
CREW CLAIMS IN THE UNITED STATES: RECENT DEVELOPMENTS



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Updates and Recent Trends in Crew Claims

- ❑ Review of the Jones Act, unseaworthiness and maintenance and cure
- ❑ Arbitration of crew claims
- ❑ Medicare secondary payer issues and set aside agreements
- ❑ British secondary payer considerations
- ❑ Developments in maintenance and cure claims
- ❑ Infectious disease claims

THE JONES ACT

- ❑ Any seaman who shall suffer personal injury in the course of his employment may maintain an action for damages at law against his employer. 46 U.S.C. § 30104.
- ❑ The Jones Act allows a seaman to sue his employer and obtain a jury trial.
- ❑ Under the “Savings to Suitors” clause, 28 U.S.C. §1333, a seaman may elect to bring his suit in a state court instead of a federal court.

THE JONES ACT

- ❑ A seaman's burden of showing causation to recover in a Jones Act claim is “feather-weight.” *Smith v. Trans-World Drilling Co.*, 772 F.2d 157 (5th Cir. 1985).
- ❑ Evidence of the “slightest” negligence is sufficient to sustain a finding of Jones Act liability. *Theriot v. J. Ray McDermott & Co., Inc.*, 742 F.2d 877 (5th Cir. 1984).

WHAT IS THE WARRANTY OF SEAWORTHINESS?

- ❑ Vessels and their operators owe members of a vessel's crew the duty to furnish a seaworthy vessel.
- ❑ The duty is absolute.



WHAT IS THE WARRANTY OF SEAWORTHINESS?

- This duty has been described by the United States Supreme Court as follows:
 - It is a species of liability without fault.
 - It is derived from and shaped to meet the hazards which performing the services imposes.
 - The liability is neither limited by conceptions of negligence nor contractual in character.

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).

CAUSATION OF INJURY DUE TO UNSEAWORTHINESS

- ❑ The standard of causation for unseaworthiness is more demanding than that of the Jones Act. *Chisolm v. Sabine Towing & Transportation Co.*, 679 F.2d 60 (5th Cir. 1982).
- ❑ To establish a claim for unseaworthiness, the claimant must prove that:
 - the unseaworthy condition played "a substantial part" in bringing about or actually causing the injury; and
 - that the injury was either the direct result or reasonably probable consequence of the unseaworthiness.

Johnson v. Offshore Express, Inc., 845 F.2d 1347, 1354 (5th Cir. 1988).

MAINTENANCE AND CURE

- ❑ Maintenance is a per diem living allowance, paid so long as the seaman is outside a hospital and has not reached the point of "maximum cure." *Pelotto v. L & N Towing Co.*, 604 F.2d 396 (5th Cir. 1979).
- ❑ Maintenance covers the cost of food and lodging similar to that aboard the vessel, and therefore, the amount may vary depending on what was provided by the ship and the equivalent shore side costs in the area where a seaman is required to recuperate. *McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir. 1986);
- ❑ The seaman does not have to prove that his injuries or illness resulted in any way from his employment, let alone establish that his employer is at fault; it is enough that the symptoms manifest themselves during the employment. *Stevens v. McGinnis, Inc.*, 82 F.3d 1353 (6th Cir.), cert. denied, 117 S.Ct. 433 (1996), citing *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 58 S.Ct. 651 (1938).



CURE

- ❑ The seaman's employer is obligated to provide medical treatment or "cure" whenever the seaman becomes injured or ill while in the service of the ship. *Farrell v. United States*, 336 U.S. 511 (1949).
- ❑ Cure is the payment of therapeutic, medical and hospital expenses not otherwise furnished to a seaman. *Pelotto v. L & N Towing Co.*, 604 F.2d 396 (5th Cir. 1979).
- ❑ The obligation persists until the injured or ill seaman reaches "maximum medical recovery." *Vaughan v. Atkinson* 396 U.S. 527 (1962).

CURE

- ❑ A seaman's claim for maintenance and cure gives rise to a maritime lien against the vessel. *The Montezuma*, 19 F.2d 355 (2d Cir. 1927).
- ❑ Accordingly, the vessel is liable *in rem* if the employer fails to provide or pay for maintenance and cure. *Baker v. Raymond Int'l, Inc.*, 656 F.2d 173 (5th Cir. 1981).

