

Identifying & Handling Jones Act Cases

Texas Trial Lawyers Association

Hot Tips for Hot Times

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I. INTRODUCTION

The purpose of this paper is to assist plaintiff's attorneys who do not regularly handle offshore injury cases. The primary focus of the paper is on identifying cases which fall within the Jones Act and on general concepts for handling such cases, including venue options, obtaining maintenance and cure, anticipating likely defenses including pre-filing procedural maneuvers commonly employed by Jones Act defendants, overcoming those defenses, and avoiding common Jones Act pitfalls.

The Jones Act is a complicated and convoluted area of law. It is unfamiliar territory for most personal injury lawyers. No seminar paper could cover the entire Jones Act in detail or address all the complications encountered in offshore injury cases. Accordingly, this paper aims to give the general personal injury practitioner an introduction into this area of the law, with special emphasis on identifying cases that fall under the Jones Act.

The author strongly advises lawyers without experience handling offshore injury cases to consult an experienced Jones Act attorney for advice and assistance before accepting an offshore injury or death case.

II. THE JONES ACT

The Jones Act is the common name for 46 U.S.C. §688, a federal statute passed to provide relief to injured railroad workers, and by extension, "seamen." It provides a statutory remedy for seaman injured in the course and scope of their Jones Act employment against their employer, and possibly others. The Jones Act provides, in relevant part, as follows:

Any seaman who shall suffer personal injury in the course and scope of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such actions 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; and in cases of death any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States confirming or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be in the court of the district in which the defendant employer resides or in which his principal office is located.

See 46 U.S.C. App § 688.

III. FAVORABLE ASPECTS OF THE JONES ACT & GENERAL MARITIME LAW

Unlike most personal injury claimants, Jones Act seamen receive favorable treatment if they are injured in the service of the vessel. For instance, Jones Act seamen are treated as "wards of the admiralty court." *See, e.g.*, 78 F.Supp.2d 603, 606 (S.D.Tex. 1999)("It is axiomatic that seaman are wards of the Admiralty court.").

Because Jones Act seamen are wards of the court, the Jones Act is "liberally construed in favor of injured seaman." *Addison v. Gulf Coast Contracting Servs, Inc.*, 744 f.2d 494, 501 (5th Cir. 1984).

The Jones Act and general maritime law provide an almost automatic remedy for seamen injured in the course and scope of their employment ("maintenance and cure.") In addition to maintenance and cure, injured seamen can bring negligence and unseaworthiness causes of action against their employer, the vessel owner(s), and responsible third parties. Jones Act negligence and causation standards are relaxed, and, for all intents and purposes, an unseaworthy vessel which causes injury means strict liability for the vessel owner.

The following sections summarize some of the more favorable features of the Jones Act and general maritime law.

A. “Maintenance & Cure”

Jones Act seaman are entitled to “maintenance and cure” if they are injured in the service of the vessel regardless of fault, unless the seaman is guilty of willful misconduct or egregious misbehavior. Maintenance and cure provides seamen medical care and treatment as well as the means of maintaining himself during his convalescence. It is the offshore equivalent of worker’s compensation benefits.

The doctrine of maintenance and cure has ancient origins, dating back to the Middle Ages when various sea codes provided special protections to mariners injured in the service of the ship. For example, Article VI of the Laws of Oleron provided that when a seaman was injured, “the master ought to set [the seaman] ashore, to provide lodging and candlelight for him . . . and likewise to afford him such diet as is usual in ship.” See *Cleirac, Jugmens D’Oleron, Article VI*; See also *Costa Crociere*, 939 F.Supp. 1538 (S.D.Fla 1996). Article XVIII of the Laws of Wisbuy stated that if a seaman was injured onshore, but in the ship’s service, he “shall be maintained and cured at the charge of the ship.” See *The Laws of Wisbury*, Article XVIII; See also *Reed v. Canfield*, 20 F.Cas. 426, 428 (D. Mass 1832) (No. 11,641).

The rationale behind maintenance and cure was explained in American courts as early as 1823, in *Harden v. Gordon*. 11 F.Cas. 480, 2 Mason 541, No 6047. In that case, Justice Story wrote as follows:

I have not been able to detect a single instance, in which the maritime laws of any foreign country throw upon seamen disabled or taken sick in the service of their ship, without their own fault, the expenses of their cure. On the contrary, the positive ordinances of the principal maritime nations expressly make these expenses a charge upon the ship. This is certainly the law of France, Denmark, Sweden, the Hanse Towns, Prussia, Holland, and probably of the Italian states.

Harden v. Gordon, 11 F. Cas. at 482.

Justice Story went on to describe the dangers inherent in the seafaring life, which underpin the justification for providing maintenance and cure to injured seamen:

Seamen are by the peculiarity of their lives liable to sudden sickness from the change of climate, exposure to perils, and exhausting labor. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. . . . In many voyages, particularly those to the West Indies, the whole wages are often insufficient to meet the expenses occasioned by the perilous diseases of those insalubrious climates.

Id. at 483.

In sum, American courts have long recognized and liberally interpreted maintenance and cure in favor of injured seamen.

