Co. v. Cedar Shipping Co.*, [FN1026] the court upheld the district court's decision to allow senior supervisory personnel of the plaintiff shipyard to give opinion testimony on the reasonableness of the amounts sought for dry docking and repairing the defendant's ship. [FN1027]

In the non-maritime case of *Tyne v. Time Warner Entertainment Co.*, [FN1028] the court agreed with the trial judge that the portrayal of the captain of the fishing boat in the movie 'The Perfect Storm' was not egregious enough to warrant recovery by the captain's children under Florida's relational right of privacy doctrine. [FN1029] (The captain was presented as being 'down and out' and as obsessed with the next big catch.) [FN1030] The court of appeal then certified to the Florida Supreme Court the question of the applicability of Florida's commercial misappropriation statute. [FN1031]

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[FN1]. David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, The University of Texas School of Law, 10th Annual Admiralty and Maritime Law Conference, Sept. 21, 2001, Tab 1, pp. 1-2. A revised version of this paper was published at 26 Tul. Mar. L.J. 193 (2001).

[FN2]. 223 F.3d 898 (8th Cir. 2000), vacated as moot 235 F.3d 1054 (8th Cir. 2000) (en banc).

[FN3]. *Id.* at 904-05.

[FN4]. David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, The University of Texas School of Law, 11th Annual Admiralty and Maritime Law Conference, Oct. 18, 2002, Tab 1, p. 1. A revised version of this paper was published at 27 Tul. Mar. L.J. 495 (2003).

[FN5]. David W. Robertson, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, The University of Texas School of Law, 9th Annual Admiralty and Maritime Law Conference, Sept. 22, 2000, Tab 1, pp. 3-6.

[FN6]. *Recent Developments*, *supra* note 1, at 4.

[FN7]. *Alden v. Maine*, 527 U.S. 706, 728 (1999).

[FN8]. *Recent Developments*, *supra* note 4, at 3.

[FN9]. 538 U.S. 721 (2003).

[FN10]. U.S. Const. amend. XIV, §5 ('The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.').

[FN11]. 29 U.S.C. § 2617(a)(2) (2000).

[FN12]. *Nev. Dep't of Human Res.*, 538 U.S. at 725.

[FN13]. *Id.* at 737.

[FN14]. *Id.* at 737 (emphasis in original).

[FN15]. *Recent Developments*, *supra* note 4, at 5.

[FN16]. 45 U.S.C. §§51-59 (2000).

[FN17]. 538 U.S. 135, 2003 AMC 609 (2003).

[FN18]. *Id.* at 148.

[FN19]. *Id.* at 149.

[FN20]. *Id.* at 141.

[FN21]. *Id.*

[FN22]. *Id.* at 161.

[FN23]. 443 U.S. 256, 1979 AMC 1167 (1979).

[FN24]. *Norfolk & Western*, 538 U.S. at 161.

[FN25]. 93 U.S. 302 (1876).

[FN26]. *Norfolk & Western*, 538 U.S. at 163-164.

[FN27]. *Id.* at 163.

[FN28]. 46 U.S.C. §§4301-4311 (2000).

[FN29]. *Recent Developments*, *supra* note 1, at 65-67.

[FN30]. *Recent Developments*, *supra* note 4, at 5.

[FN31]. 757 N.E.2d 75, 2002 AMC 609 (Ill. 2001), cert. granted, 534 U.S. 1112 (2002).

[FN32]. 537 U.S. 51, 2003 AMC 1 (2002).

[FN33]. *Id.* at 64.

[FN34]. *Id.* at 56.

[FN35]. *Id.*

[FN36]. *Id.* at 67.

[FN37]. 538 U.S. 408 (2003).

[FN38]. See *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). These decisions are summarized in *Recent Developments*, *supra* note 4, at 40.

[FN39]. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1147 (Utah 2001).

[FN40]. Justices Scalia, Thomas, and Ginsburg dissented.

[FN41]. *Campbell*, 538 U.S. at 418 (citing *Gore*, 517 U.S. 559).

[FN42]. *Id.* at 410.

[FN43]. 537 U.S. 129 (2003).

[FN44]. *Id.* at 144.

[FN45]. *Id.*

[FN46]. 538 U.S. 468 (2003). See the discussion of the grant of certiorari in this case in *Recent Developments*, *supra* note 4, at 6.

[FN47]. *Id.* at 480.

[FN48]. *Id.* at 474.

[FN49]. 250 F.Supp. 2d 997, 2003 AMC 647 (N.D. Ind. 2003).

[FN50]. *Id.* at 1003.

[FN51]. *Id.* at 1000.

[FN52]. See *id.* at 1000-02.

[FN53]. 337 F.3d 939, 2003 AMC 1934 (7th Cir. 2003).

[FN54]. *Id.* at 940.

[FN55]. *Id.*

[FN56]. *Id.*

[FN57]. *Id.*

[FN58]. See *id.* at 942-44. The basic test for admiralty jurisdiction in tort cases is summarized in section IV(A), *infra*.

[FN59]. 46 U.S.C. app. §740 (2000). The presently relevant portion of the AEA is the first paragraph, which provides:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property,

caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

[FN60]. *Id.*

[FN61]. Scott, 337 F.3d at 944.

[FN62]. See *id.* at 944-45.

[FN63]. 373 U.S. 206, 209-11 (1963).

[FN64]. See David W. Robertson & Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. Mar. L. & Com. 209, 266-67 (2003).

[FN65]. 306 F.3d 827, 2002 AMC 2270 (9th Cir. 2002).

[FN66]. *Id.* at 830.

[FN67]. *Id.* at 831-32.

[FN68]. *Id.* at 832.

[FN69]. *Id.* at 840.

[FN70]. *Id.* at 840-41.

[FN71]. 235 F.Supp. 2d 940, 2003 AMC 339 (E.D. Wis. 2002).

[FN72]. *Id.* at 942.

[FN73]. *Id.* at 944.

[FN74]. *Id.*

[FN75]. *Id.* at 945.

[FN76]. 65 P.3d 245, 2003 AMC 815 (Nev. 2003).

[FN77]. *Id.* at 247.

[FN78]. *Id.* at 250.

[FN79]. *Id.* at 250-51.

[FN80]. 239 F.Supp. 2d 316, 2003 AMC 289 (E.D.N.Y. 2003).

[FN81]. *Id.* at 318.

[FN82]. *Id.*

[FN83]. *Id.*

[FN84]. *Id.* at 319.

[FN85]. 310 F.3d 155, 2003 AMC 533 (4th Cir. 2002), cert. denied, 539 U.S. 926 (2003).

[FN86]. *Id.* at 157-58.

[FN87]. The companion case of *A Fisherman's Best, Inc. v. Recreational Fishing Alliance*, 310 F.3d 183, 2003 AMC 567 (4th Cir. 2002), held that the activities of sports fishing interests in lobbying for the ordinance was not a tortious interference with commercial fishermen's contractual relations and was exempt from antitrust liability by the Noerr-Pennington doctrine. *Id.* at 196.

[FN88]. *A Fisherman's Best*, 310 F.3d at 179.

[FN89]. *Id.*

[FN90]. *Id.* at 182 (Luttig, J., dissenting).

[FN91]. 314 F.3d 125, 2003 AMC 179 (3d Cir. 2002).

[FN92]. *Id.* at 133, n. 1.

[FN93]. *Id.* at 132.

[FN94]. 40 F.3d 622, 1995 AMC 1 (3d Cir. 1994), *aff'd*, 516 U.S. 199, 1996 AMC 305 (1996).

[FN95]. *Id.* at 639-40.

[FN96]. 338 F.3d 287, 2003 AMC 2113 (4th Cir. 2003).

[FN97]. *Id.* at 304 (citations omitted).

[FN98]. 306 F.3d 827, 2002 AMC 2270 (9th Cir. 2002).

[FN99]. *Id.* at 841.

[FN100]. Described below in section J.

[FN101]. Wallis, 306 F.3d at 842.

[FN102]. *Pike v. Woods Hole Oceanographic Institution*, 233 F.Supp. 2d 198, 2003 AMC 898 (D. Mass. 2002).

[FN103]. *Id.*

[FN104]. 223 F.Supp. 2d 198, 2003 AMC 898 (D. Mass. 2002).

[FN105]. *Id.* at 200.

[FN106]. 236 F.Supp. 2d 503 (D.V.I. 2002).

[FN107]. *Id.* at 506.

[FN108]. *Id.*

[FN109]. *Id.* at 505-06.

[FN110]. 57 P.3d 30 (Kan. App. 2002), rev. denied 2003 Kan. LEXIS 94 (Kan. Feb. 5, 2003).

[FN111]. *Id.* at 31.

[FN112]. *Id.*

[FN113]. *Id.* at 34.

[FN114]. *Id.* at 32-34.

[FN115]. See, e.g., *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1144, 1986 AMC 1201 (5th Cir. 1984) (suggesting that a 'claim against a third-party vessel for injuries sustained as a result of an alleged tort on the high seas... must be decided by principles of United States law, interpreting and applying the *communis juris*, the common law of the seas'). See also 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* 804 (3d ed. 2001) (stating that collisions in foreign territorial waters 'are as a general rule determined according to the law of that country' but that '[m]odern choice of law principles may allow equitable exceptions from this rule based on analysis of relevant contacts with other states').

[FN116]. 221 F. Supp. 2d 967 (E.D. Wis. 2002).

[FN117]. *Id.* at 970-72.

[FN118]. 337 F.3d 939, 2003 AMC 1934 (7th Cir. 2003).

[FN119]. *Id.* at 940.

[FN120]. *Id.*

[FN121]. *Id.* at 941.

[FN122]. *Id.* at 942.

[FN123]. 217 F.R.D. 392, 2003 AMC 1394 (E.D. Ky. 2003).

[FN124]. *Id.* at 393-94, 401.

[FN125]. 310 F.3d 628, 2002 AMC 2608 (9th Cir. 2002).

[FN126]. *Id.* at 631.

[FN127]. See *Governor & Co. of the Bank of Scotland v. Sabay*, 211 F.3d 271, 271 [2000 AMC 1532] (5th Cir. 2000); see *Recent Developments*, *supra* note 5, at 23.

[FN128]. See *id.* at 272.

[FN129]. *Madeja*, 310 F.3d at 638.

[FN130]. *George v. Kramo Ltd.*, 796 F. Supp. 1541, 1548, 1993 AMC 755 (E.D. La. 1992).

[FN131]. See *Barber v. M/V BLUE CAT*, 372 F.2d 626, 628 (5th Cir. 1967).

[FN132]. *Madeja*, at 639.

[FN133]. 795 F.2d 1210 (5th Cir. 1986).

[FN134]. *Id.* at 1211.

[FN135]. *Id.*

[FN136]. *Id.* at 1213.

[FN137]. *Id.*

[FN138]. We documented the Fifth Circuit's mistake, discussed its consequences, and argued for its correction in a 1999 article. See David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 *J. Mar. L. & Com.* 649 (1999). Two years ago, a prominent

plaintiffs' lawyer practicing in the St. Louis area ' [r]ep[re]sented ' to our arguments. See Roy Dripps, *The Seaman's 'Election' Under the Jones Act: A Reply to Professors Robertson and Sturley*, 14 U.S.F. Mar. L.J. 127 (2001-02). We responded with a second article to address Mr. Dripps's arguments. See David W. Robertson & Michael F. Sturley, *Understanding Panama Railroad Co. v. Johnson: The Supreme Court's Interpretation of the Seaman's Elections Under the Jones Act*, 14 U.S.F. Mar. L.J. 229 (2001-02).

[FN139]. See *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1992 AMC 2789 (5th Cir.), cert. denied, 506 U.S. 975 (1992).

[FN140]. See *Craig v. Atl. Richfield Co.* 19 F.3d 472, 1994 AMC 1354 (9th Cir. 1994), cert. denied, 513 U.S. 875 (1994).

[FN141]. See, e.g., *Allen v. Norman Bros.*, 678 N.E.2d 317, 1997 AMC 1782 (Ill. App. Ct. 1997), appeal denied, 686 N.E.2d 1157 (Ill. 1997); *Peters v. City & County of San Francisco*, 1995 AMC 788 (Cal. App. 1994).

[FN142]. See *Robertson & Sturley, The Right to a Jury Trial*, supra note 138, at 650; *Robertson & Sturley, Understanding Panama Railroad*, supra note 138, at 232.

[FN143]. 795 N.E.2d 303 (Ill. App. Ct. 2003).

[FN144]. Id. at 305.

[FN145]. Id.

[FN146]. Id. at 306, 309.

[FN147]. Id. at 309.

[FN148]. Id.

[FN149]. 46 U.S.C. app. § 1303(6) (2000).

[FN150]. See, e.g., James R. Ward, *The Floundering of 'Delivery' Under Section 3(6) of COGSA: A Proposal to Steady its Meaning in Light of its Legislative History*, 24 J. Mar. L. & Com. 287 (1993).

[FN151]. 135 F.3d 984, 1998 AMC 1453 (5th Cir.

1998).

[FN152]. 2003 AMC 1330 (N.D. Cal. 2003).

[FN153]. Under the Shipping Act, a ' non-vessel-operating common carrier ' or ' NVOCC ' is defined as ' a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier. ' 46 U.S.C. app. §1702(17)(B) (2000).

[FN154]. *America & Asia Trading Co.*, 2003 AMC at 1330. The court declared that the shipper ' hired Star [the defendant, which we describe as an NVOCC], an international freight forwarder, to arrange the shipment... ' Id. at 1330. This statement suggests that Star acted as the shipper's agent to arrange a contract of carriage with the ocean carrier on the shipper's behalf. That view would be inconsistent with the fact that the ocean carrier issued its bill of lading to Star rather than the original shipper, and that Star issued its own bill of lading to the original shipper. More significantly, Star must have been acting as a carrier rather than an agent or it could not have claimed the benefit of COGSA §3(6), which protects the carrier and the ship--not an agent for the shipper. Moreover, the shipper sued Star for breach of its obligation as a carrier, not for breach of any agency agreement. Id.

[FN155]. Id.

[FN156]. Id.

[FN157]. Id.

[FN158]. Id.

[FN159]. Id.

[FN160]. Id.

[FN161]. Id.

[FN162]. Id.

[FN163]. Id. at 1333.

[FN164]. Id. (quoting *Servicios*, 135 F.3d at 987-88, 1998 AMC at 1456) (alteration in original).

- [FN165]. Id.
- [FN166]. Id. at 1333-34 (following *National Packaging Corp. v. Nippon Yusen Kaisha*, 354 F. Supp. 986, 987, 1972 AMC 2537, 2537-38 (N.D. Cal. 1972)).
- [FN167]. Id. at 1335. Even under the Fifth Circuit's test, the motion would have been denied, because the NVOCC had not shown that it complied with those requirements, either. See id. at 1335.
- [FN168]. Id. at 1335.
- [FN169]. 2003 AMC 1168 (D. N.J. 2003).
- [FN170]. Id. at 1168.
- [FN171]. Id.
- [FN172]. Id. at 1169.
- [FN173]. Id.
- [FN174]. Id.
- [FN175]. Id.
- [FN176]. Id.
- [FN177]. 310 F.3d 102, 2002 AMC 2332 (2d Cir. 2002) (per curiam), cert. denied, 538 U.S. 922 (2003) (discussed *infra*, section III.(E)(5)).
- [FN178]. 218 F.Supp. 2d 480 (S.D.N.Y. 2002).
- [FN179]. Id. at 483.
- [FN180]. Id.
- [FN181]. 316 F.3d 165, 2003 AMC 80 (2d Cir. 2003).
- [FN182]. Id. at 165.
- [FN183]. Id.
- [FN184]. Id. at 166.
- [FN185]. Id.
- [FN186]. Id. at 167.
- [FN187]. Id. at 166.
- [FN188]. Id. at 171.
- [FN189]. Id. at 168 (citing *Ansaldo San Giorgio I v. Rheinstrom Bros. Co.*, 294 U.S. 494, 496-97, 1935 AMC 419 (1935)).
- [FN190]. See id. at 171.
- [FN191]. Id. at 168.
- [FN192]. COGSA §4(5), 46 U.S.C. app. §1304(5) (2000).
- [FN193]. Jessica Howard, 316 F.3d at 169 (quoting *Holden v. S.S. KENDALL FISH*, 262 F. Supp. 862, 864, 866 (E.D. La. 1966), *aff'd*, 395 F.2d 910 (5th Cir. 1968)).
- [FN194]. 46 U.S.C. app. §1303(8) (2000).
- [FN195]. 2003 AMC 1447 (S.D.N.Y. 2003).
- [FN196]. Id. at 1447.
- [FN197]. Id.
- [FN198]. See id. at 1448-49.
- [FN199]. Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* 183 (2d ed. 1975).
- [FN200]. See *Farr v. Hain Steamship Co.*, 121 F.2d 940, 944, 1941 AMC 1282, 1289 (2d Cir. 1941).
- [FN201]. See, e.g., *Sea-Land Service, Inc. v. Lozen Int'l, LLC*, 285 F.3d 808, 818, 2002 AMC 913 (9th Cir. 2002).
- [FN202]. See generally Michael F. Sturley, *Types of Deviation*, in 2A *Benedict on Admiralty* §123, at 12-12 to 12-13 & nn.7-8 (7th rev. ed 2003) (collecting cases).
- [FN203]. See, e.g., *B.M.A. Indus., Ltd. v. Nigerian Star Line, Ltd.*, 786 F.2d 90, 91-92, 1986 AMC 1662, 1664 (2d Cir. 1986); *Jones v. Compagnie Generale Maritime*, 882 F. Supp. 1079, 1084 n.4, 1995 AMC 2573, 2578 n.4 (S.D. Ga. 1995).
- [FN204]. 155 F.3d 1165, 1999 AMC 1168,

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1182-83 (9th Cir. 1998).

[FN205]. *Id.* at 1175.

[FN206]. 2003 AMC 1312 (C.D. Cal. 2001).

[FN207]. *Id.* at 1314.[FN208]. *Id.*[FN209]. *Id.*[FN210]. *Id.*[FN211]. *Id.*[FN212]. *Id.*

[FN213]. 45 Fed. Appx. 12 (2d Cir. 2002).

[FN214]. *Id.* at 14.

[FN215]. 2003 AMC 1447 (S.D.N.Y. 2003).

[FN216]. *Id.* at 1448.[FN217]. *Id.*[FN218]. *Id.* at 1448.[FN219]. *Id.* at 1450.[FN220]. *Id.*

[FN221]. There is no suggestion in the opinion that the inland carrier ever made a third-party beneficiary argument.

[FN222]. *Levi Strauss & Co.*, 2003 AMC at 1450.[FN223]. *Id.* at 1451.[FN224]. 310 F.3d 102, 104 2002 AMC 2332 (2d Cir. 2002) (*per curiam*), cert. denied, 123 S. Ct. 1573 (2003).

[FN225]. 46 U.S.C. app. §1303(8) (2001) (hereinafter 'section 3(8) of Cogsa').

[FN226]. *Id.*[FN227]. See *Thyssen*, 310 F.3d at 103-04.[FN228]. See *id.* at 107 (citing *Fireman's Fund Insurance Co. v. MV DSR Atlantic*, 131 F.3d 1336, 1998 AMC 583 (9th Cir. 1997), cert. denied, 525 U.S. 921 (1998)).[FN229]. See, e.g., *International Marine Underwriters CU v. M/V Kasif Kalkavan*, 989 F. Supp. 498, 499, 1998 AMC 765 (S.D.N.Y. 1998).[FN230]. *Thyssen*, 310 F.3d at 104-05.[FN231]. *Id.* at 105.[FN232]. *Id.* at 106.[FN233]. *Id.* at 107.

[FN234]. 263 F.Supp. 2d 1226, 2003 AMC 21 (N.D. Cal. 2002).

[FN235]. *Id.* at 1229.[FN236]. *Id.*[FN237]. *Id.*[FN238]. *Id.*[FN239]. *Id.*[FN240]. *Id.*[FN241]. *Id.*[FN242]. See *infra* section IV(U)(3).

[FN243]. Fed. R. Civ. P. 14(c).

[FN244]. See generally David W. Robertson, Steven F. Friedell & Michael F. Sturley, *Admiralty and Maritime Law in the United States* 105 (2001).[FN245]. *Vogt-Nem, Inc.*, 263 F.Supp. 2d at 1233.

[FN246]. See 263 F.Supp. 2d at 1234.

[FN247]. 2003 AMC 30 (C.D. Cal. 2001)

[FN248]. 515 U.S. 528, 1995 AMC 1817 (1995).

[FN249]. *Id.* at 540 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S.

614, 637 n.19 (1985)) (omission in SKY REEFER opinion).

[FN250]. [1983] 1 A.C. 565.

[FN251]. There are objections to this analysis. Unlike the House of Lords, the Supreme Court declared that any inquiry into how the chosen forum might decide the case would be 'premature.' SKY REEFER, 515 U.S. at 540.

[FN252]. Heli-Lift Ltd., 2003 AMC at 35.

[FN253]. Id.

[FN254]. Id.

[FN255]. Heli-Lift Ltd., 2003 AMC at 37.

[FN256]. Id. at 38-9.

[FN257]. 330 F.3d 225, 2003 AMC 1374 (4th Cir. 2003).

[FN258]. Id. at 227.

[FN259]. Id.

[FN260]. Id.

[FN261]. Id. at 236.

[FN262]. 701 F.2d 483, 1984 AMC 237 (5th Cir. 1983).

[FN263]. Id. at 487-88.

[FN264]. 106 F.3d 1544, 1546-47, 1997 AMC 1708 (11th Cir. 1997).

[FN265]. See *Olson Distributing Systems, Inc. v. Glasurit America, Inc.*, 850 F.2d 295, 296 (6th Cir. 1988); *Inman Freight Sys., Inc. v. Olin Corp.*, 807 F.2d 117, 121 (8th Cir. 1986).

[FN266]. *Hawkspere*, 330 F.3d at 237 (quoting *National Shipping Co.*, 106 F.3d at 1547) (alteration in *Hawkspere*).

[FN267]. Id.

[FN268]. See id. at 233-34.

[FN269]. See id. at 233-34.

[FN270]. See id. at 240.

[FN271]. 309 F.3d 76, 2002 AMC 2939 (2d Cir. 2002).

[FN272]. The case also involved a cross-claim under a second policy that required the court to provide a straight-forward interpretation of a broad free-of-capture-or-seizure ('FC&S') clause. See id. at 90-91.

[FN273]. Id. at 78.

[FN274]. Id.

[FN275]. Id.

[FN276]. Id.

[FN277]. Id.

[FN278]. Id. at 81.

[FN279]. Id. at 87.

[FN280]. Id. at 83.

[FN281]. Id. at 83-85.

[FN282]. Id. at 81.

[FN283]. See id.

[FN284]. Id. at 87.

[FN285]. See id. at 85-87.

[FN286]. See id. at 87 n.4.

[FN287]. Id.

[FN288]. See id. at 87-88.

[FN289]. See 33 U.S.C. §§901-50 (2000).

[FN290]. 33 U.S.C. §902(3) (2000).

[FN291]. 337 F.3d 939, 2003 AMC 1934 (7th Cir. 2003).

- [FN292]. *Id.* at 941, 946-947.
- [FN293]. 470 U.S. 414, 423-24, 1985 AMC 1700 (1985).
- [FN294]. *Scott*, 337 F.3d at 946.
- [FN295]. 33 U.S.C. §902(3)(D) (2000).
- [FN296]. *Scott*, 337 F.3d at 946.
- [FN297]. 432 U.S. 249, 273, 1977 AMC 1037 (1977).
- [FN298]. *Id.* at 273.
- [FN299]. 330 F.3d 162, 170, 2003 AMC 1802 (3d Cir. 2003).
- [FN300]. *Id.*
- [FN301]. 33 U.S.C. §903(a) (2000).
- [FN302]. 50 Fed. Appx. 104 (4th Cir. 2002) (*per curiam*).
- [FN303]. *Id.* at 104-05.
- [FN304]. *Id.* at 105.
- [FN305]. *Id.* (citing *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 1999 AMC 829 (4th Cir. 1998)).
- [FN306]. 300 F.3d 510, 2002 AMC 2262 (4th Cir. 2002), cert. denied, 537 U.S. 1188 (2003).
- [FN307]. 219 F.3d 426, 2001 AMC 1816 (5th Cir. 2000).
- [FN308]. 33 U.S.C. §913(b)(2) (2000). (hereinafter 'section 13(b)(2) of LHWCA')
- [FN309]. 336 F.3d 51, 2003 AMC 1829 (1st Cir. 2003).
- [FN310]. *Id.* at 56.
- [FN311]. *Id.* at 55.
- [FN312]. *Id.* at 56.
- [FN313]. 307 F.3d 1139, 2002 AMC 2441 (9th Cir. 2002).
- [FN314]. *Id.* at 1140.
- [FN315]. *Id.*
- [FN316]. *Id.*
- [FN317]. *Id.* at 1141.
- [FN318]. 33 U.S.C. §918(a) (2000).
- [FN319]. *Hanson*, 307 F.3d at 1141.
- [FN320]. 33 U.S.C. §914(f) (2000).
- [FN321]. *Hanson*, 307 F.3d at 1141.
- [FN322]. *Id.*
- [FN323]. *Id.* at 1142.
- [FN324]. *Id.* at 1141 (citing *Pleasant-El v. Oil Recovery Co.*, 148 F.3d 1300 (11th Cir. 1998); *Sea-Land Service, Inc. v. Barry*, 41 F.3d 903, 1995 AMC 1516 (3d Cir. 1994); *Severin v. Exxon Corp.*, 910 F.2d 286 (5th Cir. 1990); *Lauzon v. Strachan Shipping Co.*, 782 F.2d 1217 (5th Cir. 1985)).
- [FN325]. 339 F.3d 1102, 2003 AMC 2266 (9th Cir. 2003).
- [FN326]. *Id.* at 1107.
- [FN327]. 337 F.3d 261 (2d Cir. 2003).
- [FN328]. *Id.* at 265.
- [FN329]. *Id.*
- [FN330]. *Id.*
- [FN331]. In its discussion, the court relied to a considerable extent on the Fifth Circuit's decision in *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986).
- [FN332]. *Id.* at 267-68 (emphasis added).
- [FN333]. *Id.* at 268.
- [FN334]. 315 F.3d 286, 2003 AMC 168 (4th Cir. 2002).

- 2002).
- [FN335]. *Id.* at 288.
- [FN336]. *Id.* at 295-96.
- [FN337]. 33 U.S.C. §927(b) (2000) (emphasis supplied).
- [FN338]. 323 F.3d 1141, 2003 AMC 1193 (9th Cir. 2003).
- [FN339]. *Id.* at 1145.
- [FN340]. *Id.* at 1146.
- [FN341]. *Id.* at 1147.
- [FN342]. 336 F.3d 1103, 2003 AMC 1929 (9th Cir. 2003).
- [FN343]. *Id.* at 1105.
- [FN344]. *Id.*
- [FN345]. *Id.*
- [FN346]. *Id.*
- [FN347]. *Id.*
- [FN348]. *Id.*
- [FN349]. *Id.*
- [FN350]. *Id.*
- [FN351]. 33 U.S.C. §928(a)(2000).
- [FN352]. Richardson, 336 F.3d at 1106.
- [FN353]. *Id.*
- [FN354]. *Id.*
- [FN355]. *Id.*
- [FN356]. 33 U.S.C. § 928(b) (2000).
- [FN357]. Richardson, 336 F.3d at 1107.
- [FN358]. *Id.*
- [FN359]. *Id.* (citing *Diamond v. John Martin Co.*, 753 F.2d 1465, 1467 (9th Cir. 1985)).
- [FN360]. 287 F.Supp. 2d 160, 2003 AMC 353 (D.N.H. 2003).
- [FN361]. *Id.* at 164.
- [FN362]. 531 U.S. 438, 2001 AMC 913 (2001).
- [FN363]. See Recent Developments, *supra* note 1, at 6.
- [FN364]. Fed. R. Civ. P. Supp. F(9).
- [FN365]. *Id.*
- [FN366]. 317 F.3d 894, 2003 AMC 192 (8th Cir. 2003).
- [FN367]. *Id.* at 895.
- [FN368]. *Id.*
- [FN369]. Fed. R. Civ. P. Supp. F(9).
- [FN370]. *In re Mike's Inc.*, 317 F.3d at 896.
- [FN371]. *Id.*
- [FN372]. *Id.*
- [FN373]. *Id.*
- [FN374]. *Id.*
- [FN375]. *Id.* at 896.
- [FN376]. 864 F. Supp. 554, 1995 AMC 705 (E.D. La. 1994).
- [FN377]. Civ. A. No. 90-1685, 1990 U.S. Dist. LEXIS 13831, 1990 WL 161036 (E.D. La. Oct. 12, 1990).
- [FN378]. *In re Mike's Inc.*, 317 F.3d at 897.
- [FN379]. *Id.* at 898.
- [FN380]. *Id.*
- [FN381]. 279 F.Supp. 2d 678 (D.S.C. 2003).

- [FN382]. *Id.* at 680.
- [FN383]. 259 F.Supp. 2d 118, 2003 AMC 1096 (D.P.R. 2003).
- [FN384]. *Id.* at 120.
- [FN385]. *Id.* at 131.
- [FN386]. 314 F.3d 125, 2003 AMC 179 (3d Cir. 2002).
- [FN387]. *Id.*
- [FN388]. *Id.*
- [FN389]. Typically, cruise lines succeed in invoking these provisions. The parents' own action was time-barred in *Gibbs*. *Id.* at 130. See also *Angel v. Royal Caribbean Cruises, Ltd.*, No. 02-20409-Civ., 2002 WL 31553524 (S.D. Fla. Oct. 22, 2002).
- [FN390]. 46 U.S.C. § 183b(c) (2000).
- [FN391]. *Id.*
- [FN392]. *Gibbs*, 314 F.3d at 128.
- [FN393]. *Id.*
- [FN394]. See the discussion of this feature of *Gibbs* in section III(B)(1) *supra*.
- [FN395]. *Gibbs*, 314 F.3d at 138.
- [FN396]. No. B151303, 2002 WL 31317342 (Cal. Ct. App. Oct. 16, 2002) (unpublished).
- [FN397]. *Id.* at *3-5 (citing, *inter alia*, *Keefe v. Bahama Cruise Line*, 867 F.2d 1318, 1990 AMC 46 (11th Cir. 1989); *Gibboney v. Wright*, 517 F.2d 1054, 1975 AMC 2071 (5th Cir. 1975)).
- [FN398]. 306 F.3d 827, 2002 AMC 2270 (9th Cir. 2002).
- [FN399]. See discussions in section III(A)(3) and III(B)(1), *supra*.
- [FN400]. Wallis, 306 F.3d at 828.
- [FN401]. *Id.*
- [FN402]. 46 U.S.C. app. §§761-67 (2000).
- [FN403]. Wallis, 306 F.3d at 828.
- [FN404]. Wallis, 306 F.3d at 829.
- [FN405]. *Id.* at 830.
- [FN406]. *Id.* at 834.
- [FN407]. 868 F.2d 734 (5th Cir. 1989).
- [FN408]. Wallis, 306 F.3d at 834.
- [FN409]. *Id.* at 835.
- [FN410]. *Id.*
- [FN411]. *Id.* at 835.
- [FN412]. *Id.* at 836.
- [FN413]. 338 F.3d 287, 2003 AMC 2113 (4th Cir. 2003).
- [FN414]. *Id.* at 289.
- [FN415]. *Id.*
- [FN416]. *Id.*
- [FN417]. *Id.* at 298. In less controversial holdings, the McMellon court said that the 'Good Samaritan doctrine' could not serve as a basis for imposing a duty on the Government under the circumstances presented, because the jet skiers did not allege that they had relied on the Government's undertaking to provide warnings, and that 'under the general maritime law, exercise of reasonable care... requires the owner and operator of a dam at the very least to give adequate warnings about the existence of the dam.' *Id.* at 295, 298.
- [FN418]. 28 U.S.C. §2680(a) (2000).
- [FN419]. 46 U.S.C. app. §§741-52 (2000); but see *Smith v. United States*, 251 F.Supp. 2d 1255, 1260, 2003 AMC 680, 684 (D. Md. 2003) (citing *Tiffany v. United States*, 931 F.2d 271 (4th Cir. 1991), for the proposition that 'the Fourth Circuit [has]

confirmed an implied discretionary function exception in the SAA.’)

[FN420]. McMellon, 338 F.3d at 291 (citing Lane v. United States, 529 F.2d 175, 1976 AMC 66 (4th Cir. 1975)).

[FN421]. See also *Limar Shipping Ltd. v. United States*, 324 F.3d 1, 2003 AMC 776, 780 (1st Cir. 2003) (‘[w]e decline plaintiff’s invitation to reconsider’ the First Circuit’s rule that a discretionary function exception should be read into the SAA Id. at 7.)

[FN422]. See Recent Developments, supra note 1, at 68-69. 225 F.3d 1201, 2000 AMC 2753 (11th Cir. 2000).

[FN423]. 64 F.3d 206, 1995 AMC 2947 (5th Cir. 1995).

