

# **RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW AT THE NATIONAL LEVEL AND IN THE FIFTH AND ELEVENTH CIRCUITS**

David W. Robertson  
W. Page Keeton Chair in Tort Law  
University Distinguished Teaching Professor  
University of Texas  
727 East Dean Keeton Street, Austin, Texas 78705  
512/232-1339; Fax 512/858-1045  
[drobertson@mail.law.utexas.edu](mailto:drobotson@mail.law.utexas.edu)

Michael F. Sturley  
Fannie Coplin Regents Chair in Law  
University of Texas  
727 East Dean Keeton Street, Austin, Texas 78705  
512/232-1350; Fax 512/471-6988  
[msturley@mail.law.utexas.edu](mailto:msturley@mail.law.utexas.edu)

November 10, 2010

**RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW AT THE  
NATIONAL LEVEL AND IN THE FIFTH AND ELEVENTH CIRCUITS**

<b><u>I. INTRODUCTION</u></b>	1
<b><u>II. MISCELLANEOUS DEVELOPMENTS AT THE NATIONAL LEVEL</u></b>	2
A. <i>December 1, 2010, Changes to the Federal Rules of Civil Procedure (FRCP)</i>	2
B. <i>Inland Navigation Rules Moved from U.S. Code to CFR</i>	3
C. <i>Ongoing Concerns re Twombly and Iqbal</i>	3
<b><u>III. THE WORK OF THE SUPREME COURT</u></b>	4
A. <i>FRCP Rule 15(c): Relation Back of Amended Complaint Against Cruise Line: Krupski v. Costa Crociere</i>	4
<b><i>Krupski v. Costa Crociere S.p.A.</i></b>	
B. <i>The Legal Regime Governing the Inland Portion of Multimodal Transport</i>	6
<b><i>Kawasaki v. Regal-Beloit</i></b>	
C. <i>Maritime Arbitration</i>	13
<b><i>Stolt-Nielsen SA v. AnimalFeeds International Corp.</i></b>	
D. <i>Selected Nonmaritime Decisions</i>	15
1. <i>Arbitration</i>	15
<b><i>Rent-A-Center, West, Inc. v. Jackson</i></b>	
2. <i>Preemption</i>	16
<b><i>Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.</i></b>	
3. <i>Diversity jurisdiction—corporation’s “principal place of business”</i>	17
<b><i>Hertz Corp. v. Friend</i></b>	
4. <i>Court-awarded attorneys’ fees</i>	18
<b><i>Perdue v. Kenny A</i></b>	
<b><u>IV. SELECTED DECISIONS FROM AROUND THE COUNTRY</u></b>	19
A. <i>Admiralty Jurisdiction in Tort Cases</i>	19
<b><i>U.S. Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd.</i></b>	
B. <i>Admiralty Jurisdiction in Contract Cases</i>	21
<b><i>Primera Maritime Ltd. v. Jiangsu Eastern Heavy Industry Co.</i></b>	

C.	<i>Preemption of State Law by Federal Maritime Law</i>	22
	<b><i>U.S. Aviation Underwriters, Inc. v. Pilatus Business Aircraft, Ltd.</i></b>	
	<b><i>Lee v. Astoria Generating Co.</i></b>	
D.	<i>OCSLA: Workers' Compensation Coverage</i>	23
	<b><i>Valladolid v. Pacific Operations Offshore, LLP</i></b>	
E.	<i>Seaman Status</i>	26
	<b><i>Frazier v. Core Industries, Inc.</i></b>	
F.	<i>The Rights of Seamen</i>	27
	1. <i>Forum selection in Jones Act cases</i>	27
	<b><i>Harrington v. Atlantic Sounding Co.</i></b>	
	2. <i>Maintenance and cure</i>	29
	<b><i>Delaware River &amp; Bay Authority v. Kopacz</i></b>	
	3. <i>Significant FELA decisions</i>	29
	<b><i>McBride v. CSX Transportation, Inc.</i></b>	
	<b><i>Raab v. Utah Railway Company</i></b>	
	4. <i>Americans With Disabilities Act</i>	33
	<b><i>Kinneary v. City of New York</i></b>	
	5. <i>Punitive damages</i>	33
	<b><i>Wagner v. Kona Blue Water Farms, LLC</i></b>	
	6. <i>The defendant's right to a jury trial in Jones Act cases</i>	34
	<b><i>Endicott v. Icicle Seafoods, Inc.</i></b>	
	7. <i>Pre-judgment interest in Jones Act cases</i>	37
	<b><i>Endicott v. Icicle Seafoods, Inc.</i></b>	
G.	<i>Carriage of Goods</i>	39
	1. <i>The legal regime governing the inland portion of multimodal transport</i>	39
	<b><i>Sompo Japan Insurance Co. of America v. Union Pacific R.R. Co.</i></b>	
	<b><i>Mitsui Sumitomo Insurance Co. v. Evergreen Marine Corp.</i></b>	
	<b><i>Royal &amp; Sun Alliance Insurance, PLC v. Ocean World Lines, Inc.</i></b>	