The vessel owner and/or Jones Act employer has an affirmative duty to promptly investigate and pay maintenance and cure. *Etheridge v. Ranier Investments, Inc.*, 1988 AMC 2978 (D. Ct. Ark. 1998). Any doubts, uncertainties, or ambiguities about a seaman’s entitlement to maintenance and cure are to be resolved in the seaman’s favor. *Vella v. Ford Motor Co.*, 421 U.S. 1 (1975).

Seamen are entitled to maintenance and cure until they reach “maximum medical improvement,” which is a term of art in maritime law. Generally, maximum medical improvement is the point at which all future medical treatments are “palliative” in nature; that is, the treatments will not improve the seaman’s condition. You should be aware, however, that the standard for maximum medical improvement varies slightly from circuit to circuit. Make sure to research the standard applicable in your jurisdiction.

B. Negligence Under the Jones Act

Under the Jones Act, seamen are entitled to recover if the employer's negligence played any part, even the slightest, in producing the injury. *See Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997). The burden of proving negligence has been described as a "featherweight."

The theories of negligence available in Jones Act case are limited only by your creativity and imagination. Some recognized theories include the following: (1) failure to provide reasonably safe equipment and appliances; (2) failure to provide adequate safety measures; (3) failure to exercise care in selecting a competent master and crew; (4) assault by fellow crew members; (5) negligent orders, instructions or suggestions by supervisors; (6) requiring excessive duty or overtime; (7) failure to take appropriate protective measures in heavy weather; (8) failure to inspect properly; (9) failure to provide adequate medical treatment; (10) failure to rescue; (11) failure to warn of known hazards; (12) assigning inexperienced workers to operate machinery; (13) failure to comply with industry customs; (14) having an insufficient crew; (15) unreasonably slippery decks or stairs; (16) obstructions on deck; (17) requiring workers to carry unreasonably heavy loads; (18) having an insufficiently equipped vessel; and (19) failing to provide adequate protective clothing.

Under the Jones Act, the employer has a duty to provide adequate medical treatment. If a doctor recommended by the company fails to provide such treatment, the Jones Act employer is vicariously liable for the inadequate treatment. Moreover, if a doctor returns an injured seaman to duty, and it should be apparent to a layman that the seaman needs additional medical treatment, the Jones Act employer has a responsibility to intervene and obtain additional medical treatment for the injured seaman. *See e.g., Central Gulf Steamship Corp. v. Sambula*, 405 F.2d 291 (5th Cir. 1968); *De Centeno v. Gulf Fleet Crews, Inc.*, 798 F.2d 138 (5th Cir. 1986); *Fitzgerald v. A.L. Burbank & Co.*, 451 F.2d 670 (2nd Cir. 1971).

The Jones Act comparative negligence standard is different than the standard under Texas law. Under the Jones Act, the comparative negligence standard is "pure" comparative negligence. If a Jones Act seaman is found 90% negligent, he

will not be barred from recovering damages but will collect 10% of his total damages.

Causation under the Jones Act is also relaxed. Instead of the normal proximate cause standard, the Jones Act requires "legal cause," meaning that the negligent act contributed even the slightest degree to the injury. *See, e.g., Simeon v. T. Smith & Son, Inc.*, 852 F.2d 1421 (5th Cir. 1988); *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957).

If you can demonstrate a violation of an applicable safety statute, there is a presumption that the violation caused the injury. In such a case, the burden shifts to the Jones Act defendant to establish that the violation of the safety standard did not cause the accident or injury. *See, e.g., Reyes v. Vantage S.S. Co.*, 609 F.2d 140, 1981 AMC 1255 (5th Cir. 1980). This is the so-called "Pennsylvania Rule."

C. "Unseaworthiness"

In addition to negligence theories, vessel owners must provide a "seaworthy" vessel. This means the vessel, its crew, its appurtenances, and its operation must be "reasonably fit for the vessel's intended purpose." *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 1971 AMC 277 (1971).

The duty of seaworthiness does not depend on reasonable care, foreseeability, negligence, notice of the condition, or opportunity to correct. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 AMC 1503 (1960). For all practical purposes, an unseaworthy vessel which causes injury means strict liability for the vessel owner and/or operator.

A vessel can be unseaworthy as a result of "operational negligence." Operational negligence means conduct by an employee which makes the vessel unseaworthy. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). If the methods of operation are unreasonably dangerous, for example, this may result in an unseaworthy vessel. *Morales v. City of Galveston*, 370 U.S. 165 (1962). If the vessel owner and/or operator has failed to provide an adequate and competent crew, the vessel is unseaworthy as a matter of law. *Thezan v. Maritime Overseas Corp.*, 708 F.2d 175 (5th Cir. 1983). This could include providing an inadequate number of workers to carry out a

specific task; for example, assigning an inadequate number of workers to carry a heavy load. *Waldron v. Moore-McCormack Lines, Inc.*, 386 U.S. 724 (1967).

Another recognized unseaworthiness theory is requiring a seaman to work an unreasonable amount of hours. This can render a vessel unseaworthy. *Elms v. Crowley Marine Service, Inc.*, 1997 AMC 835 (W.D. Wa. 1996).