[FN424]. See *Pearce v. United States*, 261 F.3d 643, 2001 AMC 2586 (6th Cir. 2001).

[FN425]. 33 C.F.R. § 207.300(s) (2002).

[FN426]. McMellon, 338 F.3d at 304-05.

[FN427]. Id. at 306 (Niemeyer, J., dissenting).

[FN428]. Recent Developments, supra note 3, at 41.

[FN429]. 270 F. 3d 1215, 2002 AMC 1 (9th Cir. 2001).

[FN430]. Another case of some interest--albeit not of widespread applicability--arising out of the infamous March 23, 1989, oil spill is *SeaRiver Maritime Financial Holdings Inc. v. Mineta*, 309 F.3d 662, 2002 AMC 2409 (9th Cir. 2002). When Congress enacted the Oil Pollution Act of 1990 (OPA), section 5007, 33 U.S.C. §2737 (2000), excludes from the waters of Prince William Sound any vessel that has spilled more than one million gallons of oil into the marine environment after March 22, 1989. The clear intent and effect is to bar the Exxon Valdez (since renamed the S/R MEDITERRANEAN) from Prince William Sound. Exxon’s vessel-owning and -operating subsidiaries brought the present action to challenge the constitutionality of section 5007. In addition to fairly routine Equal Protection and Due Process

claims, they argued that this provision was unconstitutional as a bill of attainder. Although the court agreed that section 5007 ‘singled out’ the vessel, thus satisfying the first requirement for a bill of attainder, the constitutional challenge failed because the statute did not ‘inflict punishment.’ See *Mineta*, 309 F.3d at 668-78.

[FN431]. In re *Exxon Valdez*, 236 F.Supp. 2d 1043 (D. Alaska 2002).

[FN432]. 538 U.S. 408 (2003).

[FN433]. See In re *Exxon Valdez*, No. 30-35166, No. 03-32519, 2003 U.S. App. LEXIS 18219 (9th Cir. Aug. 18, 2003).

[FN434]. In re *Exxon Valdez*, 236 F.Supp. 2d 1071, 1076, 2004 AMC 305 (D. Alaska 2004).

[FN435]. Id.

[FN436]. 513 U.S. 527, 1995 AMC 913 (1995).

[FN437]. Id. at 531.

[FN438]. No. Civ. A. 01-2281, 2002 U.S. Dist. LEXIS 22735, 2002 WL 31655355 (E.D. La. Nov. 21, 2002).

[FN439]. *St. Pierre*, 2002 WL 31655355 at *3 n.8.

[FN440]. 833 So.2d 528 (La. App. 2002).

[FN441]. Id. at 530.

[FN442]. Id.

[FN443]. Id. at 531.

[FN444]. Id. at 532.

[FN445]. 46 U.S.C. app. §740 (2000). See supra note 59.

[FN446]. See David W. Robertson & Michael F. Sturley, *The Admiralty Extension Act Solution*, 34 J. Mar. L. & Com. 209-307 (2003).

[FN447]. See id. at 266-67, 274-75, 276-84, 289-93.

[FN448]. See id. at 294-95.

[FN449]. 317 F.3d 1235, 2003 AMC 94 (11th Cir. 2003), pet. for cert. filed, 124 S.Ct. 429 (2003).

[FN450]. Id. at 1237.

[FN451]. Id.

[FN452]. Id.

[FN453]. Id. at 1238. In the court's view the AEA thus supplied the locality element for admiralty jurisdiction. The potential-disruption-of-maritime-commerce prong was deemed satisfied because '[t]he AFWTF range closes twice weekly to allow fishing vessels to gather their catch. Thus, the bombing activities at the AFWTF range have the potential to disrupt maritime commerce. Id. The substantial-relationship-to-traditional-maritime-activity requirement was deemed satisfied because '[t]he Kennedy's activities include navigating the world's navigable waters and managing flight operations involving aircraft armed with ordnance to be launched at sea.' Id. at 1239.

[FN454]. 837 So.2d 96 (La. App. 2002), writ denied, 841 So.2d 794 (La. 2003).

[FN455]. Id. at 98.

[FN456]. Id. at 100.

[FN457]. No. Civ. A. 01-3063, 2002 WL 31556351 (E.D. La. 2002).

[FN458]. Id.

[FN459]. Id. at *1.

[FN460]. 498 U.S. 19, 1991 AMC 1 (1990).

[FN461]. Id. at 21.

[FN462]. 414 U.S. 573, 1973 AMC 2572 (1974).

[FN463]. Id. at 575.

[FN464]. 516 U.S. 199, 1996 AMC 305 (1996).

[FN465]. Id. at 201.

[FN466]. 264 F.Supp. 2d 437, 2003 AMC 1487

(E.D. La. 2003).

[FN467]. Id. at 440.

[FN468]. 517 U.S. 830, 1996 AMC 1817 (1996).

[FN469]. 841 So.2d 1, 2003 AMC 806 (La. App. 2003).

[FN470]. Id. at 3.

[FN471]. Id. at 6, 7. (footnote omitted).

[FN472]. 849 So.2d 803, 2003 AMC 2101 (La. App. 2003).

[FN473]. Id. at 805.

[FN474]. Id.

[FN475]. Id.

[FN476]. Id.

[FN477]. Id. at 807.

[FN478]. 833 So.2d 528 (La. App. 2002).

[FN479]. Id. at 530.

[FN480]. Id.

[FN481]. Id. at 534.

[FN482]. Id. at 535.

[FN483]. 338 F.3d 394, 2003 AMC 1839 (5th Cir. 2003).

[FN484]. Id. at 395 (citing Tex. Civ. Prac. & Rem. Code §38.001 (Vernon 1997)).

[FN485]. 338 F.3d at 406.

[FN486]. See Southworth Machinery Co. v. F/V COREY PRIDE, 994 F.2d 37, 41, 1993 AMC 2261 (1st Cir. 1993); Sosebee v. Rath, 893 F.2d 54, 57, 1990 AMC 1601 (3d Cir. 1990); See also Antillean Marine Shipping Corp. v. Through Transport Mutual Ins., Ltd., 2003 AMC 251 (S.D. Fla. 2002), discussed infra section IV(F).

[FN487]. See Wall, 833 So.2d 528 (La. App. 2002), discussed supra section IV(B)(1).

[FN488]. 839 So.2d 223 (La. App. 2003).

[FN489]. Id. at 225.

[FN490]. Id.

[FN491]. Id. (citing Albany Ins. Co. v. An Thi Kieu, 927 F.2d 882, 886 (5th Cir. 1991); Green v. Industrial Helicopters, Inc., 593 So.2d 634 (La. 1992)).

[FN492]. La. Civ. Code Ann. art. 2747 (West 2002).

[FN493]. 89 S.W.3d 633 (Tex. App. 2002).

[FN494]. Id.

[FN495]. Id.

[FN496]. Id. at 637 & n.2. (citing General Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 920 (Tex. 1993)). The court went on to remand the case for a new trial because the jury should have been instructed that the thrill boat operator was a common carrier who owed a higher degree of care than mere reasonable care. Elmer, 89 S.W.3d at 639.

[FN497]. La. Rev. Stat. Ann. § 34:1055 (West 2002).

[FN498]. No. Civ. A. 01-3137, 2002 U.S. Dist. LEXIS 23393, 2002 WL 31729491 (E.D. La. Dec. 3, 2002).

[FN499]. 2003 WL 31729491 at *3. Remember that Cooley v. Board of Wardens, 53 U.S. 299, 320 (1851), upheld the validity of Pennsylvania's compulsory pilotage statute on the view that Congress had 'manifest[ed] an intention... to leave [regulation of pilots] to the several states.' The present-day version of the legislation referred to in Cooley is codified at 46 U.S.C. §§8501-03 (2000), the general effect of which is to leave the states with authority to regulate in-state pilotage of vessels engaged in foreign trade (while asserting exclusive federal authority over the pilotage of vessels engaged in coastwise or domestic trade).

[FN500]. 515 U.S. 347, 1995 AMC 1840 (1995).

[FN501]. See id. at 348.

[FN502]. 335 F.3d 376, 2003 AMC 1653 (5th Cir. 2003).

[FN503]. Id. at 377.

[FN504]. Id.

[FN505]. Id.

[FN506]. Id. at 381-82.

[FN507]. Id. at 381.

[FN508]. 28 U.S.C. §1445(a)(2000).

[FN509]. Burchett v. Cargill, Inc., 48 F.3d 173, 175, 1995 AMC 1576 (5th Cir. 1995).

[FN510]. Id. at 176.

[FN511]. No. Civ. A. 02-1617, 2002 U.S. Dist. LEXIS 20121, 2002 WL 31375615 (E.D. La. Oct. 22, 2002).

[FN512]. Anglin, 2002 WL 31375615 at *4.

[FN513]. Id. at *3.

[FN514]. Civ. No. 03-0845, 2003 U.S. Dist. LEXIS 11432, 2003 WL 21488124 (E.D. La. June 20, 2003).

[FN515]. Hogans, 2003 WL 21488124 at *3.

[FN516]. Id.

[FN517]. 238 F.Supp. 2d 778, 2003 AMC 459 (E.D. La. 2002).

[FN518]. Id. at 780.

[FN519]. Id.

[FN520]. Id. at 782.

[FN521]. Id. at 784.

[FN522]. Id.

[FN523]. See Recent Developments, supra note 4,

at 52.

[FN524]. 265 F.3d 258, 2001 AMC 2618 (5th Cir. 2001).

[FN525]. *Karim v. Finch Shipping Co.*, 233 F.Supp. 2d 807, 810, 2003 AMC 44 (E.D. La. 2002).

[FN526]. *Id.* at 810-812.

[FN527]. *Id.* at 812.

[FN528]. 228 F. Supp. 2d 795, 2003 AMC 1050 (S.D. Tex. 2002).

[FN529]. *Id.* at 797.

[FN530]. *Id.* at 798.

[FN531]. See *id.* at 798-99.

[FN532]. *Id.* at 799 (citing *Southern Shell Fish Co. v. Plaisance*, 196 F.2d 312, 313-14 (5th Cir. 1952)).

[FN533]. *Id.*

[FN534]. 227 F.Supp. 2d 1273 (M.D. Fla. 2002).

[FN535]. *Id.* at 1274.

[FN536]. *Id.* at 1275.

[FN537]. 336 F.3d 360, 2003 AMC 1728 (5th Cir. 2003).

[FN538]. *Id.* at 362.

[FN539]. *Id.*

[FN540]. *Id.*

[FN541]. *Id.* at 363.

[FN542]. Nos. Civ. A. 02-2030, -2031 2002 U.S. Dist. LEXIS 21992, 2002 WL 31528460 (E.D. La. Nov. 14, 2002).

[FN543]. 2002 WL 31528460 at *1.

[FN544]. No. 91-2667, 1992 U.S. Dist. LEXIS 11215 (E.D. La. July 22, 1992).

[FN545]. *Id.* at *5.

[FN546]. 59 F.3d 1496, 1500, 1995 AMC 2409 (5th Cir. 1995) (en banc).

[FN547]. 963 F. Supp. 42, 45, 1997 AMC 2017 (D. Mass. 1997).

[FN548]. *Gorum*, 2002 WL 31528460 at *10.

[FN549]. *Warren v. United States*, 340 U.S. 523, 525, 1951 AMC 416 (1951).

[FN550]. 396 F.2d 547 (5th Cir. 1968).

[FN551]. No. Civ. A. 02-2153, 2003 U.S. Dist. LEXIS 2309, 2003 WL 359936 (E.D. La. Feb. 14, 2003).

[FN552]. *Id.* at *1 (internal citation omitted).

[FN553]. *Id.* at *2.

[FN554]. No. 02-31036, 2003 U.S. App. LEXIS 14500, 2003 WL 21683485 (5th Cir. July 18, 2003) (unpublished per curiam).

[FN555]. *Russell*, 2003 WL 21683485 at *1.

[FN556]. *Id.*

[FN557]. *Id.* at *5.

[FN558]. See *id.*

[FN559]. 59 F.3d 1496, 1995 AMC 2409 (5th Cir. 1995) (en banc).

[FN560]. *Id.* at 1498.

[FN561]. See *id.* at 1505-07.

[FN562]. See David W. Robertson, *The Future of Maritime Law in the Federal Courts: Personal Injury and Wrongful Death*, 31 *J. Mar. L. & Com.* 293 (2000). See generally David W. Robertson, *Punitive Damages in American Maritime Law*, 28 *J. Mar. L. & Com.* 73 (1997).

[FN563]. See, e.g., *Cascio v. TMA Marine, Inc.*, No. Civ. A. 02-2115, 2002 U.S. Dist. LEXIS 22593, 2002 WL 31640497 (E.D. La. Nov. 19,

2002) (Judge Fallon).

[FN564]. No. Civ. A. 00-1602, 2002 U.S. Dist. LEXIS 20126, 2002 WL 31365365 (E.D. La. Oct. 18, 2002).

[FN565]. Durgin, 2002 WL 31365365 at *1.

[FN566]. Id.

[FN567]. Id.

[FN568]. Id.

[FN569]. Id. at *4.

[FN570]. Recent Developments, *supra* note 4, at 12-13.

[FN571]. No. Civ. A. 00-2307, 2002 U.S. Dist. LEXIS 22714, 2002 WL 31654973 (E.D. La. Nov. 21, 2002).

[FN572]. Sanders, 2002 U.S. Dist. LEXIS 22714 at *5-*12.

[FN573]. 107 F.3d 331, 1997 AMC 1521 (5th Cir. 1997) (en banc).

[FN574]. Sanders, 2002 U.S. Dist. LEXIS 22714 at *5-*7.

[FN575]. Id. at *6-*7.

[FN576]. 599 F.2d 1359 (5th Cir. 1979).

[FN577]. Id. at 1373.

[FN578]. Tubacex, Inc. v. M/V RISAN, 45 F.3d 951, 954, 1995 AMC 1305, 1308 (5th Cir.1995); see also Sun Co. Inc. v. S.S. OVERSEAS ARCTIC, 27 F.3d 1104, 1109, 1995 AMC 57, 62, (5th Cir. 1994); Tenneco Resins, Inc. v. Davy International, AG, 881 F.2d 211, 213, 1990 AMC 402, 405 (5th Cir. 1989); Blasser Brothers, Inc. v. Northern Pan-American Line, 628 F.2d 376, 381, 1982 AMC 84, 89-90 (5th Cir. 1980).

[FN579]. See Sun Co., 27 F.3d at 1109-10; Blasser Bros., 628 F.2d at 383-84.

[FN580]. See Sun Co., 27 F.3d at 1109-10; Blasser

Bros., 628 F.2d at 383-84.

[FN581]. See Tenneco Resins, 881 F.2d at 213-14.

[FN582]. See Tubacex Inc., 45 F.3d at 954-55.

[FN583]. 46 U.S.C. app. §1304(2)(q) (2001) (Hereinafter 'COGSA §4(2)(8)').

[FN584]. Tubacex Inc., 45 F.3d at 954-55.

[FN585]. 46 U.S.C. app. §§ 1304 (a)-(p) (2001).

[FN586]. Nitram, 599 F.2d at 1370.

[FN587]. Id. at 1372.

[FN588]. 331 F.3d 422, 2003 AMC 1408 (5th Cir. 2003), cert. denied sub. nom. Bay Ocean Mgmt., Inc. v. Steel Coils, Ince. 124 S. Ct. 400, 157 L.Ed. 2d 280 (U.S. 2003).

[FN589]. Steel Coils, 331 F.3d at 425.

[FN590]. See id. at 426-430.

[FN591]. Id. at 427.

[FN592]. See id.

[FN593]. 331 F.3d at 430 (quoting 46 U.S.C. app. § 1304(1)(2001)). (emphasis added; omission in Steel Coils opinion).

[FN594]. See 331 F.3d at 430-35. The court reiterated the well-established principle that a carrier cannot satisfy its duty to exercise due diligence to provide a seaworthy vessel by delegating its responsibilities to a third party--even when the third party at issue is the shipper.

[FN595]. See id. at 432-35.

[FN596]. See id.

[FN597]. Nitram, Inc. v. Cretan Life, 599 F.2d 1359, 1373 (5th Cir. 1979).

[FN598]. Id.

[FN599]. See generally David W. Robertson, Steven F. Friedell & Michael F. Sturley, Admiralty

and Maritime Law in the United States 337-38 (2001).

[FN600]. 46 U.S.C. app. §§ 190-195 (2001).

[FN601]. See, e.g., *May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft*, 290 U.S. 333 (1933) (The IRIS).

[FN602]. See Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. Mar. L. & Com. 1, 52 & nn.426-27 (1991).

[FN603]. See, e.g., *Maxine Footwear Co. v. Canadian Gov't Merchant Marine Ltd.*, [1959] A.C. 589, 602-03 (P.C.) (Can.).

[FN604]. See, e.g., *Sunkist Growers, Inc. v. Adelaide Shipping Lines*, 603 F.2d 1327, 1338 (9th Cir. 1979). 'We adopt, as the law of our circuit, the construction placed on the Hague Rules by their Lordships in THE MAURIENNE, and hold that the provisions of Section 8, paragraph 1, COGSA, create an overriding obligation...to exercise due diligence to: (a) make the ship seaworthy... ' Id. at 1341.

[FN605]. 2003 AMC 283 (S.D. Fla. 2002).

[FN606]. 2003 AMC at 285.

[FN607]. 46 U.S.C. app. § 1304(2)(q) (2001).

[FN608]. See *Levi Strauss*, 2003 AMC 283 (S.D. Fla. 2002).

[FN609]. Id. at 284.

[FN610]. Id. at 285.

[FN611]. 2003 AMC 216 (S.D. Fla. 2003).

[FN612]. Id. at 218.

[FN613]. Id. at 220.

[FN614]. Id. at 222-23.

[FN615]. Id. at 224.

[FN616]. Id. at 227.

[FN617]. Id. at 230.

[FN618]. 2002 AMC 2576 (S.D. Fla. 2002).

[FN619]. Id.

[FN620]. Id.

[FN621]. Id.

[FN622]. Id. at 2577.

[FN623]. Id. at 2576.

[FN624]. See, e.g., *Superior Fish Co. v. Royal Globe Ins. Co.*, 521 F. Supp. 437, 440-41, 1982 AMC 710 (E.D. Pa. 1981) (well-reasoned dictum that Maritime claims are not removeable without an independent ground of federal jurisdiction); *Pacific Agencies v. Colon & Villalon, Inc.*, 372 F. Supp. 62, 65 (D.P.R. 1973) (dictum that removability of COGSA claims is questionable after *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 1959 AMC 832 (1959)).

[FN625]. See, e.g., *Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787, 1993 AMC 2609 (5th Cir. 1990) (dictum that COGSA claims arise under 28 U.S.C. § 1337); *Crispin Co. v. Lykes Bros. S.S. Co.*, 134 F. Supp. 704, 1955 AMC 1613 (S.D. Tex. 1955) (holding that COGSA cases are removable on the basis of federal question jurisdiction).

[FN626]. See *Neutax*, 2002 AMC at 2576-77

[FN627]. See id.

[FN628]. See, e.g., *Uncle Ben's Int'l. Div. of Uncle Ben's, Inc. v. Hapag-Lloyd Aktiengesellschaft*, 855 F.2d 215, 217, 1989 AMC 748 (5th Cir. 1988) (holding that Harter Act cases arise under 28 U.S.C. §1337 and are therefore removable); *Walsh v. Seagull Energy Corp.*, 836 F. Supp. 411, 418 (S.D. Tex. 1993) (dictum that Harter Act cases arise under 28 U.S.C. §1337 (2000)).

[FN629]. 46 U.S.C. app. § 1304 (2)(c).

[FN630]. See, e.g., *Great China Metal Indus. Co. v. Malaysian Int'l Shipping Corp. Berhad*, 158 A.L.R. 1, 72 Austl. L.J. Rep. 1592 (Austl. 1998).

[FN631]. See, e.g., *Thyssen, Inc. v. S/S EURUNITY*, 21 F.3d 533, 539, 1994 AMC 1638 (2d Cir. 1994).

[FN632]. 331 F.3d 422, 2003 AMC 1408 (5th Cir. 2003), cert. denied sub. nom. *Bay Ocean Mgmt., Inc. v. Steel Coils, Inc.* 124 S. Ct. 400, 157 L.Ed. 2d 280 (U.S. 2003).

[FN633]. *Id.* at 432-33.

[FN634]. 437 F.2d 580, 1971 AMC 539 (2d Cir. 1971).

[FN635]. See *Steel Coils*, 331 F.3d at 433-35.

[FN636]. *Id.*

[FN637]. See *supra* section III(E)(2).

[FN638]. 2002 AMC 1940 (S.D. Tex. 2002).

[FN639]. *Id.* at 1941.

[FN640]. *Id.*

[FN641]. *Id.* at 1942.

[FN642]. *Id.* at 1942-43.

[FN643]. *United States v. Tex. Am. Shipping Corp.*, 2002 AMC 1940, 1941 (discussing *United States v. Ocean Bulk Ships, Inc.*, 248 F.3d 331, 2001 AMC 1487 (5th Cir. 2001), cert. denied, 534 U.S. 1065 (2001)).

[FN644]. *Tex. Am. Shipping*, 2002 AMC at 1942.

[FN645]. *Id.* at 1941.

[FN646]. 46 U.S.C. app. § 1304 (5) (2001).

[FN647]. 832 So.2d 888 (Fla. App. 2002).

[FN648]. *Id.*

[FN649]. 240 F.3d 956, 2001 AMC 1663 (11th Cir. 2001).

[FN650]. *Id.* at 889.

[FN651]. *Id.*

[FN652]. *Id.* at 964-65.

[FN653]. *MacClenny Prod.*, 832 So.2d at 891.

[FN654]. See generally Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act*, 19 *J. Mar. L. & Com.* 1 (1988); Michael F. Sturley, *The Package Limitation and the Fair Opportunity Requirement*, in 2A *Benedict on Admiralty* §166, at 16-28 to 16-36 (7th rev. ed 2003).

[FN655]. See *id.*

[FN656]. See *General Electric Co. v. M/V NEDLLOYD*, 817 F.2d 1022, 1028-29, 1987 AMC 1817 (2d Cir. 1987), cert. denied, 484 U.S. 1011 (1988).

[FN657]. *Id.* at 1029.

[FN658]. *Id.*

[FN659]. 2002 AMC 2081 (E.D. La. 2002).

[FN660]. *Id.* at 2082.

[FN661]. *Id.*

[FN662]. 2002 AMC at 2085.

[FN663]. See 2002 AMC at 2086-87.

[FN664]. 359 U.S. 297, 1959 AMC 879 (1959).

[FN665]. 331 F.3d 422, 2003 AMC 1408 (5th Cir. 2003), cert. denied sub. nom. *Ocean Mgmt., Inc. v. Steel Coils, Inc.*, 124 S. Ct. 400, 157 L.Ed. 2d 280 (U.S. 2003).

[FN666]. *Id.* at 424.

[FN667]. See *id.*

[FN668]. 331 F.3d at 438.

[FN669]. *Id.*

[FN670]. *Id.* at 438 n.74.

[FN671]. 2003 AMC 1250 (M.D. Fla. 2003).

- [FN672]. *Id.* at 1250.
- [FN673]. *Id.*
- [FN674]. *Id.*
- [FN675]. See *id.*
- [FN676]. *Id.*
- [FN677]. Recent Developments, *supra* note 4, at 53-57.
- [FN678]. 300 F.3d 1300, 2002 AMC 2113 (11th Cir. 2002).
- [FN679]. *Id.* at 1301.
- [FN680]. See *Norfolk Southern Railway Co. v. James N. Kirby, Pty. Ltd.*, 71 U.S.L.W. 3476 (U.S. Jan. 6, 2003) (No. 02-1028).
- [FN681]. *Norfolk Southern Ry. Co. v. James N. Kirby, Pty. Ltd.*, 124 S.Ct. 981 (2004).
- [FN682]. 325 F.3d 695, 2003 AMC 1027 (5th Cir. 2003).
- [FN683]. *Id.* at 696.
- [FN684]. *Id.* at 697.
- [FN685]. *Id.* at 705.
- [FN686]. 9 U.S.C. §16(b)(1) (2000).
- [FN687]. See also 28 U.S.C. §1292(b) (2000).
- [FN688]. *Cargill*, 325 F.3d at 697.
- [FN689]. *Id.*
- [FN690]. *Id.*
- [FN691]. *Id.*
- [FN692]. *Id.*
- [FN693]. See *id.* at 698-700.
- [FN694]. See *id.* 702-04.
- [FN695]. See *id.* at 702-04.
- [FN696]. See *id.*
- [FN697]. *Id.* at 698.
- [FN698]. *Id.* at 700-01.
- [FN699]. *Id.*
- [FN700]. See *id.* at 701.
- [FN701]. *Id.* at 700.
- [FN702]. *Id.* at 701.
- [FN703]. *Id.*
- [FN704]. 2003 AMC 1175 (S.D. Fla. 2003).
- [FN705]. 2003 AMC at 1178.
- [FN706]. *Id.* at 1178.
- [FN707]. See *id.*
- [FN708]. *Id.* at 1183-84.
- [FN709]. No. Civ. A. 01-1702, 2003 U.S. Dist. LEXIS 11575, 2003 AMC 2200 (E.D. La. May 23, 2003).
- [FN710]. 515 U.S. 528, 1995 AMC 1817 (1995).
- [FN711]. The court also considered whether the SKY REEFER decision should be limited to the arbitration context in which it arose. *Kanematsu*, 2003 AMC at 2203. Decisions addressing this question, including *Kanematsu*, have consistently applied SKY REEFER to forum selection clauses generally. Indeed, it is somewhat surprising to see the issue raised here, for the issue was settled in the Fifth Circuit six years ago. See *Mitsui & Co. (USA), Inc. v. MIRA M/V*, 111 F.3d 33, 36, 1997 AMC 2126 (5th Cir. 1997) (*per curiam*) (SKY REEFER 'did not restrict its holding to arbitration clauses only').
- [FN712]. 2003 AMC 30 (C.D. Cal. 2001), see *supra* section III(E)(5).
- [FN713]. See *id.*

- [FN714]. *Id.* at 2206.
- [FN715]. *Id.*
- [FN716]. 927 F.2d 882, 1991 AMC 2211 (5th Cir.), cert. denied, 502 U.S. 901 (1991).
- [FN717]. 2002 AMC 2835 (S.D. Miss. 2002).
- [FN718]. 2002 AMC at 2835-36.
- [FN719]. *Id.* at 2836.
- [FN720]. *Id.* at 2835.
- [FN721]. 2002 AMC at 2836 (citing *Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co.*, 302 U.S. 556, 1938 AMC 1 (1938)).
- [FN722]. 2003 AMC 251 (S.D. Fla. 2002).
- [FN723]. *Id.* at 252.
- [FN724]. *Id.* at 252.
- [FN725]. *Id.*
- [FN726]. 348 U.S. 310, 1955 AMC 467 (1955).
- [FN727]. See *id.* at 254.
- [FN728]. *Id.*
- [FN729]. *Id.*
- [FN730]. See 33 U.S.C. §§901-50 (2000).
- [FN731]. 33 U.S.C. §903(a) (2000).
- [FN732]. 304 F.3d 1053, 2002 AMC 2343 (11th Cir. 2002) (*per curiam*).
- [FN733]. See *id.*
- [FN734]. 313 F.3d 300, 2003 AMC 15 (5th Cir. 2002), petition for cert. filed, 71 U.S.L.W. 3725 (U.S. Apr. 22, 2003) (No. 02-1637).
- [FN735]. *Id.* at 301-02.
- [FN736]. *Id.* at 302.
- [FN737]. 33 U.S.C. §902(3)(B) (2000).
- [FN738]. 33 U.S.C. §903(a) (2000).
- [FN739]. 332 F.3d 283, 2003 AMC 1430 (5th Cir. 2003).
- [FN740]. *Id.* at 286.
- [FN741]. *Id.*
- [FN742]. *Id.*
- [FN743]. *Id.*
- [FN744]. *Id.* at 287 (some internal quotation marks and italicization omitted).
- [FN745]. *Id.*
- [FN746]. *Id.*
- [FN747]. *Id.* at 289.
- [FN748]. 33 U.S.C. §916 (2000).
- [FN749]. 834 So.2d 234 (Fla. App. 2002), review den., 846 So.2d 1147 (Fla. 2003), pet. for cert. filed (Aug. 15, 2003) (No. 93-251).
- [FN750]. *Id.* at 236.
- [FN751]. *Id.* at 235.
- [FN752]. *Id.* at 236.
- [FN753]. 317 F.3d 480, 2003 AMC 197 (5th Cir. 2003).
- [FN754]. *Id.* at 482.
- [FN755]. *Id.*
- [FN756]. *Id.*
- [FN757]. *Id.*
- [FN758]. *Id.*
- [FN759]. *Id.*
- [FN760]. *Id.*

[FN761]. The court had earlier noted that while ‘ [t]he BRB’s views are not entitled to deference because it is not a policy-making agency,... [w]e do, however, give deference to the Director’s interpretations of the LHWCA. ‘ Id. at 480.

[FN762]. 225 F.2d 137 (2d Cir. 1955).

[FN763]. Id. at 484 (internal quotation marks, citations, and emphasis deleted).

[FN764]. Id. at 485.

[FN765]. Id. at 487.

[FN766]. 782 F.2d 513 (5th Cir. 1986) (en banc).

[FN767]. See *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 488, 2003 AMC 197 (5th Cir. 2003).

[FN768]. 33 U.S.C. §902(21) (2000).

[FN769]. 33 U.S.C. §905(b) (2000).

[FN770]. 512 U.S. 92, 99, 1994 AMC 1817 (1994).

[FN771]. 451 U.S. 156, 179, 1981 AMC 601 (1981)

[FN772]. 846 So.2d 145 (La. App. 2003).

[FN773]. Id. at 151.

[FN774]. 241 F. Supp. 2d 721 (S.D. Tex. 2003).

[FN775]. Id. at 724.

[FN776]. Id. at 725.

[FN777]. 334 F.3d 439, 2003 AMC 1647 (5th Cir. 2003).

[FN778]. Id. at 441.

[FN779]. Id.

[FN780]. See, e.g., *Gulf Oil Trading Co. v. M/V CARIBE MAR*, 757 F.2d 743, 749, 1985 AMC 2726 (5th Cir. 1985).

[FN781]. *Stevens Shipping & Terminal Co.*, 334 F.3d at 441.

[FN782]. Id.

[FN783]. Id. at 444.

[FN784]. Id.

[FN785]. Id.

[FN786]. 2003 AMC 1441 (E.D. La. 2003).

[FN787]. Id. at 1443.

[FN788]. Id. at 1444.

[FN789]. Id.

[FN790]. Id.

[FN791]. Id.

[FN792]. Id.

[FN793]. Id.

[FN794]. Id. at 1445.

[FN795]. See 43 U.S.C. §§1331-56 (2000).

[FN796]. 117 F.3d 909 (5th Cir. 1997).

[FN797]. Id. at 910.

[FN798]. 337 F.3d 558 (5th Cir. 2003).

[FN799]. Id. at 561.

[FN800]. Id. at 562.

[FN801]. Id. at 563.

[FN802]. Id. (citing *Romero v. Mobil Exploration & Producing North America, Inc.*, 939 F.2d 307, 310-11 (5th Cir. 1991).

[FN803]. 325 F.3d 681, 2003 AMC 1005 (5th Cir. 2003).

[FN804]. Id. at 682-83.

[FN805]. Id. at 684. (In describing the standard of review, the court made the surprising statement that ‘[w]e review legal conclusions and mixed questions

of law and fact following a bench trial de novo.' *Id.* But it then went on to specify that findings of negligence, factual causation, and legal (proximate) causation are not reviewed de novo but rather under the clearly erroneous standard. Probably the statement that mixed questions of law and fact are reviewed de novo was simply an inadvertent misstatement. The court cited *Philips Petroleum Co. v. Best Oilfield Servs.*, 48 F.3d 913, 915 (5th Cir. 1995), as authority, but we can find nothing in *Philips* addressing mixed questions. *In re Luhr Bros., Inc.*, 325 F.3d at 685.)

[FN806]. *Id.* at 689.

[FN807]. 338 F.3d 1276, 2003 AMC 1983 (11th Cir. 2003).

[FN808]. *Id.* at 1277.

[FN809]. *Id.*

[FN810]. *Id.*

[FN811]. *Id.* at 1278.

[FN812]. 332 F.3d 779, 2003 AMC 1355 (5th Cir. 2003).

[FN813]. *Id.* at 785.

[FN814]. *Id.* at 788.

[FN815]. *Id.* at 786.

[FN816]. 332 F.3d 779, 2003 AMC 1355 (5th Cir. 2003).

[FN817]. *Id.* at 790.

[FN818]. 237 F.Supp. 2d 753, 2003 AMC 72 (S.D. Tex. 2002).

[FN819]. *Id.* at 758.

[FN820]. *In re ADM/Growmark River Sys., Inc.*, 234 F.3d 881, 2001 AMC 670 (5th Cir. 2000); *Odeco Oil & Gas Co. v. Bonnette*, 74 F.3d 671, 1996 AMC 913 (5th Cir. 1996).