BASIC PRINCIPLES

- ❑ Admiralty courts liberally interpret maintenance and cure obligations "for the benefit and protection of seamen who are its wards." *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525 (1938).
- ❑ The duty to provide maintenance and cure arises without regard to fault, negligence, or causation. *Id.*
- ❑ All ambiguities or doubts with respect to whether a seaman is entitled to maintenance and cure are resolved in favor of the seaman. *Vaughan v. Atkinson*, 369 U.S. 527 (1962).
- ❑ A seaman's right to maintenance and cure cannot be completely abrogated by contract. *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367 (1932).
- ❑ The duty to provide maintenance and cure may be defined and modified by contract, such as a CBA.

DENIAL OF CURE

- ❑ Any ambiguities regarding the seaman's medical condition are to be resolved in his favor. *Flores v. Carnival Cruise Line*, 47 F.3d 1120 (11th Cir. 1995).
- ❑ Even if the condition is permanent or incurable, the employer's obligation to provide cure remains if there is the possibility that it can be improved with further treatment. *Whitman v. Miles*, 387 F.3d 68, 71 (1st Cir. 2004).
- ❑ A ship-owner must rely on the advice of a physician, and not an attorney, as to the question of whether a seaman has reached maximum medical cure, as this is a medical determination and not a legal determination. *Breese v. A.W.I., Inc.*, 823 F.2d 100 (5th Cir. 1987).

DAMAGES RECOVERABLE

- A failure to provide maintenance or cure may result in an award consisting of one or more of the following:
 - Compensatory Damages. *Garay v. Carnival Cruise Line, Inc.*, 904 F.2d 1527 (11th Cir. 1990).
 - Attorneys' Fees. Recoverable where a seaman is forced to hire a lawyer because the employer refused to provide maintenance and cure. *Vaughan, supra*.
 - Punitive Damages. In *Atlantic Sounding Co., Inc. v. Townsend*, 129 S.Ct. 2561 (2009), the U.S. Supreme Court held that punitive damages are available for the willful withholding of maintenance and cure.

OTHER CREW CLAIMS

- ❑ Retaliatory Discharge
- ❑ Penalty Wage Claims
- ❑ Death on the High Seas Act
- ❑ Unpaid Wages



ARBITRATION

- ❑ There is a strong federal policy favoring the arbitration process. *Buckley v. Nabors Drilling USA, Inc.*, 190 F.Supp.2d 958 (S.D. Tex. 2002).
- ❑ However, the Federal Arbitration Act excludes arbitration provisions in seaman's employment contracts.
- ❑ Arbitration agreements made *outside* of the employment contract generally are enforceable. In *Harrington v. Atlantic Sounding Co., Inc.*, 602 F. 3d 113 (2nd Cir. 2010) a seaman entered into an arbitration agreement in exchange for cash advances from the employer, which the court found to be enforceable.

ARBITRATION

- In *Bautista v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005), the Court held that a foreign seaman can be compelled to arbitrate Jones Act claims, regardless of the FAA exemption, if:
 - The seaman is from a country that is a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards; and
 - The employment contract contains an arbitration provision.

POEA

- ❑ *Bautista* involved the claims of Filipino crewmembers who were injured when a vessel's boiler exploded.
- ❑ The crewmembers' employment contracts were closely regulated by the Philippines' Overseas Employment Agency, which requires Filipinos involved in work related injuries abroad to resolve their claims in the Philippines.
- ❑ The U.S. court determined that the arbitration provision was not "incapable of being performed" in the Philippines and that the district court had properly granted the employer's motion to compel arbitration of the plaintiff seamen's claims—including claims under the Jones Act—in the Philippines.

BAUTISTA

- Four requirements must be met to compel arbitration:
 - (1) a written agreement within the meaning of the UN Convention;
 - (2) arbitration must occur within a territory that is a signatory to the Convention;
 - (3) the agreement arises from a legal commercial relationship between the parties; and
 - (4) a party to the agreement is not a U.S. citizen or the relationship between the parties has some reasonable relationship with one or more foreign states.

