

Recent Developments in Maritime Law

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- **Punitive Damages are permitted under the General Maritime Law.** Exxon Shipping Co. vs. Grant Baker, 554 U.S. ___, (2008). This case involved the infamous supertanker M/V Exxon Valdez, which caused an enormous oil spill in 1989 in Prince William Sound, Alaska. Interestingly, the ship ran aground on Alaska’s Bligh Island Reef, named for Captain William Bligh, a central figure in the story of the mutiny on The Bounty.

The Supreme Court held that, The Clean Water Act’s water pollution penalties, 33 U. S. C. §1321, do not preempt punitive-damages awards in maritime spill cases and that punitive damages are permitted under the General Maritime Law.

The Court also held that punitive damages in a case must be limited to the amount of compensatory damages. In the Court’s words, “a 1:1 ratio is a fair upper limit in such maritime cases.”

- **Punitive Damages for failure to pay maintenance and cure.** Atlantic Sounding Co. vs. Townsend, 200 U.S. 321, 129 S.Ct. 2561 (June 25, 2009).

The U. S. Supreme Court reversed—no, no, no, interpreted its earlier case—Miles vs. Apex Marine Corp., 498 U.S.19 (1990) which held that while the General Maritime Law cause of action for death of a seaman did exist, damages for such an action cannot include non-pecuniary losses such as loss of society. The basis of the Court’s ruling was that the Death On The High Seas Act “by its terms, limits recoverable damages in suits for wrongful death on the high seas to ‘pecuniary loss sustained by the persons for whose benefit the suit is brought.’” And because the “Jones Act establishes a uniform system of seamen’s tort law.”

For many years numerous courts, including our Fifth Circuit, had interpreted Miles as precluding punitive damages. For example, Guevara vs. Maritime Overseas Corp, 59 F.3d 1496 (5th Cir. 1995) (*en banc*); Glynn vs. Roy Al Boat Mgmt. Corp., 57 F.3d 1495 (9th Cir. 1995). But these cases are now overruled, and the statutory scheme of Congress in fashioning uniform laws that would apply under both statutory recovery and General Maritime Law (common law) are now abrogated.

- Possible expansion of damages to permit Jones Act non-pecuniary damages in death cases. Judge Berrigan Order July, 2009 in In re Maryland Marine, Inc. (E.D. La. No. 08-1560, July 9, 2009).
- **Does Maintenance and Cure obligation cease when a seaman receives Social Security disability or Medicare benefits?**

In the “old days” seamen were entitled to free medical care by the government as a matter of law in the United States Public Health Service Hospitals. It was then well established that “a shipowner’s duty to provide maintenance and cure may ordinarily be discharged by ... admittance to a public hospital . . .” Kossick vs. United Fruit Co., 365 U.S, 731, 737 (1961). The Second Circuit held that since Medicare is the “functioning equivalent of the previously available free treatment at Public health Services hospitals”, this satisfies the employer’s obligation to furnish cure. Moran Towing & Transp. Co. vs. Lombas, 58 F.3d 24 (2nd Cir. 1995).

Recently, On September 25, 2009, the Third Circuit, rejected the reasoning of the Second Circuit’s Lombas decision, where the employer argued that the payment of Social Security Disability benefits (“SSD”) was the “functional equivalent” of the payment maintenance. Delaware River & Bay Authority vs. Kopacz, 584 F3d 623 (3rd Cir. 2009). The Third Circuit ruled that receipt of SSD payments does not relieve the seaman’s employer of the obligation to pay maintenance.

The reasoning of the Third Circuit appears somewhat obtuse, but for authority it relied on its decision in Shaw vs. Ohio River Co., 526 F.3d 193, 201 (3rd Cir. 1975), which involved payments received by a seaman under a state disability program: “The dispositive issue here, therefore, is whether SSD benefits provide the ‘exact equivalent’ of maintenance, or whether the two differ in their scope, purpose, and conditions of eligibility.” The court then goes on to an extended discussion of the “distinct policy aims” that differentiate SSD benefits and maintenance and cure and the “conditions of eligibility” for the two programs.

The Kopacz court states that, “SSD benefits are more closely analogous to LTD [Long Term Disability] payments, which aim to replace lost wages, than to maintenance.” I found this aspect of the court’s reasoning to be sound, but the court also engages in a multi-page discussion about the “conditions of eligibility for SSD by contrast [being] both more—and less—

stringent than those required to obtain maintenance.” It concludes that because the Lombas court did not consider whether the SSD payments were the “exact equivalent,” “[it]omitted an aspect of the offset analysis that we deemed ‘essential’ ... its holding lacks persuasive force” Kobacz goes on then to hold that the claimant’s receipt of SSD benefits did not relieve [the employer] of its maintenance obligation.”

This sets up an interesting possibility of a conflict in the circuits, which could well lead to the Supreme Court someday lending its voice to clarify these important and interesting issues.