[FN821]. *In re Kirby Inland Marine, L.P.*, 237 F.Supp. at 788-89.

[FN822]. *Id.* (citing *In re Dammers & Vanderheide & Scheepvaart Maats Christina B.V.*, 836 F.2d 750, 1988 AMC 1674 (2d Cir. 1988) and *Beiswenger Enters. Corp. v Carletta*, 86 F.3d 1032, 1996 AMC 2734 (11th Cir. 1996)).

[FN823]. 2003 AMC 1720 (E.D. La. 2003)

[FN824]. *Id.* at 1720-21.

[FN825]. *Id.* at 1722.

[FN826]. 332 F.3d 779, 791, 2003 AMC 1355 (5th Cir. 2003).

[FN827]. *Id.* (See also *Shofstahl v. Board of Commissioners*, 841 So.2d 1, 2003 AMC 806 (La. App. 2003). treated *supra* under the heading 'Preemption of state law by federal maritime law.' But cf. *Sanders v. Diamond Offshore Drilling, Inc.*, No. Civ. A. 00-2307, 2002 U.S. Dist. Lexis 22714, 2002 WL 31654974 (E.D. La. Nov. 21, 2002) treated *supra* under the heading 'No primary duty doctrine in the Fifth Circuit?')

[FN828]. No. 02-31083, 2003 U.S. App. LEXIS 14737, 2003 WL 21729400 at *1 (5th Cir. July 24, 2003) (unpublished per curiam).

[FN829]. *Id.* (See *Melancon v. Amoaco Prod. Co.*, 850 F.2d 1238, 1245 (5th Cir. 1988)).

[FN830]. 511 U.S. 202, 1994 AMC 1521 (1994).

[FN831]. *Id.* at 205.

[FN832]. 329 F.3d 1311, 1315, 1318, 2003 AMC 1217 (11th Cir. 2003).

[FN833]. *Id.* at 1313.

[FN834]. 46 U.S.C. app. §762(a) (2000). There is a limited new exception for some commercial air crash victims. 46 U.S.C. app. §762(b) (2000).

[FN835]. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 1986 AMC 2113 (1986).

[FN836]. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 1978 AMC 1059 (1978).

[FN837]. *Moragne v. States Marine Lines*, 398 U.S.

375, 1970 AMC 967 (1970).

[FN838]. *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 1973 AMC 2572 (1974).

[FN839]. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 1991 AMC 1 (1990).

[FN840]. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

[FN841]. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996).

[FN842]. 333 F.3d 1216, 2003 AMC 1705 (11th Cir. 2003).

[FN843]. *Id.* at 1218.

[FN844]. *Id.* at 1220-21.

[FN845]. *Id.* at 1224-25.

[FN846]. *Id.* (Cf. also *Scarborough v. Clemons Industries*, 264 F.Supp. 2d 437, 2003 AMC 1487 (E.D. La. 2003) treated *supra* under the heading 'Preemption of state law by federal maritime law.')

[FN847]. 350 U.S. 124 (1956).

[FN848]. The term 'warranty' in this usage is arguably a misnomer. The strong meaning of the term is a guarantee of success. In the present usage it has the much weaker meaning of reasonable care, diligence, and skill.

[FN849]. *Ryan Stevedoring Co.*, 350 U.S. at 125-27.

[FN850]. See 33 U.S.C. §905(b) (2000).

[FN851]. The strongest exhibits for the strength of the commitment are *McDermott, Inc. v. Amclyde*, 511 U.S. 202, 1994 AMC 1521 (1994), and *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975). But see *Exxon Co. v. Sofec*, 517 U.S. 830, 1996 AMC 1817 (1996).

[FN852]. 339 F.3d 1309, 2003 AMC 1966 (11th Cir. 2003).

[FN853]. *Id.* at 1312.

[FN854]. *Id.*

[FN855]. 238 F.Supp. 2d 778, 2003 AMC 459 (E.D. La. 2002).

[FN856]. *Id.* at 792.

[FN857]. *Id.*

[FN858]. Recent Developments, *supra* note 4, at 47-48.

[FN859]. 271 F.3d 1318, 2002 AMC 751 (11th Cir. 2001).

[FN860]. 329 F.3d 809, 2003 AMC 1228 (11th Cir. 2003).

[FN861]. See 271 F.3d at 1324.

[FN862]. *Merrill Steven Dry Dock Co.*, 329 F.3d at 813-14.

[FN863]. *Id.* at 813.

[FN864]. *Id.* at 816.

[FN865]. See the discussion in David W. Robertson, Steven F. Friedell & Michael F. Sturley, *Admiralty and Maritime Law in the United States* 71 (2001).

[FN866]. 578 S.E.2d 846, 2003 AMC 750 (2003).

[FN867]. *Id.* at 851.

[FN868]. 345 U.S. 571 (1953).

[FN869]. 358 U.S. 354 (1959).

[FN870]. 398 U.S. 306, 1970 AMC 974 (1970).

[FN871]. 398 U.S. at 309.

[FN872]. 782 F.2d 1478, 1987 AMC 881 (9th Cir. 1986).

[FN873]. 58 Fed. Appx. 835, 2003 AMC 275 (11th Cir. 2003) (*per curiam*). (Under Eleventh Circuit Rule 36-8, unpublished opinions may be cited as persuasive authority but not as binding precedent.)

[FN874]. Id. at 840.

[FN875]. 35 F.3d 665 (5th Cir. 2003).

[FN876]. Id. at 667.

[FN877]. 231 F.Supp. 2d 555, 2003 AMC 1055 (S.D. Tex. 2002).

[FN878]. 499 U.S. 585 (1991).

[FN879]. Elliot, 231 F.Supp. 2d at 560.

[FN880]. Id. at 558-60.

[FN881]. Id.

[FN882]. Id.

[FN883]. Id.

[FN884]. Id.

[FN885]. See generally Graydon Staring, *Forgotten Equity: The Enforcement of Forum Clauses*, 30 J. Mar. L. & Com. 405 (1999); Martin Davies, *Forum Selection Clauses in Maritime Cases*, 27 Tul. Mar. L.J. 367 (2003).

[FN886]. 246 F.Supp. 2d 668 (S.D. Tex. 2003).

[FN887]. Id. at 670.

[FN888]. Id. at 673. (citing *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.2d 216, 221 (5th Cir. 1998); see also *Sabocuhan v. Geco-Prakla*, 78 F.Supp. 2d 603, 606-07 (S.D. Tex. 1999)).

[FN889]. La. Rev. Stat. Ann. §23:921(A)(2) (West 1999) provides in pertinent part:

The provisions of every employment contract or agreement... by which any foreign or domestic employer or any other person or entity includes a choice of forum clause... in an employee's contract of employment... shall be null and void except where the choice of forum clause... is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the incident which is the subject of the civil... action.

[FN890]. Speed, 246 F.Supp. 2d at 675. (citing *Sawicki v. K/S STAVANGER PRINCE*, 802 So.2d

598, 2002 AMC 343 (2001) (applying the Louisiana anti-forum-clause statute to a contract between a Policy seaman and a Norwegian employer).

[FN891]. Recent Developments, *supra* note 4, at 51 n.57.

[FN892]. 802 So.2d 598, 2002 AMC 343 (La. 2001)

[FN893]. Id. at 600.

[FN894]. 832 So.2d 314 (La. App. 2002).

[FN895]. Id. at 316.

[FN896]. Id.

[FN897]. Id.

[FN898]. Id.

[FN899]. Id.

[FN900]. 841 So.2d 547, 2003 AMC 825 (Fla. App. 2003).

[FN901]. Id. at 550.

[FN902]. Id.

[FN903]. Id.

[FN904]. 499 U.S. 585, 1991 AMC 1697(1991).

[FN905]. *Norwegian*, 841 So.2d at 554.

[FN906]. *Supra* section IV(E)(8).

[FN907]. 2003 AMC 1175 (S.D. Fla. 2003).

[FN908]. No. Civ. A. 01-1702, 2003 U.S. Dist. LEXIS 11575, 2003 AMC 2200 (E.D. La. May 23, 2003).

[FN909]. 9 U.S.C. §1 (2000).

[FN910]. 190 F.Supp. 2d 958 (S.D. Tex. 2002), *aff'd mem.*, 51 Fed. Appx. 928 (5th Cir. 2002).

[FN911]. Id. at 963.

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- [FN912]. *Id.*
- [FN913]. *Id.*
- [FN914]. No. 02-2163, 2002 U.S. Dist. LEXIS 19699, 2002 WL 31319943 (E.D. La. Oct. 15, 2002).
- [FN915]. *Id.* at *5.
- [FN916]. *Brown v. Nabors Offshore Corp.*, 339 F.3d 391, 2003 AMC 2245 (5th Cir. 2003).
- [FN917]. See Recent Developments, *supra* note 4, at 53.
- [FN918]. 293 F.3d 270, 2002 AMC 1529 (5th Cir. 2002), cert. denied, 537 U.S. 1030 (2002).
- [FN919]. June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, reprinted in 9 U.S.C. § 201 note.
- [FN920]. 9 U.S.C. §1 (2000).
- [FN921]. 9 U.S.C. §205 (2000) provides:
Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention [on the Recognition and Enforcement of Foreign Arbitral Awards], the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending.
- [FN922]. 2003 AMC 1065 (E.D. La. 2002).
- [FN923]. *Id.* at 1068.
- [FN924]. *Id.* at 1069.
- [FN925]. 201 F.3d 524 (5th Cir. 2000).
- [FN926]. *Francisco*, 2003 AMC at 1072.
- [FN927]. 201 F.3d at 527 (internal quotation marks and citations omitted).
- [FN928]. *Id.* at 530-31. Judge Vance stayed proceedings as to certain defendants who were not entitled to compel arbitration.
- [FN929]. 2002 AMC 2429 (E.D. La. 2002).
- [FN930]. 407 U.S. 1, 1972 AMC 1407 (1972).
- [FN931]. *Id.* at 10.
- [FN932]. *Id.*
- [FN933]. *Dahiya*, 2002 AMC at 2430 (citing *Haynsworth v. Lloyd's of London*, 121 F.3d 956, 963 (5th Cir. 1998)).
- [FN934]. LA. Rev. Stat. Ann. § 23:921 (A)(2) (West 1999). See *supra* note 889.
- [FN935]. See also *Sawicki v. K/S STAVANGER PRINCE*, 802 So.2d 598, 2002 AMC 343 (La. 2002) (holding that the statute could apply retroactively).
- [FN936]. *Dahiya*, 2002 AMC at 2432.
- [FN937]. 2003 AMC 42 (E.D. La. 2002).
- [FN938]. *Id.* at 42-43.
- [FN939]. 331 F.3d 1207, 2003 AMC 1716 (11th Cir. 2003).
- [FN940]. *Id.* at 1208.
- [FN941]. *Id.* at 1209 n.2.
- [FN942]. *Id.* at 1209.
- [FN943]. See *Cargill Ferrous International v. SEA PHOENIX MV*, 325 F.3d 695, 2003 AMC 1027 (5th Cir. 2003). (Discussed *supra* section IV(E)(8)).
- [FN944]. 70 Fed. Appx. 759 (5th Cir. 2003) (*per curiam*).
- [FN945]. *Id.* at 760.
- [FN946]. *Id.* at 759.
- [FN947]. 2003 AMC 251 (S.D. Fla. 2002). (*Supra* section IV(F)).
- [FN948]. *In re Air Crash Disaster Near New*

Orleans, 821 F.2d 1147, 1163 n. 25, 1987 AMC 2735 (5th Cir. 1987) (en banc).

[FN949]. See supra note 873.

[FN950]. 58 Fed. Appx. 835, 2003 AMC 275 (11th Cir. 2003) (per curiam).

[FN951]. FANTOME, S.A. v. Frederick, No. 02-10890, 2003 WL 23009844 at *1 (Jan. 24, 2003 11th Fla.).

[FN952]. Id.

[FN953]. Id. at *2.

[FN954]. Id.

[FN955]. Id.

[FN956]. Id. (citing Szumlicz v. Norwegian American Line, Inc., 698 F.2d 1192 (11th Cir. 1983)).

[FN957]. 270 F. Supp. 2d 882 (S.D. Tex. 2003)

[FN958]. Id. at 884.

[FN959]. Id. at 884-886.

[FN960]. Id. at 886.

[FN961]. See David W. Robertson, Steven F. Friedell & Michael F. Sturley, Admiralty and Maritime Law in the United States 602 (2001) (relying on language in Bhatnagar v. Surrendra Overseas Ltd., 52 F.3d 1220, 1225, 1995 AMC 1716 (3d Cir. 1995)).

[FN962]. 319 F.3d 1302 (11th Cir. 2003).

[FN963]. Id. at 1304-05.

[FN964]. Id.

[FN965]. Id. at 1308-09.

[FN966]. Id. at 1309.

[FN967]. 325 F.3d 665 (5th Cir. 2003).

[FN968]. Id. at 667.

[FN969]. Id. at 675.

[FN970]. Id. at 673-4.

[FN971]. Id. at 674.

[FN972]. 325 F.3d 665 (5th Cir. 2003).

[FN973]. Id. at 667.

[FN974]. Id.

[FN975]. Id. at 675-76.

[FN976]. Id. at 677.

[FN977]. 510 U.S. 443, 1994 AMC 913 (1994).

[FN978]. 486 U.S. 140, 1988 AMC 1817 (1988).

[FN979]. 339 F.3d 1309, 2003 AMC 1966(11th Cir. 2003).

[FN980]. Id. at 1310.

[FN981]. Id. at 1314.

[FN982]. David W. Robertson, Steven F. Friedell & Michael F. Sturley, Admiralty and Maritime Law in the United States 108 (2001) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980)).

[FN983]. 310 F.3d 374, 2002 AMC 2596 (5th Cir. 2002).

[FN984]. Id. at 375.

[FN985]. Id.

[FN986]. Id.

[FN987]. Id.

[FN988]. Id. at 377.

[FN989]. Id. at 379.

[FN990]. Id. at 380.

[FN991]. Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil and

Commercial matters, Nov. 15, 1965, art. 10(a) 20 U.S.T. 361, 362 T.I.A.S. No. 6638.

[FN992]. *Nuovo Pignone*, 310 F.3d at 380.

[FN993]. See *Bankston v. Toyota Motor Corp.*, 889 F.2d 172, 173-74 (8th Cir. 1989).

[FN994]. See *Ackermann v. Levine*, 788 F.2d 830, 839 (2d Cir. 1986).

[FN995]. *Nuovo Pignone*, 310 F.3d at 380.

[FN996]. 834 So.2d 915 (Fla. App. 2003).

[FN997]. *Id.* at 917.

[FN998]. *Id.*

[FN999]. *Id.*

[FN1000]. *Id.*

[FN1001]. *Id.*

[FN1002]. *Id.* at 918. Writing separately, Judge Cope argued that a doctor in this situation should be treated as doing business in Florida. 'Where a Florida-based company is in the business of selling cruises which depart from Florida, sail into international waters, and return to Florida, plainly the company is engaged in business in Florida. The same analysis holds true for a ship's physician who, under a contract of employment, sails on such a ship.' *Id.* at 918 n.5 (Cope, J., '[s]peaking just for himself'). This proposed analysis would have been inconsistent with the court's prior decision in *Elmlund v. Mottershead*, 750 So.2d 736 (Fla. App. 2000).

[FN1003]. See *supra* note 445.

[FN1004]. 46 U.S.C. app. §740 (2000).

[FN1005]. *Id.*

[FN1006]. 46 U.S.C. app. §§781-90 (2000).

[FN1007]. 46 U.S.C. app. §§741-52 (2000).

[FN1008]. See 46 U.S.C. app. §§745, 782 (2000).

[FN1009]. 317 F.3d 1235, 2003 AMC 94(11th Cir. 2003), *pet. for cert. filed*, 124 S.Ct. 429, 71 U.S.L.W. 3791 (Apr. 7, 2003).

[FN1010]. *Id.* at 1237.

[FN1011]. 28 U.S.C. §2401 (2000).

[FN1012]. *Anderson*, 317 F.3d at 1237-38.

[FN1013]. *Id.* at 1238.

[FN1014]. *Id.*

[FN1015]. Fed. R. Civ. P. 14(c) (2002) (emphasis added); see generally David W. Robertson, Steven F. Friedell & Michael F. Sturley, *Admiralty and Maritime Law in the United States* 105-06 (2001).

[FN1016]. 338 F.3d 394, 2003 AMC 1839 (5th Cir. 2003).

[FN1017]. *Id.* at 396.

[FN1018]. *Id.*

[FN1019]. *Id.* at 399.

[FN1020]. *Id.*

[FN1021]. *Id.* at 400.

[FN1022]. *Id.*

[FN1023]. Fed. R. Civ. P. Supp. B(1) (2002).

[FN1024]. 2003 AMC 519 (E.D. La. 2002).

[FN1025]. *Id.* at 521.

[FN1026]. 320 F.3d 1213, 2003 AMC 324 (11th Cir. 2003).

[FN1027]. *Id.* at 1215.

[FN1028]. 336 F.3d 1286 (11th Cir. 2003).

[FN1029]. *Id.* at 1292.

[FN1030]. *Id.*

[FN1031]. *Id.* at 1293.

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***649 THE RIGHT TO A JURY TRIAL IN JONES ACT CASES: CHOOSING THE FORUM VERSUS
 CHOOSING THE PROCEDURE**

David W. Robertson [FN1]
 Michael F. Sturley [FNaa1]

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Sturley

I

INTRODUCTION

We are honored to participate in this festschrift to honor George Jay Joseph, who has been the publisher of the Journal for 30 years. We know Jay to be a modest man [FN1] who prefers accomplishing his goals to hearing his accomplishments discussed by others. Thus, we will keep this introduction very brief, and use it simply to mention why we have chosen to discuss our present subject in his honor. Those who have dealt with Jay over the years know that he is a very fair man who strongly believes that everyone is entitled to be treated equally. We thus believe that the equal treatment for plaintiffs and defendants under the Jones Act advocated here will appeal to him, and accordingly dedicate this article in his honor.

*650 II

BACKGROUND

For many years, it was practically an article of faith that the plaintiff in a personal injury action benefits from a jury trial while the defendant prefers a bench trial. Recently, however, the playing field has shifted somewhat, with the result that the plaintiff's preference is not always so clear. [FN2] Today's plaintiff may well find a bench trial before a sympathetic judge preferable to facing a possibly skeptical jury. But a plaintiff can form a rational preference between these two choices only when she knows the identity of the judge who will try the case.

In non-maritime [FN3] actions, the plaintiff's preference in this regard is typically unavailing. If either party sees a

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significant advantage in having a bench trial, the other can generally neutralize the advantage by demanding a jury. [FN4] In admiralty actions, however, there are generally no juries, [FN5] so a plaintiff who wishes to guarantee a bench trial can--in appropriate cases--invoke admiralty jurisdiction and Rule 9(h) [FN6] to avoid the jury. Unfortunately for the plaintiff, though, the decision to bring the case in admiralty must generally be made before the identity of the judge is known. Plaintiffs would instead prefer a procedure offering a unilateral right to choose between a bench trial and a jury trial that can be exercised after a case has been assigned to the judge who will hear it.

In recent years, some courts have construed the Jones Act [FN7] to give plaintiffs the unilateral right they seek. [FN8] A Jones Act plaintiff wishing to take advantage of this option simply files the action on the federal court's "law side" under the "saving to suitors" clause, [FN9] invoking federal question jurisdiction under 28 U.S.C. § 1331. [FN10] She does not demand a jury trial when filing the action, but instead waits until the case is assigned to a specific *651 judge. At that point, the plaintiff decides whether a bench trial or a jury trial is preferable, and files a jury demand if necessary. Because Rule 38(b) gives a party 10 days to file a jury demand [FN11] and district court clerks generally assign cases to judges more quickly, the process can work exactly as the plaintiff hopes provided the defendant does not also have the right to demand a jury trial after the case is assigned to a judge. Thus far, the modern courts confronting this matter have denied defendants this right.

The disparity--whereby the plaintiff but not the defendant can demand a jury in a Jones Act suit filed under 28 U.S.C. § 1331--originated in the Fifth Circuit 13 years ago. In *Rachal v. Ingram Corporation*, [FN12] the court declared that in a Jones Act proceeding brought pursuant to 28 U.S.C. § 1331, "the only right to a jury trial belong[s] to the plaintiff." [FN13] In *Rachal* itself, this meant that the defendant could not prevent the plaintiff from amending his complaint to shift the case to the admiralty side of court for a bench trial. Although there is a limited sense in which the court's general proposition can be justified, [FN14] as stated (and subsequently applied) it is too broad. In this article, we reveal the mistake, discuss its consequences, and argue for its correction.

III

THE ADMIRALTY JURISDICTION, THE SAVING-TO-SUITORS CLAUSE, AND THE SEVENTH AMENDMENT: A TINY PRIMER

A. Admiralty Jurisdiction

Article III, § 2 of the Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." This provision gives the Supreme Court and the lower federal courts the "power and responsibility ... for fashioning the controlling rules of admiralty law." [FN15] With the gentle assistance of the Necessary and Proper Clause, [FN16] it also *652 empowers Congress to "alter, qualify, or supplement [[[admiralty and maritime law] as experience or changing conditions might require." [FN17]

B. The Saving-to-Suitors Clause

The First Congress created federal district courts and gave them jurisdiction over admiralty and maritime cases while expressly recognizing the right of "suitors" (plaintiffs) to pursue most [FN18] maritime causes of action in nonadmiralty courts. In pertinent part, the 1789 formulation was as follows:

The district courts ... shall ... have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, ... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.... [FN19]

The present formulation is 28 U.S.C. § 1333(1) (which, by judicial fiat, [FN20] has been held to have the same meaning as the original):

The district courts shall have original jurisdiction, exclusive of the courts of the states, of ... any civil case of

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admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled. [FN21]

As reflected in the original wording of the saving clause, cases that maritime plaintiffs [FN22] choose to bring in nonadmiralty courts are frequently referred to as "common law" cases. [FN23]

The saving clause does no more than offer an escape from the otherwise "exclusive" admiralty court for those maritime plaintiffs who qualify. [FN24] It provides no ticket of entry to any other forum. A saving-clause plaintiff [FN25] can normally proceed in a state court, where typically there are no *653 constraints on subject matter jurisdiction. [FN26] But if the saving-clause plaintiff wishes to pursue relief on the law side of federal court, she must establish the presence of either federal question jurisdiction under 28 U.S.C. § 1331 [FN27] or diversity jurisdiction under 28 U.S.C. § 1332. The fact that a case arises under the general maritime law is not enough to qualify it for federal question jurisdiction. [FN28] But Jones Act cases will lie under 28 U.S.C. § 1331 because Congress so provided. [FN29]

C. Terminology

It will be easier to discuss the concepts introduced in the previous subsection if we coin some terms. Throughout this article, we use the term maritime plaintiff to mean one who could establish the requisites for admiralty and maritime jurisdiction and thus proceed in federal court under 28 U.S.C. § 1333. When a maritime plaintiff chooses to proceed under § 1333, she becomes an admiralty plaintiff. When a maritime plaintiff chooses to take advantage of the saving clause to seek relief in a common-law court, she becomes a saving-clause plaintiff.

D. The Seventh Amendment and the Federal Rules of Civil Procedure

The Seventh Amendment provides:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

*654 This amendment does not apply in state courts, [FN30] where the right to jury trial turns on state constitutional and statutory provisions. In federal courts, whether there is a Seventh Amendment right to jury trial in a particular case "depends on the nature of the cause of action" [FN31]-- whether the cause of action is of a type historically tried to juries in England--and not on the particular grounds whereby federal-court subject matter jurisdiction is invoked. [FN32] But because cases in admiralty are not "suits at common law," the Seventh Amendment has never been regarded as applicable to cases brought pursuant to 28 U.S.C. § 1333. [FN33] On the other hand, maritime cases that are brought pursuant to the saving-to-suitors clause on the law side of federal court are generally regarded as common-law cases and thus subject to the Seventh Amendment. [FN34]

The Federal Rules of Civil Procedure reinforce the right to a jury trial. Under Rule 38(a), "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." [FN35] But the Rules do not extend the parties' jury-trial rights beyond statutory and constitutional grants. In particular, Rule 38(e) explicitly provides that the Rules "shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h)." [FN36]

IV

THE HISTORY AND CONCEPTUAL BACKGROUND OF THE JONES ACT

A. The General Maritime Law and The Osceola

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As the propeller vessel *Osceola* approached the port of Milwaukee in December 1896, the master ordered the forward port gangway hoisted so as *655 to be ready for quick discharge of cargo. The vessel was still in the open lake, and the wind caught the gangway and caused a derrick to fall upon Patrick Shea, a crew member. Alleging the master's negligence, Shea sued the vessel in rem in the Eastern District of Wisconsin. That court gave judgment for the plaintiff. When the defendant appealed to the Seventh Circuit, the appellate court certified questions to the Supreme Court, which answered as follows:

[W]e think the law may be considered as settled upon the following propositions:

1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship....
3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.
4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident. [FN37]

The fourth (and perhaps the third) of the *Osceola* propositions meant that Patrick Shea had no negligence action; the judgment in his favor had to be reversed. [FN38] They also guaranteed that Congress would soon have its attention directed to the claim that American seamen needed the protection of a negligence remedy against their employers.

B. The Congressional Response to The *Osceola*

In 1915, Congress acquiesced in the view that seamen needed a negligence remedy by enacting § 20 of the Act to Promote the Welfare of American Seamen, [FN39] which provided:

In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority. [FN40]

*656 "By those few lines the Congress apparently intended to change the maritime law as stated in *The Osceola*.... The draftsman of Section 20 had evidently read the third proposition in *The Osceola* to mean that the reason why seamen could not recover damages for negligence was that all the members of the crew were fellow-servants ...; on that reading, the abolition of the fellow-servant relationship removed the only barrier to recovery...." [FN41]

The 1915 statute did not have the intended effect. In *Chelentis v. Luckenbach S.S. Co.*, [FN42] the Supreme Court gave "Congress a lesson on 'How to read a case' of a type familiar to any first term law student" [FN43] by holding that the 1915 statute was "irrelevant." [FN44] The Court explained that the true source of the seaman's lack of a negligence remedy was the fourth *Osceola* proposition. By abrogating only the third one, Congress had worked no functional change in the law.

Having thus been "goaded ... into doing it [providing a negligence remedy for seamen] the hard way," [FN45] Congress enacted the present Jones Act in 1920 [FN46] to provide in pertinent part as follows:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.... Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. [FN47]

The railway employees' statutes incorporated by reference into the Jones Act comprise the Federal Employer's Liability Act (FELA), [FN48] which spells out a liberal negligence remedy for certain railway workers against their

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employers.

C. The Supreme Court's Rewriting of the Jones Act

On its face, the Jones Act gave an injured seaman an "election": He could pursue his rights under maritime law, as summarized in *The Osceola*, or he could seek recovery under the newly-available principles of FELA by suing *657 "at law, with the right of trial by jury" in "the court of the district" where the employer resides or has its principal office. The description of the action in which FELA-style relief could be sought--one "at law" in the "court of the district" of defendant's residence or principal office--unmistakably referred to a suit on the law side [FN49] of federal court invoking its federal question (arising under) jurisdiction. [FN50]

On its face, the Jones Act was arguably unconstitutional. The invitation it apparently offered to injured seamen was this: Stay with the admiralty court and the maritime law if you wish, but if you want a better deal, come to the law side of federal court and into the enlightened regime of the FELA. This invitation would doubtless prove so attractive as to effectively withdraw these cases from the realms of admiralty jurisdiction and maritime law.

That Congress cannot constitutionally withdraw core subjects from the realms of admiralty jurisdiction and maritime law was powerfully indicated by *Panama R. Co. v. Johnson*, [FN51] in which the defendant in a law-side Jones Act suit challenged the Act's constitutionality on the ground that "the statute enables a seaman asserting a cause of action essentially maritime to withdraw it from the reach of the maritime law and the admiralty jurisdiction." [FN52] Justice Van Devanter's opinion for the unanimous Court [FN53] agreed with the defendant that "there are [constitutional] boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them." [FN54] The Court also agreed with the defendant that if the Jones Act meant that an injured seaman could benefit from the new rights only on the law side of federal court--which seemed to be what the statute rather plainly said--then "a grave question [would] arise respecting its constitutional validity." [FN55]

The Court was determined to avoid that grave question and to sustain the constitutionality of the Jones Act. [FN56] It did so by resorting to what Professors *658 Gilmore and Black have called "the purest judicial invention." [FN57] The (constitutional) Jones Act that the Panama R. Co. Court "invented" bears only a general resemblance to the (arguably unconstitutional) Jones Act that Congress had written. The judicially reconstituted version, which in its essential features remains the controlling law, has the following five parts: (a) An injured seaman can pursue the FELA-based negligence remedy in admiralty court. [FN58] (b) Alternatively, he can choose to sue on the law side of federal court on the basis of the Jones Act's language and the general grant of federal question jurisdiction. [FN59] (c) When the seaman chooses the federal question/law side route, he is deemed to have invoked the permission granted by the general saving-to-suitors clause to bring a maritime case in a common-law court. [FN60] (d) The applicability of the saving-to-suitors clause to Jones Act federal question/law side suits entails the conclusion that Jones Act suits can also be maintained in state courts [FN61] and in federal court on the basis of diversity jurisdiction. [FN62] (e) Jones Act cases are characterized as admiralty cases when they are maintained in federal court on the basis of admiralty jurisdiction. [FN63] When they are brought on any other jurisdictional *659 basis-- whether in state court or on the law side of federal court--they, like other saving-clause cases, are deemed to be cases at common law. [FN64]

V

DEFENDANTS' LOSS OF JURY TRIAL RIGHTS UNDER THE JONES ACT

A. The Origin of the Current Doctrine: *Rachal v. Ingram Corporation*

As explained above in section III-B, the saving-to-suitors clause gives most maritime plaintiffs the choice between proceeding in admiralty and proceeding in a common-law court. A plaintiff whose case falls under the

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saving clause can take the case to state court. Or, if she can establish a basis for federal question jurisdiction (28 U.S.C. § 1331) or diversity jurisdiction (28 U.S.C. § 1332), she can take the case to the law side of federal court. [FN65] Since the 1966 absorption of admiralty's procedural rules into the Federal Rules of Civil Procedure, Rule 9(h) has provided the method whereby a maritime plaintiff with the choice between the admiralty and law sides can exercise that choice:

A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes whether so identified or not. [FN66]

For the most part, Rule 9(h) works well. By including the 9(h) identifying statement, the plaintiff signals her choice of the admiralty side and bench *660 trial. [FN67] By omitting it and pleading diversity or federal question jurisdiction, the plaintiff signals her choice of the law side and jury trial.

But plaintiffs' counsel are not always knowledgeable, and even knowledgeable counsel sometimes have reason to change their minds about their initial choice of jury trial. The Federal Rules include potentially contradictory messages respecting a maritime plaintiff's freedom to amend her pleadings to withdraw an initial jury-trial designation and add a Rule 9(h) identifying statement. [FN68] The contradiction has spawned two lines of cases.

The permissive line of cases takes its signals from Rules 9(h) and 15. Rule 9(h) follows the above-quoted language with the statement that "[t]he amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15." [FN69] The Advisory Committee Notes to Rule 9(h) repeat the thought:

The choice made by the pleader in identifying or in failing to identify his claim as an admiralty or maritime claim is not an irrevocable election. The rule provides that the amendment of a pleading to add or withdraw an identifying statement is subject to the principles of Rule 15. [FN70]

The thought thus repeated is a message of leniency because of Rule 15(a)'s provision that "leave [of court to amend a pleading] shall be freely given when justice so requires." [FN71] The courts in the permissive line of cases have concluded that the story ends there, such that a maritime plaintiff should be freely permitted to amend to add a Rule 9(h) designation unless the defendant would be seriously prejudiced. [FN72]

The countervailing line of cases--the strict line--takes its message from Rules 38(d) and 39(a). Rule 38(d) states that "[a] demand for trial by jury ... *661 may not be withdrawn without the consent of the parties." [FN73] Rule 39(a) amplifies:

When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties ... consent to trial by the court sitting without a jury or (2) the court ... finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States. [FN74]

The "strict" courts have held that Rules 38(d) and 39(a) countermand the permissive message of Rules 9(h) and 15 and mean that one cannot amend to add a Rule 9(h) identifying statement (thereby effecting the withdrawal of an earlier jury demand) without consent of the other parties or a judicial finding that no jury right exists.

The Fifth Circuit has taken the "strict" side of the foregoing dichotomy. [FN75] Yet even on this side of the fence there is often a tendency toward leniency. This tendency was doubtless strongly invoked by the matter that came to the court as *Rachal v. Ingram Corporation*. [FN76] The trial judge had allowed the Jones Act plaintiff to withdraw a jury demand and designate the case as falling under Rule 9(h). [FN77] The defendant was unhappy with the outcome of the bench trial and appealed on the ground that its Seventh Amendment right to a jury trial had been violated. The Fifth Circuit had at least five good reasons for wanting to affirm the decision below.