ARBITRATION

- ❑ In *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009), the Court refused to compel arbitration because public policy rendered an arbitration clause unenforceable when foreign law applied and the Plaintiff could not pursue U.S. statutory claims.
- ❑ *Thomas* crafted a new public policy defense, providing that arbitration is unenforceable if foreign law applies because the plaintiff cannot assert U.S. statutory claims.
- ❑ *Thomas* only relied on *Bautista* to note that a seaman's employment contract was commercial and therefore satisfied part of the prerequisites to compel arbitration

THOMAS

- ❑ Crewmember sued Carnival following an accident where he injured his spine and burned his leg with coffee he was holding.
- ❑ Citing *Bautista*, the trial court granted Carnival's motion to arbitrate.
- ❑ The 11th Circuit noted that certain affirmative defenses exist to compelling arbitration under the Convention. Ultimately, however, the Court reversed, holding the arbitration clause void under public policy.
- ❑ It required arbitration in the Philippines applying Panamanian law.
- ❑ Thus, the Court reasoned that if Thomas received no award in arbitration, he would have no opportunity for a later review of the award concerning his U.S. statutory claim.
- ❑ The Court held this was a prospective waiver of a statutory right which was against public policy.

ARBITRATION

- ❑ The 11th Circuit reversed itself in *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2011). There, the court departed from its decision in *Thomas*, stating that a court could only refuse to enforce an arbitral award if the award itself is contrary to the public policy of the country and only *after* arbitration was completed.
- ❑ The court held it could only conduct a “very limited inquiry” in deciding a motion to compel arbitration under the Convention, and based on the clause itself, arbitration was enforceable regardless of the law to be applied.

LINDO

- ❑ Lindo sued NCL under the Jones Act alleging injury.
- ❑ The District Court compelled arbitration, consistent with *Bautista*.
- ❑ The 11th Circuit noted that *Thomas* did not cite or rely on *Bautista's* governing principles which allow for only a limited review and strongly favor arbitration.
- ❑ The Court analyzed Article II of the UN Convention, which states arbitration will be enforced unless a court finds that the agreement is "null and void, inoperative or incapable of being performed." Accordingly, Lindo had to prove that the arbitration agreement was "null and void" rather than make an attack based on a public policy exception to enforcement.
- ❑ The court found that Lindo failed to prove the agreement was "null and void," and thus, the attempt to avoid the arbitration agreement was unsuccessful.

ARBITRATION

- ❑ A seaman can make claims against the employer which fall outside of the employment agreement and thus are not subject to an arbitration provision. *Doe v. Princess Cruise Line Ltd.*, 657 F.3d 1204 (11th Cir. 2011).
- ❑ In *Doe* a crewmember alleged she was sexually assaulted and asserted employment related claims (Jones act, maintenance and cure, unseaworthiness) and other claims (false imprisonment, intentional infliction of emotional distress, spoliation of evidence). The 11th Circuit determined the employment related claims were subject to arbitration but the other claims could be tried before a jury.

MEDICARE

- ❑ Medicare is a social insurance program administered by the United States government that provides health insurance for:
 - (1) People 65 or older
 - (2) People under 65 with certain disabilities and/or injuries
 - (3) People of any age with End-Stage Renal Disease (ESRD)(permanent kidney failure requiring dialysis or a kidney transplant)

Medicare Seeks Reimbursement

- ❑ Under the Omnibus Budget Reconciliation Act of 1980, P.L. 96–499, Medicare was determined to be a secondary payer in general liability cases. This sought to shift costs from the Medicare program to private sources of payment.
- ❑ The Omnibus Act was largely ignored, and Medicare continued to be the primary payer in many circumstances.

Medicare Enforcement

- ❑ In 2001, Medicare began requiring Medicare-Set Asides for certain Workers' Compensation settlements which included future Medicare covered medical treatment.
- ❑ Then, Congress passed the Medicare, Medicaid, and SCHIP Extension Act of 2007 ("MMSEA"), which was supposed to go into effect on January 1, 2010. 42 U.S.C. 1395y(b)(7)-(8).
- ❑ However, liability insurers were granted two extensions with which to set up internal structures to comply with the reporting requirements and for Medicare to prepare for the influx of reports.
- ❑ The last extension granted by Medicare begins enforcement on January 1, 2012, retroactive to October 1, 2011.



