

PRESENTED AT

The University of Texas School of Law
26th Annual Admiralty and Maritime Law Conference

September 29, 2017
South Texas College of Law, Houston, Texas

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

David W. Robertson
William Powers, Jr. and Kim L. Heilbrun Chair in Tort Law
University Distinguished Teaching Professor
University of Texas at Austin

Michael F. Sturley
Fannie Coplin Regents Chair in Law
University of Texas at Austin
Visiting Professor (August-December 2017)
National University of Singapore Faculty of Law

Matthew H. Ammerman
LAW OFFICE OF MATTHEW H. AMMERMAN, P.C.

Author Contact Information:

David W. Robertson
University of Texas School of Law
drobotson@law.utexas.edu
512-232-1339

Matthew H. Ammerman
LAW OFFICE OF MATTHEW H. AMMERMAN, P.C.
mha@MaritimeDefense.net
713-227-1404

Michael F. Sturley
University of Texas School of Law
msturley@law.utexas.edu
512-232-1350
National University of Singapore
Faculty of Law
msturley@nus.edu.sg
+65-6601-5973

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

I. INTRODUCTION	1
II. MISCELLANEOUS DEVELOPMENTS AT THE NATIONAL LEVEL	3
A. Federal Rules Amendments	3
B. Maximum Compensation Rate Under the LHWCA	3
C. Increased Penalty Amounts under the LHWCA	3
III. THE WORK OF THE SUPREME COURT	4
A. Nonmaritime Personal Jurisdiction Decisions	4
1. General (All-Purpose) Personal Jurisdiction	5
<i>BNSF Railway Co. v. Tyrrell</i>	
2. Specific (Case-Linked) Personal Jurisdiction	11
<i>Bristol-Myers Squibb Co. v. Superior Court</i>	
B. Petition for Certiorari	17
<i>Touchet v. Estis Well Service, L.L.C.</i>	
IV. SELECTED DECISIONS FROM AROUND THE COUNTRY	19
A. Admiralty Jurisdiction in Tort	19
1. Problems with the “Maritime Connection” Requirements	19
<i>Hargus v. Ferocious & Impetuous, LLC</i>	
2. Problems with the “Location” Requirement	20
<i>Rios v. United States</i>	
<i>Mello v. Young Brothers</i>	
B. Admiralty Jurisdiction in Contract Cases	23
<i>Interpool, Inc. v. Four Horsemen, Inc</i>	
C. The Rights of Seamen	24
1. Seaman Status	24
<i>Lewan v. Soo Marine Supply</i>	
2. Maintenance and Cure	25
a. Restatement-style summary: Shipowners’ Liability Convention	25
b. Thwarted nonlitigiousness aspirations	26
<i>Ward v. EHW Constructors</i>	
c. Maximum medical recovery; voluntary refusal of needed medical treatment	27
<i>Ward v. EHW Constructors</i>	

d. The intentional concealment defense	29
<i>Coastal Villages Pollock, LLC v. Naufahu</i>	
e. The recoupment (restitution) issue	29
<i>Block Island Fishing, Inc. v. Rogers</i>	
<i>Williams v. Central Contracting & Marine Inc.</i>	
3. Jones Act and Unseaworthiness Litigation	30
a. Causation in Jones Act cases	30
<i>Ghaleb v. American Steamship Co.</i>	
b. Prejudgment interest in Jones Act/unseaworthiness actions	32
<i>Nevor v. Moneypenny Holdings, LLC</i>	
c. Punitive damages in unseaworthiness actions	35
<i>Batterton v. Dutra Group</i>	
<i>Tabingo v. American Triumph LLC</i>	
4. Forum Selection and Arbitration Clauses in Seamen’s Employment Contracts	37
<i>Tu Vo v. Trident Seafoods Corp</i>	
<i>Castro v. Tri Marine Fish Company, LLC</i>	
D. Limitation of Liability; General Maritime Tort Law	39
<i>Holzhauser v. Golden Gate Bridge Highway & Transportation District</i>	
<i>In re Aramark Sports and Entertainment Services, LLC</i>	
E. Carriage of Goods	44
1. Continued Validity of COGSA	44
<i>Liberty Woods International, Inc. v. M/V Ocean Quartz</i>	
2. Negligent Third Parties and Himalaya Clauses	46
<i>Lofthouse Manufacturing Ltd. v. Ports America Baltimore, Inc.</i>	
3. <i>Forum Non Conveniens</i> and Forum Selection Clauses in Bills of Lading	48
<i>Amazon Produce Network, LLC v. NYK Line</i>	
<i>Goal Zero, LLC v. Cargo Freight Services, Ltd.</i>	
<i>Thyssenkrupp Materials NA, Inc. v. M/V Kacey</i>	
<i>Liberty Woods International, Inc. v. M/V Ocean Quartz</i>	
4. Carriers’ Actions Against Cargo Interests	50
<i>Mediterranean Shipping Co. v. Best Tire Recycling, Inc.</i>	
<i>BMW of North America LLC v. M/V Courage</i>	