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The first three were general reasons, applicable in virtually [FN78] any appeal challenging the procedure of a trial that has gone all the way to final judgment: (a) There is almost always a sense in which the appellant seems to be seeking two bites at the apple, which is normally regarded as one too many. (b) Appellate judges typically defer to trial judges on most procedural calls. (c) Reversal would require a full new trial, [FN79] which often seems an unwarranted expenditure of judicial resources in the light of the general lack of cosmic importance of the alleged trial court mistake.

In addition, there were two specific reasons pushing the Rachal panel toward affirmance. (d) The plaintiff's original designation of the case as *662 being on the jury docket was equivocal, [FN80] thus weakening defendant's Rule 38(d) claim of reliance on the opponent's jury demand. (e) The defendant's position had vacillated. When the plaintiff filed the amended complaint explicitly requesting that the action be identified as one in admiralty under Rule 9(h), without benefit of trial by jury, the defendant "answered with a general denial and declined to specifically address the 9(h) designation." [FN81] Then, at a pretrial conference, the defendant sought time "to reconsider its position on the jury trial issue" [FN82] and received seven days. Finally, the defendant shifted its position to insist on a jury. [FN83] The Rachal defendant's Seventh Amendment argument was thus about as weak, rhetorically speaking, as a Seventh Amendment argument can get. The Fifth Circuit's impulse to repudiate that argument and affirm the trial court's resolution of the case must have been very powerful.

But there were some problems. Fourteen years earlier, in *Johnson v. Penrod Drilling Co.*, [FN84] another Fifth Circuit panel had carefully identified and squarely confronted the issue: "[C]ould [Jones Act] plaintiffs, through the device of amending their complaints to state admiralty and maritime claims under Rule 9(h), effectively withdraw their demands for jury trials without compliance with the specific procedure set forth in Rule 39(a) for the withdrawal of such demands?" [FN85] The earlier court's answer was an emphatic "no," because such amendments "constituted violations of [defendant's] Seventh Amendment right to trial by jury." [FN86] The two consolidated cases that came to the court as *Johnson v. Penrod Drilling Co.* thus had to be remanded for jury trials. On rehearing, this part of the panel's opinion was explicitly adopted by the full court sitting en banc. [FN87]

One Fifth Circuit panel cannot overrule another, let alone an en banc decision of the full court. This meant that the Rachal panel could not indulge its urge to affirm the bench trial judgment without finding a way to distinguish the inconvenient precedent. It did so in a three-step process. The *663 Rachal panel's first step was to seize upon the fact that in *Johnson v. Penrod Drilling Co.* the plaintiffs had originally pleaded both federal question jurisdiction and diversity jurisdiction. [FN88] (We believe that "seize upon" is appropriate phrasing, because we find no indication that the earlier court regarded the diversity allegations as significant to its analysis.) The second step was to proclaim that "diversity jurisdiction was the only possible connection to a Seventh Amendment right to jury trial in *Johnson*." [FN89] (This proclamation entailed two conceptual errors: the unprecedented notion that the right to jury trial turns on the particular grounds on which federal-court subject matter jurisdiction is invoked rather than on the nature of the cause of action, [FN90] and the facially astonishing notion that diversity cases are somehow worthier of Seventh Amendment protection than federal question cases. [FN91]) The third step was to assert that Rule 39(a)(2) was satisfied in Rachal by the above-entailed finding that the Jones Act defendant has no constitutional or statutory right to a jury trial except when the plaintiff has pleaded diversity jurisdiction. [FN92]

Motivated both by the desire to affirm the district court's decision and thus avoid a new trial and by the consequent need to distinguish *Johnson v. Penrod Drilling Co.*, the Rachal court fell into serious error. This error spawned the doctrine, since followed by those courts that have addressed the issue, that a Jones Act defendant has no right to a jury trial.

B. Subsequent Federal Appellate Cases

Linton v. Great Lakes Dredge & Dock Co. [FN93] should have been a straightforward illustration of the simple point that we are making here: A Jones Act plaintiff has the right to select her forum, but within the selected forum jury-trial rights are determined by the normal rules. [FN94] In *Linton*, the plaintiffs brought their action in

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Louisiana state court and designated the *664 case as a nonjury proceeding, as permitted by a subsequently-repealed Louisiana statute designed to give plaintiffs essentially the same procedural choices in state court that Rule 9(h) does in federal court. [FN95] The defendant, arguing that the plaintiffs' designation effectively put this case into the federal court's exclusive admiralty jurisdiction, removed the suit to federal court. When the district judge refused to remand the case, the plaintiffs brought an interlocutory appeal.

Most of the Fifth Circuit's opinion in the case consists of a sensible explanation of why the Louisiana legislature was free to offer plaintiffs the choice that it did, why such a choice did not turn a state-court saving-clause suit into a federal admiralty suit, and why a remand to state court was accordingly required. [FN96] Having correctly decided the case on other grounds and having properly explained its holding, however, the court sought to reinforce its opinion by relying on *Rachal*. The court essentially argued that because a Jones Act defendant has no right to insist on a jury trial in nondiversity actions, even in federal court, the defendant before it had no basis for complaining that it was being denied the right to a jury trial in state court. [FN97] The argument was completely unnecessary to the court's holding (which was otherwise correct), and thus no immediate harm was done as a result of the *Rachal* mistake, but in making the argument the Linton court helped to solidify its previous erroneous interpretation.

Craig v. Atlantic Richfield Co. [FN98] is in some ways similar to *Rachal*, but with the ironic twist that the plaintiff was prejudiced when the court held that a defendant is not entitled to a jury trial under the Jones Act. In 1983, well before *Rachal* was decided, [FN99] the plaintiff filed her Jones Act case on the law side of federal district court asserting only federal question jurisdiction. [FN100] She did not make a jury demand, but after the case was assigned to a specific judge one of the defendants made a timely demand. Perhaps the plaintiff made no jury demand of her own because she would have been satisfied with a bench trial before the assigned judge, or perhaps she believed (as she later argued) that she was entitled to rely on the defendant's demand. [FN101] In any event, the case was designated on the docket as a jury action for eight years.

Nine months before trial, a different judge (to whom the case had in the *665 meantime been reassigned) sua sponte transferred the case to the nonjury docket on the ground that the defendant was not entitled to demand a jury trial. The defendants, who were presumably satisfied with the prospect of a bench trial before the newly assigned judge, offered no objection. The plaintiff, however, was now adamant that she was entitled to a jury trial despite her failure to demand one initially. Among other arguments, she asserted that she was entitled to rely on the defendant's original jury demand. The district court rejected this argument, primarily on the authority of *Rachal*. Because the court believed that the defendant had no right to a jury trial, the demand was ineffective and the plaintiff was unjustified in relying on it. [FN102] The Ninth Circuit affirmed, saying simply that it agreed with *Rachal* on the key issue but offering no independent explanation or analysis. [FN103]

C. State Cases Under the Saving-to-Suitors Clause

Appellate courts in California and Illinois--reading *Rachal* for the broad proposition that the Jones Act defendant has no jury-trial right--have recently taken that proposition as controlling federal maritime law that supplants normal state-law jury-trial guarantees. In *Peters v. City & County of San Francisco*, [FN104] the California Court of Appeal held that "the right to a jury trial [under the Jones Act] is an issue of substantive law that turns on federal law alone." [FN105] As a result, it held that the *Rachal* analysis preempted the state constitutional right to a jury trial that the defendant would otherwise have been entitled to invoke. In *Allen v. Norman Brothers*, [FN106] the Appellate Court of Illinois--going beyond an appellate court's natural tendency to affirm the decision below on issues such as this [FN107]--reversed a judgment entered on a jury verdict for the defendant and remanded the case for a bench trial. The court held that "the right to a jury trial in a case brought under the Jones Act is a matter of substance rather than procedure, and matters of substance are governed by federal law.... Under federal courts' interpretation of the Jones Act, a defendant has no right to a trial by jury." [FN108]

The *Rachal* mistake takes on a particularly disturbing coloration in these *666 state-court cases. Reasoning

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logically from Rachal's explicit premises, these courts have held that the Jones Act plaintiff has an infeasible right to a bench trial in all forums, regardless of a particular forum's normal approach to the right of trial by jury.

VI

THE PROPER INTERPRETATION OF THE JONES ACT: DISTINGUISHING THE RIGHT TO CHOOSE
 THE FORUM FROM THE RIGHT TO CHOOSE THE MODE OF TRIAL WITHIN THE FORUM

A. The Constitutional Issue

The most serious problem with the Rachal mistake is the denial of Jones Act defendants' constitutional rights. As is explained above, [FN109] the Seventh Amendment "creates a historical test for trial by jury." [FN110] Although the text speaks of "suits at common law," it has long been recognized that coverage is not limited to the common-law forms of action as they existed in 1791. Justice Story explained in 1830 that the amendment "embrace[s] all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights." [FN111]

The Supreme Court has a well-developed jurisprudence on the applicability of the Seventh Amendment in statutory actions. In *Curtis v. Loether*, [FN112] for example, the Court unanimously held that the amendment "appl[ies] to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." [FN113] The Court went on to explain:

[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts ..., a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law. [FN114]

Accordingly, there is no right to a jury trial in a Jones Act case tried "in admiralty," which Justice Story carefully distinguished from an action "at law." But there is a right to a jury trial when the plaintiff brings the action *667 on the law side, regardless of whether she relies on diversity or federal question jurisdiction (or both).

The applicability of the Seventh Amendment is determined by "the nature of the cause of action," [FN115] rather than the particular grounds whereby federal-court subject matter jurisdiction is invoked. This is clear primarily from the frequency with which the Supreme Court has described the standards for determining whether the Seventh Amendment applies without mentioning the basis for federal court jurisdiction, [FN116] but courts have occasionally made the point explicitly. [FN117] Even if there were a reason to distinguish cases brought under 28 U.S.C. § 1331 from those brought under § 1332, however, the argument for constitutional protection would be stronger in federal question cases--which is precisely the opposite of what the Rachal court held. [FN118] In view of the federal courts' obligation under *Erie* [FN119] to follow state substantive law in diversity cases, it could at least be argued that there should also be greater respect for state rules implicating the right to a jury trial in diversity cases. [FN120] Indeed, the Seventh Amendment's applicability in appropriate federal question cases was never doubted (until Rachal), whereas there was some doubt whether *Erie* controlled the jury-trial right in diversity cases for a quarter century. [FN121]

Until 1938, it was customary to regard the federal district courts' admiralty, equity, and "law" jurisdictions as existing in separate compartments. Jones Act cases might be heard in admiralty--where the Seventh Amendment did not apply--or at law, where it did. Under both the Jones Act language and the Court's interpretation of it in *Panama Railroad*, it was clear that the district court sat "at law" when the plaintiff so elected. This alone should be enough to demonstrate that the Seventh Amendment applies to modern law-side actions under the Jones Act. [FN122]

In 1938, the Federal Rules of Civil Procedure merged law and equity. *668 Hence, it has been necessary since

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1938 to examine new causes of action brought on non-admiralty jurisdictional bases to see whether "the action involves rights and remedies of the sort typically enforced in an action at law." [FN123] There should be no question that an action for damages for personal injuries caused by negligence is included in this category. In *Curtis v. Loether*, the Court held that an action under the Civil Rights Act of 1968 was covered by the Seventh Amendment. The Court reasoned:

A damages action under the statute sounds basically in tort--the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach.... [T]his cause of action is analogous to a number of tort actions recognized at common law. [FN124]

If an action under the Civil Rights Act of 1968 is covered by the Seventh Amendment because it is analogous to traditional tort actions, [FN125] a fortiori a Jones Act suit (which is a traditional tort action) should be covered.

The Seventh Amendment undeniably protects defendants as well as plaintiffs. In *Curtis v. Loether*, for example, the Court upheld the defendant's right to a jury trial, notwithstanding its recognition of "the possibility that jury prejudice may deprive a victim of discrimination of the verdict to which he or she is entitled." [FN126]

The inclusion of the phrase "with the right of trial by jury" in the Jones Act does not convert a constitutional right into a mere statutory right. Obviously, rights protected by the Constitution are not lost by statute-- particularly a statute confirming their existence. *Pernell v. Southall Realty* [FN127] illustrated a similar situation. In *Pernell*, the Court upheld a defendant's constitutional right to a jury trial in an action under a provision of the District of Columbia Code. Prior to 1970, the Code had explicitly provided for a right to jury trial in actions under this provision. The *Pernell* Court's holding that the defendant had a constitutional right illustrates that the pre-1970 statute merely confirmed a right that was already protected by the Constitution.

*669 The Seventh Amendment does not apply in state courts, [FN128] and thus defendants do not have a constitutional right to a jury trial in Jones Act cases brought in state courts. But at least in actions brought in federal court, the Seventh Amendment protects a Jones Act defendant's right to demand a jury trial.

B. The Statutory Interpretation Issue

It is well settled that a court, if possible, should construe an ambiguous statute to avoid a constitutional violation--or even to avoid deciding a serious constitutional question. [FN129] As we explain in the previous subsection, [FN130] the Seventh Amendment guarantees the defendant's right to a jury trial in a Jones Act case tried "at law," regardless of whether the statute itself does. Even if our constitutional argument were unconvincing, it would at least counsel in favor of construing the Jones Act to give defendants a statutory right to a jury trial, provided such a construction is plausible. In our view, this construction is not only plausible, but is the correct understanding of what Congress intended.

Under the Jones Act, the plaintiff has de facto unilateral control of the bench trial/jury trial choice. The plaintiff exercises that control by choosing the forum. The plaintiff desiring a bench trial brings the case in admiralty under 28 U.S.C. § 1333. There is no procedure whereby a defendant can defeat a plaintiff's proper invocation of § 1333 jurisdiction. And when the case is heard in admiralty, neither party is entitled to a jury trial. [FN131] The plaintiff desiring a jury trial can bring the case--pursuant to the saving-to-suitors clause--to the law side of federal court, alleging either federal question or (if present) diversity jurisdiction. There is no procedure whereby the defendant can cause such a case to be transferred to the admiralty side. And when the case is on the law side, the Seventh Amendment and Rule 38(a) generally grant the right to jury trial. [FN132] The plaintiff can also secure *670 a jury trial by bringing the case in a state court whose law guarantees the right to jury trial. Defendants cannot remove any case from state court into admiralty. [FN133] Moreover, there is a specific statutory prohibition against the removal of Jones Act cases from state to federal court. [FN134]

Having the power to control the forum, the Jones Act plaintiff starts out with full control over whether the case

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will be tried to a jury. This is the sense in which frequent statements to the effect that "beyond peradventure ... the Jones Act gives only the plaintiff the right to choose a jury trial" [FN135] are true. But in the sense in which the Rachal court made the facially identical claim, it was not true. Under the law as it stood before Rachal, once the Jones Act plaintiff had chosen her forum, the court's normal procedural regime, including any provision for jury trial, obtained. The Panama R. Co. Court itself made this clear, stating that when the Jones Act plaintiff "sues on the common-law side [of federal court] there will be a right of trial by jury." [FN136] The Second Circuit, whose decision was affirmed by the Supreme Court in Panama R. Co., explicitly stated that the Seventh Amendment applies in such a case. [FN137] This means that, once the Jones Act plaintiff has made her forum choice, the Jones Act defendant has the same rights as any other defendant in that forum. If defendants in the chosen forum normally have a right to a jury, then so does the Jones Act defendant.

On the foregoing view, it is a mistake to maintain--as did the Rachal court implicitly and the Linton court explicitly--that "the Jones Act plaintiff can elect a non-jury trial in federal court either (1) by electing to sue in admiralty, or (2) by grounding his suit on federal question jurisdiction ... and not requesting a jury." [FN138] The second proposition is simply wrong. Once the plaintiff has put the Jones Act case on the law side--whether on federal question or diversity grounds--the defendant's Seventh Amendment and Rule 38 right should attach, just as it does in any other law-side maritime case in which the plaintiff seeks a form of relief, such as damages, familiar to the common law. There is no legitimate basis for making Jones Act proceedings unique in this respect.

*671 The Rachal opinion seems not only to distort Johnson v. Penrod Drilling Co., but also to depend on strained readings of the Jones Act and Rules 38(a) and 39(a). The presently relevant language of the Jones Act is this:

Any seaman who shall suffer personal injury ... may at his election maintain an action for damages at law, with the right of trial by jury....

There are two ways to read the concluding phrase. The first is as meaning "with the [normal] right of [the parties to a law-side proceeding to] trial by jury." The second: "with the [plaintiff having a unilateral] right of trial by jury." The second is the Rachal reading. To us, it seems strained. If the statutory phrase had been "with a right of trial by jury," the Rachal reading might have been less implausible. In using the words "the right of trial by jury," the framers of the Act seemed to refer to the normal, bilateral, jury trial right. [FN139]

Rule 38(a) says that "[t]he right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate." [FN140] The use of the plural "parties" seems to signal a presumption that jury trial rights are seldom unilateral in the Rachal sense. Rule 39(a)(2) empowers the court to ignore a jury demand by either party only if it "finds that a right of trial by jury ... does not exist...." [FN141] Rachal implicitly reads the Rule as though it continued with the words "on the part of the party demanding a jury." Those words are not part of the Rule, which we believe again implies that normally we expect jury-trial rights to be bilateral, not unilateral.

The error of the Rachal approach becomes particularly stark when the court's distinction between diversity and federal question cases is examined. According to the Rachal court, in a Jones Act case under 28 U.S.C. § 1332 (diversity jurisdiction), the defendant is entitled to a jury trial, [FN142] whereas in a nondiversity case under § 1331 (federal question jurisdiction), the rule is the opposite. What is the justification for this distinction? It could not be the Seventh Amendment, the application of which does not depend on the basis for jurisdiction. [FN143] But there is also no justification for the distinction in the statute *672 itself. If the Jones Act gives the defendant the right to a jury trial on the law side in diversity cases, which the Rachal court recognized, there is nothing in the legislation (or the legislative history [FN144]) that limits the right to diversity cases.

It is easy to avoid both the constitutional problems associated with denying Jones Act defendants their jury trial rights and the absurdity of distinguishing between federal question and diversity cases in the applicability of the Seventh Amendment. The Jones Act should be construed to preserve jury trial rights in law-side actions for both plaintiffs and defendants. The interpretation we suggest is at the very least a plausible construction of an

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ambiguous statute. A court should therefore adopt our interpretation if for no other reason than to avoid what would otherwise be at least a serious Seventh Amendment question.

VII

CORRECTING THE RACHAL MISTAKE

A. Recognizing the Problem

Forum shopping is rife in our legal system. For a variety of good and bad reasons, we routinely encourage both plaintiffs [FN145] and defendants [FN146] to forum shop, often with devastating results. In giving the Jones Act plaintiff an infeasible choice among the admiralty, diversity, federal question, and state-court routes to relief, the statute that the Panama R. Co. Court created is a remarkable illustration of our system's tolerance for forum shopping. But the Jones Act plaintiff's unilateral control should have a stopping place. In holding that once the Jones Act plaintiff has chosen the federal-question route, she has a further infeasible bench trial option within that jurisdiction, Rachal goes a step too far. From this perspective, the objection to Rachal is not only that it misinterpreted the intent of Congress and denied defendants a Seventh Amendment right, but also an argument for fundamental fairness.

Moreover, at the level of legal aesthetics, Rachal is unseemly in several *673 ways. First, it countervails the everyday assumption that important procedural rights are available to the parties on an even-handed basis and not restricted to one side of the docket. Second, it brings needless disharmony or disuniformity into the law. On the Rachal court's own premises, virtually all law-side saving-clause cases--viz., general maritime diversity cases, Jones Act diversity cases, and (presumably) maritime cases that are maintainable under § 1331 on the basis of statutes other than the Jones Act [FN147]--entail the normal operation of Rule 38(a) and the Seventh Amendment. It makes no sense to treat Jones Act cases in which the plaintiff pleads only § 1331 jurisdiction as unique in this respect. This kind of asymmetry is a self-evidently bad idea. To the extent possible, the legal system should try to keep things simple by keeping them symmetrical, minimizing the number of unprincipled distinctions. [FN148]

The confusion at the state level is even more serious. The courts in California and Illinois that have read the Rachal analysis as endowing the Jones Act plaintiff with an infeasible bench-trial option that preempts normal state-law jury-trial guarantees [FN149] have committed the worst errors. Even if one accepted Rachal and believed that the Jones Act gave the plaintiff--and only the plaintiff--a statutory right to a jury trial, two additional propositions must also be accepted to justify the denial of a defendant's jury-trial rights in state court. We reject both of these additional propositions.

First, a state court that wishes to deny a defendant its jury-trial rights must conclude that it is bound to follow federal law, which would generally mean that the issue is one of "substance" rather than "procedure." In California, *674 the Peters court justified this conclusion on the ground that the right to a jury trial is "too substantial a part of the rights accorded by the [Jones Act] to be classified as a mere procedural right." [FN150] The principal authority supporting this conclusion was *Dice v. Akron, Canton & Youngstown Railroad*, [FN151] in which the Supreme Court asserted that "the right to trial by jury is too substantial a part of the rights accorded by [FELA] to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." [FN152]

Because the Jones Act incorporates FELA by reference, [FN153] FELA decisions are persuasive authority on the meaning of the Jones Act. [FN154] We nevertheless do not believe that *Dice* resolves the question here. [FN155] Even in the FELA context, the Supreme Court has been somewhat equivocal on the issue. [FN156] In any event, the existence of a jury-trial right is less central to the Jones Act than to FELA: When the plaintiff brings a Jones Act case in admiralty (an option generally unavailable under FELA), there is no right to a jury trial. Although the Jones Act explicitly mentions "the right of trial by jury," [FN157] that phrase refers to the "action for damages at

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law ... [in] the [federal] court of the district in which the defendant employer resides or in which his principal office is located." [FN158] No one has suggested that the phrase gives either party the right to a jury trial in admiralty, and there is no apparent reason why it should give either party the right to a jury trial in state court.

Second, even if we agreed that Dice should be extended to the Jones Act context, that would simply guarantee the plaintiff the right to a jury trial in state court. Nothing in Dice suggests that the plaintiff's "substantial" right to have a jury trial would also include the plaintiff's supposed right under Rachal to insist upon a nonjury trial. The Jones Act does not explicitly deny defendants the right to a jury trial; at most, it simply fails to grant such rights. Indeed, the Supreme Court's FELA jurisprudence suggests that both plaintiffs and defendants have the right to a jury trial in state court as a *675 matter of federal law. [FN159] In other words, it may be plausible to believe that the Jones Act forbids the states from denying plaintiffs (and even defendants) the right to a jury trial, [FN160] but it is much more difficult to imagine how the Jones Act forbids the states from according defendants the right to a jury trial that would otherwise exist. [FN161] The cases that take this final step are the ugliest part of the Rachal legacy.

B. Implementing the Solution

Outside the Fifth and Ninth Circuits, the next federal court to confront the issue should simply announce that, while the Jones Act plaintiff has an indefeasible choice of a bench-trial forum, she has no such choice on the law side of the court. The announcement should state that the Jones Act language "the right of trial by jury" applies to both plaintiffs and defendants. That reading of the Act's language is more straightforward than the Rachal reading, and it brings Jones Act cases brought on the law side pursuant to 28 U.S.C. § 1331 into line with the remainder of the law. [FN162] Alternatively, the federal courts should find that the Seventh Amendment applies to Jones Act cases under § 1331, [FN163] just as it does to all other maritime cases under § 1331 in which the plaintiff seeks to enforce rights and remedies of the sort typically available at common law, and to all such maritime cases, including Jones Act cases, brought pursuant to 28 U.S.C. § 1332.

Within the Fifth and Ninth Circuits, the authority of Rachal and Craig may constrain a panel (or a district court) to await en banc consideration to *676 correct the problem identified here. In the meantime, however, the courts in those two circuits should do nothing to extend the Rachal error. [FN164]

Correcting the consequences of the Rachal mistake in the state courts should be fairly straightforward under either of two routes. [FN165] The first would hold that the availability of a jury trial in Jones Act cases is a procedural question that is properly controlled by the normal law of the forum. [FN166] This is the broad message of *American Dredging Co. v. Miller*, [FN167] and it means that even if Rachal were correct federal law, the state courts should not heed it. The second would hold that Rachal is out of step with the remainder of the federal law, including the Fifth Circuit's earlier decision in *Johnson v. Penrod Drilling Co.* [FN168] and the Second Circuit's venerable decision (affirmed by the Supreme Court) in *Panama R. Co.* [FN169] Even within the states of the Fifth and Ninth Circuits, state courts are not bound to follow Rachal's erroneous interpretation of federal law. [FN170]

VIII

CONCLUSION

The Rachal court's erroneous ruling that the defendant has no right to a jury in a Jones Act suit filed under 28 U.S.C. § 1331 has led to confusion and apparent injustice in both federal and state courts. The mistake is offensive to the Seventh Amendment and finds no support in the language or history of the Jones Act. Federal courts outside the Fifth and Ninth Circuits, as well as state courts, should simply refuse to follow Rachal and its progeny. The Fifth and Ninth Circuits should take the next opportunity to address the issue en banc.

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Commerce.

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We are grateful for the helpful comments that we have received from our colleagues Douglas Laycock, Charles Alan Wright, and Ernest A. Young. We previously addressed the issue raised here during the 1995-1996 academic year, when the Jones Act defendant's right to a jury trial formed part of the problem in the Third Annual Judge John R. Brown Admiralty Moot Court Competition. At that time, Samuel R. Askew, of the University of Texas Law School class of 1996, provided valuable research assistance.

[FN1]. Readers may note, for example, that the Journal's editors are all listed on the inside front cover, and the members of the editorial board are listed on the inside back cover. But Jay lists his own name in the Journal only when he is legally required to do so--on the "Statement of Ownership, Management, and Circulation." See, e.g., 30 J. Mar. L. & Com. 162 (1999).

[FN2]. The reasons for this shift are beyond the scope of this article. Perhaps so-called "jury education" projects are part of the explanation.

[FN3]. For a brief discussion of our use of certain terms, see *infra* section III-C.

[FN4]. In some cases, lower transaction costs can make a bench trial preferable for both parties. This is not exactly a zero-sum game.

[FN5]. See *infra* note 33 and accompanying text.

[FN6]. Fed. R. Civ. P. 9(h) (quoted in text at note 66).

[FN7]. 46 U.S.C. app. § 688(a) (quoted in text at note 47).

[FN8]. We have found only seven reported decisions that support construing the Jones Act in the unilateral (and mistaken) way that is the focus of this article. Since the first of these cases was decided in 1986, however, there has been no reported judicial authority directly to the contrary. Cf. *infra* note 34 and accompanying text.

[FN9]. 28 U.S.C. § 1333(1) (quoted in text at note 21).

[FN10]. The grant of federal question jurisdiction provides: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Admiralty actions cannot generally be brought under § 1331, see *infra* note 28 and accompanying text, but the Jones Act gives the plaintiff a choice between suing in admiralty under 28 U.S.C. § 1333 or proceeding on the law side under § 1331, see *infra* note 29 and accompanying text; *infra* section IV.

[FN11]. Fed. R. Civ. P. 38(b).

[FN12]. 795 F.2d 1210 (5th Cir. 1986).

[FN13]. *Id.* at 1217. See also *id.* at 1212 ("the Jones Act gives only the plaintiff the right to choose a jury trial").

[FN14]. See *infra* note 135 and accompanying text.

[FN15]. *Fitzgerald v. United States Lines*, 374 U.S. 16, 20, 1963 AMC 1093 (1963).

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[FN16]. Article I, § 8 of the Constitution provides in pertinent part that "[t]he Congress shall have power ... to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

[FN17]. *Panama R. Co. v. Johnson*, 264 U.S. 375, 393, 1924 AMC 551 (1924).

[FN18]. Admiralty jurisdiction is exclusive over actions in rem and over several statutory maritime actions, including those provided by the Limitation of Liability Act, 46 U.S.C. app. §§ 181-188, the Suits in Admiralty Act, 46 U.S.C. app. §§ 741-752, and the Public Vessels Act, 46 U.S.C. app. §§ 781-790.

[FN19]. First Judiciary Act, ch. 20, § 9, 1 Stat. 76-77 (1789).

[FN20]. See G. Gilmore & C. Black, *The Law of Admiralty* 39-49 (2d ed. 1975) (ascribing "main force" on the point to *Madruga v. Superior Court*, 346 U.S. 556, 1954 AMC 405 (1954)). The *Madruga* majority stated that the change in the wording of the saving-to-suitors clause did not narrow it. See 346 U.S. at 560 n.12. The dissenting opinion noted that the change did not broaden the clause, either. See *id.* at 565-66 (Frankfurter, J., dissenting).

[FN21]. 28 U.S.C. § 1333(1).

[FN22]. See *infra* section III-C.

[FN23]. See, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 363, 1959 AMC 832 (1959).

[FN24]. See *supra* note 18 and accompanying text.

[FN25]. See *infra* section III-C.

[FN26]. Respecting subject matter jurisdiction, "[m]ost state courts are courts of general jurisdiction." 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3522, at 60 (2d ed. 1984). Of course, a plaintiff must always satisfy the rules of personal jurisdiction and venue.

[FN27]. The subject matter jurisdiction provided by 28 U.S.C. § 1337 is a subspecies of federal question jurisdiction. See generally *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 8 & n.7 (1983); 13B Wright, Miller & Cooper, *supra* note 26, § 3561, at 4 & n.12 (1984); *id.* § 3574, at 235 & n.3.

[FN28]. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 1959 AMC 832 (1959).

[FN29]. See *infra* section IV. When a seaman joins unseaworthiness and maintenance and cure claims to a Jones Act claim and proceeds under 28 U.S.C. § 1331, the unseaworthiness and maintenance and cure claims do not themselves fall under the court's § 1331 jurisdiction, but they can nevertheless be maintained as "pendent" to the plaintiff's Jones Act claim. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 380-81, 1959 AMC 832 (1959). The plaintiff has a right to have all three claims heard by the jury. The Jones Act jury right stems from the Seventh Amendment as well as the express terms of the statute. See *infra* section VI. The right to jury trial on the joined claims was created by the Supreme Court as a part of its "power and responsibility for fashioning the controlling rules of admiralty law." *Fitzgerald v. United States Lines*, 374 U.S. 16, 20, 1963 AMC 1093 (1963).

[FN30]. See, e.g., *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916). In *Bombolis*, the Court held that a state could authorize a non-unanimous jury verdict in a case under the Federal Employer's Liability Act (FELA), *infra* note 48, notwithstanding the Seventh Amendment requirement that jury verdicts be unanimous, because the Seventh Amendment does not apply in state courts.

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[FN31]. *Johnson v. Venezuelan Line S.S. Co.*, 314 F. Supp. 1403, 1405, 1970 AMC 1731 (E.D. La. 1970) (Rubin, J.).

[FN32]. See *infra* notes 115-21 and accompanying text.

[FN33]. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1638 (1999); *Waring v. Clarke*, 46 U.S. (5 How.) 441, 459- 60 (1847); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2315, at 116 & n.1 (2d ed. 1995) (collecting cases). Congress has created a statutory exception to the bench-trial-in-admiralty rule with the Great Lakes Act. See *infra* note 67 and accompanying text.

[FN34]. *Panama R. Co. v. Johnson*, 289 F. 964, 982-83 (2d Cir. 1923), *aff'd*, 264 U.S. 375, 1924 AMC 551 (1924)

[FN35]. Fed R. Civ. P. 38(a).

[FN36]. Fed R. Civ. P. 38(e).

[FN37]. *The Osceola*, 189 U.S. 158, 175 (1903) (citation omitted).

[FN38]. *Bottsford v. Shea*, 125 F. 1000 (7th Cir. 1903) (*per curiam*).

[FN39]. Act to Promote the Welfare of American Seamen, ch. 153, 38 Stat. 1164 (1915).

[FN40]. 38 Stat. 1185.

[FN41]. *Gilmore & Black*, *supra* note 20, § 6-20, at 325.

[FN42]. 247 U.S. 372 (1918).

[FN43]. *Gilmore & Black*, *supra* note 20, § 6-20, at 325.

[FN44]. 247 U.S. at 384.

[FN45]. *Gilmore & Black*, *supra* note 20, § 6-20, at 326.

[FN46]. Merchant Marine Act, ch. 250, § 33, 41 Stat. 1007 (1920).

[FN47]. 46 U.S.C. app. § 688(a).

[FN48]. 45 U.S.C. §§ 51-60.

[FN49]. Before the admiralty rules of procedure were merged into the Federal Rules of Civil Procedure in 1966, federal courts were looked upon as having an admiralty side and a law side, with completely separate procedural regimes, docket books, and litigational ethos. See generally Robertson, *Admiralty Procedure and Jurisdiction After the 1966 Unification*, 74 Mich. L. Rev. 1627 (1976). As a technical matter, the 1966 unification melded the two sides of court. But because the Rules preserve some of the key historical features of admiralty procedure—including the absence of a right to jury trial—the custom of referring to cases brought under 28 U.S.C. § 1333 as being on the admiralty side and to those brought under 28 U.S.C. §§ 1331 or 1332 as being on the law side has subsisted.

[FN50]. The present version of the grant of federal question jurisdiction is 28 U.S.C. § 1331. See *supra* note 10.