Another interesting aspect of this Kopacz case is its holding that seaman who go home at night, after working on the vessel during the day, and thus do not receive from the shipowner/employer room and board are entitled, nonetheless, to maintenance and cure. “Today, we make explicit what was implicit in Barnes [an earlier case]: commuter seamen enjoy the same right to maintenance as their blue water counterparts.”

● **Mandatory arbitration of Louisiana Insurance policies. Will the courts soon order arbitration of Jones Act cases?** Safety National Casualty Corp. vs. Certain Underwriters at Lloyd’s, London, 587 F.3d 716 (5th Cir. *en banc*, 2009).

This case involved several contractual disputes among three insurance companies, concerning reinsurance claims, in which each of the insurance contracts contained an arbitration clause. After preliminary maneuvering irrelevant to this discussion, the District Court granted the plaintiffs’ motion to quash arbitration, holding that Louisiana law applied and that the matter would be tried in the United States District Court for the Middle District of Louisiana. Upon interlocutory appeal, the Fifth Circuit reversed, ordering arbitration. The Fifth Circuit *en banc* then addressed the issue, and it too ordered arbitration.

The ramifications of this decision could be immense, but before getting to that, an understanding of the underlying laws involved in the court’s decision is imperative.

The **Louisiana Insurance Act**, La. R.S. § 22:868, prohibits provisions in insurance contracts that would deprive the state courts of jurisdiction of actions against the

insurer and declares that any such provision shall be void.

“A. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state ... shall contain any condition, stipulation, or agreement:

(2) Depriving the courts of this state of the jurisdiction of action against the insurer.

C. Any such condition, stipulation, or agreement in violation of this Section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.”

Louisiana courts have thus held that arbitration agreements are unenforceable. McDermott Int'l, Inc. v. Lloyds Underwriters of London, 120 F.3d 583, 586 (5th Cir. 1997)

The **McCarran-Ferguson Act**, 15 U.S.C. §§ 1011 provides that "Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."¹⁷

The **McCarran-Ferguson Act** further provides, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ..., unless such Act specifically relates to the business of insurance" 5 U.S.C. § 1012(b)

So the **McCarran-Ferguson Act** authorizes state law to “reverse-preempt” federal law because the McCarran-Ferguson Act does not permit an "Act of Congress" to "invalidate, impair, or supersede" state law unless the Act of Congress "specifically relates to the business of insurance."

The **Convention on the Recognition and Enforcement of Foreign Arbitral Awards**, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3, states that each signatory nation "shall recognize an agreement in writing under which the parties undertake to submit to arbitration" their dispute "concerning a subject matter capable of settlement by arbitration." The Convention further provides that signatory nation's courts shall compel arbitration when requested by a party to an international arbitration agreement.

The Convention Act, 9 U.S.C. § 201, implementing legislation for the Convention, states that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 "shall be enforced in United States courts in accordance with this chapter."

The ramifications of this decision could really be enormous. In essence, any insurance policy with an arbitration clause written by a foreign insurer can now require arbitration of the underlying claim. And make no mistake, there are many foreign insurance policies in the maritime field, such as virtually all Lloyd's of London maritime hull and P & I insurance policies. And policies insuring land based property and casualty will also be impacted, not just maritime insurance.

Note that it is the underlying claim that is subject to arbitration. No matter what that underlying claim might be. If the underlying claim involves the Jones Act, an injured Louisiana seaman might be required to prosecute his claim in arbitration, perhaps in a venue far from Louisiana, based on the holding of this case. This would, if applicable, deprive the Jones Act seaman of his traditional right to trial by jury and the express jurisdiction specified in the act itself. 46 U.S.C. §688.

The Fifth Circuit's ruling in Safety National is in conflict with a case from the Second Circuit, which might hopefully lead the Supreme Court to take up this important issue. In Stephens v. American International Insurance Co., 66 F.3d 41 (2d Cir.1995) the court held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards is an Act of Congress, or at least "relies upon an Act of Congress for its implementation" and thus the treaty did not override the Kentucky insurance law at issue.

Short of the United States Supreme Court reversing the Fifth Circuit *en banc* decision in Safety National, a great number of maritime cases will be arbitrated in the future, to the detriment of Louisiana seamen as well as, perhaps members of the Louisiana bar.

- Powerful rogue wave in Winter crossing of the Pacific Ocean is Act of God, which precludes recovery under the Jones Act and the General Maritime Law. The court expressly found no negligence whatsoever on the part of the ship and the seaman's employer. Wendelboe vs. Exxon Shipping Co, et al., 6 So. 3rd 884 (La. 1st Cir. February 13, 2009).
- Ballet dancer not yet aboard cruise ship not a seaman under the Jones Act. Campbell vs. Royal Caribbean Cruises Ltd., ____ F.3d ____ (5th Cir. No. 08-41343, September 8, 2009).