2. <i>Negligent third parties</i>	40
<i>Fortis Corporate Insurance, SA v. Viken Ship Management AS</i>	
<i>St. Paul Travelers Insurance Co. v. M/V Madame Butterfly</i>	
H. <i>Longshore and Harbor Workers' Compensation Act (LHWCA)</i>	42
1. <i>The Act's coverage</i>	42
<i>Valladolid v. Pacific Operations Offshore, LLP</i>	
<i>In re Norfolk Southern Ry. Co.</i>	
2. <i>Negligence actions against "vessels" under § 905(b)</i>	43
<i>Lee v. Astoria Generating Co.</i>	
3. <i>The compensability of psychological injuries</i>	45
<i>Pedroza v. BRB</i>	
4. <i>Circuit split on appellate jurisdiction in Defense Base Act cases</i>	45
<i>Service Employees International, Inc. v. Director, OWCP</i>	
I. <i>General Maritime Tort Law</i>	46
1. <i>Negligently inflicted emotional distress</i>	46
<i>Stacy v. Rederiet Otto Danielsen, A.S.</i>	
2. <i>Implied warranty of workmanlike performance</i>	49
<i>Northern Ins. Co. v. Point Judith Marina</i>	
3. <i>DOHSA's lack of a survival provision</i>	50
<i>Bowoto v. Chevron Corp.</i>	
J. <i>Procedural Issues</i>	52
1. <i>Rule B</i>	52
<i>Shipping Corp. of India Ltd. v. Jaldhi Overseas Pte Ltd.</i>	
<i>Hawknet, Ltd. v. Overseas Shipping Agencies</i>	
<i>Scanscot Shipping Services GmbH v. Metales Tracomex LTDA</i>	
2. <i>Appellate review of removal-remand rulings in Jones Act and FELA cases</i>	54
<i>In re Norfolk Southern Ry. Co.</i>	
3. <i>Forum non conveniens in DOHSA cases</i>	55
<i>Loya v. Starwood Hotels &amp; Resorts Worldwide, Inc.</i>	

<b><u>V. THE WORK OF THE FEDERAL COURTS IN THE FIFTH AND ELEVENTH CIRCUITS</u></b>	55
A. <i>Admiralty Jurisdiction in Tort Cases</i>	55
<i>Perforaciones Exploracion y Produccion v. Maritimas Mexicanas, S.A.</i>	
<i>Casas v. U.S. Joiner, LLC</i>	
<i>Chambers v. Wilco Industrial Services, L.L.C.</i>	
B. <i>Preemption of State Law by Federal Maritime Law</i>	58
<i>Misener Marine Constr., Inc. v. Norfolk Dredging Co.</i>	
<i>Jowers v. Lincoln Electric Co.</i>	
<i>Felarise v. Cheramie Marine, L.L.C.</i>	
<i>Rogers v. Coastal Towing, L.L.C.</i>	
C. <i>Outer Continental Shelf Lands Act Litigation</i>	62
1. <i>The application of adjacent-state law under 43 U.S.C. § 1333(a)(2)(A)</i>	62
<i>Grand Isle Shipyard, Inc. v. Seacor Marine, LLC</i>	
2. <i>Jury trial in OCS cases</i>	66
<i>Duet v. Falgout Offshore, LLC</i>	
<i>Apache Corp. v. Global Santafe Drilling Co.</i>	
3. <i>Removal of OCSLA cases</i>	69
<i>Patlan v. Apache Corp.</i>	
<i>Moore v. BIS Salamis, Inc.</i>	
D. <i>Seaman Status Under the Jones Act</i>	71
1. <i>The vessel requirement</i>	71
<i>Moore v. BIS Salamis, Inc.</i>	
2. <i>The contribution requirement</i>	73
<i>Teaver v. Seatrax of Louisiana</i>	
3. <i>The substantial connection requirements</i>	74
<i>Butcher v. Superior Offshore Intern., Inc.</i>	
4. <i>The change-of-assignment doctrine</i>	75
<i>George v. Cal-Dive International, Inc.</i>	
5. <i>The fleet doctrine</i>	76
<i>George v. Cal-Dive International, Inc.</i>	