If a contractor or subcontractor creates an unseaworthy condition, the vessel owner is responsible for injuries caused by the condition whether the vessel owner had notice or not. *Edynak v. Atlantic Shipping, Inc.*, 565 F.2d 215 (3rd Cir. 1977).

Common unseaworthy conditions include (1) unreasonably slippery decks, (2) unsafe stairs, (3) obstructions on deck, (4) improper or defective tools or equipment, (5) a vessel that has been improperly equipped, (6) negligent orders, (7) assault by a fellow crewmember, (8) failure to warn of dangers (unless the danger is commonly known), (9) improper training or instruction, (10) inadequate safety equipment, and (11) improper protective clothing.

Seaworthiness does not require a perfect vessel. All that is required is “reasonable fitness,” which is determined by the “reasonable man” standard. *Allen v. Seacoast Products, Inc.*, 623 F.2d 355 (5th Cir. 1980).

The duty of a vessel owner to provide a seaworthy vessel applies only to seamen employed by the vessel. There is no duty of seaworthiness owed to passengers or visitors. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). There are some possible exceptions to this standard (for example, harbor workers who perform traditional “seaman”-type duties), but those exceptions are narrow.

D. The Statute of Limitations

The Jones Act provides a three-year statute of limitations.¹ Be cognizant, however, of a case

¹ “Unless otherwise provided by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years

currently pending before the United States Supreme Court, *Stewart v. Dutra*, 343 F.3d 10 (1st Cir. 2003). The *Dutra* case may take special purpose vessels out of the Jones Act, thus upsetting decades of established Jones Act jurisprudence and shortening the statute of limitations for injuries aboard special purpose vessels. The *Dutra* case is discussed in more depth later in this paper.

IV. RECOGNIZING A JONES ACT CASE

Your client has a Jones Act remedy if he was (1) a “seaman” (2) working on a “vessel” (3) “in navigation.” All three elements of this test must be met in order for the Jones Act to apply.

Most personal injury practitioners will immediately recognize certain cases as Jones Act cases. For example, a captain or member of the crew of a traditional ship who is injured offshore will almost always have a Jones Act remedy.

There are some cases, however, that non-Jones Act lawyers may not recognize as a potential Jones Act case because the case doesn’t involve a traditional “vessel” like a ship or barge. For example, workers assigned to offshore “special purpose vessels,” (like mobile drilling rigs) casino boat workers, and workers on floating cranes may be seamen.

The injury does not necessarily need to occur on the vessel for the Jones Act and maritime law to apply. Seamen injured onshore who are in the service of the ship when they are injured may be entitled to Jones Act remedies. For example, a seaman injured while commuting to his vessel is in the course and scope of his Jones Act employment and may be entitled to a Jones Act remedy if the vessel does not provide sleeping quarters and it is necessary for the seaman to commute to and from the vessel. *See, e.g., Williamson v. Western Pacific Dredging Corp.*, 441 F.2d 65 (9th Cir. 1971); *Diamond Offshore Management Co. v. Guidry*, 84 S.W.2d 256, 259-60 (Tex.App.–Beaumont 2002, pet. filed) (Jones Act case arose from automobile accident).

from the date the cause of action accrued.” *See* 46 U.S.C. § 763a.

A. “Seaman”

The Jones Act doesn't define “seaman” or “vessel” or “in navigation.” The courts have been left to define the terms, and over the years have addressed seaman status in a number of situations.

As an initial matter, captains of vessels and members of the crews of traditional vessels are almost always seamen as long as their injury occurs in the service of the vessel.

Workers assigned to a vessel (not necessarily captains or those assisting in navigation of the vessel) who are injured or killed in the service of the vessel may be Jones Act seamen. The Supreme Court has established two requirements for “seaman” status: (1) the employee's duties must contribute to the function of the vessel or the accomplishment of its mission, and (2) the employee must establish that he has an “employment-related connection to a vessel in navigation that is substantial in terms of its nature and duration.” *Chadris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). One critical question to ask your client is how much time he spent working offshore versus onshore. If the worker spent less than 30% of his time offshore, he or she is probably not a Jones Act seaman under *Chadris*. *Id.* at 371.

Harbor workers and ship repairers may or may not be seaman entitled to a Jones Act remedy. Some cases have held that where the harbor worker also qualifies as a “seaman,” he may recover his medical expenses and loss of income under applicable worker's compensation statutes and compensation for general damages under the Jones Act as long as the worker's compensation claim has not been actually contested and tried. *See Figueroa v. Campbell Industries*, 1995 AMC 793 (9th Cir. 1995).

Similarly, harbor workers on floating cranes used to load and unload ships may be seaman if the employee's connection to the vessel regularly exposes him to the “perils of the sea.” *See Endeavor Marine v. Crane Operators, Inc.* 234 F3d 287, 2001 AMC 581 (5th Cir. 2000).

Floating casino workers are probably not seaman under *Lane v. Grand Casinos of Mississippi, Inc.*, 708 So.2d 1377 (Ms. S. Ct. 1998) if they are regular land-based workers who perform work while the vessel is docked.