5. Customary Freight Units	51
<i>Vinnlustodin HF v. Sea Tank Shipping AS (“The Aqasia”)</i>	
F. General Maritime Tort and Contract Law	54
<i>In re Cooper Marine & Timberlands Corp.</i>	
<i>Nieves v. Cooper Marine & Timberlands Corp.</i>	
G. Marine Insurance	55
<i>Travelers Property Casualty Co. of America v. Klick</i>	
<i>Sullivan v. Certain Underwriters at Lloyds</i>	
<i>AGCS Marine Insurance Co. v. World Fuel Services, Inc.</i>	
<i>QBE Seguros v. Morales-Vasquez</i>	
<i>National Liability & Fire Insurance Co. v. Rooding</i>	
H. Longshore and Harbor Workers’ Compensation Act (LHWCA)	58
1. Tort Cases	58
<i>Arbogast v. Georgia-Pacific, LLC</i>	
<i>Cruz v. United States</i>	
<i>Fernandez v. City of New York</i>	
2. Administrative Cases	60
<i>Chugach Management Services v. Jetnil</i>	
<i>Fenske v. Service Employers International</i>	
<i>Kealoha II</i>	
<i>Knutson Towing v. Wakely</i>	
<i>Metro Machine Corp. v. Director, OWCP</i>	
<i>Navalo v. Cochise Consultancy, Inc.</i>	
<i>Ansello v. Wisconsin Central, Ltd</i>	
I. Maritime Liens	66
<i>ING Bank, N.V. v. M/V Temara</i>	
J. Removal	68
<i>Gonzalez v. Red Hook Container Terminal LLC</i>	
<i>Atlantic Coast Marine Group, Inc. v. Willis</i>	
K. Miscellaneous	69
<i>New York Shipping Association v. Waterfront Commission</i>	
L. Miscellaneous Nonmaritime Cases	70
1. The Government Contractor Doctrine	70
<i>Ripley v. Foster Wheeler LLC</i>	

2. The <i>Twiqbal</i> Criteria for the Validity of Federal-Court Complaints	71
<i>West Bend Mutual Insurance Co. v. Schumacher</i>	
<i>Ex Parte Austal USA, LLC</i>	
V. THE WORK OF THE COURTS IN THE FIFTH AND ELEVENTH CIRCUITS	76
A. Admiralty Jurisdiction	76
1. Admiralty Jurisdiction in Tort	76
a. The navigable water requirement	76
<i>Tundidor v. Miami-Dade County</i>	
<i>Frickey v. Shell Pipeline Co.</i>	
b. The “SRTMA” requirement re shipbuilding torts	77
<i>Crace v. Northrop Grummon Ship Systems</i>	
<i>Babineaux v. Diamond B. Industries</i>	
c. The “PDMC” requirement	78
<i>Ledesma v. Airbus Helicopters, Inc.</i>	
2. Jurisdiction in Limitation of Liability Proceedings	79
<i>In re Texas Petroleum Investment Co.</i>	
3. Admiralty Jurisdiction in Contract Cases	80
<i>Larry Doiron, Inc. v. Specialty Rental Tools & Supply, L.L.P.</i>	
<i>In re Crescent Energy Services, LLC</i>	
B. The Federal vs. State Law Consequences of Admiralty Jurisdiction	81
<i>Frickey</i>	
<i>Davis v. Dynamic Offshore Resources, L.L.C.</i>	
C. Vessel Status	82
<i>Helix Energy Solutions Group, Inc. v. Gold</i>	
D. The Rights of Seamen	83
1. Seaman Status	83
a. The substantial-in-duration requirement	83
<i>Guidry v. ABC Insurance Co.</i>	
<i>Wade v. Baywater Drilling</i>	
b. The substantial-in-nature requirement	85
<i>Welch v. Prop Transport & Trading, LLC</i>	
c. Seaman Status Under the FLSA	86
<i>Halle v. Galliano Marine Service</i>	

