MARITIME LAW ASSOCIATION OF THE UNITED STATES
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Inter-Circuit Conflicts in Maritime Law: the *McCorpen* Counterclaim; Loss of Society Damages; and Red-Letter Clauses in vessel repair contracts

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I. THE "*MCCORPEN* COUNTERCLAIM?"

A. *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir 1968) *cert. denied*, 393 U.S. 894, 21 L. Ed. 2d 175, 89 S. Ct. 223 (1968)

- Created a **defense** for a Jones Act employer wherein maintenance and cure obligations could be terminated upon a showing of a concealment of pre-existing medical conditions in a pre-employment screening or questionnaire

- Elements of the *McCorpen* Defense:

  1. An employer must show that the seaman intentionally misrepresented or concealed medical facts

  2. The non-disclosed facts where material to the employer's decision to hire the seaman

  3. A connection between the withheld information and the injury complained of in the lawsuit

B. General but not universal adoption of *McCorpen* defense

- *Evans v. Blidberg Rothchild Co.*, 382 F.2d 637 (4th Cir. 1967)

- *Sulentich v. Interlake Steamship Co.*, 257 F.2d 316, 320 (7th Cir.), *cert. denied*, 358 U.S. 885, 3 L. Ed. 2d 113, 79 S. Ct. 125 (1958)

- *Burkert v. Weyerhaeuser Steamship Co.*, 350 F.2d 826, 829 n.4 (9th Cir. 1965)

- *Jackson v. NCL Am., LLC*, 730 F. App'x 786 (11th Cir. 2018)

- *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 352 (8th Cir. 1994) (where a seaman is not asked about his health or prior injuries, nondisclosure of such information will not be considered knowing or intentional if the seaman held good-faith belief that he was fit for duty and that the shipowner could not consider past illness or injury important.)

- *Sammon v. Cent. Gulf S.S. Corp.*, 442 F.2d 1028 (2nd Cir. 1971) (*McCorpen* is not the rule of the second circuit - the concealment of a pre-existing condition by the seaman during a pre-hiring interview "is fraudulent only if the seaman knows or reasonably should know that the concealed condition is relevant.")

- *Deisler v. McCormack Aggregates, Co.*, 54 F.3d 1074 (3d Cir. 1995) (discussing both *McCorpen* and *Sammon* but not affirmatively adopting either)

C. Restitution for past maintenance and cure under *McCorpen*

- McCorpen did not address whether an employer was entitled to restitution for the amounts previously paid under their maintenance and cure obligations
- Employers began seeking restitution for past maintenance and cure under the authority of *McCorpen* in the form of a set-off of damages
- In some cases, employers sought restitution by way of an affirmative counterclaim against the injured seaman - ***a "McCorpen* Counterclaim"**
- Many instances of lower courts granting summary judgment on counterclaims in favor of the employer

D. No affirmative counterclaim - *Boudreaux v. Transocean Deepwater, Inc.*, 721 F.3d 723 (5th Cir. 2013) *cert. denied* 134 S.Ct. 101 (Jan. 21, 2014)

- Jones Act seaman claims injury to back while servicing equipment
- He failed to disclose prior serious back problems in a preemployment medical questionnaire – affirmatively answering "no" to several serious inquiries regarding history of back trouble
- Transocean was able to establish a *McCorpen* defense – discharging its obligation to pay further maintenance and cure
- Transocean then filed a counterclaim against Boudreaux to recover previously paid maintenance and cure benefits arguing the claim arose from principles of fraud and unjust enrichment
- 5th Circuit holds that a successful *McCorpen* defense permits an offset for damages but an affirmative cause of action against an injured seaman is not permitted
- ***Block Island Fishing, Inc. v. Rogers*, 844 F.3d 358 (1st Cir. 2016)** (agreeing with "*Boudreaux's* sound rule" that the *McCorpen* defense does not constitute an affirmative cause of action)

E. Lower authority outside of the 5th and 1st Circuits continues to permit *McCorpen* as an affirmative counterclaim against a seaman

- *Vitcovich v. Ocean Rover O.N.*, 106 F.3d 411, 1997 U.S. App. LEXIS 724 (9th Cir. Jan. 14, 1997) (unpublished) (allows an employer to affirmatively seek restitution for previously paid maintenance and cure benefits)

- *Souviney v. John E. Graham & Sons*, 1994 WL 416643 (S.D. Ala. 1994) (permitting a *McCorpen* counterclaim)

- *Bergeria v. Marine Carriers, Inc.*, 341 F.Supp. 1153 (E.D. Pa. 1972)

- *Quiming v. Int'l Pac. Enters., Ltd.*, 773 F.Supp. 230 (D. Haw. 1990)

II. THE RECOVERABILITY OF LOSS OF SOCIETY DAMAGES FOR NON-SEAFARERS UNDER THE GENERAL MARITIME LAW

A. Background

- Loss of Society Damages

- Cases arise from deaths to non-seafarers in territorial waters

- Jones Act, LHWCA, and DOHSA not applicable

- General Maritime Law *Moragne* wrongful death claims

- *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974) (permitting loss of society for longshoreman killed in territorial waters)

B. Widespread preclusion of recovery of loss of society damages

- Loss of Society damages not recoverable under the Jones Act or DOHSA

- It would disregard federal interests of uniformity and would create an anomaly to provide greater recovery for the survivors of nonseamen than "the wards of admiralty" received *Tucker v. Fearn*, 333 F.3d 1216, 1223 (11th Cir. 2003).