However, a casino barge can be a “vessel” under certain circumstances, and a worker assisting as a member of its crew may be considered a “seaman.” *See, e.g., Weaver v. Hollywood Casino-Aurora, Inc.*, 2001 U.S. App. Lexis 13870 (7th Cir. 2001). *See, e.g., Wiora v. Harrah's Illinois Corp.*, 2000 AMC 2259 (N.D. Ill. 1999) (full-time waitress employed on river boat casino is a “seaman” who can seek remedies under federal maritime law).

An anchor-handling crewmember assigned to various vessels who was injured after a several day mission on a vessel chartered by his employer was found to be a “seaman” in *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240, 1984 AMC 1740 (5th Cir. 1983).

If there is a question regarding seaman status, the fact finder will decide, subject to review by the courts.

B. “Vessel”

For an employee to be a “seaman,” he or she must be on a “vessel” which is “in navigation.” A “vessel” is floating structure used as an instrument of commerce or used to transport passengers, cargo or equipment from place to place on navigable waters. *See Giffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 1975 AMC 2527 (3rd Cir. 1975). Mobile offshore oil rigs and mobile offshore drilling units (so called “special purpose vessels”) typically are considered vessels. A structure which has no “transportation function” may still qualify as a vessel if it was actually involved in navigation at the time of the employee's injury. *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138, 1995 AMC 2093 (9th Cir. 1995). Casino boats, Jack-up drilling rigs, pile driving barges, dredge barges, and crane barges may be vessels.

The status of special purpose vessels like offshore oil rigs and work platforms has received considerable attention from the courts. Determining whether a special purpose vessel is a “vessel” under the Jones Act will involve careful consideration of the applicable law. One case listed three factors to determine whether a floating platform was a “vessel”: (1) whether the structure was constructed and used primarily as a work platform; (2) whether the vessel was moored or otherwise secured at the time of the injury; and (3) though it is capable of movement and sometimes moved in navigable waters,

whether the transportation function was incidental to its primary purpose. See *Burchett v. Cargill, Inc.*, 48 F.3d 173 (5th Cir. 1995).

The types of special purpose vessels are too numerous to list in this paper. If there is any doubt about whether the structure on which your client suffered injury was a “vessel,” be sure to thoroughly research the voluminous case law addressing the status of special purpose vessels.

C. “In Navigation”

A vessel is considered “in navigation” when it is “engaged as an instrument of commerce and transportation on navigable waters.” *McKinley v. All-Alaskan Seafoods, Inc.*, 980 F.2d 507, 1993 AMC 305, 308 (9th Cir. 1992). To determine whether a vessel is “in navigation,” you must apply a two-part test. The first part of the test is satisfied if the vessel is in navigation, that is, it must not have been withdrawn from navigation. The second part of the test requires that the vessel be afloat in navigable waters.

A vessel permanently affixed to the ocean floor is probably not a vessel in navigation. See, e.g., *Thompson v. Crown Petroleum Corp.*, 418 F.2d 239. A dredge employed only on artificial irrigation canals is not in navigation in that it did not move on navigable waters. *Stanfield v. Shellmaker, Inc.*, 869 F.2d 521 (9th Cir. 1989). A vessel which has not been commissioned to navigate is not a vessel “in navigation.” For example, if ship is on sea trials it is probably not yet a vessel “in navigation” for purposes of the Jones Act and the workers aboard the vessel are probably not “seamen.” See *Reynolds v. Ingalls Shipbuilding Div.* 788 F.2d 264 (5th Cir. 1986).

Note that a vessel does not necessarily need to be navigating to be “in navigation.” For example, a gambling riverboat was not removed from navigation during a period of four months when it was moored to the dock because of low water on Mississippi River. See *Greer v. Continental Gaming Co.*, 5 S.W.3d 559 (Mo. Ap. 1999). Another example is a vessel in dry dock or port under routine repairs. Such a vessel will be considered “in navigation” unless it has been laid up or actually withdrawn from navigation. See *Senko v. LaCross Dredging Corp.*, 352 U.S. 370, 373 (1957).

V. HANDLING JONES ACT & MARITIME CASES

A. Venue Options

Once you have determined that your client is entitled to a Jones Act remedy, you need to select the most appropriate forum for bringing the lawsuit. The Jones Act provides a number of options.

In the author's experience, most attorneys without Jones Act experience assume that Jones Act cases must be filed in federal court. Not true. Federal court is only one option. The other option is state court. Importantly, in Texas at least, Jones Act seamen may file in state court in the county in which a substantial part of the events occurred, the county of the defendant's principal office in the state, or ***the county where the plaintiff resided at the time the cause of action accrued.*** See Tex.Civ.Prac.& Rem. Code §15.018.

If you choose to file your client's lawsuit in federal court, and the Jones Act and maritime law are the only basis for federal jurisdiction, you will probably try your case to the bench. However, if there is an independent basis for federal jurisdiction (for example, diversity), you may be entitled to a jury trial.