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[FN51]. 264 U.S. 375, 1924 AMC 551 (1924).

[FN52]. *Id.* at 387.

[FN53]. Justice Sutherland did not participate.

[FN54]. 264 U.S. at 386.

[FN55]. *Id.* at 390.

[FN56]. Construing a statute to avoid a serious constitutional question remains a well-settled principle of statutory interpretation. See *infra* note 129 and accompanying text. The Court's approach in *Panama R. Co.*--going to heroic lengths to permit Congress to extend railway workers' benefits to injured seamen--nevertheless presents a sharp contrast not only with that taken in *Chelentis* just six years before, see *supra* notes 42-44 and accompanying text, but also with the Court's nearly-contemporaneous actions in the two post-Jensen cases striking down Congress's attempts to extend state workers' compensation benefits to injured longshore and harbor workers. See *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

[FN57]. *Gilmore & Black*, *supra* note 20, § 6-22, at 340.

[FN58]. "[T]he statute leaves the injured seaman free ... to assert his right of action under the new rules on the admiralty side of the court." 264 U.S. at 391. The reasoning that led to this surprising reading of the Act included interpreting the Act's second sentence to refer to venue only, *id.* at 383-85, and reading the first sentence's key words "in such action" to mean in "an action to recover damages for such injuries," *id.* at 391.

[FN59]. "The action [in the present case, in which recovery was upheld] was brought on the common-law side of a District Court of the United States, and the right of recovery was based expressly on [the new Jones Act].... The case arose under a law of the United States and involved the requisite amount [in controversy], if any was requisite; so there can be no doubt that the case was within the general jurisdiction conferred on the District Courts by [the general grant of federal question jurisdiction]...." *Id.* at 382-84.

[FN60]. "[T]he constitutional provision [granting admiralty jurisdiction to the federal judicial power] interposes no obstacle to permitting rights founded on the maritime law or an admissible modification of it to be enforced as such through appropriate actions on the common-law side of the courts--that is to say, through proceedings in personam according to the course of the common law. This was permissible before the Constitution, and it is still permissible [[[citing the saving-to-suitors clause]]." *Id.* at 388.

[FN61]. *Panama R. Co. v. Vasquez*, 271 U.S. 557 (1926); *Engel v. Davenport*, 271 U.S. 33 (1926).

[FN62]. See, e.g., *Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 899-900, 1973 AMC 1862 (5th Cir. 1972), adopted on rehearing, 510 F.2d 234, 235 (5th Cir.) (en banc) (per curiam), cert. denied, 423 U.S. 839 (1975).

[FN63]. *Texas Menhaden Co. v. Palermo*, 329 F.2d 579, 1964 AMC 2136 (5th Cir. 1964) (per curiam).

[FN64]. *Panama R. Co. v. Johnson*, 264 U.S. at 382, 388, 391.

[FN65]. See *supra* note 49.

[FN66]. Fed. R. Civ. P. 9(h). Rule 14(c) sets forth an impleader procedure available only on the admiralty side, whereby the third-party defendant is automatically treated as a primary defendant. Rule 38(e) states that there is no right to jury trial on the admiralty side. See *supra* note 36 and accompanying text. Rule 82 exempts admiralty-side

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cases from the venue requirements that obtain on the law side. The Supplemental Rules (A through F) include procedures for in rem, quasi in rem, possessory, petitory, and possession suits, and for limitation of liability proceedings. A claim is "cognizable only in admiralty" if it falls within admiralty's exclusive jurisdiction, see *supra* note 18, or if there is no basis for federal subject matter jurisdiction other than admiralty. The final sentence of Rule 9(h) provides that "[a] case that includes an admiralty or maritime claim within this subdivision is an admiralty case within 28 U.S.C. § 1292(a)(3)," which governs interlocutory appeals.

[FN67]. There is one exception to the bench-trial rule in admiralty. Under 28 U.S.C. § 1873, certain admiralty cases arising on the Great Lakes and connecting waters entail a right of either party to demand a jury trial. This statute dates from the Great Lakes Act, ch. 20, 5 Stat. 726 (1845). The courts have recognized that the actions it describes do not fall under the Seventh Amendment. See, e.g., *Concordia Co. v. Panek*, 115 F.3d 67, 70, 1997 AMC 2357 (1st Cir. 1997); *Standard Oil Co. v. Arizona*, 738 F.2d 1021, 1023 (9th Cir. 1984); cf. *The Genesee Chief v. Fitzhugh*, 53 U.S. 443, 459-60 (1851).

[FN68]. See *Johnson v. Penrod Drilling Co.*, *supra* note 62, 469 F.2d at 901 (referring to the "apparently conflicting provisions of the Federal Rules of Civil Procedure" respecting amendments to withdraw jury demands).

[FN69]. Fed. R. Civ. P. 9(h).

[FN70]. Fed. R. Civ. P. 9, 1966 Advisory Committee Notes.

[FN71]. Fed. R. Civ. P. 15(a).

[FN72]. See *Diotima Shipping Corp. v. Chase, Leavitt & Co.*, 102 F.R.D. 532, 534 (D. Me. 1984) ("In freely granting leave to amend [to add a 9(h) identifying statement], some [courts] have found the Rule 9(h) and Rule 15 configuration to control the right to a jury trial") (citing *McCrary v. Seatrain Lines, Inc.*, 469 F.2d 666 (9th Cir. 1972), and *Fruin-Colnon Corp. v. M.G. Transport Service, Inc.*, 79 F.R.D. 674 (S.D. Ill. 1978)).

[FN73]. Fed. R. Civ. P. 38(d).

[FN74]. Fed. R. Civ. P. 39(a).

[FN75]. See *Diotima Shipping Corp. v. Chase, Leavitt & Co.*, 102 F.R.D. 532, 534 (D. Me. 1984) (discussing the two lines of cases and citing *Johnson v. Penrod Drilling Co.*, *supra* note 62, 469 F.2d at 897, in the nonpermissive line).

[FN76]. 795 F.2d 1210 (5th Cir. 1986).

[FN77]. *Rachal v. Ingram Corp.*, 600 F. Supp. 406 (W.D. La. 1984), *aff'd*, 795 F.2d 1210 (5th Cir. 1986).

[FN78]. Cf. *infra* note 107 and accompanying text.

[FN79]. See, e.g., *Lytle v. Household Manufacturing*, 494 U.S. 545, 553-54 (1990) (if an issue is erroneously tried to the judge, the only effective remedy is to retry the issue to a jury).

[FN80]. The trial judge described the plaintiff's initial pleading as straightforward: "Plaintiff originally filed this action on July 13, 1983, alleging jurisdiction under the Jones Act and the general maritime law, specifically praying for a trial by jury." 600 F. Supp. at 406. But the court of appeals described the original complaint as lacking any clear jurisdictional allegations, as having included checks of both a 9(h) designation and a jury trial election on the cover sheet, and as having included a jury demand. 795 F.2d at 1212. In a subsequent footnote, the court of appeals stated that "[w]hen read together with the jury demand, ... the complaint clearly states a civil

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action at law." Id. at 1214 n.3.

[FN81]. 600 F. Supp. at 407.

[FN82]. Id.

[FN83]. See id.

[FN84]. Supra note 62.

[FN85]. Johnson v. Penrod Drilling Co., supra note 62, 469 F.2d at 902.

[FN86]. Id. at 903.

[FN87]. Johnson v. Penrod Drilling Co., 510 F.2d 234, 235 (5th Cir.) (en banc) (per curiam), cert. denied, 423 U.S. 839 (1975).

[FN88]. See 795 F.2d at 1216 ("There is an important distinction between Johnson and the case before us today ...: the Johnson plaintiffs alleged diversity jurisdiction as well as Jones Act jurisdiction, while here Rachal has asserted only admiralty and Jones Act jurisdiction.").

[FN89]. Id.

[FN90]. See infra notes 115-21 and accompanying text. In a footnoted non sequitur to its characterization of Johnson v. Penrod Drilling Co. as turning on the invocation of diversity rather than federal question jurisdiction, the Rachal court explicitly acknowledged the correctness of the statement in Johnson v. Venezuelan S.S. Line, supra note 31, that the Seventh Amendment issue does not turn on the grounds on which subject matter jurisdiction is invoked. 795 F.2d at 1216 n.8.

[FN91]. See infra notes 118-21 and accompanying text.

[FN92]. See 795 F.2d at 1215 & n.6.

[FN93]. 964 F.2d 1480, 1992 AMC 2789 (5th Cir.), cert. denied, 506 U.S. 975 (1992).

[FN94]. See infra section VI-B. The Linton decision could be criticized on the ground that the court should have followed FELA decisions guaranteeing jury-trial rights in state court, but we find this criticism unpersuasive. See infra notes 151-58 and accompanying text.

[FN95]. See La. Code Civ. Proc. art. 1732(6) (West 1990); see generally Parker v. Rowan Cos., 599 So. 2d 296, 1993 AMC 1754 (La.), cert. denied, 506 U.S. 871 (1992). Art. 1732(6) was repealed by Act 1363 of 1999.

[FN96]. 964 F.2d at 1484-91.

[FN97]. Id. at 1489 n.16; id. at 1490.

[FN98]. 19 F.3d 472, 1994 AMC 1354 (9th Cir.), cert. denied, 513 U.S. 875 (1994).

[FN99]. Even the district court decision in Rachal, supra note 77, which also declared that Jones Act defendants have no right to a jury trial, did not come down until 1984.

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[FN100]. Diversity jurisdiction was not an option. See 19 F.3d at 476.

[FN101]. See Fed. R. Civ. P. 38(b), (d); 39(a)(1).

[FN102]. See *Craig v. Atlantic Richfield Co.*, No. C-83-0604 (N.D. Cal. Apr. 8, 1992), reprinted in *Petition for Certiorari* at 23a, *Craig*, 513 U.S. 875 (1994) (No. 94-194).

[FN103]. 19 F.3d at 476.

[FN104]. 1995 AMC 788 (Cal. App. 1994).

[FN105]. *Id.* at 792.

[FN106]. 678 N.E.2d 317, 1997 AMC 1782 (Ill. App.), leave to appeal denied, 686 N.E.2d 1157 (Ill. 1997). See also *Gibbs v. Lewis & Clark Marine, Inc.*, 700 N.E.2d 227, 1999 AMC 389 (Ill. App. 1998) (following *Allen*).

[FN107]. See *supra* text at note 78.

[FN108]. 678 N.E.2d at 321.

[FN109]. See *supra* section III-D.

[FN110]. C. Wright, *Law of Federal Courts* 653 (5th ed. 1994).

[FN111]. *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830). See also, e.g., *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 347-48 (1998) (quoting *Parsons*); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1638 (1999) (quoting *Feltner* and citing *Parsons*).

[FN112]. 415 U.S. 189 (1974).

[FN113]. *Id.* at 194.

[FN114]. *Id.* at 195.

[FN115]. *Johnson v. Venezuelan Line S.S. Co.*, 314 F. Supp. 1403, 1405, 1970 AMC 1731 (E.D. La. 1970) (Rubin, J.).

[FN116]. As Sherlock Holmes recognized, sometimes the dog's failure to bark is as telling as the evidence that we do hear. See *Doyle, Silver Blaze*, in A.C. Doyle, *The Complete Sherlock Holmes* 349 (1930). When we raised this specific issue with our colleague Charles Alan Wright, his reaction was: "If we [in 9 C. Wright & A. Miller, *supra* note 33] do not say in terms that the right [to a jury trial] is the same regardless of what the basis of federal jurisdiction is ..., it is, because the point seems so obvious."

[FN117]. See *Johnson v. Venezuelan Line S.S. Co.*, 314 F. Supp. 1403, 1405, 1970 AMC 1731 (E.D. La. 1970) (Rubin, J.).

[FN118]. See *supra* notes 88-92 and accompanying text.

[FN119]. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

[FN120]. Cf. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996).

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[FN121]. The Supreme Court finally resolved the previously unsettled issue in *Simler v. Conner*, 372 U.S. 221 (1963) (per curiam) (holding that the right to jury trial in federal courts is to be determined as a matter of federal law in diversity as well as other actions).

[FN122]. See generally, e.g., *Feltner*, supra note 111, 523 U.S. at 348- 52.

[FN123]. *Curtis*, 415 U.S. at 195.

[FN124]. *Id.* See also *Feltner*, supra note 111, 523 U.S. at 352 (noting "the 'general rule' that monetary relief is legal," not equitable).

[FN125]. See also, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624 (1999) (holding that the Seventh Amendment protects jury-trial rights in a "takings" action under 42 U.S.C. § 1983).

[FN126]. 415 U.S. at 198. See also, e.g., *Feltner*, supra note 111, 523 U.S. at 347-55 (upholding the defendant's Seventh Amendment right to a jury trial in an action for statutory damages for copyright infringement); *Grandfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (upholding the defendant's Seventh Amendment right to a jury trial in a bankruptcy action to avoid fraudulent transfers).

[FN127]. 416 U.S. 363 (1974).

[FN128]. See, e.g., *Bombolis*, supra note 30, 241 U.S. at 217.

[FN129]. See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (finding it "incumbent upon us to read the statute to eliminate [[serious constitutional] doubts so long as such a reading is not plainly contrary to the intent of Congress"); *Concrete Pipe & Prods. of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 628-29 (1993) ("[I]n a case of statutory ambiguity, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.'") (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)).

[FN130]. See supra section VI-A.

[FN131]. See supra note 33 and accompanying text. A Jones Act plaintiff might also secure a bench trial by maintaining a state-court suit in a state whose law gives him a unilateral right to select a bench trial. Until recently, Louisiana had such a statute. See supra note 95 and accompanying text.

[FN132]. See supra section III-D.

[FN133]. *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 363 & n.16, 371-72, 1959 AMC 832 (1959).

[FN134]. The provisions of 28 U.S.C. § 1445(a), precluding removal of FELA cases, see supra note 48 and accompanying text, apply to Jones Act cases as well. See, e.g., *Lackey v. Atlantic Richfield Co.*, 990 F.2d 202, 207, 1994 AMC 1513 (5th Cir. 1993).

[FN135]. *Adams v. Falcon Drilling Co.*, 1998 U.S. Dist. LEXIS 5623 at *5-* 6, 1998 WL 195981 at *2 (E.D. La. 1998).

[FN136]. 264 U.S. at 395.

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[FN137]. *Panama R. Co. v. Johnson*, 289 F. 964, 982 (2d Cir. 1923), *aff'd*, 264 U.S. 375, 1924 AMC 551 (1924).

[FN138]. *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1490, 1992 AMC 2789 (5th Cir.), *cert. denied*, 506 U.S. 975 (1992).

[FN139]. The fact that the Panama R. Co. Court ignored or tortured the statute's language does not seem relevant to the present argument. The Panama R. Co. Court was "rewriting" the statute to preserve it from constitutional challenge. The Rachal court's rewrite, on the other hand, creates rather than resolves constitutional problems. See *supra* section VI-A.

[FN140]. Fed. R. Civ. P. 38(a).

[FN141]. Fed. R. Civ. P. 39(a)(2).

[FN142]. 795 F.2d at 1213. As is explained above, see *supra* notes 84-92 and accompanying text, the Rachal court was constrained to reach this conclusion by the prior decision in *Johnson v. Penrod Drilling Co.*, *supra* note 62.

[FN143]. See *supra* notes 115-21 and accompanying text.

[FN144]. The Jones Act was enacted as a single section of the Merchant Marine Act of 1920. See *supra* note 46 and accompanying text. Although there is a substantial volume of legislative history for the Act as a whole, there is very little on the section constituting the Jones Act, and nothing on the issue here. See generally H.R. Rep. No. 443, 66th Cong., 1st Sess. (1919); S. Rep. No. 573, 66th Cong., 2d Sess. (1920); H.R. Rep. No. 1093, 66th Cong., 2d Sess. (1920); H.R. Rep. No. 1102, 66th Cong., 2d Sess. (1920); H.R. Rep. No. 1107, 66th Cong., 2d Sess. (1920); Establishment of an American Merchant Marine: Hearing on H.R. 10378 et al. Before the Senate Comm. on Commerce, 66th Cong., 1st & 2d Sess. (1919-20).

[FN145]. See, e.g., *American Dredging Co. v. Miller*, 510 U.S. 443, 1994 AMC 913 (1994) (upholding the plaintiff's use of state-court procedure to avoid the federal doctrine of *forum non conveniens*).

[FN146]. See, e.g., *Camejo v. Ocean Drilling & Exploration Co.*, 838 F.2d 1374 (5th Cir. 1988) (allowing the defendant to remove a foreign seaman's action from state to federal court and then to have it dismissed for *forum non conveniens*).

[FN147]. When a case under the Carriage of Goods by Sea Act, 46 U.S.C. app. §§ 1300-1315, is brought on the law side under 28 U.S.C. § 1331, for example, courts have recognized the parties' right to a jury trial—even in the absence of diversity jurisdiction. See, e.g., *Sea-Land Serv., Inc. v. J & W Import/Export, Inc.*, 976 F. Supp. 327, 1998 AMC 1572 (D.N.J. 1997); *Heri v. Fritz Cos.*, 841 F. Supp. 1188, 1193 (N.D. Ga. 1993).

[FN148]. We recognize that the adoption of our suggestion will not completely eliminate the plaintiff's unilateral forum-shopping opportunities after the selection of the judge who will hear the case. If the Jones Act plaintiff brings her action in admiralty, making the required Rule 9(h) election, see *supra* note 66 and accompanying text, she may still be able to amend her complaint to withdraw the Rule 9(h) statement. If she does so quickly enough, she may still be able to make a jury demand. See *supra* note 11 and accompanying text. Under this scenario, the defendant may not object that it is being deprived of its jury-trial rights, for the movement is from a bench trial to a jury trial (and the defendant has no right to a bench trial, see *infra* note 161). But at least this forum-shopping technique is subject to judicial control. Indeed, it is subject to the control of a judge who, by hypothesis, is one to whom the plaintiff would rather not try the case without a jury. Although Rule 15(a) declares that "leave [to amend a pleading] shall be freely given when justice so requires," see *supra* note 71 and accompanying text, and Rule 9(h) declares that "[t]he amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15," see *supra* note 69 and accompanying text, we feel confident that district judges will not

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allow plaintiffs to abuse this technique. Rachal, by contrast, puts the manipulation it sanctioned beyond effective judicial supervision.

[FN149]. See *supra* section V-C.

[FN150]. *Peters v. City & County of San Francisco*, 1995 AMC 788, 791 (Cal. App. 1994).

[FN151]. 342 U.S. 359 (1952).

[FN152]. *Id.* at 363.

[FN153]. See *supra* notes 47-48 and accompanying text.

[FN154]. See, e.g., *Kernan v. American Dredging Co.*, 355 U.S. 426, 439, 1958 AMC 251 (1958).

[FN155]. In Jones Act cases, the courts are not bound to follow FELA itself--let alone a decision construing FELA--when its application appears unreasonable. See generally, e.g., *Cox v. Roth*, 348 U.S. 207, 209 (1955).

[FN156]. It is clear from *Bombolis* that whatever right to a jury trial may exist under FELA in state courts, it is not the same jury-trial right that exists in federal court. See *supra* note 30. Not only did the Dice Court discuss *Bombolis* without questioning its authority, 342 U.S. at 363, it also suggested that a state could deny jury trials entirely in FELA cases if the state "abolished trial by jury in all negligence cases including those arising under the federal Act." *Id.*

[FN157]. See *supra* text at note 47.

[FN158]. See *supra* notes 49-50 and accompanying text.

[FN159]. In *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330 (1987), the Court quoted the passage from Dice regarding the substantiality of the right to a jury trial. *Id.* at 336. *Peters* cited this passage from *Monessen* (in addition to Dice). See 1995 AMC at 791. But the *Monessen* Court held that a state court had erred in taking an issue away from the jury over the defendant's objection. See 486 U.S. at 339-42. To the extent that the FELA cases provide any guidance on this issue in the Jones Act context, therefore, they support our thesis that plaintiffs and defendants have equal rights to a jury trial.

[FN160]. This argument might plausibly be based on the statutory language "with the right of trial by jury" and on the FELA precedents discussed *supra*, notes 151-52 & 159 and accompanying text.

[FN161]. Saying that the Jones Act grants only the plaintiff a right to a jury trial is very different from saying that the Jones Act grants the plaintiff a right to a nonjury trial. Such a unilateral right would be unprecedented. See 9 C. Wright & A. Miller, *supra* note 33, § 2302.2, at 45 ("there is no constitutional right to a nonjury trial"); cf. *Singer v. United States*, 380 U.S. 24 (1965) (criminal defendant has no constitutional right to a nonjury trial).

[FN162]. *Russell v. Atlantic & Gulf Stevedores*, 625 F.2d 71, 1980 AMC 2922 (5th Cir. 1980), held that the negligence action available to longshoremen and harbor workers under 33 U.S.C. § 905(b) merely restates general maritime law and hence does not create an action cognizable under 28 U.S.C. § 1331. However, the premise of the decision was that, if the action did lie under § 1331, there would be a normal Seventh Amendment jury trial right. Moreover, the COGSA cases that have been maintained in federal court under 28 U.S.C. § 1331 have implied the existence of a normal Seventh Amendment right. See *supra* note 147.

[FN163]. Although recent decisions have rejected this conclusion, the Second Circuit so held in the *Panama R.*

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Co. decision that was affirmed by the Supreme Court. See supra note 34 and accompanying text.

[FN164]. Cf. *Carman Tool & Abrasives, Inc. v. Evergreen Lines*, 871 F.2d 897, 1989 AMC 913 (9th Cir. 1989) (recognizing the binding authority of prior Ninth Circuit authority on the "fair opportunity" doctrine, but refusing to extend the questionable doctrine to new contexts).

[FN165]. The decisions of the intermediate appellate courts in California and Illinois, see supra section V-C, may complicate the solution to this problem in those states.

[FN166]. Although there are FELA decisions in tension with this conclusion, we do not find them persuasive in the Jones Act context. See supra notes 151- 58.

[FN167]. 510 U.S. 443, 1994 AMC 913 (1994). See also *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1992 AMC 2789 (5th Cir.), cert. denied, 506 U.S. 975 (1992).

[FN168]. Supra note 62.

[FN169]. See supra note 34 and accompanying text.

[FN170]. See, e.g., *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("[N]either federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located."); *Penrod Drilling Corp. v. Williams*, 868 S.W.2d 294, 296 (Tex. 1993) ("While Texas courts may certainly draw upon the precedents of the Fifth Circuit, or any other federal or state court, in determining the appropriate federal rule of decision, they are obligated to follow only higher Texas courts and the United States Supreme Court.").

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Article

***229 UNDERSTANDING PANAMA RAILROAD CO. V. JOHNSON: THE SUPREME COURT'S INTERPRETATION OF THE SEAMAN'S ELECTIONS UNDER THE JONES ACT**

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*230 I. Introduction

When teaching admiralty law to second- and third-year law students, we have found that *Panama Railroad Co. v. Johnson*, [FN1][FN1] the Supreme Court's first decision under the Jones Act, [FN2][FN2] is among the most difficult opinions for the students to understand. [FN3][FN3] In upholding the constitutionality of the new Act, [FN4][FN4] the Court interpreted the statute in a way that is difficult to reconcile with its actual language. We think we are correct to tell students that the Court essentially rewrote the Act. [FN5][FN5] *Panama Railroad* is thus a crucial case for understanding the Jones Act. Despite the difficulties, we regularly discuss it in our introductory admiralty classes. [FN6][FN6]

No one who has failed to meet the challenge and grasp the complexities of *Panama Railroad* can hope to function successfully in what Professors Gilmore and Black have described as “the wilderness of Jones *231 Act case law.” [FN7][FN7] From time to time we are consulted by lawyers who, having carefully read the Jones Act but not *Panama Railroad*, have formed the dysfunctional belief that Jones Act claims are “not admiralty.” Like the apocryphal master plumber who charges a fortune for solving a horrible mess by tapping once with his Stillson wrench on an offending piece of pipe, we feel no guilt when billing these lawyers for teaching them the *Panama Railroad* solution.

We will not be sending Roy Dripps a bill, because we know that his self-description in the current volume of this Journal as “an experienced admiralty practitioner” [FN8][FN8] is unduly modest. Indeed, Mr. Dripps's success in the Jones Act wilderness has been remarkable. However, in his valiant defense of a litigational advantage gained by exploiting certain judicial misunderstandings of the Jones Act, [FN9][FN9] Mr. Dripps proposes a reading of *Panama Railroad* that greatly distorts the basic thrust of the opinion.

Understanding *Panama Railroad* is important for more than a sense of historical perspective. Although the decision is over seventy-five years old, it remains central to the resolution of controversies under the Jones Act. One such controversy involves the availability of a jury trial. Views are sharply divided as to the nature and extent of the Jones Act plaintiff's right to control the choice between a jury and nonjury trial. In our earlier study of this issue, [FN10][FN10] we maintained that the Jones Act plaintiff has three basic rights in this respect: to secure a nonjury trial by filing the case in admiralty, i.e., in federal court pursuant to 28 U.S.C. § 1333; [FN11][FN11] to secure a *232 jury trial by filing the case “on the law side” [FN12][FN12] of federal court, i.e., pursuant to 28 U.S.C. § 1331 [FN13][FN13] or 28 U.S.C. § 1332 [FN14][FN14]; and to secure whatever jury-trial rights are available under state law by filing the case in state court. Mr. Dripps agrees that the Jones Act plaintiff has all the foregoing rights, but he insists upon two further rights for which we can find no legitimate [FN15][FN15] support: the right to insist upon a bench trial in cases filed on the law side of federal court and in state court. [FN16][FN16] We believe that in his argument for these additional rights, Mr. Dripps has fundamentally misread *Panama Railroad*, thereby mischaracterizing the role that the decision should properly play in this debate.

In this article, we offer a more detailed explanation of the *Panama Railroad* decision in order to aid readers in their understanding of this seminal opinion and to assist them in avoiding the confusion proposed by Mr.

Dripps. We further explain how Panama Railroad supports the interpretation of the Jones Act that we have previously advanced [FN17][FN17] and demonstrate that Mr. Dripps's reading of the case is fundamentally flawed. This misreading undermines his entire analysis of the Jones Act.

*233 II. Background

Understanding Panama Railroad requires some background discussion of the Jones Act and the historical context in which it was enacted. At the beginning of the twentieth century, the general maritime law provided two remedies for injured seamen that were unknown to the common law: (1) maintenance and cure, and (2) unseaworthiness. These doctrines, which did not require the plaintiff to prove negligence, were conveniently summarized by the Supreme Court in its first two "propositions" [FN18][FN18] in *The Osceola*:

1. . . . [T]he vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. . . . [T]he vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. . . . [FN19][FN19]

This generosity was offset by a restrictive rule preventing a seaman from recovering damages for injuries caused by the negligence of his employer or a fellow employee. This restrictive doctrine was set forth in *The Osceola*'s third and fourth "propositions":

3. . . . [A]ll the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

4. . . . [T]he seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident. [FN20][FN20] *234 Congress eventually responded to *The Osceola* in 1915, enacting section 20 of the "Act to Promote the Welfare of American Seamen," [FN21][FN21] which provided:

In any suit to recover damages for any injury sustained on board vessel or in its service seamen having command shall not be held to be fellow-servants with those under their authority. [FN22][FN22]

Although this provision was no doubt intended to alter the law as stated in *The Osceola* and to provide a negligence remedy for injured seamen, [FN23][FN23] the effort failed. In *Chelentis v. Luckenbach Steamship Co.*, [FN24][FN24] the Supreme Court ruled that Congress's elimination of the third *Osceola* proposition was "irrelevant." [FN25][FN25] The injured seaman's negligence claim still failed under the fourth *Osceola* proposition. [FN26][FN26]

Congress tried again. In 1920, it enacted the present Jones Act by rewriting section 20 to provide in pertinent part as follows:

[A]ny seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. [FN27][FN27]

The Act's reference to railway employees' statutes incorporates the Federal Employer's Liability Act

(FELA), [FN28][FN28] which provides a liberal negligence remedy for certain railway workers against their employers. [FN29][FN29]

*235 III. The Panama Railroad Decision

Shortly after the new Jones Act entered into force, Andrew Johnson, a quartermaster on a Panama Railroad Company vessel, was injured during the course of his employment when he fell from a ladder. [FN30][FN30] Claiming that the injury had been caused by his employer's negligence, [FN31][FN31] he brought an action under the Jones Act to recover for his injuries on the law side [FN32][FN32] of the United States District Court for the Eastern District of New York. [FN33][FN33] *236 The jury found for the plaintiff and awarded \$10,000 in damages. [FN34][FN34] The Second Circuit affirmed. [FN35][FN35]

In the Supreme Court, the defendant raised six separate arguments. [FN36][FN36] It had three objections to the constitutionality of the Jones Act, [FN37][FN37] an objection to the district court's jurisdiction to hear the case, [FN38][FN38] and two *237 objections to the district court's substantive application of the Jones Act. [FN39][FN39] We will focus on the three constitutional issues here. [FN40][FN40]

A. The Defendant's Argument Under the Admiralty Jurisdiction Clause

The defendant's principal argument turned on the third clause of Article III, Section 2, of the Constitution, which simply provides that “[t]he judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction.” [FN41][FN41] The Supreme Court had previously held that “[t]he question as to the true limits of maritime law and admiralty jurisdiction is . . . exclusively a judicial question, and no . . . act of Congress can make it broader, or (it may be added) narrower, than the judicial power may determine those limits to be.” [FN42][FN42] The defendant's theory was that the Jones Act violated this requirement because it narrowed the admiralty court's jurisdiction. [FN43][FN43]

This argument relied on a specific characterization of the plaintiff's “election” under the Jones Act. [FN44][FN44] According to the defendant, the Jones *238 Act gave the plaintiff a choice between two very different alternatives. On the one hand, the plaintiff could have brought his claim in admiralty and sought to recover under the general maritime law remedies validated in *The Osceola's* first two propositions, i.e., maintenance and cure and unseaworthiness. On the other hand, he could have brought his claim on the law side and sought recovery under the common law as modified by the Jones Act. [FN45][FN45] As the defendant summarized the effect of the Act,

a cause of action essentially maritime in its nature is bodily removed, or at the election of one of the parties, may be removed to a common law court, there to be decided, not according to maritime principles, but according to the very different common law principles, as modified or extended, in the case of personal injuries to railway employees. [FN46][FN46]

This choice created a constitutional problem because if Congress could require that a maritime cause of action be tried under common law, instead of maritime law, “it could in the end destroy the entire constitutional jurisdiction of the [admiralty] courts.” [FN47][FN47] Congress was not permitted to take maritime cases out of the admiralty jurisdiction and assign them to the law side; that would be a narrowing of the limits of “admiralty and maritime Jurisdiction” to something less than “the judicial power [had] determine[d] those limits to be.” [FN48][FN48] Under the defendant's reading of the statute, core maritime personal injury cases previously

within the admiralty jurisdiction would now be outside of it.

Moreover, the defendant argued, it did not matter that Congress had not explicitly foreclosed an admiralty action, but had instead offered the plaintiff a choice:

If Congress can authorize one party . . . to remove his cause from the jurisdiction and principles of the maritime law, and have it treated according to the conflicting principles and *239 rights of the common law, it could undoubtedly do the same thing directly without extending an election to the litigant. [FN49][FN49]

The Court strongly hinted that it was prepared to accept the under-lying constitutional argument (that Congress could not by statute diminish the admiralty and maritime jurisdiction), [FN50][FN50] but ultimately rejected the defendant's position because it was unwilling to accept the defendant's characterization of the plaintiff's "election" under the Jones Act. [FN51][FN51] It instead construed the plaintiff's "election" in a completely different way.

The Court first held that the Jones Act had modified substantive maritime law, giving an injured seaman a negligence action against the employer. [FN52][FN52] Thus the seaman's substantive election was between two "alternatives accorded by the maritime law." [FN53][FN53] The statute "brings into [general maritime] law new rules drawn from another system and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules." [FN54][FN54] In other words, Congress gave seamen an election between the "old" maritime law rules, as explained in *The Osceola*, and the "new" maritime law, as supplemented by the Jones Act.

In the opinion's key paragraph, which we discuss in detail below, [FN55][FN55] the Court then proceeded to hold that the plaintiff also had an independent jurisdictional election: The plaintiff could enforce the "new" maritime law rights on the law side (as the Jones Act explicitly provides) or in admiralty (as the Court held Congress must implicitly have intended). [FN56][FN56] Similarly, as *240 had previously been recognized under the saving to suitors clause, [FN57][FN57] the plaintiff could enforce the "old" maritime law rights on the law side (if an independent basis for jurisdiction existed) or in admiralty. [FN58][FN58] Thus, which-ever election the plaintiff made on the substantive law ("old" or "new" maritime law rights), an independent election remained as to the court in which the action would be filed.