- *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4 F.3d 1084, 1092 (2nd Cir. 1993) ("We agree with the overwhelming majority of the pertinent federal decisions that nondependent parents cannot recover damages for loss of society in a general maritime action.")

- *Anderson v. Whittaker Corp.*, 894 F.2d 804, 812 (6th Cir. 1990) ("finding that non-dependent parents of a decedent may not recover damages for loss of society")

- *Tucker v. Fearn*, 333 F.3d 1216, 1221-22 (11th Cir. 2003) ("Applying *Moragne*, *Higginbotham*, and *Miles*, we determine that nondependent survivors, such as Tucker, of nonseamen, such as Tucker's son, equally cannot recover loss of society damages in a wrongful death action under general maritime law.")

- *In re American River Transp. Co.*, 490 F.3d 351, 359 (5th Cir. 2007)

C. The outlier – *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994)

- Non-seafarers killed in recreational boating accident

- 9th Circuit Permits recovery of loss of society damages for a non-seafarer relying on *Gaudet*

- "*Sutton* does not acknowledge the potentially limited force of *Gaudet* after being confined to its facts [by *Miles*]. Neither does *Sutton* address the Supreme Court's more restrictive approach to maritime wrongful death causes of actions since *Gaudet*." *In re American River Transp. Co.*, 490 F.3d 351, 359 (5th Cir. 2007)

III. RED LETTER/EXCULPATORY CLAUSES IN CONTRACTS TO REPAIR VESSELS

A. Background

- *Bisso v. Inland Waterways Corp*., 349 U.S. 85, 85-86, (1955) ("contracts releasing towers from all liability for their negligence" are invalid.)

- Clauses commonly used by vessel repairers to limit their liability in the event of improper repair work

- Contracts to repair a vessel invoke admiralty jurisdiction *Hatteras of Lauderdale, Inc. v. Gemini Lady*, 853 F.2d 848 (11th Cir. 1988)

B. 9th Circuit

- Permit a vessel repairer to exculpate themselves from liability for their own negligence but not gross negligence

- *Morton v. Ziedell Explorations, Inc.*, 695 F.2d 347 (9th Cir. 1982)

- *M/V American Queen v. San Diego Marine Const. Corp.*, 708 F.2d 1483 (9th Cir. 1983) (absent evidence of overreaching, clauses limiting liability in ship repair contracts will be enforced)

- *Royal Ins. Co. of America v. Southwest Marine*, 194 F.3d 1009, 1014 (9th Cir. 1999) ("[E]xcept in towing contracts, exculpatory clauses are enforceable even when they completely absolve parties from liability for negligence.")

C. 5th and 8th Circuits

- *Sander v. Alexander Richardson Investments*, 334 F.3d 712, 714, 721 (8th Cir. 2003) ("We hold that the exculpatory clause contained in the slip rental agreements is valid and enforceable. The agreement clearly and unequivocally shifted the risk of loss to the boat owner and released the Yacht Club from all liability, including that liability arising from

its own negligence. Public policy demands enforcing contracts as written and recognizing the parties' freedom to contract.")

- *Theriot v. Bay Drilling Corp*., 783 F.2d 527, 540 (5th Cir. 1986) (upholding an exculpatory clause for a party's own negligence in an indemnification scenario).

D. 11th Circuit

- *Diesel "Repower", Inc. v. Islander Investments Ltd.*, 271 F.3d 1318, 1324 (11th Cir. 2001)
    - First, the clause must clearly and unequivocally indicate the parties' intention.
    - Second, the clause may not absolve the repairer of all liability and the liability risk must still provide a deterrent to negligence.
    - Third, the "businessmen" must have equal bargaining power so there is no overreaching.

E. 1st Circuit

- *Broadley v. Mashpee Neck Marina, Inc.*, 471 F.3d 272, 274 (1st Cir. 2006)

- *La Esperanza de P.R., Inc. v. Perez y Cia. de Puerto Rico, Inc*., 124 F.3d 10, 19 (1st Cir. 1997) (affirming the validity of a "red letter clause")

- *In re Martin*, 596 F. Supp. 2d 142, 151 (D. Mass. 2009) (discussing in depth 1st Circuit Precedent and circuit split)

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