Medicare Secondary Payer Act

Taking Medicare's Interest Into Consideration

Section 111 of the MMSEA is the “teeth” of the Act. It requires Responsible Reporting Entities to reimburse Medicare for payments it has made to a Plaintiff. An insurer can face penalties for failing to report settlements involving plaintiffs who have received Medicare benefits.

Medicare Secondary Payer Act

□ Key Points:

- The purpose of Section 111 is to verify any and all primary payers in incidents involving Medicare beneficiaries so that Medicare can act as a secondary instead of a primary payer.
- Section 111 does not eliminate any of the existing self reporting, resolution, or claims processes. There has always existed a requirement to report settlements with beneficiaries, however, Medicare was lax in enforcement.
- Section 111 will:
 - Identify Medicare beneficiaries
 - Notify Medicare of Possible recovery for conditional payments previously made on behalf of the liable party.

Medicare Secondary Payer Act

Who is Required to Report?

Responsible Reporting Entities (RRE): the insurer or self insured plan:

1. Liability insurers (including Self-Insurance)
2. No-Fault
3. Workers' Compensation

This means insurers are now responsible for reporting and may face fines for failing to do so.

Medicare Secondary Payer Act

- ❑ What claims must be reported?
 - Claimant is 65 years of age
 - If under 65 has the claimant:
 - ❑ Been paid Medicare for 24 months?
 - ❑ Received disability pension from a railroad retirement board?
 - ❑ Been diagnosed with Lou Gehrig's disease?
 - ❑ Been diagnosed with end-stage renal disease?

Medicare Secondary Payer Act

□ Conditional Payments

- If you have a known Medicare beneficiary that has already received benefits – payments for injuries caused by the tortfeasor –you must reimburse Medicare.
- Medicare has a lien protecting their interests.
- Limited to the scope of damages arising from the tortfeasor's liability and no others.



PENALTIES

Failure to report a settlement with a Plaintiff who has received Medicare benefits carries a possible \$1,000.00 per day penalty

Medicare Set Asides

- ❑ What if a patient is not currently a Medicare beneficiary but will likely be claiming benefits in the future for the injury which resulted in settlement?
- ❑ You still must take Medicare's Interest into consideration. 42 U.S.C 1395y(b)(2)(A).
- ❑ Medicare Set Aside agreements attempt to consider Medicare's interests in the future.



Medicare Set Aside

- ❑ Determining whether a set aside is necessary must occur early in litigation in order to facilitate a settlement.
- ❑ The parties should be able to address the obligations, and who will undertake them, in the settlement terms.

Medicare Set Aside

- If it is determined that a set aside is not necessary, counsel who specialize in Medicare set aside agreements have recommended hold harmless language to be inserted in the Release as a safeguard.



Medicare Set Aside

- When pressed for approval of set aside agreements, Medicare has sometimes refused to do so, claiming:
 - it is either too back logged; or
 - it fails to respond at all.

Medicare Set Aside

- As a result, counsel for parties have sought judicial approval to foreclose a later claim from Medicare:

“The parties wanted a “Medicare Set Aside” (MSA) approved by the Center for Medicare and Medicaid Services (CMS) for purposes of complying with the provisions of the Medicare Secondary Payer Statute (MSP), 22 U.S.C. § 1395y(b)(2) and the commensurate regulations. However, they were advised by CMS that approval may not ever be forthcoming, and in the event it might possibly be forthcoming, it would not be for quite some time. As a result, the settlement could not be finalized. In an effort to avoid rescinding the settlement altogether, yet comply with the provisions of the MSP, the parties filed a joint motion for declaratory judgment seeking approval of the settlement and a declaration that the interests of Medicare are adequately protected by setting aside a sum of money for future medical expenses.”