The Court's construction of the two elections available to the plain-tiff differs significantly from the defendant's construction. Although the defendant also recognized the two elections, it did not treat them as independent. The choice of the "new" maritime law rights, in the defendant's view, necessarily required the plaintiff to file the action on the law side. [FN59][FN59]

Because the Court concluded that the Jones Act did not require a plaintiff to bring a maritime action outside of the admiralty jurisdiction, the defendant's constitutional argument was unfounded. [FN60][FN60] The Jones Act simply gave the plaintiff the option to pursue specific maritime rights in admiralty or at law, which is precisely what the saving to suitors clause had been doing for well over a century.

B. The Defendant's Due Process Arguments

Although the admiralty jurisdiction argument occupied the bulk of the Court's attention (and the single largest part of the defendant's brief), the defendant also had two constitutional arguments under the Due Process

Clause of the Fifth Amendment. [FN61][FN61] In its second point, the defendant argued that the Act so arbitrarily and irrationally discriminated in favor of the seaman that it violated substantive due process. [FN62][FN62] The defendant's third point was that the Act was so vague and uncertain that it violated a more procedural aspect of due process. [FN63][FN63]

*241 1. Arbitrary Discrimination

The gist of the defendant's substantive due process argument was that the benefits given to the plaintiff, in particular the right to elect between "old" and "new" maritime law rights and the related right to elect between law and admiralty, were "arbitrary and irrational discrimination" [FN64][FN64] in violation of the Due Process Clause. Although this argument may seem highly implausible today, Panama Railroad was decided in the era when substantive due process arguments were often successful. A few months before Panama Railroad was argued, for example, the Court had held in *Adkins v. Children's Hospital* [FN65][FN65] that the federal minimum wage law for women in the District of Columbia violated the Due Process Clause. [FN66][FN66] In Panama Railroad, the argument was made that the new statute interfered with the contract between the seaman and the shipowner in a manner that arbitrarily discriminated against not only the owner, but also the other maritime workers who had not been so favored. [FN67][FN67]

The Court dismissed this argument in a single paragraph. [FN68][FN68] As this paragraph is central to Mr. Dripps's argument, we discuss it in some detail below. [FN69][FN69] In our view, the central reasoning was that the sorts of elections given to Jones Act plaintiffs--the choice of the substantive law on which to base the claim and the choice of the forum in which to bring the suit--are regularly given to plaintiffs in general, and there is nothing unconstitutional about this.

2. Incorporating FELA by Reference

The defendant's final constitutional argument was that the Jones Act was "so vague and uncertain as not to constitute due process at law." [FN70][FN70] The Court understood this as a criticism that "the statute . . . does not set forth the new rules but merely adopts them by a generic reference." [FN71][FN71] The *242 defendant saw this as a constitutional problem because it was unclear exactly which "statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees" Congress intended to incorporate into the Jones Act. [FN72][FN72] As a result, neither seamen nor shipowners would know the legal standards to which they were subject. [FN73][FN73]

The Court dismissed this argument very quickly: "The reference, as is readily understood, is to [FELA] and its amendments. This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference." [FN74][FN74]

IV. The Dripps Analysis

The core of Mr. Dripps's analysis is his assertion that the "election" mentioned in the Jones Act has a very different meaning than the one that we have proposed, [FN75][FN75] the one that the Panama Railroad Court adopted, [FN76][FN76] the one that the Panama Railroad defendant advocated, [FN77][FN77] or the one that Congress may have intended. [FN78][FN78] Furthermore, he suggests that his asserted understanding of the Jones Act "election" is so self-evident that our failure to recognize it is "inexplicable," [FN79][FN79] and he mistakenly claims that the courts have adopted his reading of the statute practically from the beginning.

[FN80] He *243 falls into further error simply by misreading our prior work on this topic. [FN81][FN81] Not only are Mr. Dripps's arguments unpersuasive on their face, [FN82][FN82] close examination of the sources that he cites in support of his arguments reveals that his analysis is without foundation.

A. Mr. Dripps's Selection of the "Controlling" Paragraph of Panama Railroad

In his opening paragraph, Mr. Dripps asserts that "the Jones Act confers a specific election on the injured seaman to select the form of trial, namely either a jury or non-jury trial." [FN83][FN83] We have explained the limited sense in which a similar statement is functionally correct: the plaintiff has the undenied power to obtain a jury trial by bringing her Jones Act case on the law side and filing a jury demand, and she has the power to obtain a nonjury trial by bringing her Jones Act case in admiralty. [FN84][FN84] But Mr. Dripps means something more than this. In his view, the Jones Act plaintiff has a unilateral right to demand either a jury or nonjury trial, even if the action is brought on the law side of federal court or in a state court in which a jury trial would generally be available to either party. [FN85][FN85] The right "to select . . . either a jury or non-jury trial," he believes, goes beyond (and exists independently of) the right to select the forum. [FN86][FN86]

The asserted source of this unilateral right is a single paragraph of the Panama Railroad opinion. [FN87][FN87] As Mr. Dripps explains it, "The Court *244 concluded that the Jones Act 'permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers.'" [FN88][FN88] He continues: "The 'varying measures of redress' refers to the seaman's choice of a remedy in negligence under the then-new Jones Act or under the general maritime law warranty of seaworthiness. The 'different forms of action' refers to the choice between a jury and a non-jury trial." [FN89][FN89] He concludes by describing this passage as the "controlling language from the Supreme Court." [FN90][FN90]

Taken completely out of context, the language that Mr. Dripps quotes might be able to support the meaning that he ascribes to it. But if one reads the paragraph in which the language appears and considers the context in which it is written, the Court's actual meaning is seen to be something very different. It will be convenient from time to time to refer to this paragraph as the Dripps selection. It reads in full as follows:

A further objection urged against the statute is that it conflicts with the due process of law clause of the Fifth Amendment in that it permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers, and therefore is unreasonably discriminatory and purely arbitrary. The complaint is not directed against either measure of redress or either form of action but only against the right of election as given. Of course the objection must fail. There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it has never been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to *245 either, should rest with the one seeking redress than the one from whom redress is sought. [FN91][FN91]

This paragraph, which was the entirety of the Court's response to the second of the defendant's three constitutional arguments (the substantive due process argument), [FN92][FN92] includes the following four propositions: (1) The Jones Act gives the plaintiff a choice between "varying" or "alternative measures of redress." (2) The Act also gives the plaintiff a choice between "different forms of action" or "alternative . . . modes of en-

forcement.” (3) Such choices are not uncommon. (4) Such choices are not unconstitutional.

Mr. Dripps does not appear to disagree with us on the first, third, and fourth propositions of the Dripps selection. We agree that the first statement's term “alternative measures of redress” refers to the Osceola remedies (unseaworthiness and maintenance and cure) versus the new negligence action. [FN93][FN93] And there is no debate about the meaning of the third and fourth propositions. The key disagreement relates to the second proposition. What did the Court mean by saying that the Jones Act gives the plaintiff a choice between alternative “forms of action” (“modes of enforcement”)? Mr. Dripps wants these terms to refer to jury versus nonjury trial, whereas we think it clear that they refer instead to the plaintiff's election between bringing the Jones Act suit in admiralty or on the law side. In the following subsections, we explore each side of this debate.

B. The Argument for Mr. Dripps's View that the Panama Railroad Court Used “Different Forms of Action” to Refer to Jury Trial Versus Nonjury Trial

We cannot find any argument to support Mr. Dripps's view that the Panama Railroad Court used “different forms of action” to refer to jury trial versus nonjury trial. What we find instead are nine ipse dixits. [FN94][FN94] At no *247 point in his article does Mr. Dripps offer any support for his assumption. He merely rests his entire argument upon it while leaving it wholly unexamined.

C. The Arguments for Our View that the Panama Railroad Court Used “Different Forms of Action” to Refer to Actions in Admiralty and Actions on the Law Side of Federal Court

1. Our Selection of the Key Paragraph of Panama Railroad

Any straightforward search for the meaning of the Dripps selection must begin by placing that paragraph in context with the rest of the Court's opinion. As we explained in Part III, [FN95][FN95] by far the most potent of the defendant's constitutional arguments was the assertion that the Jones Act impermissibly destroyed a key part of admiralty jurisdiction by requiring seamen wishing to pursue the new negligence remedy to do so on the law side. The Court acknowledged the argument's potency, stating:

It must be conceded that the construction thus sought to be put on the statute finds support in some of its words, and also that if it be so construed a grave question will arise respecting its constitutional validity. [FN96][FN96] *248 The Court then presented an intricately structured paragraph rejecting the defendant's argument by essentially rewriting the Jones Act. [FN97][FN97] This paragraph precedes the one on which Mr. Dripps places his sole reliance. [FN98][FN98]

Understanding this “rewrite” paragraph is the key to a full understanding of the case. It will help to have the Jones Act's language in focus while analyzing the paragraph. In pertinent part, the Jones Act provides:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . [FN99][FN99]

On its face, [FN100][FN100] the Act says what the Panama Railroad defendant urged that it said: that the negligence remedy created (by incorporating FELA by reference) is available only on the law side. But the Court construed the Act differently, in a long paragraph that we present in its entirety (except for internal cita-

tions) below. To ease the reader's passage through the Court's dense prose, we have broken the long paragraph into five shorter subparagraphs, which we have numbered (in brackets) from 1 to 5. After each number, we have also provided (in brackets) a heading that summarizes the Court's argument in the subparagraph that follows.

[1. By virtue of the saving to suitors clause, admiralty plaintiffs who sue in personam can normally choose to do so in a common law (nonadmiralty) court.] The course of *249 legislation, as exemplified in § 9 of the Judiciary Act of 1789, always has been to recognize the admiralty jurisdiction as open to the adjudication of all maritime cases as a matter of course, and to permit a resort to common-law remedies through appropriate proceedings in personam as a matter of admissible grace.

[2. It would be strange and indeed radical for Congress suddenly to change that system.] It therefore is reasonable to believe that, had Congress intended by this statute to withdraw rights of action founded on the new rules [i.e., the Jones Act] from the admiralty jurisdiction and to make them cognizable only on the common-law side of the courts, it would have expressed that intention in terms befitting such a pronounced departure,—that is to say, in terms unmistakably manifesting a purpose to make the resort to common-law remedies compulsory, and not merely permissible.

[3. “In such action” is too cryptic a phrase to convey such a radical change.] But this was not done. On the contrary, the terms of the statute in this regard are not imperative but permissive. It says “may maintain” an action at law “with the right of trial by jury,” the import of which is that the injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident. The words “in such action” in the succeeding clause are all that are troublesome. But we do not regard them as meaning that the seaman may have the benefit of the new rules if he sues on the law side of the court, but not if he sues on the admiralty side. Such a distinction would be so unreasonable that we are unwilling to attribute to Congress a purpose to make it.

[4. Therefore, the words “in such action” should be read to refer to any seaman's action to recover damages for employer negligence.] A more reasonable view, consistent with the spirit and purpose of the statute as a whole, is that the words are used in the sense of “an action to recover damages for such injuries,” the emphasis being on the object of the suit rather than the jurisdiction in which it is brought. So we think the reference is to all actions brought to recover *250 compensatory damages under the new rules as distinguished from the allowances covered by the old rules, usually consisting of wages and the expense of maintenance and cure.

[5. The statute, thus construed, merely creates a new maritime remedy, which can be asserted in admiralty or, by virtue of the saving to suitors clause, on the law side.] In this view, the statute leaves the injured seaman free under the general law to assert his right of action under the new rules on the admiralty side of the court. On that side the issues will be tried by the court, but if he sues on the common-law side there will be a right of trial by jury. So construed, the statute does not encroach on the admiralty jurisdiction intended by the Constitution, but permits that jurisdiction to be invoked and exercised as it has been from the beginning. [FN101][FN101]

It will be convenient to call the above-quoted passage the key para-graph of Panama Railroad. We do not think any fair-minded and knowledgeable reader will disagree that the key paragraph asserts the following five interrelated propositions: (a) An injured seamen can pursue the new negligence remedy in an action “on the admiralty side of the court.” [FN102][FN102] (b) By virtue of the saving to suitors clause, he can alternatively pursue the new negligence remedy “on the common-law side of the courts.” [FN103][FN103] (c) By virtue of the Jones Act, such a common-law action can be maintained on the “common-law side” [FN104][FN104] of federal court. In other words, the Jones Act confers federal question jurisdiction. [FN105][FN105] (d) If the seaman sues in admiralty, “the issues will be tried by the court.” [FN106][FN106] (e) “[B]ut if he sues on the common-

law side there will be a right of trial by jury.” [FN107][FN107] “[T]rial by jury [is] as an incident” of the decision “to proceed on the common law side of the court.” [FN108][FN108]

Laying the Dripps selection and the key paragraph side by side reveals that the meaning of the Dripps selection is not the one that Mr. Dripps desires. The key paragraph validates the view that the “measures of *251 redress” choice discussed in the Dripps selection refers to the old Osceola remedies versus the new negligence remedy. It also shows that the “forms of action” choice discussed in the Dripps selection refers to admiralty actions versus common-law actions. There is nothing in the key paragraph (or elsewhere in the Panama Railroad opinion) even remotely suggesting that “forms of action” could have been intended to refer to a choice between jury and nonjury trials in common-law actions. Indeed, the jury trial is explicitly referred to “as an incident” of the decision “to proceed on the common law side of the court.” [FN109][FN109] In the Dripps selection, the Court’s meaning was plainly confined to the “forms of action” choice it had just finished describing in the key paragraph.

2. The Argument to Which the Court Was Responding in the Dripps Selection

The Court opened the Dripps selection [FN110][FN110] by signaling it as a response to the defendant’s Fifth Amendment substantive due process argument. [FN111][FN111] This argument was summarized by the Reporter of Decisions as Point II of the summary. [FN112][FN112] It also comprised Point II of the defendant’s brief. [FN113][FN113] It will help in ascertaining the Court’s meaning to look at the defendant’s presentation of the argument.

In the only sentence of the Reporter’s summary to address the “election” issue, the defendant argued that the plaintiff had been given a privilege “to try his cause of action under either one of two diverse systems of law, where not only the remedies but the rights are different.” [FN114][FN114] The phrase “two diverse systems of law” is an unambiguous reference to the general maritime law (as it existed prior to the Jones Act) and the common law (as modified by the Jones Act). The “rights” under these “two diverse systems” would then refer to the different substantive rights that the defendant saw in each system, meaning the traditional maritime law rights on the one hand and the new negligence action on the other. [FN115][FN115] The *252 “remedies” refer to the two jurisdictional alternatives for enforcing the different substantive rights, meaning an action in admiralty or an action on the law side. [FN116][FN116]

Several factors confirm this reading. In the defendant’s argument on point I (the interference-with-admiralty-jurisdiction argument), [FN117][FN117] these two “elections” were the focus of attention, [FN118][FN118] and the defendant used the terms “right” and “remedy” in exactly the sense that we have explained here. [FN119][FN119] Moreover, in *Chelentis v. Luckenbach Steamship Co.*, [FN120][FN120] which the defendant quoted in its brief on this point, [FN121][FN121] the Court elucidated the meaning of the defendant’s terms, stating that the “distinction between rights and remedies is fundamental” [FN122][FN122] and explaining:

A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. . . . [U]nder the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law . . . [FN123][FN123]

The *Chelentis* Court went on to offer additional guidance on the meaning of the term “remedy,” both as used in its opinion and as used in the saving clause. Specifically, an in personam suit “is essentially a proceeding according to the course of the common law, and within the saving clause of the statute . . . of a common law rem-

edy.” [FN124][FN124] In contrast, “[a] proceeding in rem . . . is not a remedy afforded by the common *253 law.” [FN125][FN125] Plainly the Chelentis Court was not using the term “remedy” to refer to a choice between a jury and a nonjury trial, but to the choice between the type of action available on the law side of federal court and the type of action available only on the admiralty side. [FN126][FN126]

Once it is clear that the defendant's use of the term “rights” in its argument referred to the different substantive rights under the general maritime law and the Jones Act, and that the defendant's use of the term “remedies” referred to the two jurisdictional alternatives, it becomes a simple matter to understand what the Panama Railroad Court must have intended in the Dripps selection. The Court's “varying measures of redress” can be seen as a paraphrasing of the defendant's “rights,” while the Court's “different forms of action” is a paraphrasing of the defendant's “remedies.” Even if this language were “controlling,” it would be irrelevant to Mr. Dripps's argument. The passage does not refer to the right to choose a jury trial (except to the extent that the choice is an incident to the choice between the two jurisdictional alternatives).

Our view of the Panama Railroad Court's meaning in using the phrase “different forms of action” is further confirmed by deeper scrutiny of the defendant's argument. The defendant devoted ten pages of its brief to the substantive due process point. [FN127][FN127] The gist of the defendant's argument was that the “election” given to the plaintiff was an “arbitrary and irrational discrimination” [FN128][FN128] in violation of the Due Process Clause. [FN129][FN129] To flesh out this argument, the defendant needed to give a detailed account of how the plaintiff is advantaged under the Jones Act, and it would obviously have been to the defendant's benefit to be thorough in this *254 respect. The defendant needed to list every arguable advantage that the plaintiff might have received under the statute--particularly advantages that might have seemed unfair. The defendant accordingly explained in some detail that the plaintiff “is alone given the sole privilege of deciding . . . whether his cause shall be prosecuted under the maritime law, or under the entirely different and in some respects conflicting provisions of the common law as extended or modified by the statutes of the United States affecting railway employees.” [FN130][FN130] The defendant similarly complained that the Jones Act “extends to the seaman a new process at law,” which the plaintiff may pursue “either in the common law courts of the United States or common law courts of the several states.” [FN131][FN131]

Throughout this detailed discussion, there was no suggestion that the plaintiff's advantages might also include a unilateral right to determine whether a law-side action would be tried to a jury. The omission cannot be explained by a failure to recognize the significance of the jury choice, because the brief discusses the right to a jury trial as an incident of normal procedure on the law side. [FN132][FN132] Nor can the omission be explained by the view that it would be fair or rational to give the plaintiff this unilateral right. The defendant seemed ready to argue that any benefit given solely to the plaintiff is “arbitrary and irrational discrimination.” [FN133][FN133] The omission can only be explained by the fact that the defendant did not believe that the plaintiff had been given the unilateral right that Mr. Dripps asserts.

In sum, the defendant discussed the two elections given to the plaintiff: (1) the substantive law choice between the general maritime law (unseaworthiness, maintenance and cure) and the Jones Act, and (2) the procedural choice between an action in admiralty (necessarily in federal court) or an action at law (either on the law side of federal court or in state *255 court). There was no mention of the plaintiff's having a unilateral right to elect “the form of trial” (jury or nonjury) in an action at law.

Two conclusions follow from the defendant's arguments. First, it seems unlikely that anyone at the time thought that the plaintiff had the unilateral right that Mr. Dripps now asserts. [FN134][FN134] Even the party

with the strongest possible incentive to make such a claim did not see any basis for including this objection among its arguments. Second, it is beyond belief that the Supreme Court intended the phrase “different forms of action” to refer to something that no one had argued or even mentioned. When the Court summarizes a party's argument, it presumably intends its language to correspond to the party's usage, and not to use ambiguous language to attribute to a party an argument that was in fact never made.

3. The Significance of the Court's Rejection of the Defendant's Substantive Due Process Argument

The Panama Railroad Court gave two reasons for rejecting the defendant's substantive due process argument. The first was that “[t]here are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement.” [FN135][FN135] This statement is perfectly true if the elections under consideration are the substantive law choice between the Osceola-approved remedies and the Jones Act and the procedural choice between the admiralty and law sides. The law routinely permits the plaintiff to pursue her action under whatever substantive law theories are available to her, and it routinely grants the plaintiff at least the initial choice of forum. But the Court's explanation would no longer be true if applied to “the choice between a jury and a non-jury trial.” To the best of our knowledge, there are no other “instances in the law” where a plaintiff has a unilateral right to a jury trial. As a general rule, either both parties have a right to a jury trial (as in a typical common-law action) or neither party has a right to a jury trial (as in a typical equity action). Even in a criminal prosecution, the accused has no right to insist on a bench trial. [FN136][FN136] In the rare case when jury trials are available in admiralty, *256 under the Great Lakes Act of 1845, [FN137][FN137] the option is equally available to both parties. [FN138][FN138]

The Court's second reason was a statement that “[i]n the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought.” [FN139][FN139] Again, the statement is true when addressing the substantive choice between the Osceola remedies and the Jones Act and the procedural choice between the admiralty and law sides. But it is untrue as applied to the choice between jury and nonjury trial, because the right to demand a jury can be and indeed is normally afforded to both parties. The Seventh Amendment does so. [FN140][FN140] The Federal Rules of Civil Procedure do so. [FN141][FN141] And this has always been the normal procedure in common-law courts. [FN142][FN142]

4. Summarizing the Debate

The Dripps selection--the supposedly “controlling language from the Supreme Court” [FN143][FN143]--does not come close to having the meaning that Mr. Dripps attempts to impose on it. The problem is not our “fail[ure] to acknowledge” it, [FN144][FN144] but Mr. Dripps's refusal to understand it. To the extent that it is relevant at all, the Dripps selection fully supports the explanation that we have already given. And once it is recognized that Mr. Dripps cannot rely on this language, there is almost nothing left to his analysis. [FN145][FN145]

*257 D. The Pre-Rachal Jurisprudence

As Mr. Dripps correctly notes, [FN146][FN146] we have traced the erroneous interpretation of the Jones Act that he supports to Rachal v. Ingram Corporation, [FN147][FN147] a 1986 Fifth Circuit decision. [FN148][FN148] He argues that our explanation is “flawed” because cases prior to Rachal adopt the same interpretation. [FN149][FN149] We stand by our original explanation. Mr. Dripps cites three pre- Rachal cases to

support his assertion that prior courts had construed the Jones Act to give plaintiffs the unilateral right that he claims. [FN150][FN150] The first (and most prominent) is Panama Railroad, and he cites only the paragraph that we have already discussed. [FN151][FN151] For the reasons we have already given, nothing in Panama Railroad in general [FN152][FN152] or the cited paragraph in particular [FN153][FN153] supports Mr. Dripps's argument. Thus his criticism of our analysis must stand or fall on the remaining two decisions that he cites: a 1949 Third Circuit opinion and a 1964 Fifth Circuit opinion. [FN154][FN154] Neither offers him any support. To the extent they are relevant at all, they support the explanation that we have advanced.

*258 1. The McCarthy Case

In *McCarthy v. American Eastern Corp.*, [FN155][FN155] the injured seaman sued on the law side and the action was tried to a jury. [FN156][FN156] There is no hint that the plaintiff asserted a right to a bench trial in the face of a demand by the defendant for jury trial, which is the right, Mr. Dripps claims, that the case supports. If the plaintiff had asserted such a right, then the existence of the jury verdict would demonstrate that the assertion was unsuccessful. Therefore, if McCarthy were directly relevant, it would undermine Mr. Dripps's claim.

The issue actually presented in McCarthy concerned the defendant's contention that the Jones Act required the plaintiff to "elect" between the general maritime law and the Jones Act in the sense that the plaintiff could claim under one or the other but not both. [FN157][FN157] The word "election" is used in this sense in some contexts, [FN158][FN158] and at the time McCarthy was decided some circuits were interpreting the Jones Act to require such an election of remedies. [FN159][FN159] But the Third Circuit instead held (anticipating the Supreme Court's subsequent decision in *Fitzgerald v. United States Lines* [FN160][FN160]) that a Jones Act negligence recovery was not inconsistent with a general maritime law claim based on unseaworthiness. [FN161][FN161]

*259 In support of its conclusion, the Third Circuit devoted a paragraph to explaining its understanding of the "election" clause in the Jones Act. It stated:

In our view the election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action. . . . It was the purpose of the "election" clause of the Jones Act, we think, to make certain that an injured seaman, instead of suing in admiralty, could at his option assert his cause of action for personal injuries in the federal court in an action at law regardless of diversity of citizenship, thereby obtaining the right to a jury trial in every case in which the injuries were serious enough to bring the claim within the jurisdictional amount of \$3,000. [FN162][FN162] In this passage, the Third Circuit endorsed the view that we have repeatedly expressed, [FN163][FN163] that the Jones Act gives the plaintiff a procedural choice of an action in admiralty or an action at law. [FN164][FN164] The only mention of a right to a jury trial is as a normal incident of the procedure on the law side. [FN165][FN165] Far from supporting Mr. Dripps's interpretation of the election clause, McCarthy adopts the interpretation of the election clause that Mr. Dripps is trying vigorously to rebut.

2. The Palermo Case

In *Texas Menhaden Co. v. Palermo*, [FN166][FN166] the injured seaman sued in admiralty [FN167][FN167] and the action was accordingly tried without a jury. [FN168][FN168] The defendant nevertheless asserted a right to a jury trial on the plaintiff's negligence claim, apparently on the view that the Jones Act gives the defendant a right to a jury trial. [FN169][FN169] The Fifth Circuit rejected this claim on *260 the basis that there is no jury trial in admiralty, except under the Great Lakes Act of 1845, [FN170][FN170] and this was an admiralty case.

[FN171][FN171] In the process of reaching this conclusion, the court explained:

The Jones Act merely affords the injured seaman the choice between a suit in admiralty without a jury and a suit on the civil side of the docket with a jury. [FN172][FN172]

Palermo illustrates the sense in which Mr. Dripps, the Rachal court, and others assert a rule that is deceptively similar to a correct statement of the functional way in which a plaintiff can (and should be permitted to) control the choice between a jury and a nonjury trial. As we have consistently explained, “the plaintiff has the undenied power to obtain a jury trial by bringing her Jones Act case on the law side and filing a jury demand, and she has the power to obtain a nonjury trial by bringing her Jones Act case in admiralty.” [FN173][FN173]

Nothing about Palermo supports the broader rule for which Mr. Dripps contends. The Palermo court was plainly using its “jury” references in the sense that the availability vel non of a jury follows as a normal incident of the procedure, depending on the jurisdictional basis for the suit. Its ultimate holding on this issue is based directly on the fact that “[t]here is no jury trial in admiralty,” [FN174][FN174] meaning that the result in this case depended exclusively on the jurisdictional basis for the suit. This same reasoning would support the defendant's right to a jury trial on the law side, because the normal procedure on the law side is to hold a jury trial on the demand of either party. If the Palermo court had supported Mr. Dripps's broader rule, it need not have mentioned the admiralty jurisdiction because the jurisdictional basis for the suit would have been irrelevant. The court could simply have announced that the defendant never has a right to a jury trial under the Jones Act. But the Palermo court did not make this announcement. It took another twenty-two years for the Fifth Circuit to make this mistake. [FN175][FN175]

*261 E. Jones Act Cases in State Court

Mr. Dripps argues that the plaintiff's unilateral right to elect either a jury or nonjury trial exists as “a matter of federal substantive law,” [FN176][FN176] and thus “state courts are bound to enforce [the right] regardless of state law.” [FN177][FN177] Once again, Mr. Dripps's analysis is simply wrong. As we have explained, the right to a jury trial in Jones Act cases follows as a normal incident of the procedural rules of the forum. [FN178][FN178] If the plaintiff brings her action in admiralty, neither party is entitled to a jury trial because a jury trial is not part of admiralty procedure (except to the extent that the Great Lakes Act of 1845 [FN179][FN179] authorizes one). If the plaintiff brings her action on the law side in federal court, then either party should be entitled to demand a jury trial because jury trials are a part of the normal procedure for cases of this type at law. And if the plaintiff brings her action in a state court, where the Seventh Amendment does not apply, [FN180][FN180] the parties' jury trial rights should be determined by the procedural rules of that forum. [FN181][FN181] If a state would normally permit either party to demand a jury in this type of *262 case, then it should follow the same procedure in Jones Act cases. Alternatively, if a state chooses to restrict the availability of jury trials in maritime actions in their courts, this is permissible as a matter of state law. But no state court should feel constrained to follow the Rachal analysis in the mistaken belief that the result is compelled by federal law. [FN182][FN182]

1. The Dice Case

Mr. Dripps relies primarily on *Dice v. Akron, Canton & Youngstown Railroad Co.* [FN183][FN183] for the proposition that a Jones Act plaintiff's jury trial rights exist as a matter of federal substantive law. [FN184][FN184] In *Dice*, the Supreme Court held that “the right to trial by jury is too substantial a part of the rights accorded by [FELA] to permit it to be classified as a mere ‘local rule of procedure’ for denial in the man-

ner that Ohio has here used.” [FN185][FN185] Although FELA decisions are generally persuasive authority on the meaning of the Jones Act, [FN186][FN186] Dice is still inadequate for Mr. Dripps's purposes for at least three reasons.

First, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, [FN187][FN187] a decision that Mr. Dripps cites as “well-settled law,” [FN188][FN188] demonstrates that whatever right to a jury trial may exist in state-court FELA cases, it is not the same jury-trial right that exists in federal court. [FN189][FN189] *Bombolis* held that a state could authorize a non-unanimous jury verdict in a case under FELA, notwithstanding the Seventh Amendment requirement that jury verdicts must be unanimous, because the Seventh Amendment does not apply in *263 state courts. [FN190][FN190] Not only did the Dice Court discuss *Bombolis* without questioning its authority, [FN191][FN191] it also suggested that a state could entirely deny jury trials in FELA cases if the state “abolished trial by jury in all negligence cases including those arising under the federal Act.” [FN192][FN192]

Second, the existence of a jury-trial right is less central to the Jones Act than to FELA. If a plaintiff brings a Jones Act case in admiralty (an option generally unavailable under FELA), there is no right to a jury trial. [FN193][FN193] However “substantial” the right to a jury may be under FELA, it is not substantial enough under the Jones Act to overcome normal admiralty procedures. It has long been recognized that the courts need not follow FELA decisions in Jones Act cases when a FELA rule is logically inapplicable in the maritime context. [FN194][FN194]

Third, even if Dice were extended to the Jones Act context, it would simply guarantee the plaintiff the right to a jury trial in state court. Dice does not suggest that the right to a jury trial would include the supposed right under *Rachal* to insist upon a nonjury trial. Indeed, the Supreme Court's FELA jurisprudence suggests that both parties are entitled to a jury trial in state court as a matter of federal law. [FN195][FN195] In other words, even if one believed that the Jones Act forbids the states from denying plaintiffs (and even defendants) the right to a jury trial, there would still be no basis for concluding that the Jones Act guarantees plaintiffs a state-court bench trial by forbidding the states from extending to defendants the jury-trial rights that would otherwise exist.

*264 2. The Implications of a Unilateral Choice as a Matter of Substantive Law

It is significant that Mr. Dripps does not argue that a Jones Act plaintiff has the right to demand a jury trial if she brings her action in admiralty. [FN196][FN196] If he were correct in his assertion that the Jones Act grants the plaintiff a statutory right to a jury trial in state court or on the law side of federal court, it logically follows that this same statutory right should be available in admiralty. The Great Lakes Act [FN197][FN197] demonstrates that Congress can provide a right to a jury trial in admiralty if it chooses to do so. The Supreme Court upheld the constitutionality of the Great Lakes Act in *The Genesee Chief v. Fitzhugh*, [FN198][FN198] and explicitly accepted the Act's granting of the right to a jury trial in *The Eagle*. [FN199][FN199] And in *Fitzgerald v. United States Lines*, [FN200][FN200] the Court explained that “neither [the Seventh] Amendment nor any other provision of the Constitution forbids [jury trials in admiralty cases].” [FN201][FN201] Thus, if the Jones Act “election” clause means that the plaintiff has a unilateral right to elect a jury trial, there is no logical reason not to *265 recognize this right in admiralty cases. Indeed, there is ample authority for the proposition that substantive rights under the Jones Act should remain constant without regard for the forum in which a particular case is heard. [FN202][FN202] If plaintiffs really did have this unilateral right as a matter of federal substantive law, it would be truly remarkable that their ability to exercise this substantive right varied according to the jurisdictional basis under which they brought their claims in federal court.

The solution to the dilemma posed in the previous paragraph, of course, as well as the proper interpretation of Dice and the Jones Act, is that Jones Act plaintiffs do not possess the unilateral right that Mr. Dripps claims.