E.	<i>The Rights of Seamen: Maintenance and Cure</i>	76
	1. <i>Introduction: too much litigation</i>	76
	<i>Atlantic Sounding Co. v. Oliver</i>	
	<i>Royal Caribbean Cruises Ltd. v. Whitefield</i>	
	<i>Savarese v. Pearl River Navigation, Inc.</i>	
	<i>Atlantic Sounding Co. v. Vickers</i>	
	2. <i>The duration of the employer's obligation</i>	79
	<i>Pallis v. United States</i>	
	3. <i>The McCorpen defense to maintenance and cure</i>	80
	<i>Atlantic Sounding Co. v. Petrey</i>	
	<i>Everett v. Atlantic Sounding Co.</i>	
	<i>Atlantic Sounding Co. v. Parker</i>	
	4. <i>Penalizing employers who flout the maintenance and cure obligation</i>	83
	<i>Mayne v. Omega Protein, Inc.</i>	
	5. <i>Is an employer who pays undeserved maintenance or cure entitled to restitution?</i>	84
	<i>Patterson v. Allseas USA</i>	
	<i>Boudreaux v. Transocean Deepwater, Inc.</i>	
	<i>Cotton v. Delta Queen Steamboat Co.</i>	
F.	<i>The Rights of Seamen: Jones Act Litigation</i>	86
	1. <i>Is the contributory negligence defense ousted in OSHA-violation cases?</i>	86
	<i>Comings v. Mike Hooks Inc.</i>	
	2. <i>A new (Johnson) variety of contributory negligence?</i>	87
	<i>Ramirez v. American Pollution Control Corp.</i>	
G.	<i>Limitation of Liability</i>	88
	1. <i>Privity or knowledge</i>	88
	<i>Craven v. Cashman Equipment Corp.</i>	
	2. <i>Setting the amount of the limitation fund</i>	89
	<i>In re Orion Dredging Services</i>	
	<i>Perforaciones Exploracion y Produccion v. Maritimas Mexicanas, S.A.</i>	

H.	<i>Carriage of Goods</i>	91
	1. <i>Overview of cargo litigation</i>	91
	<b><i>American National Fire Ins. Co. v. M/V Seaboard Victory</i></b>	
	2. <i>Package limitation</i>	92
	<b><i>Channa Imports, Inc. v. Hybur, Ltd.</i></b>	
	3. <i>Delivery</i>	93
	<b><i>C.H. Robinson Worldwide, Inc. v. Compania Libre de Navegacion (Uruguay) S.A.</i></b>	
	4. <i>Himalaya clauses</i>	94
	<b><i>Jaytheon Co. v. M/V Seaboard Explorer II</i></b>	
	5. <i>The continued validity of COGSA</i>	95
	<b><i>Jaytheon Co. v. M/V Seaboard Explorer II</i></b>	
I.	<i>Marine Insurance</i>	98
	<b><i>Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.</i></b>	
J.	<i>Longshore and Harbor Workers' Compensation Act (LHWCA)</i>	100
	1. <i>Negligence actions under LHWCA § 5(b) (33 U.S.C. § 905(b))</i>	100
	<b><i>Jones v. Cooper T. Smith Stevedoring Co.</i></b>	
	3. <i>Can LHWCA workers sue their employers in tort for intentional injury?</i>	101
	<b><i>Fisher v. Halliburton</i></b>	
	4. <i>Workers' compensation law nuts and bolts</i>	101
	<b><i>Craven v. Director, OWCP</i></b>	
	<b><i>Cooper v. International Offshore Services</i></b>	
	<b><i>Louisiana Insurance Guaranty Association v. Director, OWCP</i></b>	
	5. <i>Miscellaneous issues</i>	104
	<b><i>Bollinger v. Director, OWCP</i></b>	
	<b><i>Eysselinck v. Director, OWCP</i></b>	
K.	<i>General Maritime Tort Law: the AmClyde Regime</i>	105
	<b><i>Combo Maritime, Inc. v. U.S. United Bulk Terminal, LLC</i></b>	
	<b><i>Cooper v. Faith Shipping</i></b>	
L.	<i>Collision</i>	108
	<b><i>Combo Maritime, Inc. v. U.S. United Bulk Terminal, LLC</i></b>	