You can elect to proceed on the Admiralty side of federal court by a simple statement in the pleading to the effect that the claim is an admiralty or maritime claim. See F.R.Civ.P. 9(h); See also *T.N.T. Marine Serve., Inc.*, 702 F.2d at 587 (quoting Fed.R.Civ. P. 9 advisory committee note (1966 amendment)). A discussion of the relative advantages and disadvantages of the Admiralty side and the diversity side of federal court is beyond the scope this paper. Suffice it to say that you should be aware of your federal court options, research the advantages and disadvantages that may apply to your client's case, and make an informed decision before filing suit in federal court.

If you choose to file the lawsuit in state court, your client will be entitled to a jury and the case is generally not removable. See *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. at 455. This result is mandated by 28 U.S.C. §1331(1), the "savings to suitors" clause, which saves to a

Jones Act seaman his choice of forum and the right to trial by jury for his action brought under the Jones Act. See, e.g., *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d at 406.

As in most injury and death cases, where you choose to file your lawsuit may be the most important decision you make in the entire case. You have a number of attractive choices in a Jones Act case. Choose carefully.²

B. Obtaining Maintenance & Cure and Anticipating Defenses

One of the first things you want to do when you accept a Jones Act case is to determine whether your client is receiving maintenance and cure benefits. If the employer is not providing maintenance and cure benefits, you should take steps to obtain maintenance and cure benefits and preserve this issue for trial.

To obtain maintenance and cure and preserve this issue for trial, you should obtain all of your client's medical records and bills as soon as possible. You should also obtain the accident report, if possible. You should obtain any pertinent pictures of the accident scene and your client's injuries. As you collect this information, you should forward it to the Jones Act employer along with a demand for commencement of maintenance and cure benefits. A sample demand letter is attached to this paper in the appendix.

As the case proceeds, you should continue to send medical records and bills to the Jones Act employer.³ Your letters, and any responses from the lawyer for the Jones Act employer, may become exhibits at trial. You should paper the file with this in mind.

There are limited defenses in a maintenance and cure claim. One defense is willful misconduct on the part of the injured seaman. A seaman who engages in willful misconduct and is injured as a result is not be entitled to maintenance and cure. *Matthews v. Gulf & South American S.S. Co.*, 1964 AMC 305 (E.D.

² Sample Federal court and state court petitions are attached in the appendix of the paper.

³ Or, obviously, to the employer's lawyer once the lawsuit has been filed or the employer has hired a lawyer.

La 1964). Examples of willful misconduct include gross drunkenness, alcoholism, fighting, suicide, or contracting a venereal disease.

Most willful misconduct cases involve egregious conduct. In almost all instances, the willful misconduct defense will be obvious immediately. Keep in mind that questionable conduct which does not necessarily rise to the level of willful misconduct should not prevent a Jones Act seaman from receiving maintenance and cure benefits, because any doubts about the entitlement to maintenance and cure are resolved in favor of the injured seaman.

Another defense to payment of maintenance and cure involves misrepresentations on a pre-employment physical examination. A seaman who intentionally conceals his physical condition in a pre-employment physical examination or employment application forfeits his rights to maintenance and cure if he is later injured. *Wactor v. Spartan Transp. Co.*, 27 F.3d 347 (8th Cir. 1994). There is a difference between "non-disclosure" and "intentional concealment." A seaman does not have to volunteer information about his medical history. But a seaman is required to answer questions about his past medical history truthfully.

The misrepresentation must be material, that is, there must be some proof that the condition would have affected the decision to hire. If the seaman believes in good faith that he was physically fit for duty, he may be able to avoid the misrepresentation defense. Further, the vessel owner must establish a "causal link" between the concealed condition and later injury.

The Jones Act practitioner should be particularly cognizant of the misrepresentation defense because it may eliminate the most basic benefit Jones Act seaman are entitled to receive. Before presenting your client for deposition, make sure to obtain all records relating to any pre-employment physical exam and all medical records pre-dating the injury. If your client answered questions on his pre-employment physical exam in a way that is inconsistent with his prior medical history, you need to find out why and prepare your client to answer questions about the discrepancy. For example, your client may have been rushed during the exam, or failed to understand the questions posed during the exam, or answered a pre-employment

questionnaire in a way that appears untruthful but can be explained.

If possible, and within the bounds of honesty and legal ethics, you do not want your client to tell the defense attorney during his deposition that he simply lied about his physical condition or intentionally concealed material facts about his past medical history. The best course of action is to find out if a pre-employment physical examination was conducted, know how your client responded to questions posed by the employer, and determine whether your client's responses are consistent with his medical history. In other words, be prepared, and prepare your client accordingly.

VI. COMMON JONES ACT DEFENSE TACTICS

A. Pre-emptive Declaratory Judgment Action

One of the most common defense tactics is a "pre-emptive" declaratory judgment action, in which the defendant files a Declaratory Judgment action in federal court asking the federal court to declare its obligation to pay maintenance and cure. Defense lawyers frequently employ this tactic to forum shop and prevent the injured seaman from moving forward with his claims in state court in front of a jury.