Schexnayder v. Scottsdale Ins. Co., 2011 WL 3273547 (W.D. La. 2011). 37

PENALTIES

- ❑ Failure to include a set aside in a settlement agreement may result in Medicare refusing to pay for treatment in the future for which the seaman was paid in the settlement
- ❑ Medicare may seek reimbursement from any party for treatment it later covers. Thus, a settling insurer could face double payment.



British NHS Interests

- UK law requires reimbursement by a payer that is liable to an injured party where the injured party received medical treatment for those injuries in the UK National Health System.

British NHS

- ❑ Before payment, an insurer can apply to the NHS Compensation Recovery Unit for a Certification of Recoverable Benefits.
- ❑ This tells the potential payer what benefits the injured party received in the system.
- ❑ The liable party can make a setoff from the potential settlement payment in light of the reimbursement obligation.

British NHS

- Any setoff will depend on how the settlement payments are classified.
- For example, under Maintenance and Cure, a significant portion should be set off and paid to NHS.

British NHS

- ❑ Questions arise regarding jurisdiction of U.S. courts to enforce UK provisions requiring setoffs.
- ❑ UK law implicates payment no matter where the injury occurred as long as the injured person receives benefits.

British NHS

- ❑ Attempts are made to circumvent the NHS by stipulating that the payment is for “general damages.”
- ❑ UK Counsel most appropriate when facing the UK NHS.



Maintenance and Cure Trends

- ❑ Plaintiff's attorneys are seeking novel ways to expand the scope of maintenance and cure beyond the recent availability of punitive damages.
- ❑ Often, after filing suit, the Plaintiff will sever the claim for maintenance and cure and seek an expedited ruling.
- ❑ Employers are entering settlement agreements which do not account for an eventual termination of maintenance and cure. Thus, with chronic medical conditions, employers are paying maintenance and cure for years.

Maintenance and Cure

- Example:

A settlement is reached before ruling on the claim for maintenance and cure which calls for payment of back maintenance owed of hundreds of thousands of dollars;

Future medical care will still be provided;

Maintenance has to be paid until MMI;

New medical conditions arise and because the seaman is collecting maintenance and cure, he is considered to be in the “service of the ship” and is therefore entitled to maintenance and cure for the new conditions. *Duarte v. Royal Caribbean Cruises Ltd.*, 761 So.2d 367 (Fla. 3rd DCA 2000);

A decade later, the employer is still paying maintenance and cure with no end in sight.

Maintenance Rates

- ❑ Seaman are increasingly challenging maintenance rates;
- ❑ A cruise line employee is subject to a collective bargaining agreement and cannot challenge the rate.
- ❑ However, non-CBA seaman are entitled to “the shore side equivalent of the room and board received on the vessel.” *McWilliams v. Texaco, Inc.*, 781 F.2d 514 (5th Cir. 1986).
- ❑ Thus, the seaman files a motion alleging entitlement to more than the amount he is receiving. Usually they seek their salary divided by 365 and claim that is the daily rate owed.

Maintenance Rates

- ❑ However, the employer is entitled to and should demand documentation from the seaman as to his necessary (rent and food) costs.
- ❑ Example:

The Seaman filed a motion to increase maintenance seeking \$100 per day. We obtained all of her expenses and successfully challenged her claim. The Court limited it to \$30 per day.

Maintenance Rates

□ Example:

An employer did not investigate the seaman's actual expenses, and on the eve of a hearing agreed to pay \$125 per day. Because of the availability of punitive damages, the employer was fearful of proceeding to trial on the issue of maintenance and cure, thus agreed to this rate.

The problem then becomes a possible never ending obligation to provide the seaman with maintenance and cure at this rate.

Seeking to End Maintenance and Cure

- ❑ Maintenance and Cure is owed until the seaman is at maximum medical cure for all conditions.
- ❑ Physicians whom are willing to protract the declaration of maximum medical cure are in large supply.
- ❑ Because of the now clear availability of punitive damages, benefits should be paid while the employer seeks a determination that the seaman is at maximum medical cure.

Declaratory Judgment to End Benefits

- ❑ The most common avenue for seeking to end Maintenance and Cure is a Declaratory Judgment.
- ❑ The employer becomes the Plaintiff, seeking a declaration from the Court that based on the medical evidence, the seaman is at maximum medical cure and therefore, maintenance and cure may be terminated.