M.	<i>Governmental Immunity and Government Contractor Immunity</i>	109
	1. <i>State governmental immunity</i>	109
	<b><i>Aqua Log, Inc. v. Georgia</i></b>	
	2. <i>Federal governmental immunity</i>	110
	<b><i>Uralde v. United States</i></b>	
	<b><i>In re Katrina Canal Breaches Litigation</i></b>	
	<b><i>Ackerson v. Bean Dredging LLC</i></b>	
	3. <i>The federal government contractor defense</i>	112
	<b><i>Jowers v. Lincoln Electric Co.</i></b>	
	<b><i>Ackerson v. Bean Dredging LLC</i></b>	
N.	<i>Procedural Issues</i>	113
	1. <i>Personal jurisdiction</i>	113
	<b><i>Seymour v. Scorpion Payroll, Ltd.</i></b>	
	<b><i>Cooper v. Faith Shipping</i></b>	
	2. <i>Forum non conveniens</i>	115
	<b><i>Perforaciones Exploracion y Produccion v. Maritimas Mexicanas, S.A.</i></b>	
	<b><i>Saqui v. Price Central America, LLC</i></b>	
	<b><i>Wilson v. Island Sea Investments, Ltd.</i></b>	
	3. <i>Miscellaneous procedural issues</i>	116
	<b><i>Underwriters at Lloyd’s v. Osting-Schwinn</i></b>	
O.	<i>Miscellaneous Cases</i>	116
	1. <i>What is a “vessel”?</i>	116
	<b><i>Crimson Yachts v. Betty Lyn II Motor Yacht</i></b>	
	<b><i>International Ship Repair &amp; Marine Services, Inc. v. Morales</i></b>	
	2. <i>Deepwater Horizon (B.P. oil spill) news</i>	118
	<b><i>In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010</i></b>	
	<b><i>Hornbeck Offshore Services, L.L.C. v. Salazar</i></b>	
	3. <i>The border search exception to the Fourth Amendment</i>	118
	<b><i>United States v. Pickett</i></b>	
	<b><i>United States v. Alfaro</i></b>	

4. *Texas fee-shifting contract*

119

***The Offshore Drilling Co. (TODCO) v. Gulf Copper & Manufacturing Corp.***

**RECENT DEVELOPMENTS IN ADMIRALTY AND MARITIME LAW  
AT THE NATIONAL LEVEL AND IN THE FIFTH AND ELEVENTH CIRCUITS**

David W. Robertson  
W. Page Keeton Chair in Tort Law  
University Distinguished Teaching Professor  
University of Texas  
727 East Dean Keeton Street, Austin, Texas 78705  
512/232-1339; Fax 512/858-1045  
[drobotson@law.utexas.edu](mailto:drobotson@law.utexas.edu)

Michael F. Sturley  
Fannie Coplin Regents Chair in Law  
University of Texas  
727 East Dean Keeton Street, Austin, Texas 78705  
512/232-1350; Fax 512/471-6988  
[msturley@law.utexas.edu](mailto:msturley@law.utexas.edu)

October 1, 2010

**I. INTRODUCTION**

This is the tenth paper in a series of annual reports on U.S. admiralty and maritime law and practice.<sup>1</sup> In these papers we try to call attention to the principal