Ideally, the lawyer representing the injured seaman will file a claim seeking maintenance and cure together with the main negligence and unseaworthiness claims before the Jones Act defendant files a declaratory judgment action. If you file first, you should be able to get the federal case dismissed.

Even if you don't file first, because the Jones Act contains a "savings to suitors" clause, federal courts typically recognize the defendant's efforts at forum shopping and will remand the case to state court as long as there is a pending state court case and you file the appropriate motion to remand by the applicable deadline. If you do not file first, you should immediately file a claim in your chosen forum, include maintenance and cure, negligence, and unseaworthiness claims as appropriate, and file a motion to remand within the applicable deadline(s).

B. Limitation of Liability Claim

One of the best defenses in a significant maritime personal injury case is the Limitation of Liability Act. The Limitation of Liability Act allows a ship owner to limit its liability to the value of the vessel, its cargo, and the freight on the date of the incident. In a limitation proceeding, the ship owner files a claim in federal court similar to a bankruptcy proceeding, which stays pending state court claims and forces the plaintiff into federal court.

The purpose of the Limitation of Liability Act stems from the perceived competitive disadvantage American ship owners operated under in the mid-1800s compared to British ship owners. At the time, British ship owners were able to avail themselves of a limitation proceeding while American ship owners were not. In response to this perceived competitive disadvantage, Congress enacted a statute similar to the current Limitation Act.

Although the reason for the original passage of the Act no longer exists (most developed maritime nations have eliminated limitation proceedings), and federal courts have begun to construe the Limitation Act narrowly, it is still a very valuable weapon in the maritime defense lawyer's arsenal. If you have a significant maritime personal injury claim, you should anticipate a Limitation of Liability proceeding.

A limitation proceeding can be brought in the district in which the vessel is currently located, or, if the vessel is not within any district, then the limitation proceeding can be brought in any district. Note, however, that if suit has already been filed in federal or state court against the ship owner, then the limitation proceeding must be filed in the federal district where the lawsuit is pending.

A limitation action gives the ship owner an automatic stay of claims by injured seamen. Rule F(3) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure provides that on application of the plaintiff⁴, "the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's

⁴ Note that the ship owner is the plaintiff in a limitation proceeding.

property with respect to any claim subject to limitation in the action.”

There is an exception to this rule. A stay can be lifted when (1) the total amount of the claims does not exceed the vessel’s declared value, and (2) when all claimants stipulate that the federal court has exclusive jurisdiction over the limitation action and all claimants stipulate that they will not seek to enforce a judgment exceeding the declared value of the vessel until the federal court has determined the ship owner’s rights in the limitation proceeding. *See In re Kirby Inland Marine, L.P.*, 237 F.Supp.2d at 755.

The ship owner is not entitled to protection of the Limitation Act if the loss occurred with its “privity or knowledge.” *See In re Bayview Charter Boats, Inc.*, 692 F.Supp. 1480, 1482 (E.D.N.Y. 1988). In a limitation proceeding, most of the work will be done trying to determine the ship owner’s privity or knowledge.

A cautionary note: The Limitation Act is one of the more complex features of maritime law. This author strongly recommends that practitioners lacking experience in limitation proceedings consult an experienced maritime lawyer immediately if you suspect a limitation proceeding will be filed.

C. Releases of Claims, Including Oral Releases

Jones Act defendants sometimes try to settle with an injured seaman before the seaman is represented by counsel. They attempt to convince the seaman to sign a release of claims. Such releases are enforceable subject to review by the Court. Importantly, oral releases are also enforceable, consistent with a long history in maritime law of enforcing oral contracts. *Sea-Land Service, Inc. v. Sellan*, 64 F.Supp.2d 1255 (S.D. Fl. 1999).

Because seamen are treated as wards of the Admiralty court, releases are looked upon with suspicion. The Eastern District of Illinois, quoting an 1823 opinion from the Circuit Court of Massachusetts, wrote as follows:

Every court should watch with jealousy an encroachment upon the rights of seaman, because they are unprotected and need

counsel; because they are thoughtless and require indulgence; because they are credulous and complying. . . They are emphatically the wards of admiralty, and though not technically incapable of entering into a valid contract, they are treated in the same manner, as courts of equity are accustomed to treat young heirs . . . They are consider as placed under the dominion and influence of men who have naturally acquired a mastery over them; and as they have little of the foresight and caution belonging to persons trained in other pursuits of life, the most rigid scrutiny is instituted in the terms of every contract, in which they engage.

See In re Complaint of Ruley, 1989 AMC 344, 345-46 (E.D.II. 1988) (quoting *Harden v. Gordon*, 11 Fed. Cas. No. 6047 (Cir. Ct. D. Ma.)).

The vessel operator and/or owner has the burden to prove the release was executed appropriately, and courts look upon seaman’s release paternalistically. The party seeking to enforce a release against a seaman must prove that the release was “executed freely, without deception or coercion, and were made by the seaman with a full understanding of his rights.” *Garrett v. Moore-McCormack, Co.* 317 U.S. 239 (1942). Inadequacy of the consideration for the release, standing alone, is not enough to invalidate a seaman’s release. It is, however, evidence that the seaman did not fully understand his rights.