2. Maintenance and Cure	88
a. Too much litigation; preemptive declaratory actions; related shenanigans	88
<i>Atlantic Sounding Co., Inc. and Weeks Marine, Inc. v. Pervel</i>	
<i>Coastal Drilling Co. v. Creel</i>	
b. The “McCorpenesque” defense: a background essay on <i>McCorpen and Brown</i>	91
c. A sampling of current cases treating the “McCorpenesque” defense	96
<i>Bosarge v. Cheramie Marine, L.L.C.,</i>	
<i>Cenac Marine Services, LLC v. Clark</i>	
<i>Rinehart v. National Oilwell Varco L.P</i>	
d. Punitive damages in M&C actions	97
<i>Satterfield v. Harvey Gulf International Marine,</i>	
e. Availability and amount of daily maintenance payments	98
<i>Armstrong v. Offshore Specialty Fabricators</i>	
<i>Moody v. Noble Drilling (U.S.) LLC</i>	
3. Jones Act and Unseaworthiness Litigation	99
a. The Primary Duty Doctrine	99
<i>DE Jean v. Caillou Island Towing Co.,</i>	
b. Forum Selection Clauses in Seamen’s Employment Contracts	99
<i>In re OSG Ship Management, Inc</i>	
<i>Tu Vo v. Trident Seafoods Corp.</i>	
<i>Castro v. Pullmantur, S.A.</i>	
c. Punitive Damages in Jones Act and Unseaworthiness Cases	102
<i>Wade v. Clemco Industries Corp.</i>	
d. Other Damages Issues in Seamen’s Cases	103
<i>Bell v. Foster Wheeler Energy Corp.</i>	
<i>Rockett v. Belle Chasse Marine Transport, LLC</i>	
<i>Rinehart v. National Oilwell Varco L.P.</i>	
<i>McBride v. Estis Well Service, L.L.C.</i>	
e. Arbitration Clauses and Enforcement in Seamen’s Actions	106
<i>Alberts v. Royal Caribbean Cruises, Ltd.</i>	
<i>Cvoro v. Carnival Corp.</i>	
<i>Shah v. Blue Wake Shipping</i>	
<i>Wexler v. Solemates Marine, Ltd.</i>	

E. Carriage of Goods	112
1. Negligent Third Parties and Himalaya Clauses	112
<i>Royal SMIT Transformers BV v. HC Bea-Luna M/V</i>	
2. The Cargo Claimant’s Prima Facie Case, Delivery, Q Clause	114
<i>United States v. Sealift, Inc.</i>	
3. “Restraint of Princes”	115
<i>Eitzen Chemical A/S v. Carib Petroleum</i>	
4. Carriers’ Actions Against Cargo Interests	115
<i>GIC Services, L.L.C. v. Freightplus USA, Inc.</i>	
5. <i>Forum Non Conveniens</i> and Forum Selection Clauses in Bills of Lading	118
<i>Maxima International, S.A. v. Interocean Lines, Inc.</i>	
F. Marine Insurance	118
<i>Continental Insurance Co. v. L&L Marine Transportation, Inc.</i>	
G. Collision	119
<i>Moench v. Marquette Transportation Co. Gulf-Inland, L.L.C.</i>	
<i>Marquette Transportation Co. v. M/V Century Dream</i>	
<i>Maya Special Maritime Enterprises v. Tug M.L. Crochet</i>	
H. Longshore and Harbor Workers’ Compensation Act (LHWCA)	120
1. The Act’s Coverage	120
<i>Mays v. Chevron Pipe Line Co.,</i>	
<i>Baker v. Director, Office of Workers’ Compensation Programs</i>	
2. Tort Cases	125
<i>Koch v. United States</i>	
<i>Miller v. Navalmar (U.K.) Ltd.</i>	
<i>Dixon v. NYK Reefers Ltd.</i>	
<i>Deperrodil v. Bozovic Marine, Inc.</i>	
3. Administrative Cases	129
<i>Bollinger Shipyards, Inc. v. Director, Office of Worker’s Compensation Programs</i>	
<i>Continental Insurance Co. v. Dawson</i>	
<i>Chugach Management Services v. Jetnil,</i>	
<i>Triple Canopy, Inc. v. United States Department of Labor</i>	
<i>Blackmon v. Huntington Ingalls</i>	