F. The Seventh Amendment

Even if the Jones Act could be interpreted to give the plaintiff a unilateral choice between jury and nonjury trial on the law side, such an interpretation of the statute would be unconstitutional. The Seventh Amendment [FN203][FN203] “appl[ies] to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.” [FN204][FN204] “[W]hen Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts . . . a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law.” [FN205][FN205]

We fully recognize that not every federal statute qualifies [FN206][FN206] under the Seventh Amendment’s “historical test for trial by jury.” [FN207][FN207] Mr. Dripps *266 is simply wrong to assert that we “assume . . . that all federal statutory actions are governed by the Seventh Amendment.” [FN208][FN208] On the specific page that he cites, we in fact discussed the Supreme Court’s “well-developed” jurisprudence for recognizing when the Seventh Amendment requires a jury trial in statutory actions. [FN209][FN209] Far from assuming “that all federal statutory actions are governed by the Seventh Amendment,” we quoted the governing test. [FN210][FN210]

Applying the historical test to the Jones Act, however, the Supreme Court’s well-developed jurisprudence points strongly in favor of the application of the Seventh Amendment. [FN211][FN211] Although the Jones Act expands upon the rights that were recognized at common law in 1791, this is not fatal. An action under the Jones Act still “involves rights and remedies of the sort typically enforced in an action at law.” [FN212][FN212] Indeed, the Jones Act simply provides a negligence action for tort damages--the very model of a traditional common-law action. [FN213][FN213]

Mr. Dripps asserts that we “conclude that, because the Seventh Amendment guarantees a jury trial in federal court, the Jones Act itself should be construed to provide the defendant with a statutory jury trial right, in effect importing the Seventh Amendment into state courts in Jones Act cases.” [FN214][FN214] This misconceives the thrust of our argument. We have explained that one of the many reasons that the Jones Act should not be construed to give plaintiffs a unilateral right to insist upon a bench trial (which means denying defendants their right to demand a jury trial) is to avoid an interpretation of the statute that would raise serious questions about its constitutionality. [FN215][FN215] By this, we did not suggest that the Jones Act should be construed to give defendants a jury-trial right that they would not otherwise have under the normal rules of the forum. We simply indicated that the Jones Act should be construed to permit the normal rules of the *267 forum with respect to jury trials to operate. In federal court, this means that the plaintiff and defendant should have the same right to a jury trial. As we explicitly recognized in our earlier article, in state court this issue should be resolved not by the Seventh Amendment [FN216][FN216] or federal law, [FN217][FN217] but by the state rules that would otherwise apply. [FN218][FN218]

V. Conclusion

When Mr. Dripps successfully represented the petitioner in *Lewis v. Lewis & Clark Marine, Inc.*,

[FN219] he contended during the course of oral argument that “a nonjury Jones Act case” is “part of the seaman's remedy under the Jones Act.” [FN220][FN220] Chief Justice Rehnquist apparently found this contention surprising, for he immediately asked, “The defendant cannot ask for a jury trial in that situation?” [FN221][FN221] When Mr. Dripps sought to justify his contention on the basis of the nonremovability of Jones Act cases, [FN222][FN222] Chief Justice Rehnquist retorted that “it's one thing to say, for Congress to say it can't be removed, but it seems to me it's quite another, a separate thing for *268 Congress to say that the plaintiff can have a nonjury trial and the defendant cannot move for a jury.” [FN223][FN223]

Although Mr. Dripps agreed with the suggestion that this issue was not directly involved in Lewis, [FN224][FN224] Chief Justice Rehnquist was right to be surprised. It is nothing short of astonishing to suggest that—in a forum in which jury trials are generally available at the request of either party—one party would have a unilateral right to choose between a jury trial and a bench trial. Such a unilateral right would be unprecedented in law, offensive to the Seventh Amendment, and contrary to basic notions of even-handed procedural fairness.

Fortunately neither Congress nor the Supreme Court has ever endorsed this astonishing result, and thus the mistake first made by the Fifth Circuit in *Rachal*, and perpetuated by zealous advocates such as Mr. Dripps, can still be corrected without too much difficulty.

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[FN3]. 264 U.S. 375, 1924 AMC 551 (1924).

[FN4]. Section 33 of the Merchant Marine Act of 1920 is popularly known as the Jones Act. See Merchant Marine Act, ch. 250, §33, 41 Stat. 988, 1007 (1920) (codified at 46 U.S.C. app. §688(a) (1994)).

[FN5]. This is not a prize that could be awarded by default. Indeed, there is substantial competition for the “most difficult to understand” honor. See also, e.g., *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 1959 AMC 832 (1959); *Black Diamond S.S. Corp. v. Robert Stewart & Sons, Ltd. [The Norwalk Victory]*, 336 U.S. 386, 1949 AMC 393 (1949).

[FN6]. See *Panama Railroad*, 264 U.S. at 385-91 (upholding the Jones Act in the face of a constitutional challenge under Article III, Section 2); *id.* at 391-92 (upholding the Jones Act in the face of the argument that it was so vague and uncertain that it violated the Due Process Clause); *id.* at 392-93 (upholding the Jones Act in the face of a substantive due process challenge); see also *infra* notes 40-74 and accompanying text (discussing the constitutional arguments).

[FN7]. See generally David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. Mar. L. & Com. 649, 656-59 (1999) (describing the “Supreme Court's [r]ewriting of the Jones Act”); see also Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty*, § 6-22, at 340 (2d ed. 1975) (stating the *Panama Railroad* decision was “the purest judicial invention”).

[FN6]. See David W. Robertson, Steven F. Friedell & Michael F. Sturley, *Admiralty and Maritime Law in the United States* 189-92 (2001) (presenting an edited version of Panama Railroad for classroom use). Other popular casebooks also include Panama Railroad. See, e.g., Nicholas J. Healy & David J. Sharpe, *Cases and Materials on Admiralty* 479 (3d ed. 1999).

[FN7]. Gilmore & Black, *supra* note 5, §6-20, at 327.

[FN8]. Roy Dripps, *The Seaman's "Election" Under the Jones Act: A Reply to Professors Robertson and Sturley*, 14 U.S.F. Mar. L.J. 127, 127 n.* (2001). In this article, we will respond to Mr. Dripps's arguments. See *infra* notes 75-218 and accompanying text.

[FN9]. Mr. Dripps is wrong to think that we "impute... [improper] forum-shopping motive[s]" to plaintiffs who seek to benefit from a unilateral right to choose between bench and jury trial. *Id.* at 138. On the contrary, we teach our students that both plaintiffs and defendants must forum shop, and proclaim that "[l]awyers who fail to maximize their clients' forum-selection and choice-of-law options are not providing adequate counsel." Robertson, Friedell & Sturley, *supra* note 6, at 575. Certainly no blame attaches to any party or counsel who uses to the fullest all of the forum-shopping opportunities provided by law. But we do not believe that the law should allow either party to block the other's access to a jury trial through maneuvers that are "beyond effective judicial supervision." Robertson & Sturley, *supra* note 5, at 673 n.148. Cf. Dripps, *supra* note 8, at 138 n.86 (echoing our observation that, under any view of the Jones Act elections, it will often be possible for a plaintiff to opt for a jury trial after learning of an unfavorable judicial assignment).

[FN10]. See Robertson & Sturley, *supra* note 5.

[FN11]. 28 U.S.C. § 1333 (1994).

[FN12]. Until the admiralty rules of procedure were merged into the Federal Rules of Civil Procedure in 1966, admiralty was a separate compartment of federal court. See Robertson, Friedell & Sturley, *supra* note 6, at 90-95 (discussing admiralty procedure before 1966). The 1966 merger melded the two sides of court, but because the Rules preserve some of the key historical features of admiralty procedure, it is still customary and often helpful to use the term "the law side" to refer to the federal court when exercising subject matter jurisdiction on any basis other than 28 U.S.C. § 1333 (prescribing admiralty and maritime jurisdiction).

[FN13]. 28 U.S.C. § 1331 (1994).

[FN14]. 28 U.S.C. § 1332 (1994 & Supp. V 1999).

[FN15]. In our earlier study, we explained that *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986) (holding that in Jones Act cases in which subject matter jurisdiction rests on 28 U.S.C. §1331, the defendant has no right to a jury trial), originated the mistaken interpretation of the Jones Act plaintiff's "election" that Mr. Dripps wishes to preserve. See Robertson & Sturley, *supra* note 5, at 659-63. We noted that the *Rachal* court offered no principled basis for distinguishing *Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 901-04, 1973 AMC 1862 (5th Cir. 1972), adopted on reh'g, 510 F.2d 234, 1975 AMC 2161 (5th Cir. 1975) (en banc) (per curiam) (holding that the defendant has a right to jury trial in Jones Act cases in which subject matter jurisdiction rests on 28 U.S.C. §§1331 and 1332). See Robertson & Sturley, *supra* note 5, at 662-63. And we pointed out that the *Rachal* court ignored Panama Railroad. See *id.* at 670. Mr. Dripps is thus wrong in stating that "Robertson & Sturley acknowledge that no reported decision supports their hypothesis." Dripps, *supra* note 8, at 132 n.33 (citing Robertson &

Sturley, *supra* note 5, at 650 n.8). What we actually said in our earlier study was that no reported case since *Rachal* has straightened out the matter. See Robertson & Sturley, *supra* note 5, at 650 n.8.

[FN16]. See, e.g., Dripps, *supra* note 8, at 128-29.

[FN17]. See Robertson & Sturley, *supra* note 5.

[FN18]. *The Osceola*, 189 U.S. 158, 175 (1903). Perhaps because the *Osceola* Court was answering a certified question from the court below, it set out its decision in four numbered “propositions” of law that are somewhat more categorical and less nuanced than typical judicial discourse.

[FN19]. *The Osceola*, 189 U.S. at 175 (citation omitted).

[FN20]. *Id.*

[FN21]. Act to Promote the Welfare of American Seamen, ch. 153, 38 Stat. 1164 (1915).

[FN22]. Section 20, 38 Stat. at 1185.

[FN23]. See Gilmore & Black, *supra* note 5, §6-20, at 325.

[FN24]. 247 U.S. 372 (1918).

[FN25]. 247 U.S. at 384.

[FN26]. See *id.* at 384-85. Gilmore and Black characterize *Chelentis* as giving “Congress a lesson on ‘How to read a case’ of a type familiar to any first term law student.” Gilmore & Black, *supra* note 5, § 6-20, at 325.

[FN27]. Merchant Marine Act, ch. 250, §33, 41 Stat. 988, 1007 (codified at 46 U.S.C. app. §688(a)).

[FN28]. 45 U.S.C. §§51-60 (1994). The Panama Railroad Court confirmed the obvious reference to FELA. See *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391-92, 1924 AMC 551 (1924) (“The reference, as is readily understood, is to [FELA] and its amendments.”). This has often been reaffirmed. See, e.g., *American Dredging Co. v. Miller*, 510 U.S. 443, 455-56, 1994 AMC 913 (1994); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-24, 1991 AMC 1 (1990); *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 324, 1927 AMC 946 (1927); *Engel v. Daventport*, 271 U.S. 33, 35-36, 1926 AMC 679 (1926).

[FN29]. See generally Robertson, Friedell & Sturley, *supra* note 6, at 187 (discussing FELA).

[FN30]. See *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 382, 1924 AMC 551 (1924). The facts of the case are stated in varying levels of detail in the Supreme Court's opinion, 264 U.S. at 382, and the Second Circuit's opinion, *Panama R.R. Co. v. Johnson*, 289 F. 964, 967 (2d Cir. 1923), *aff'd*, 264 U.S. 375, 1924 AMC 551 (1924).

[FN31]. See 264 U.S. at 382 (“[T]he complaint charg[ed] that the injuries resulted from negligence of the employer in providing an inadequate ladder and negligence of the ship's officers in permitting a canvas dodger to be stretched and insecurely fastened across the top of the ladder and in ordering the seaman to go up the ladder.”). The inadequacy of the ladder and the canvas dodger suggest that Mr. Johnson might have been successful in an action for unseaworthiness. See *supra* notes 18-19 and accompanying text (discussing unseaworthiness rights under *The Osceola*). Indeed, the Second Circuit reported that “[h]e claim[ed] that his injuries were due to

the defendant's negligence in furnishing a defective ladder and by reason of the unseaworthiness of the ship." 289 F. at 967. But he did not seek to recover on an unseaworthiness basis. See *infra* note 32.

[FN32]. The injury took place while the vessel was sailing down Ecuador's Guanaquil River toward the Pacific Ocean. See 264 U.S. at 382; 289 F. at 967. Because the tort occurred on navigable water, the Second Circuit recognized that the suit would have been within the district court's admiralty jurisdiction. See *id.* at 967. Moreover, it seems likely that Mr. Johnson would have been successful in an action for unseaworthiness under the general maritime law. See *supra* note 31. Perhaps his failure to seek any recovery on an unseaworthiness basis can be explained on the ground that he believed he was required to elect between his traditional rights under the general maritime law (including unseaworthiness) and his new rights under the Jones Act. See *infra* notes 157-61 and accompanying text. Because he preferred a jury trial, he chose to pursue his Jones Act claim on the law side. By 1963, an injured seaman could combine a negligence claim, an unseaworthiness claim, and a maintenance and cure claim on the law side, and all three could be tried to a jury. See *Fitzgerald v. United States Lines*, 374 U.S. 16 (1963).

[FN33]. Although the defendant's principal office and place of business was in the Southern District of New York, and the Jones Act explicitly provides that "[j]urisdiction... shall be under the court of the district in which the defendant employer resides or in which his principal office is located," 46 U.S.C. app. § 688(a), the defendant did not enter a special appearance and move to dismiss. When the defendant thereafter demurred to the complaint on the ground that the district court lacked jurisdiction, the court summarily concluded that the quoted statutory language constituted a venue provision, and that the defendant had waived any objection to venue. See *Johnson v. Panama R.R. Co.*, 277 F. 859, 860 (E.D.N.Y. 1921). Ultimately, the Second Circuit and the Supreme Court each adopted a substantially similar analysis. See *infra* notes 35 & 38.

[FN34]. See 289 F. at 967.

[FN35]. See *id.* at 981. The Second Circuit initially affirmed with a substantial opinion covering a range of substantive points. The court on its own motion then directed reargument on the jurisdictional question, see *supra* note 33, raised by the plaintiff's filing his action in the Eastern rather than the Southern District of New York. See 289 F. at 981. On rehearing, the Second Circuit agreed that the defendant's belated objection went not to subject-matter jurisdiction but only to venue (although the court also used some language suggesting that it may have thought the statutory clause related to personal jurisdiction). In any event, the defendant's objection had been waived. See *id.* at 983-85.

[FN36]. See 264 U.S. at 376-82 (summary of the defendant's argument by the Reporter of Decisions). The Reporter's summary does not appear in the Supreme Court Reporter, see 44 S. Ct. 391, 392, or American Maritime Cases, see 1924 AMC 551, 551. It is similarly unavailable on WestLaw, see the WestLaw report at 264 U.S. 375, 376, and on the internet sites that we checked, see, e.g., FindLaw, at <http://laws.findlaw.com/us/264/375.html>. Only a highly abbreviated summary of the defendant's argument (consisting simply of principal headings and case citations) appears in the Lawyers' Edition report. See 68 L. Ed. 748, 749-50. To view the summary of the defendant's argument by the Reporter of Decisions, therefore, one must consult either the official United States Reports, 264 U.S. 375, 376-82, or use Lexis, 1924 U.S. LEXIS 2517.

For a complete presentation of the defendant's argument, see Brief for Plaintiff-in-Error [Defendant], *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924) (No. 369) [hereinafter Defendant's Brief]. Bound copies of the briefs from that period are available at the Supreme Court Library. Copies on microfiche or microfilm are

available at major research law libraries, including many academic law libraries.

Some of the terminology in the case may be confusing to the modern reader, and thus some explanation may be helpful. The shipowner, the Panama Railroad Company, was the defendant in the trial court. Under current certiorari practice, it would be known as the “petitioner” in the Supreme Court today. Prior to the so-called “Judges’ Bill” (the Judiciary Act of 1925, ch. 229, 43 Stat. 936), however, review on writ of certiorari was far less common. In this case, the original defendant was the “plaintiff in error” on a writ of error to the Second Circuit. Similarly, Andrew Johnson, the injured seaman, was the plaintiff in the trial court and the “defendant in error” in the Supreme Court. In 1928, Congress abolished writs of error in cases from federal courts. For a contemporary comment on this change in practice and terminology, see Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 Harv. L. Rev. 1, 27-29 (1928).

[FN37]. See 264 U.S. at 376-82 (Reporter’s summary of the defendant’s constitutional arguments); see also *infra* notes 41-74 and accompanying text (discussing the defendant’s constitutional arguments and the Court’s responses to them).

[FN38]. See 264 U.S. at 382 (Reporter’s summary of point IV of “Argument for Plaintiff in Error”) (noting the defendant’s jurisdictional argument); see also *supra* notes 33 & 35 (discussing the lower courts’ treatment of the jurisdictional argument). Although the Supreme Court discussed the jurisdictional argument in some detail, it did not find the argument any more persuasive than did the lower courts. It held that the defendant had waived its objection by entering a general appearance without claiming its privilege. See 264 U.S. at 383-85.

[FN39]. See 264 U.S. at 382 (Reporter’s summary of points V and VI of “Argument for Plaintiff in Error”) (noting the defendant’s arguments regarding the substantive application of the Jones Act). The defendant objected that the evidence was insufficient to establish its negligence (point V), and that the district court had misinstructed the jury on the question of assumption of risk (point VI). The Supreme Court quickly disposed of each of these arguments. See *id.* at 393 (rejecting the sufficiency of the evidence argument); *id.* (rejecting the assumption of risk argument). The Second Circuit addressed the assumption of risk argument in detail. See 289 F. at 977-80.

[FN40]. Mr. Dripps conflates the three into a single “challenge to the Election Clause of the Jones Act as violative of due process under the Fifth Amendment.” Dripps, *supra* note 8, at 130. He then makes the erroneous assumption that this “challenge” addressed a unilateral jury/nonjury choice on behalf of Jones Act plaintiffs. *Id.* at 130 n.24.

[FN41]. U.S. Const. art. III, sec. 2, cl. 3.

[FN42]. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576 (1874). See also *The St. Lawrence*, 66 U.S. (1 Black) 522, 527 (1861) (“certainly no State law can enlarge [the admiralty jurisdiction], nor can an act of Congress... make it broader than the judicial power may determine to be its true limits.”).

[FN43]. See Defendant’s Brief, *supra* note 36, at 12.

[FN44]. We do not find the defendant’s characterization surprising or remarkable. As the Court itself admitted, with a degree of understatement that we do find remarkable, “the construction thus sought to be put on the statute finds support in some of its words.” 264 U.S. at 390. The defendant’s characterization is indeed the most obvious reading of the statute. See, e.g., Robert M. Hughes, *Does the 33rd Section of the Merchant Marine Act (the Jones Act) Apply to Proceedings in Admiralty?*, 34 Yale L.J. 183, 188 (1924) (describing this characteriza-

tion as the Jones Act's "simple and natural construction," and declaring that "the meaning of the act could hardly have been considered doubtful" prior to Panama Railroad); cf. Gilmore & Black, *supra* note 5, §6-22, at 340 (stating "the reading was not unreasonable").

[FN45]. See Defendant's Brief, *supra* note 36, at 10-11.

[FN46]. *Id.* at 11-12. It should be recognized that the defendant used the word "removed" in this sentence, on both occasions, in its ordinary English sense, and not in the sense of removal under 28 U.S.C. §1441 (1994).

[FN47]. Defendant's Brief, *supra* note 36, at 12.

[FN48]. *The Lottawanna*, 88 U.S. (21 Wall.) 558, 576 (1874).

[FN49]. Defendant's Brief, *supra* note 36, at 12. Once again, see *supra* note 46, it should be recognized that the defendant used the word "removed" in its ordinary English sense, and not in the sense of removal under 28 U.S.C. §1441.

[FN50]. See 264 U.S. at 386 ("[T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without."); *id.* at 390 ("[I]f [the Jones Act] be so construed [as the defendant has argued] a grave question will arise respecting its constitutional validity.").

[FN51]. See *id.* at 390-91.

[FN52]. See *id.* at 388. The defendant had freely conceded Congress's power to modify the general maritime law in order to provide a negligence remedy to injured seamen, see *id.* at 378 (Reporter's summary of "Argument for Plaintiff in Error"); Defendant's Brief, *supra* note 36, at 11, but had assumed that the Jones Act did not do so. The Second Circuit, however, had already held that the Jones Act modified the general maritime law, see 289 F. at 969-71, so this holding could not have been completely unanticipated.

[FN53]. 264 U.S. at 388.

[FN54]. *Id.*

[FN55]. See *infra* notes 95-109 and accompanying text.

[FN56]. See 264 U.S. at 390-91.

[FN57]. See *id.* at 390.

[FN58]. See *id.* at 390-91.

[FN59]. See *supra* notes 44-46 and accompanying text.

[FN60]. See 264 U.S. at 391.

[FN61]. See U.S. Const. amend. V.

[FN62]. See 264 U.S. at 380 (Reporter's summary of point II of "Argument for Plaintiff in Error"); Defendant's

Brief, *supra* note 36, at 22-32 (“POINT II”); see also *infra* notes 64-69 and accompanying text (discussing the defendant's substantive due process argument and the Court's response to it).

[FN63]. See 264 U.S. at 380-82 (Reporter's summary of point III of “Argument for Plaintiff in Error”); Defendant's Brief, *supra* note 36, at 32-38 (“POINT III”); see also *infra* notes 70-74 and accompanying text (discussing the defendant's procedural due process argument and the Court's response to it).

[FN64]. 264 U.S. at 380 (Reporter's summary of “Argument for Plaintiff in Error”); Defendant's Brief, *supra* note 36, at 22.

[FN65]. 261 U.S. 525 (1923).

[FN66]. See *Adkins*, 261 U.S. at 554-62.

[FN67]. See *Panama Railroad*, 264 U.S. at 380 (Reporter's summary of “Argument for Plaintiff in Error”); Defendant's Brief, *supra* note 36, at 23-25.

[FN68]. See 264 U.S. at 392-93.

[FN69]. See *infra* notes 87-93 and accompanying text.

[FN70]. 264 U.S. at 380 (Reporter's summary of “Argument for Plaintiff in Error”); Defendant's Brief, *supra* note 36, at 32 (heading for POINT III).

[FN71]. 264 U.S. at 391. The defendant's understanding of the argument seems to have been somewhat broader. See *id.* at 380-82 (Reporter's summary of “Argument for Plaintiff in Error”); Defendant's Brief, *supra* note 36, at 32-38 (POINT III).

[FN72]. 264 U.S. at 381 (Reporter's summary of “Argument for Plaintiff in Error”); Defendant's Brief, *supra* note 36, at 35-36.

[FN73]. See 264 U.S. at 381 (Reporter's summary of “Argument for Plaintiff in Error”); Defendant's Brief, *supra* note 36, at 36.

[FN74]. 264 U.S. at 391-92. The Second Circuit had addressed the argument in greater detail. See *Panama Railroad*, 289 F. at 971-74. The court of appeals reasoned that the Jones Act unambiguously incorporated at least FELA, and no “serious question” could be raised as to Congress's right to incorporate FELA by reference. See *id.* at 971. That was adequate to resolve the present case. The defendant was not in a position to object that the Jones Act may or may not incorporate other federal railroad statutes because “the court below did not apply, and was not asked to apply, any of these [other statutes].” *Id.* at 973-74.

[FN75]. See *Robertson & Sturley*, *supra* note 5, at 671-72; see also *id.* at 656-59; *infra* notes 95-145 and accompanying text.

[FN76]. See *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 390-91, 1924 AMC 551 (1924); see also *supra* notes 52-60 and accompanying text; *Robertson & Sturley*, *supra* note 5, at 656-59.

[FN77]. See Defendant's Brief, *supra* note 36, at 10-12; see also *supra* notes 44-46 and accompanying text.

[FN78]. See *supra* note 44 and authorities cited therein; see also Robertson & Sturley, *supra* note 5, at 658.

[FN79]. Dripps, *supra* note 8, at 132 n.32.

[FN80]. See, e.g., *id.* at 129 & n.17, 135 & n.63.

[FN81]. See, e.g., *supra* notes 9, 15; *infra* notes 181, 182; *infra* note 208 and accompanying text; *infra* note 214 and accompanying text.

[FN82]. For example, it is facially implausible to argue that the Jones Act “specifically authorizes a non-jury trial and proceedings in state courts.” Dripps, *supra* note 8, at 153. The Jones Act does not specify either nonjury trials or proceedings in state courts. See *supra* text at note 27 (quoting the Jones Act). Rather than “authoriz[ing] a non-jury trial,” the statute “specifically” provides for “the right of trial by jury.” 46 U.S.C. app. §688(a). And although Jones Act cases may be brought in state court, this is not because the statute “specifically authorizes... proceedings in state courts.” It instead follows from the Panama Railroad construction of the statute and the saving to suitors clause. See Robertson & Sturley, *supra* note 5, at 658 & n.61.

[FN83]. Dripps, *supra* note 8, at 128.

[FN84]. See Robertson & Sturley, *supra* note 5, at 669-70 & nn.131-35; see also *infra* notes 102-08 and accompanying text.

[FN85]. See, e.g., Dripps, *supra* note 8, at 128-29. Mr. Dripps does not argue that a Jones Act plaintiff has the power to demand either a jury or nonjury trial if the action is brought in admiralty. We discuss the significance of this omission below. See *infra* notes 196-202 and accompanying text.

[FN86]. Dripps, *supra* note 8, at 128.

[FN87]. See 264 U.S. at 392-93. Mr. Dripps cites or quotes some or all of the paragraph in question over a dozen times for the proposition that the Panama Railroad Court held that the plaintiff has the unilateral right that Mr. Dripps asserts. See Dripps, *supra* note 8, at 128 nn.8-9, 129 nn.17, 19, 130 nn.23, 25, 131 nn.30-31, 134 n.59, 135 nn.61, 63, 139 n.92, 140 nn.97, 99-100 & 101. He never cites or discusses any other part of the Court's opinion.

[FN88]. Dripps, *supra* note 8, at 130 (quoting Panama Railroad, 264 U.S. at 392) (emphasis added by Mr. Dripps).

[FN89]. *Id.* at 131 (footnotes omitted).

[FN90]. *Id.* at 132.

[FN91]. 264 U.S. at 392-93.

[FN92]. See *supra* notes 64-69 and accompanying text (discussing the defendant's substantive due process argument and the Court's response to it).

[FN93]. In the passage that we have quoted, see *supra* text at note 89, Mr. Dripps mentions only “the general maritime law warranty of seaworthiness.” Dripps, *supra* note 8, at 131. We assume that he would agree that the doctrine of maintenance and cure was part of the choice on the general maritime law side. In fact, it was the

maintenance and cure option that was most stressed at the time. See, e.g., *Panama Railroad*, 264 U.S. at 391 (mentioning maintenance and cure but not the doctrine of unseaworthiness). Remember that today's seaman does not have to choose but can pursue all three. See *supra* note 32.

[FN94]. We have located nine instances in which Mr. Dripps simply asserts the conclusion that he wishes to establish. The first occurs early in his argument, where he states: "The 'different forms of action' refers to the choice between a jury and a non-jury trial." Dripps, *supra* note 8, at 131. His only support for this assertion appears in the accompanying footnote, which declares:

A seaman may exercise that option [i.e., the nonjury trial option] in federal court by filing in admiralty.... But that option is not restricted to a federal admiralty suit because "the Jones Act allows the injured seaman to elect a non-jury trial in an action 'at law' in state court." *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1490, 1992 AMC 2789 (5th Cir. 1992).

Dripps, *supra* note 8, at 131 n.27. *Linton* is one of the cases that we demonstrate is based on the 1986 *Rachal* mistake. See *Robertson & Sturley*, *supra* note 5, at 663-65 (discussing *Linton*). The *Linton* opinion does not analyze *Panama Railroad*. In the immediately following sentence, Mr. Dripps quotes the Second Circuit's *McAfoos* opinion: "The 'election' contemplated by the Jones Act is primarily a decision as to the form of trial--whether jury or non-jury." Dripps, *supra* note 8, at 131 & n.28 (quoting *McAfoos v. Canadian Pac. Steamships, Ltd.*, 243 F.2d 270, 273, 1957 AMC 2493 (2d Cir. 1957)). A glance at *McAfoos* reveals that the quoted statement expressed the truism that jury versus nonjury trial is the main consequence of the election between the law and admiralty sides of federal court. The *McAfoos* court did not mention *Panama Railroad* or in any other way suggest a linkage between its term "form of trial" and the *Panama Railroad* terms "forms of action" and "modes of enforcement." See also *infra* note 154 (discussing the significance of *McAfoos*).

A few pages later, Mr. Dripps begins his critique of our analysis with the statement:

Robertson and Sturley... fail to acknowledge that [*Rachal v. Ingram Corp.*, 795 F.2d 1210, 1215 (5th Cir. 1986), *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1489 n.16, 1992 AMC 2789 (5th Cir. 1992), and *Craig v. Atlantic Richfield Co.*, 19 F.3d 472, 476, 1994 AMC 1354 (9th Cir. 1994)] all reach the same conclusion as did the Supreme Court in *Panama Railroad*... [The] doctrine [that a Jones Act defendant has no right to a jury trial] arose in the *Panama Railroad* case, over fifty years earlier [than *Rachal*].

Dripps, *supra* note 8, at 135. In a footnote, he simply cites the Dripps selection (i.e., his selected paragraph from *Panama Railroad*) without further comment or explanation. See *id.* at 135 n.63. Again, Mr. Dripps is merely assuming that the *Panama Railroad* paragraph means what he wants it to mean. In the opening paragraph of part IV of his article, Mr. Dripps asserts: "[The] conclusion [that under the Jones Act only the plaintiff has the right to elect a trial by jury] was... made by the United States Supreme Court in *Panama Railroad*...." Dripps, *supra* note 8, at 139. The accompanying footnote simply cites the Dripps selection without further comment or explanation. See *id.* at 139 n.92. Once again, we have only an assumption.

On the following page, he states:

The Supreme Court specifically held that the Jones Act "permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers." By conferring upon the plaintiff a right to choose a non-jury trial, the statute thereby excludes any implicit right in the defendant to select the opposite.

Id. at 140 (citation omitted). Once again the accompanying footnotes merely cite the Dripps selection without analysis, see *id.* at 140 nn.99-101, thereby incorporating Mr. Dripps's cherished assumption. Two paragraphs later, Mr. Dripps argues that "[t]he prohibition [in 28 U.S.C. §1445(a)] against removal [from state to federal court of FELA and Jones Act cases]... strongly supports construction of the election clause as a unilateral right of the seaman-plaintiff to choose the form of trial." Dripps, *supra* note 8, at 141-42. His statement is cor-

rect on its face, but his assumption that “form of trial” means jury versus nonjury trial is incorrect. In the removal context, it simply means state versus federal court.

Several pages later, Mr. Dripps states: “The Election Clause of the Jones Act is an express limitation on jury trials.” *Id.* at 145. Here he cites only *Gibbs v. Lewis & Clark Marine, Inc.*, 700 N.E.2d 227, 231, 1999 AMC 398 (Ill. App. Ct. 1998). See Dripps, *supra* note 8, at 145 n.141. The Gibbs case was handled by a plaintiffs' law firm that we believe communicates freely with Mr. Dripps. The Gibbs court quoted from the Panama Railroad paragraph and made the same assumption Mr. Dripps makes in his article. (The italics in Mr. Dripps's text are of course his own. We think perhaps he is asking too much of italics.)

Two pages later, he states: “[T]he Jones Act does contain a unilateral grant of the right to select the form of trial.” Dripps, *supra* note 8, at 147. Here there is no relevant citation and, again, no argument or analysis. We have only his italics.

In his concluding sentence, Mr. Dripps asserts: “Because the [Jones Act] specifically authorizes a non-jury trial and proceedings in state courts, a non-jury state court trial is one of the options available to the injured seaman.” Dripps, *supra* note 8, at 153. There is no footnote. The Jones Act does not mention nonjury trial or state courts. See also *supra* note 82.

[FN95]. See *supra* notes 41-51 and accompanying text.

[FN96]. 264 U.S. at 390. See also *id.* at 386 (“[T]here are boundaries to the maritime law and admiralty jurisdiction which inhere in those subjects and cannot be altered by legislation, as by excluding a thing falling clearly within them or including a thing falling clearly without.”).

[FN97]. See *id.* at 390-91.

[FN98]. The two paragraphs are separated by one dealing briefly with the defendant's argument that it was invalid for the Jones Act to incorporate the railway statutes by reference and another dealing briefly with the defendant's argument that the Act was offensive to the principle of uniformity.

[FN99]. 46 U.S.C. app. §688(a).

[FN100]. The words “in such action” confine the new negligence remedy to “an action for damages at law, with the right of trial by jury.” An action for damages “at law” is a law side action. The words “with the right of trial by jury” underscore the intention to refer to the law side. And the second sentence of the Jones Act, which the Panama Railroad Court treated as a venue provision, states: “Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.” 46 U.S.C. app. §688(a). This describes venue on the law side of federal court in federal question cases. See 28 U.S.C. § 1391(b) (1994 & Supp. V 1999) (current venue statute applicable to federal question cases); Judicial Code of 1911, ch. 231, §51, 36 Stat. 1087, 1101 (general venue statute in force when the Jones Act was enacted in 1920). The way in which the Panama Railroad Court read the words “in such action” out of the Jones Act was the “purest judicial invention” to which Professors Gilmore and Black referred. See *supra* note 5.

[FN101]. Panama Railroad, 264 U.S. at 390-91 (citations omitted).

[FN102]. Subparagraph [5].

[FN103]. Subparagraph [2].

[FN104]. Subparagraphs [3] and [5].

[FN105]. See 28 U.S.C. §1331.

[FN106]. Subparagraph [5].

[FN107]. Id.

[FN108]. Subparagraph [3].

[FN109]. Id.

[FN110]. See supra text at note 91 (quoting the Dripps selection).

[FN111]. See supra notes 64-69 and accompanying text (discussing the defendant's Fifth Amendment substantive due process argument and the Court's response to it).

[FN112]. See 264 U.S. at 380 (Reporter's summary of point II of "Argument for Plaintiff in Error").

[FN113]. See Defendant's Brief, supra note 36, at 22-32 ("POINT II").