VII. COMMON JONES ACT PITFALLS

A. Retain an Economist

If your client is seeking to recover future lost wages, you must retain an economist. This results from a 1983 Fifth Circuit case, *Culver v. Slater Boat Co.*, 722 F.2d 114 (referred to as “*Culver II*”).

Culver II resulted from confusion about the most appropriate way to calculate future damages in maritime injury cases. In *Johnson v. Penrod Drilling Co.*, 510 F.2d 2234 (5th Cir. 1975), the Fifth Circuit held that juries “should not be instructed to take into account future inflationary or deflationary trends in computing lost earnings. . .”. *Culver II*, 722 F.2d at 117. The *Penrod* case was subsequently overruled in *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir.

1982) (*Culver I*). In *Culver I*, the Fifth Circuit held that evidence of inflation's probable effect on damage awards should be admissible. The Fifth Circuit also addressed the proper method for considering future economic conditions. The court concluded that this issue should be resolved on case-by-case basis. *Id.*

After *Culver I*, the United States Supreme Court cited *Culver I* approvingly and confirmed that the fact finder should consider inflation in determining appropriate damage award. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). However, the Supreme Court expressed its fears that adjustment for inflation calculations would convert maritime injury trials into "graduate seminar[s] on economic forecasting." *Id.*

Following the Supreme Court's decision in *Laughlin Steel*, the Fifth Circuit decided *Culver II*. The Fifth Circuit decided *Culver II* to address the Supreme Court's concern about maritime injury trials turning graduate seminars on economic forecasting.

Culver II states that as an initial matter, calculating future damages requires reaching conclusions about four assumptions: (1) estimating the loss of work life resulting from the injury or death; (2) determining the loss income stream as a result of the injury or death; (3) adding up the total damages; and (4) discounting the amount of total damages to its present value.

In *Culver II*, the Fifth Circuit was primarily concerned with the fourth factor. The court held that fact finders in the Fifth Circuit "must adjust damage awards to account for inflation according to the below-market discount rate method." *Culver II*, 722 F.2d at 122. The court allowed parties to stipulate to the appropriate market discount rate. In the absence of agreement about the appropriate market discount rate, the court held that parties "may introduce expert opinion concerning the appropriate rate." *Id.*

In this practitioner's experience, the parties never agree on appropriate market discount rate. Therefore, as a practical matter, *Culver II* requires Jones Act lawyers to retain an economist to establish the appropriate calculations for future loss of earning capacity.

While it is not necessary that you hire an economist with experience calculating damages in Jones Act cases, it is highly recommended. First, the economist will be familiar with the appropriate methodology for calculating future lost wages. Second, your economist will be able to address damage defenses frequently raised in Jones Act cases, particularly cases involving defendants engaged in the offshore drilling industry.

One defense often raised by defendants engaged in the business of offshore drilling relates to conditions unique to the industry. Historically, the availability of work in the offshore drilling industry has fluctuated significantly. Moreover, the hazards of offshore maritime employment make long careers the exception rather than the rule. Various studies suggest that offshore oil field employees have a shorter average work life expectancy than members of the at-large labor force. Defendants attempt to introduce these studies as a way of attacking future damage calculations.

Courts are split on the admissibility of reports concluding that offshore oil field employees have shorter work life expectancies, because many of the studies employ general statistical analysis, which is not necessarily relevant to an individual seaman. You should object to any report suggesting that offshore oil field workers enjoy shorter work life expectancies.

Although defendants have had difficulty proving shorter than average work life expectancies through general statistical reports, as a general matter, they have been allowed to reduce future economic loss projections by reference to overall industry conditions. *See Book v. Nordrill, Inc.*, 826 F.2d 1457, 1461 (5th Cir. 1987).

In summary, hire an economist, and, if possible, hire an economist with experience in Jones Act cases.

B. An Important Case -- *Stewart v. Dutra*

A recent case may have far-reaching implications for Jones Act seaman on special purpose vessels. The case is *Stewart v. Dutra*, 343 F.3d 10 (1st Cir. 2003). Two opinions have been issued by the First Circuit Court of Appeals which relate to the case (*Stewart I & Stewart II*). *Stewart I* is reported at 230 F.3d 461 (CA1

2000) and at 2001 AMC 1116). For purposes of this paper, only *Stewart I* is relevant.

The United States Supreme Court has accepted certiorari to address the issues presented in *Stewart I*. An opinion by the Supreme Court upholding the First Circuit's holding in *Dutra* may strip the protections of the Jones Act from workers on special purpose vessels in certain circumstances.

The factual background of *Dutra* is important. *Dutra* was a dredging company hired to perform work in an immersed tube tunnel under Boston Harbor (the "Ted Williams" tunnel). The dredge SUPER SCOOP and Scow 4 were used for the work. The SUPER SCOOP was a dredge with a clamshell bucket which moved through the Boston Harbor, digging out the ocean floor as it moved. Scow 4 was brought alongside the SUPER SCOOP and filled with the dredging material scooped by the SUPER SCOOP.