---

<sup>1</sup> The preceding nine papers are David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 34 TUL. MAR. L.J. 443 (2010) [hereinafter *2009 Recent Developments*]; David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 33 TUL. MAR. L.J. 381 (2009) [hereinafter *2008 Recent Developments*]; David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 32 TUL. MAR. L.J. 493 (2008) [hereinafter *2007 Recent Developments*]; David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 31 TUL. MAR. L.J. 463 (2007) [hereinafter *2006 Recent Developments*]; David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 30 TUL. MAR. L.J. 195 (2006) [hereinafter *2005 Recent Developments*]; David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 29 TUL. MAR. L.J. 369 (2005) [hereinafter *2004 Recent Developments*]; David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and*

national-level developments that bear on the work of admiralty judges, lawyers, and scholars, and we look more closely at the relevant work of the U.S. Courts of Appeals for the Fifth and Eleventh Circuits. We do not warrant full coverage, although with respect to the Fifth and Eleventh Circuit Courts of Appeals, we try to be fairly thorough.<sup>2</sup>

## **II. MISCELLANEOUS DEVELOPMENTS AT THE NATIONAL LEVEL**

### **A. *December 1, 2010, Changes to the Federal Rules of Civil Procedure (FRCP)***

The Supreme Court has sent a package of procedural-rule amendments<sup>3</sup> to Congress that will take effect on December 1, 2010, unless Congress rejects or defers them. The changes to the FRCP affect Rules 8, 26, and 56. Rule 8(c) is amended to delete “discharge in bankruptcy” from the list of affirmative defenses that must be affirmatively pleaded. The alterations to Rule 26 deal with discovery of expert evidence. According to *U.S. Law Week*, the “amendments to Rule 56 are intended to improve

---

*in the Fifth and Eleventh Circuits*, 16 U.S.F. MAR. L.J. 147 (2004) [hereinafter *2003 Recent Developments*]; David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 27 TUL. MAR. L.J. 495 (2003) [hereinafter *2002 Recent Developments*]; David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 26 TUL. MAR. L.J. 193 (2001) [hereinafter *2001 Recent Developments*].

<sup>2</sup> We include selected district court decisions for their information value. But remember that “[a] decision by a federal district judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.” 18 MOORE’S FEDERAL PRACTICE § 134.02[1][d], p. 138-24.1 (3d ed. 2007).

<sup>3</sup> In addition to the changes to the FRCP, the package also includes minor amendments to the Federal Rules of Appellate Procedure as well as changes to the criminal procedure, bankruptcy, and evidence rules.

procedures for presenting and deciding motions for summary judgment. The changes do not affect the standard for granting summary judgment.”<sup>4</sup>

**B. *Inland Navigation Rules Moved from U.S. Code to CFR***

In 1981, the former Western Rivers Rules and Great Lakes Rules were subsumed by the Inland Rules, which apply on all U.S. waters not governed by the International Regulations for Preventing Collisions at Sea, 1972 (COLREGS). For many years the Inland Rules were codified at 33 U.S.C. §§ 2001-38. In 2004, Congress repealed the codified rules as of the effective date of final regulations to be prescribed by the Coast Guard. 33 U.S.C. § 2071 provides that the new inland rules are to be “as consistent as possible” with COLREGS.

On April 15, 2010, the Coast Guard issued a final rule (to take effect on May 17) placing the Inland Rules in the Code of Federal Regulations at 33 CFR Part 83. Evidently no substantive changes to the Inland Rules have been made.

**C. *Ongoing Concerns re Twombly and Iqbal***

Last year’s paper<sup>5</sup> addressed concerns that the Supreme Court’s nonmaritime decisions in *Atlantic Corp. v. Twombly*<sup>6</sup> and *Ashcroft v. Iqbal*<sup>7</sup> may have disrupted federal-court motion practice by creating a new “plausibility” standard for federal civil complaints. The hubbub continues. During the past year the Judiciary Committees of both Houses of Congress held hearings on the matter, and various pieces of legislation

---

<sup>4</sup> 78 U.S.L.W. 2670 (May 11, 2010).

<sup>5</sup> 2009 *Recent Developments*, supra note 1, at 451-52.

<sup>6</sup> 550 U.S. 544 (2007).

<sup>7</sup> 129 S.Ct. 1937 (2009).