[FN114]. 264 U.S. at 380 (Reporter's summary of "Argument for Plaintiff in Error") (paraphrasing Defendant's Brief, supra note 36, at 23).

[FN115]. See supra notes 44-45 and accompanying text.

[FN116]. See supra notes 46-49 and accompanying text.

[FN117]. The defendant made explicit what would have been obvious in any case, viz., that its argument in point II was built upon the argument in point I. See, e.g., Defendant's Brief, supra note 36, at 24 (referring back to the argument in point I).

[FN118]. See, e.g., Panama Railroad, 264 U.S. at 376-80 (Reporter's summary of point I of "Argument for Plaintiff in Error") (paraphrasing Defendant's Brief, supra note 36, at 10-14); see also supra notes 41-49 and accompanying text (discussing the defendant's argument).

[FN119]. See, e.g., 264 U.S. at 379 (Reporter's summary of point I of "Argument for Plaintiff in Error") (paraphrasing Defendant's Brief, supra note 36, at 20) ("The difference between the creation of a right and the exercise of a common law remedy under the saving clause is well set forth in *Sudden & Christenson v. Industrial Accident Comm.*, 182 Cal. 437 [188 P. 803 (1920)].").

[FN120]. 247 U.S. 372 (1918).

[FN121]. See Defendant's Brief, supra note 36, at 19-20.

[FN122]. *Chelentis*, 247 U.S. at 384.

[FN123]. Id. at 384.

[FN124]. Id. (quoting *Knapp, Stout & Co. v. McCaffrey*, 177 U.S. 638, 648 (1900)).

[FN125]. *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372, 383 (1918) (quoting *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 431 (1866)).

[FN126]. While the recurrent difference between actions brought under the saving to suitors clause and admiralty actions is jury trial *vel non*, the Court has recently made clear that the applicability of the saving clause does not turn on the choice between a jury and a nonjury trial. See *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454-55, 2001 AMC 913 (2001). This is somewhat ironic because Mr. Dripps represented the successful petitioner in *Lewis*, in which he argued that “the saving to suitors clause embraces non-jury cases.” Brief for Petitioner, at 10, *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 2001 AMC 913 (2001) (No. 99-1331); see also *id.* at 32-36. In other words, Mr. Dripps correctly argued to the Court in *Lewis* that the term “remedy” in the saving clause refers to the type of action available outside of admiralty without regard to whether there is a jury trial, but now he argues that the Panama Railroad Court’s paraphrasing of the term “remedy” in the same context refers to the type of trial (jury or nonjury).

[FN127]. See Defendant’s Brief, *supra* note 36, at 22-32.

[FN128]. *Panama Railroad*, 264 U.S. at 380 (Reporter’s summary of “Argument for Plaintiff in Error”); Defendant’s Brief, *supra* note 36, at 22.

[FN129]. See *supra* notes 64-69 and accompanying text.

[FN130]. Defendant’s Brief, *supra* note 36, at 22. See also *id.* at 22-26 (developing the argument in greater detail).

[FN131]. *Id.* at 23. The argument based on the plaintiff’s ability to elect the court is closely interwoven with the argument based on the plaintiff’s ability to elect the substantive law. Not surprisingly (see *supra* note 44), the defendant assumed that the new statutory remedy could be pursued only on the law side. See, e.g., *id.* at 10-11 (arguing that the Jones Act violates Article III, Section 2, of the Constitution because it gives the injured seaman “the privilege of proceeding in admiralty for maintenance and cure” or “of suing for full indemnity under the common law as modified by the railroad law,” and in the process “taking his case wholly from without the jurisdiction and principles of the maritime law, and of transferring it to the jurisdiction of a common law court”); 264 U.S. at 377-78 (Reporter’s summary of this argument); see also *supra* notes 41-49 and accompanying text (discussing this argument). Thus the choice of court and the choice of substantive law arguments were necessarily made in conjunction.

[FN132]. See Defendant’s Brief, *supra* note 36, at 23.

[FN133]. *Id.* at 22.

[FN134]. The contemporary commentary on *Panama Railroad* offers no hint that the decision gave Jones Act plaintiffs any special rights with respect to jury trials. See, e.g., Hughes, *supra* note 44.

[FN135]. *Panama Railroad*, 264 U.S. at 392.

[FN136]. See *Singer v. United States*, 380 U.S. 24 (1965) (holding criminal defendant has no right to a nonjury trial).

[FN137]. Great Lakes Act, ch. 20, 5 Stat. 726 (1845). To the extent that the Act remains in force, it is codified at

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28 U.S.C. §1873 (1994).

[FN138]. See 28 U.S.C. §1873. The statute now in force provides:

In any case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising upon or concerning any vessel of twenty tons or upward, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between places in different states upon the lakes and navigable waters connecting said lakes, the trial of all issues of fact shall be by jury if either party demands it.

Id.

[FN139]. *Panama Railroad*, 264 U.S. at 393.

[FN140]. See U.S. Const. amend. VII.

[FN141]. See Fed. R. Civ. P. 38.

[FN142]. See, e.g., *Scott v. Neely*, 140 U.S. 106, 109-10 (1891).

[FN143]. *Dripps*, supra note 8, at 132.

[FN144]. Id.

[FN145]. See supra note 87.

[FN146]. See *Dripps*, supra note 8, at 129 & n.16.

[FN147]. 795 F.2d 1210 (5th Cir. 1986).

[FN148]. See *Robertson & Sturley*, supra note 5, at 659-63.

[FN149]. See *Dripps*, supra note 8, at 129 & n.17; see also, e.g., id. at 135 & nn.62-63; id. at 139.

[FN150]. See id. at 129 n.17 (citing *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 392-93, 1924 AMC 551 (1924); *Texas Menhaden Co. v. Palermo*, 329 F.2d 579, 580 (5th Cir. 1964) (per curiam); *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726, 1953 AMC 1864 (3d Cir. 1949)).

[FN151]. See supra note 87.

[FN152]. See *Robertson & Sturley*, supra note 5, at 670 & nn.136-37.

[FN153]. See supra notes 87-93.

[FN154]. Elsewhere in the article, Mr. Dripps quotes a Second Circuit decision which said, "The 'election' contemplated by the Jones Act is primarily a decision as to the form of trial--whether jury or non-jury." *Dripps*, supra note 8, at 131 & n.28 (quoting *McAfoos v. Canadian Pac. Steamships, Ltd.*, 243 F.2d 270, 273, 1957 AMC 2493 (2d Cir. 1957)). Mr. Dripps does not cite this decision in support of his view that the unilateral election doctrine predates *Rachal*. Even if he had, *McAfoos* would not support his view (or the unilateral election doctrine). The Second Circuit treated the relevant Jones Act "election" as the choice between the law and admiralty sides in which the availability vel non of a jury is determined under the ordinary rules of procedure. See, e.g., *McAfoos*, 243 F.2d at 272 ("the election contemplated by the statute [is] between a suit in admiralty and a trial by jury"); id. at 273 ("this choice [between jury and nonjury trial] is governed by F.R.C.P., rule 38"); id.

("[e]xperience has demonstrated the felicity of the ordinary federal procedure") (emphasis added); *id.* ("Congress... intended that the time for seeking jury trial was to be governed by the ordinary rules of procedure") (emphasis added). The statement that Mr. Dripps quoted was simply the Court's recognition of the most important practical consequence of the election between the law and admiralty sides. Cf. *supra* note 84 and accompanying text.

[FN155]. 175 F.2d 724, 1953 AMC 1864 (3d Cir. 1949).

[FN156]. See *McCarthy*, 175 F.2d at 724.

[FN157]. See *id.* at 725.

[FN158]. See generally Douglas Laycock, *Modern American Remedies* 637-39 (3d ed. 2002) (discussing election of remedies). In the maritime context, situations often arise in which an injured worker must "elect" between two inconsistent remedies. For example, the Jones Act (which protects only "seamen") and the Longshore & Harbor Workers' Compensation Act (which excludes seamen) are mutually exclusive remedies. See 46 U.S.C. app. § 688(a); 33 U.S.C. §§ 901-950 (1994 & Supp. V 1999). See, e.g., *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 347 (1991). Although an injured worker who is unsure of her status may initially proceed under both, see, e.g., *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 91-92, 1992 AMC 305 (1991), ultimately only one action may succeed, see, e.g., *Sharp v. Johnson Bros. Corp.*, 973 F.2d 423, 426-27 (5th Cir. 1992).

[FN159]. See, e.g., *McGhee v. United States*, 165 F.2d 287, 289-90, 1948 AMC 139 (2d Cir. 1947); *Skolar v. Lehigh Valley R.R. Co.*, 60 F.2d 893, 894, 1933 AMC 88 (2d Cir. 1932). Both of these decisions were effectively overruled on this issue in *Balado v. Lykes Bros. S.S. Co.*, 179 F.2d 943, 945, 1950 AMC 609 (2d Cir. 1950).

[FN160]. 374 U.S. 16 (1963). See generally *Gilmore & Black*, *supra* note 5, §§6-23 to 6-25, at 342-51 (discussing the gradual process by which this issue was resolved in the federal courts).

[FN161]. See *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 727, 1953 AMC 1864 (3d Cir. 1949).

[FN162]. *McCarthy*, 175 F.2d at 726-27.

[FN163]. See, e.g., *supra* notes 55-58 and accompanying text; *Robertson & Sturley*, *supra* note 5, at 671.

[FN164]. See also *Gilmore & Black*, *supra* note 5, §6-25, at 346-47 (discussing *McCarthy*).

[FN165]. We read the language "thereby obtaining the right to a jury trial," *McCarthy v. American Eastern Corp.*, 175 F.2d 724, 726-27, 1953 AMC 1864 (3d Cir. 1949) (emphasis added), to mean that the right to a jury trial exists in a law-side Jones Act case by reason of the fact that it is a case on the law side, and not as a result of any statutory grant independent of the basis for jurisdiction.

[FN166]. 329 F.2d 579 (5th Cir. 1964) (*per curiam*).

[FN167]. See *Palermo*, 329 F.2d at 579.

[FN168]. See *id.* at 580.

[FN169]. See *id.*

[FN170]. The Great Lakes Act of 1845, to the extent that it remains in force, is now codified at 28 U.S.C. §1873. See *supra* note 138 (quoting §1873).

[FN171]. See *Texas Menhaden Co. v. Palermo*, 329 F.2d 579, 580 (5th Cir. 1964) (*per curiam*).

[FN172]. *Palermo*, 329 F.2d at 580 (emphasis in original).

[FN173]. *Supra* text at note 84; see also *Robertson & Sturley*, *supra* note 5, at 669-70 & nn.131-35.

[FN174]. 329 F.2d at 580.

[FN175]. See *Rachal v. Ingram Corp.*, 795 F.2d 1210 (5th Cir. 1986).

[FN176]. *Dripps*, *supra* note 8, at 128.

[FN177]. *Id.* at 128-29.

[FN178]. See *supra* notes 108-09 and accompanying text; *Robertson & Sturley*, *supra* note 5, at 663 & n.94; *id.* at 670.

[FN179]. 28 U.S.C. §1873. See *supra* note 138 (quoting §1873).

[FN180]. Mr. Dripps is correct to state that the Seventh Amendment does not apply in state court actions. See *Dripps*, *supra* note 8, at 146. We have already noted this jurisprudence. See *Robertson & Sturley*, *supra* note 5, at 654 & n.30; *id.* at 669 & n.128.

[FN181]. Mr. Dripps is correct in his observation that we “d[id] not analyze the state constitutional and statutory provisions underpinning the Illinois Appellate Court’s decision in *Allen [v. Norman Bros., Inc., 678 N.E.2d 317, 1997 AMC 1782 (Ill. App. Ct. 1997)]*.” *Dripps*, *supra* note 8, at 146 n.145. But this is not “[s]trange[.]” *Id.* Mr. Dripps obviously cares deeply about the Illinois constitutional and statutory provisions governing jury trials, particularly in the Jones Act context, because he regularly represents injured seamen in Illinois state court actions. See *id.* at 127 n.*.

Our concern, on the other hand, is not with the results of particular cases, but with the principled development of U.S. maritime law, including the proper interpretation of the Jones Act. If Illinois or any other state chooses to enforce special rules regarding the availability of jury trials in maritime actions in their courts, that is permissible as a matter of state law. (We express no view as to whether Illinois has in fact done this. Cf. *id.* at 149 & nn.170-71.) Federal law has no role to play in that decision, and state courts that have felt constrained to follow federal law on this question are mistaken. Cf. *infra* note 195 and accompanying text.

Because our concern is not with the individual states’ specific rules for the availability of jury trials under their local procedures, Mr. Dripps is wrong to say that we “make unsupported assumptions regarding the availability of jury trials in state courts.” *Dripps*, *supra* note 8, at 130. In fact we make no assumptions regarding the availability of jury trials in state courts. Our point is simply that when a Jones Act case is tried in state court, the state should follow its normal rules regarding the availability of jury trials, whatever those rules might be.

[FN182]. Mr. Dripps asserts that we “have argued... that a Jones Act defendant in state court always has a jury trial right.” *Dripps*, *supra* note 8, at 129 & n.15 (citing *Robertson & Sturley*, *supra* note 5, at 649). This is simply

wrong. Indeed, the cited page has no substantive discussion at all. Our actual views are summarized in the text here. For a more detailed discussion, see Robertson & Sturley, *supra* note 5, at 665-66, 673-75, 676. We have consistently explained “that the availability of a jury trial in Jones Act cases is a procedural question that is properly controlled by the normal law of the forum.” *Id.* at 676.

[FN183]. 342 U.S. 359 (1952).

[FN184]. See Dripps, *supra* note 8, at 143-44.

[FN185]. Dice, 342 U.S. at 363.

[FN186]. See, e.g., *American Dredging Co. v. Miller*, 510 U.S. 443, 456, 1994 AMC 913 (1994) (quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 439, 1958 AMC 251 (1958)) (“the Jones Act adopts ‘the entire judicially developed doctrine of liability’ under [FELA]”); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32, 1991 AMC 1 (1990) (stating when Congress “incorporat[ed] FELA unaltered into the Jones Act,” the judicial “gloss” on FELA was intended to be part of the package).

[FN187]. 241 U.S. 211 (1916).

[FN188]. Dripps, *supra* note 8, at 134 & n.59; see also *id.* at 141 & n.108, 146 & nn.146-47.

[FN189]. See *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952).

[FN190]. See *Bombolis*, 241 U.S. at 217-23.

[FN191]. See *Dice*, 342 U.S. at 363.

[FN192]. *Id.*

[FN193]. See *infra* notes 196-202 and accompanying text.

[FN194]. See, e.g., *Cox v. Roth*, 348 U.S. 207, 209, 1955 AMC 942 (1955) (holding that the death of an individual employer does not defeat a Jones Act claim even though FELA does not provide for the survival of actions against deceased tortfeasors because such a provision would have been unnecessary in the railroad context); *The Arizona v. Anelich*, 298 U.S. 110, 123-24 (1936) (holding that the FELA assumption-of-the-risk tied to the railroad-specific Federal Safety Appliance Act does not apply under the Jones Act); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377, 1933 AMC 9 (1932) (holding that the administrator of a deceased seaman could bring a Jones Act action based on the master's failure to provide proper care even though a FELA employer was not subject to such a duty because the duty was recognized under the general maritime law).

[FN195]. See, e.g., *Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 339-42 (1987) (holding that a state court had erred in taking an issue away from the jury over the defendant's objection).

[FN196]. Mr. Dripps is also unable to explain the related logical inconsistency that we have identified, see Robertson & Sturley, *supra* note 5, at 671-72 & nn.142-44; see also *id.* at 663 & nn.91-92, 667 & nn.118-21, whereby the same court that first denied a Jones Act defendant's right to a jury trial in a federal question case (in *Rachal*) nevertheless recognized a Jones Act defendant's constitutional right to a jury trial in a diversity case (*Johnson v. Penrod Drilling Co.*, 469 F.2d 897, 901-04, 1973 AMC 1862 (5th Cir. 1972), adopted on reh'g, 510

F.2d 234, 235 (5th Cir. 1975) (en banc) (per curiam)). If the Seventh Amendment does not apply in Jones Act cases, see *Dripps*, supra note 8, at 146, and the Jones Act itself gives only the plaintiff a statutory right to a jury trial, see, e.g., *id.* at 141, then what is the source of the diversity defendant's right to a jury trial? And whatever the source of the diversity defendant's right, why should the federal question defendant not also be protected? Mr. Dripps brushes past these questions with the astounding remark that "the 'federal question' [in Jones Act cases brought pursuant to 28 U.S.C. §1331] is actually admiralty jurisdiction," *id.* at 137, going on to note that the Seventh Amendment does not apply in admiralty cases, see *id.* In truth, of course, the federal courts have federal question jurisdiction over Jones Act cases by virtue of the Jones Act itself. See *Ballard v. Moore-McCormack Lines, Inc.*, 285 F. Supp. 290, 293 (S.D.N.Y. 1968) (stating that "[b]ecause a case arises under the law which creates the cause of action... a suit under the Jones Act is properly regarded as one arising under a law of the United States within the intendment of 28 U.S.C. §1331"); see also supra note 105 and accompanying text; *Robertson & Sturley*, supra note 5, at 658 & n.59 (discussing the *Panama Railroad* holding that the district court had federal question jurisdiction under the Jones Act). Admiralty alone cannot be a basis for federal question jurisdiction. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359-80, 1959 AMC 832 (1959).

[FN197]. 28 U.S.C. §1873. See supra note 138 (quoting §1873).

[FN198]. 53 U.S. (12 How.) 443 (1851).

[FN199]. 75 U.S. (8 Wall.) 15, 25 (1868).

[FN200]. 374 U.S. 16 (1963).

[FN201]. *Fitzgerald*, 374 U.S. at 20.

[FN202]. See, e.g., *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 224 (1958) (holding the same substantive rule applies in Jones Act cases "whether the action is at law or in admiralty, in the state or the federal courts"); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-44 & n.9 (1942) (holding the same substantive rule applies in Jones Act cases in state court, in federal court on the law side, and in admiralty); *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 324 (1927) (holding the same substantive rule applies in Jones Act cases at law and in admiralty); *Engel v. Davenport*, 271 U.S. 33, 38-39 (1926) (the same substantive rule applies in Jones Act cases in state or federal court); *Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391, 1924 AMC 551 (1924) (holding the same substantive rule applies in Jones Act cases at law and in admiralty).

[FN203]. The Seventh Amendment provides: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

[FN204]. *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

[FN205]. *Curtis*, 415 U.S. at 195.

[FN206]. See, e.g., *Tull v. United States*, 481 U.S. 412, 425-27 (1987) (holding that the Seventh Amendment does not guarantee a jury trial to assess civil penalties under the Clean Water Act).

[FN207]. Charles Alan Wright, *Law of Federal Courts* 653 (5th ed. 1994).

[FN208]. Dripps, *supra* note 8, at 129-30 (citing Robertson & Sturley, *supra* note 5, at 666).

[FN209]. See Robertson & Sturley, *supra* note 5, at 666.

[FN210]. *Id.* (quoting Curtis v. Loether, 415 U.S. 189, 195 (1974)).

[FN211]. See *id.* at 666-68 (describing the Seventh Amendment analysis).

[FN212]. Curtis v. Loether, 415 U.S. 189, 195 (1974).

[FN213]. See Curtis, 415 U.S. at 195.

[FN214]. Dripps, *supra* note 8, at 146 (emphasis in original) (citing Robertson & Sturley, *supra* note 5, at 668).

[FN215]. See Robertson & Sturley, *supra* note 5, at 669 & nn.129-30. Mr. Dripps also recognizes the principle of statutory interpretation on which we relied. See Dripps, *supra* note 8, at 130 n.24.

[FN216]. See, e.g., Robertson & Sturley, *supra* note 5, at 654 & n.30, 669 & n.128 (recognizing that the Seventh Amendment does not apply in state courts).

[FN217]. See, e.g., *id.* at 676 & nn.166-67 (arguing that state courts should not be bound by federal law in deciding the availability of jury trials under the Jones Act).

[FN218]. See, e.g., *id.* at 654 (“in state courts... the right to jury trial turns on state constitutional and on statutory provisions”); *id.* at 676 & nn.166-67 (arguing that state courts should recognize the right to a jury trial as a procedural question that is properly controlled by the right of the forum).

[FN219]. 531 U.S. 438, 2001 AMC 913 (2001). In *Lewis*, the Eighth Circuit had held that the employer/shipowner's invocation of the Limitation of Liability Act, 46 U.S.C. app. §§183-189 (1994 & Supp. V 1999), precluded Mr. Dripps's client from bringing a state-court Jones Act suit in which the plaintiff had not demanded jury trial. See *Lewis & Clark Marine, Inc. v. Lewis*, 196 F.3d 900 (8th Cir. 1999). In unanimously reversing, the Supreme Court focused on the Limitation Act and the saving to suitors clause. Whether Jones Act plaintiffs have a unilateral right to a bench trial was not discussed or considered.

[FN220]. Transcript of Oral Argument, at 10, *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 2001 AMC 913 (2001) (No. 99-1331) [hereinafter *Lewis Transcript*]. Oral argument transcripts are freely available (starting with the 2000 Term) on the Supreme Court's website, at http://www.supremecourtus.gov/oral_arguments/argument_transcripts.html. Older transcripts are also available on Lexis and WestLaw.

[FN221]. *Lewis Transcript*, *supra* note 220, at 11.

[FN222]. See *id.* Mr. Dripps argued that “the antiremoval provision in 28 U.S.C. [§] 1445(a)” prevented a defendant from removing a Jones Act case to federal court, where it “would be able to trigger the Seventh Amendment and get a jury trial.” *Id.*; cf. Dripps, *supra* note 8, at 140-42. He also cited *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1992 AMC 2789 (5th Cir. 1992). See *Lewis Transcript*, *supra* note 220, at 11. Cf. Dripps, *supra* note 8, at 132-33 (relying on *Linton*); Robertson & Sturley, *supra* note 5, at 663-65 (explaining that *Linton* was based on the *Rachal* mistake).

14 USFMLJ 229
14 U.S.F. Mar. L.J. 229

Page 36

[FN223]. Lewis Transcript, *supra* note 220, at 11. Chief Justice Rehnquist also observed that the Court had previously held in *Singer v. United States*, 380 U.S. 24 (1965), “that the Government can move for a jury trial even though the defendant doesn't want one.” *Id.* at 11-12. See also *supra* note 136 and accompanying text (citing *Singer*); *Robertson & Sturley*, *supra* note 5, at 675 n.161 (same).

[FN224]. See Lewis Transcript, *supra* note 220, at 11.

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THE HONORABLE MICHAEL J. HEAVEY
SUPERIOR COURT

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JONATHAN DEAN LEITE,

Plaintiff,

Case No. 03-2-08684-3KNT

v.

**ORDER DENYING
PLAINTIFF'S MOTION TO
STRIKE DEFENDANT'S JURY
DEMAND**

ALASKA FRONTIER COMPANY,

Defendant.

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This court, having considered plaintiff's motion to strike defendant's jury demand and materials in support thereof, opposition by defendant, and plaintiff's reply, if any, and the record to date, hereby DENIES the motion.

IT IS HEREBY ORDERED:

That defendant's jury demand is GRANTED.

DATED this 8th day of December, 2004.

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Michael Heavey
HONORABLE MICHAEL J. HEAVEY
Superior Court Judge

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Seaman have the right to elect to proceed in admiralty or at law. If they choose law the right to jury trials. It is not an election to select a bench or jury trial. This court has no admiralty jurisdiction. If Washington's constitution states the right to jury trial is "inviolable" (Art 2, § 21) Personal injury actions for damages from negligence (unseaworthiness is a type of negligence) existed at common law prior to 1889.

**ORDER DENYING PLAINTIFF'S MOTION
TO STRIKE DEFENDANT'S JURY DEMAND- 1**

HOLMES WEDDLE & BARCOTT
999 THIRD AVENUE, SUITE 2600 A-154
SEATTLE, WASHINGTON 98104-0111

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Presented By:

HOLMES WEDDLE & BARCOTT

Aimee L. Coon for
Philip W. Sanford, WSBA #18593
Attorney for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this 6th day
of December, 2004, a true and
correct copy of the foregoing was sent via
Hand Delivery to:

Robert M. Kraft
Levinson Friedman
720 Third Avenue, Suite 1800
Seattle, WA 98104-1845

Ann Forthuber
Ann Forthuber

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THE HONORABLE MICHAEL J. FOX
Date of Hearing: November 4, 2005
Without Oral Argument

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PARTIES/COUNSEL ON NOV 10 2005
Heikkila
Davies

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

PAUL R. ELLIOTT, JR.,

Plaintiff,

v.

FISHING COMPANY OF ALASKA,

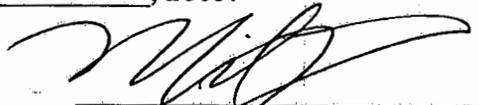
Defendant.

Case No. 04-2-20546-8 SEA
~~[PROPOSED]~~ ORDER DENYING
PLAINTIFF'S MOTION TO
STRIKE DEFENDANTS' JURY
DEMAND

This court, having considered plaintiff's motion to strike defendants' jury demand and materials in support thereof, opposition by defendant, and plaintiff's reply, if any, and the record to date, hereby ORDERS

That plaintiff's Motion to Strike Defendants' Jury Demand is DENIED.

DATED this 8th day of NOV., 2005.



THE HONORABLE MICHAEL J. FOX
Superior Court Judge

[PROPOSED] ORDER DENYING PLAINTIFF'S
MOTION TO STRIKE DEFENDANTS' JURY DEMAND

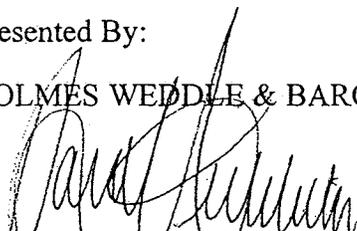
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HOLMES WEDDLE & BARCOTT
999 THIRD AVENUE, SUITE 2600
SEATTLE, WASHINGTON 98104-4011
TELEPHONE (206) 292-8008

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Presented By:

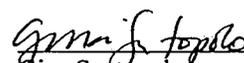
HOLMES WEDDLE & BARCOTT


Kara Heikkila, WSBA #27966
Attorneys for Defendant

CERTIFICATE OF MAILING

I hereby certify that on this 2nd day
of November, 2005, a true and
correct copy of the foregoing was sent via
Messenger to:

Richard J. Davies
Kraft Palmer Davies, PLLC
720 Third Avenue, Suite 1510
Seattle, WA 98104


Gina Santopolo



SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/21/04

DEPT. 86

HONORABLE TRACY T. MORENO

JUDGE

J.M. GURNEE

DEPUTY CLERK

HONORABLE
5

JUDGE PRO TEM

R. HICKMAN C.A.

ELECTRONIC RECORDING MONITOR

Deputy Sheriff

K. KOLL #4159

Reporter

8:30 am NC034507

Plaintiff

Counsel

DENNIS ELBER (X)

PETER CHODZKO

VS

Defendant

Counsel

WILLIAM ENGER (X)

CROWLEY MARINE SERVICES ET AL

~~COUDERT BROTHERS LLP~~

RECEIVED BY TELECOPIER

NATURE OF PROCEEDINGS:

MOTION FOR DETERMINATION OF COURT OR JURY TRIAL

DATE: 7.21.04

TIME: 16:40

The matter is called for hearing.

The court hears argument of counsel and takes the motion under submission and will rule by 4:00pm this date.

Counsel are to call for ruling.

RULING ON SUBMITTED MATTER:

The court's tentative ruling is to allow the defendant the right to a jury trial. The court recognizes that there is no California case on point.

The court finds that Craig v Atlantic Richfield from the 9th Circuit is not on point, as it involved an action filed in federal court and failed to address actions filed in state court. Similarly, Rachal v. Ingram, from the 5th Circuit is distinguishable, as it too involved an action in federal court. The court also finds Linton v. Great Lakes Dredge & Dock Co. unpersuasive as the case involved review of the district court's refusal to remand the case to state court.

The court thus finds that facts of Hutton v. Consolidated Grain and Barge and Hahn v. Nabors Off-

MINUTES ENTERED
07/21/04
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/21/04

DEPT. 86

HONORABLE TRACY T. MORENO

JUDGE

J.M. GURNEE

DEPUTY CLERK

HONORABLE
5

JUDGE PRO TEM

R. HICKMAN C.A.

ELECTRONIC RECORDING MONITOR

Deputy Sheriff

K. KOLL #4159

Reporter

8:30 am NC034507

Plaintiff

Counsel DENNIS ELBER (X)

PETER CHODZKO

Defendant

VS

CROWLEY MARINE SERVICES ET AL

Counsel WILLIAM ENGER (X)

NATURE OF PROCEEDINGS:

shore Corp. to be the closest to this case. As Hutton points out, neither Craig, Rachal or Linton expressly state that only the plaintiff in a Jones Act case filed in state court has the right to elect trial by jury. Applying a strict statutory construction, the Jones Act does not limit the right to trial by jury to the plaintiffs only. The Jones Act states that a plaintiff may "at his election" maintain an action for damages at law with the right to a jury. The court believes that the language involves plaintiffs right to choose the forum, not the right to elect a trial by jury. The Jones Act gives plaintiffs the election to pursue an action either in admiralty with no right to a jury trial or pursue an action "at law" with the right to a jury trial.

Here, plaintiff chose to file in state court. Denial of defendants state law jury trial guarantee offends the traditional notion of fairness. The court finds no public policy benefit in construing the Jones Act to give plaintiffs the sole right to elect between a jury trial or bench trial. Thus, the court adopts the reasoning set forth in Hutton and Hahn, and hereby grants defendants the right to a jury trial.

A copy of this minute order is sent via fax to the following:

DENNIS ELBER
(562) 435-8304

MINUTES ENTERED 07/21/04 COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 07/21/04

DEPT. 86

HONORABLE TRACY T. MORENO

JUDGE

J.M. GURNEE

DEPUTY CLERK

HONORABLE
5

JUDGE PRO TEM

R. HICKMAN C.A.

ELECTRONIC RECORDING MONITOR

Deputy Sheriff

K. KOLL #4159

Reporter

8:30 am

NC034507

PETER CHODZKO

VS

CROWLEY MARINE SERVICES ET AL

Plaintiff

Counsel

DENNIS ELBER (X)

Defendant

Counsel

WILLIAM ENGER (X)

NATURE OF PROCEEDINGS:

WILLIAM ENGER
(213) 229-2999

MINUTES ENTERED
07/21/04
COUNTY CLERK

TO WHOM IT MAY CONCERN:

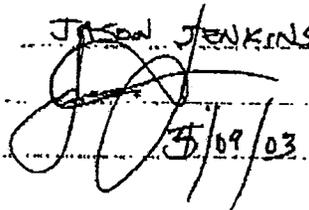
THE DAY OF JR'S ACCIDENT, WE WERE EXITING I BELIEVE FREEZER #3 ON THE BAD RAIL. WE HAD BEEN PLAGUED WITH THE FREEZER CART MISTRACKING ALL THE TIME.

(THE ACCIDENT)

AS WE WERE ABOUT (13-20 FT) FROM THE FREEZER ENTRANCE COMING OUT, IN A MATTER OF A SPLIT SECOND, JR'S ARM WAS CAUGHT IN BETWEEN THE FREEZER COIL AND CART. I HAD BEEN PUSHING THE CART, AND WAS CONCENTRATING ON KEEPING IT ON TRACK. JR WAS PULLING THE CART AT A REAL GOOD (FAST) LIP UNDERSTAND BLY.

I LATER HEARD HIS ACCOUNT OF THE ACCIDENT, AND HE SAID, "I TRIPPED ON THE METAL PLATE AT THE ENTRANCE AND MY ELBOW CAUGHT THE COIL AS I FELL BACK CATCHING THE CART"

JASON JENKINS



5/09/03

FILED
CLERK OF THE COURT
STATE OF WASHINGTON
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No. 61538-6-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

JUSTIN ENDICOTT,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of August, 2008, I caused
a true and correct copy of the Brief of Appellant Icicle Seafoods, Inc. to be
served on the following in the manner indicated below:

Via Hand Delivery
The Court of Appeals of the
State of Washington
Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

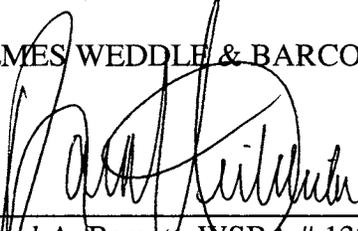
Via Hand Delivery
Counsel for Respondent:
Anthony Rafel
Rafel Law Group, PLLC
999 Third Avenue
Suite 1600
Seattle, WA 98104

Via Overnight Delivery
Counsel for Respondent:
Cory Itkin
Arnold & Itkin
5 Houston Center
1401 McKinney Street
Suite 2550
Houston, TX 77010

DATED this 19 day of August, 2008.

Respectfully submitted,

HOLMES WEDDLE & BARCOTT, P.C.



Michael A. Barcott, WSBA # 13317
Kara Heikkila, WSBA #27966
Thaddeus J. O'Sullivan, WSBA #37204
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Attorneys for Appellant