Willard Stewart, a marine engineer, worked for *Dutra*. He spent the majority of his time on the SUPER SCOOP. Occasionally, he worked aboard Scow 4. On July 15, 2003, Stewart fell from an unguarded hatch on Scow 4 after the SUPER SCOOP's crew moved the scow. He was injured severely.

The district court granted *Dutra*'s motion for summary judgment under the Jones Act, holding that the SUPER SCOOP was not a "vessel" under the Jones Act. Stewart appealed, and the First Circuit affirmed the lower court's decision. The United States Supreme Court accepted certiorari to resolve a conflict between the First Circuit's "vessel" test and the test employed by other circuits.

Dutra is significant because the test employed by the First Circuit for special purpose vessels like dredges, work platforms, offshore oil rigs, etc. depends on what the vessel is doing at the time of the worker's injury. If the vessel is actually navigating at the time of the injury, the worker is on a "vessel" "in navigation," and therefore he is a "seaman" under the Jones Act. If, on the other hand, the vessel is dredging, or drilling oil, or not actually navigating at the time of the injury, the First Circuit's restrictive vessel test would hold that the worker is not a seaman because he was not injured while the vessel was in navigation.

There have been many amicus briefs filed on behalf of Stewart, including briefs filed on behalf of the offshore oil industry which urge the United States Supreme Court to reject the First Circuit's vessel-status test.

If you handle Jones Act or maritime law claims involving special purpose vessels, keep a close eye on the *Dutra* case.

VIII. TRYING A JONES ACT CASE – STRATEGIC & TACTICAL CONSIDERATIONS

The Jones Act is one of the few remedial schemes remaining which favors injured plaintiffs. In this practitioner's experience, jurors will often believe that if an employee is injured at work, the employer should be responsible for medical bills and any lost wages, whether he was onshore or offshore, and whether the company was at fault or not. In this respect, Jones Act cases are like non-subscriber cases.

If the Jones Act employer has refused to pay maintenance and cure or terminated maintenance and care benefits too soon, emphasize this point. Jurors have a tendency to get upset with employers who fail to take care of their injured employees. Additionally, the jury will read their jury instructions for maintenance and cure, and, in most cases, be able to reach only one conclusion. And once the jurors have concluded that the defendant wrongfully withheld maintenance and cure benefits, they will be more likely to award past lost wages, lost future wages, and non-economic damages available under the Jones Act.

You should also take every opportunity to emphasize the negligence and unseaworthiness instructions because they are very favorable. You can find the Fifth Circuit's pattern instructions on the Fifth Circuit web site at www.ca5.uscourts.gov.

Finally, a significant number of injured Jones Act seamen are relatively uneducated but make significantly more money than their peers with the same education level. In many cases, it is highly unlikely that an uneducated seaman injured in the course and scope of his Jones Act employment and unable to work offshore will find employment onshore at a salary

commensurate with the salary he earned offshore. Emphasize this point.

prevent your client from receiving maintenance and cure benefits, something you want to avoid.

IX. CONCLUSION

The first thing you should consider when you review a potential Jones Act case is whether your client is a "seaman" working on a "vessel" "in navigation," and whether your client was injured in the course and scope of his offshore employment. This will be the determining factor in deciding whether to file a lawsuit under the Jones Act.

When you try your client's Jones Act case, if the client's employer refused to pay maintenance and cure, stress to the jury the legal standards and obligations imposed on a Jones Act employer. In this practitioner's experience, juries have a tendency to punish defendants who fail to pay maintenance and cure. You should also emphasize the legal standards governing negligence, because they are extremely favorable to injured seamen.

After you have determined that your client is a "seaman" who was on a vessel in navigation when he was injured, you should next determine your liability theories and who you should sue. Proper parties in an offshore injury case include the client's employer, the vessel owner or operator, and any negligent third-party contractors.

Finally, if you have a case involving an unseaworthy vessel, focus sufficient time on this aspect of the case, because an unseaworthy condition which causes injury means strict liability for the vessel owner(s).

Good luck.

You should determine at the outset of the case whether your client is receiving maintenance and cure benefits. If your client is not receiving maintenance and cure benefits, make a demand immediately upon the client's Jones Act employer. Make sure you provide your client's medical records and bills as the case proceeds, and continue to request maintenance and cure benefits in writing.

Before filing suit, you should carefully consider all of the venue options available under the Jones Act, including federal court or state court. After determining the most appropriate venue in which to file your client's lawsuit, file the lawsuit and anticipate likely defenses. You should be particularly wary of a preemptive declaratory judgment action and a limitation of liability proceeding. Both of these defenses require prompt action on your part to protect your client's interests and obtain the best possible recovery.

When you present your client for deposition, spend the necessary time reviewing the applicable documents and preparing your client for the questions that Jones Act defense lawyers will ask. Pay particular attention to any evidence indicating that your client failed to answer pre-employment physical examination questions with full candor. A misrepresentation on a pre-employment physical examination may

X. APPENDIX

- A. Maintenance & Cure Letter
- B. Form State Court Jones Act Petition
- C. Form Federal Court Jones Act Petition