Declaratory Judgment to End Benefits

- ❑ Such a judgment is difficult to obtain. It is a finding by the Court, not a jury, and a determination by a jury is favored. *Aries Marine Corp. v. Lolly*, 2006 WL 681184 (W.D.La.,2006).
- ❑ Any medical opinion put forth by the seaman will be given great weight and if it differs from the evidence introduced by the employer, there is “equivocation” the standard by which maintenance and cure must still be paid. *Johnson v. Marlin Drilling Co.*, 893 F.2d 77 (5th Cir. 1990).



Practical Considerations

- ❑ The use of a Declaratory Judgment often is a strategic method for attempting to bring closure to a file.
- ❑ An unrepresented seaman may be likely to refuse a global settlement discussion.
- ❑ When faced with a Declaratory Judgment, chances for settlement, and file closure, increase.

Infectious Disease

- If the disease manifests itself during a seaman's service with the ship, is he entitled to maintenance and cure?
- The answer depends on the seaman's knowledge at the time he signs onto the vessel.

Infectious Disease

- ❑ If the seaman is without knowledge that his system contains the germs of a disease that may later incapacitate him, he may claim maintenance and cure. *Calmar S. S. Corp. v. Taylor*, 303 U.S. 525 (U.S. 1938).
- ❑ If the seaman knows that he had an ailment, but had no reason to believe it is inherently serious or may become disabling, he may claim maintenance and cure. *Lindquist v. Dilkes*, 127 F.2d 21 (3d Cir. 1941).
- ❑ If the seaman knew or should have known that he had a disease that is inherently serious or may become disabling, and he withholds or actively conceals this knowledge, he would be disqualified. *Tawada v. United States*, 162 F.2d 615 (9th Cir. 1947).

Infectious Disease

- ❑ As stated in *Lindquist*, “the sailor's duty is to disclose whatever he as an ordinarily prudent person should have known is material to the risk.” *Lindquist* at 24.
- ❑ Since the seaman’s condition is not the product of a defect in the ship or a failure in the obligations owed to him by the shipowner, neither an unseaworthiness claim nor a Jones Act claim can be maintained.

Disease On-board

- ❑ The duty of a vessel and her owner to provide maintenance and cure for a seaman falling ill while in service arises from the contract of employment and does not rest upon negligence or culpability on part of owner or master, and is not restricted to those cases where the seaman's employment is the cause of injury or illness. *Calmar S. S. Corp. v. Taylor*, 303 U.S. 525 (U.S. 1938).
- ❑ Thus, where the seaman can prove that the vessel caused him to contract the disease, he *may* recover under the doctrine of unseaworthiness and the Jones Act.

Disease On-board

- ❑ However, proof that a disease causing agent was onboard is a difficult burden for the seaman.
- ❑ In *Peterson v. U.S.*, 224 F.2d 748 (9th Cir. 1955), the Court found that a disease contracted on-board which infected four crewmembers did not render the vessel unseaworthy. There, the court found, in part, that a certain skin disease was not unusual, especially because the ship sailed in tropical waters.

Proof by the Seaman

- Recent cases have supported the finding in *Peterson*.
 - *Meier v. Global Industries Offshore, LLC*, 2010 WL 4393995 (S.D. Tex. 2010). Plaintiff asserted Jones Act negligence and unseaworthiness. The court held in favor of Defendant because it was “purely speculation” to suggest that the seaman contracted the infection while aboard the boat.
 - *Beck v. Pride Intern., Inc.*, 2008 WL 5068704 (S.D. Tex. 2008). Holding in favor of Defendant, the court noted that the seaman must present medical or other scientific evidence of causation to prove his claims of negligence and unseaworthiness.

Proof by the Seaman

- However, in *Offshore Pipelines, Inc. v. Schooley*, 984 S.W.2d 654 (Tex. 1st DCA 1998), a barge worker was able to produce scientific evidence that he contracted an intestinal tumor from contaminated drinking water. There, the Plaintiff introduced expert evidence that the water supply was never adequately tested and medical evidence that the cause of his tumor was water from the vessel.

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