I. Outer Continental Shelf Lands Act	134
<i>Butler v. Superior Energy Service, Inc.</i>	
<i>Richard v. Anadarko Petroleum Corp.</i>	
<i>Hammer v. PHI, Inc</i>	
J. General Maritime Tort and Contract Law	138
<i>International Marine, L.L.C. v. Integrity Fisheries, Inc.</i>	
<i>Abston v. Jungerhaus Maritime Services GMBH & Co.</i>	
<i>LLOG Exploration Co., L.L.C. v. Signet Maritime Corp.</i>	
K. Salvage	140
<i>Evans v. Vidalia Dock & Storage Co.</i>	
<i>Salvors, Inc. v. Unidentified Wrecked & Abandoned Vessel</i>	
L. Procedure	142
1. Personal Jurisdiction	142
<i>O’Berry v. Ensco International, LLC</i>	
2. General Procedural Issues	143
<i>In re C.F. Bean LLC</i>	
<i>Lee v. Offshore Logistical and Transport, L.L.C.</i>	
M. Removal	144
<i>Zeringue v. Crane Co.</i>	
<i>Savoie v. Pennsylvania General Insurance Co.</i>	
<i>Moreau v. Weston Solutions, Inc.</i>	
N. Oil Pollution Act	148
<i>Settoon Towing, L.L.C. v. Marquette Transportation Co., L.L.C.</i>	
O. Forum Selection Clauses in General	149
<i>Chang v. Carnival Corp</i>	
P. Miscellaneous Cases	150
<i>Edwards v. Continental Casualty Co.</i>	
<i>In re Fairway Methanol LLC</i>	
<i>Heniff Transportation Systems, L.L.C. v. Trimac Transportation Services</i>	

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

David W. Robertson
William Powers, Jr. and Kim L. Heilbrun 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@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

Visiting Professor (August-December 2017)
National University of Singapore Faculty of Law
469G Bukit Timah Road, Singapore 259776
+65-6601-5973
msturley@nus.edu.sg

Matthew H. Ammerman
LAW OFFICE OF MATTHEW H. AMMERMAN, P.C.
2040 North Loop West, Ste. 390, Houston, Texas 77018-8114
713/227-1404; Fax 713/456-2634
mha@MaritimeDefense.net

September 1, 2017

I. INTRODUCTION

This is the seventeenth paper in a series of annual reports on U.S. admiralty and maritime law and practice.¹ In these papers we try to call attention to the principal national-

¹ The preceding sixteen 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*, 41 TUL. MAR. L.J. 437 (2017) [hereinafter 2016 *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*, 40 TUL. MAR. L.J. 343 (2016) [hereinafter 2015 *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*, 39 TUL. MAR. L.J. 471 (2015)

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.²

[hereinafter *2014 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*, 38 TUL. MAR. L.J. 419 (2014) [hereinafter *2013 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*, 37 TUL. MAR. L.J. 401 (2013) [hereinafter *2012 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*, 36 TUL. MAR. L.J. 425 (2012) [hereinafter *2011 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*, 35 TUL. MAR. L.J. 493 (2011) [hereinafter *2010 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*, 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 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*].

² We make no attempt to be thorough respecting district court decisions, although we have included some for their information value. “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

II. MISCELLANEOUS DEVELOPMENTS AT THE NATIONAL LEVEL

A. Federal Rules Amendments

Amendments to the Federal Rules of Appellate and Civil Procedure will go into effect on December 1, 2017, unless Congress acts on them prior to that date. The affected rules are FRAP 4(a)(4)(B)(iii) (dealing with notices of appeal) and FRCP 4(m) (specifying the time limit for service). Both amendments are highly technical. The FRAP amendment corrects an inadvertent glitch in the 2009 amendments. The FRCP amendment corrects a similar glitch in the 2016 amendment.³

B. Maximum Compensation Rate Under the LHWCA

Section 10(f)(1) of the Longshore and Harbor Workers' Compensation Act⁴ ties the maximum weekly compensation rate to the national average weekly wage. Effective October 1, 2017, the maximum weekly compensation rate will be \$1,436.48 (up from \$1,406.00 in fiscal 2016).

C. Increased Penalty Amounts under the LHWCA

The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015⁵ requires agencies to adjust the levels of existing civil monetary penalties annually based on inflation. In October 2016 the penalties were more than doubled for an LHWCA employer's failure to notify the Office of Workers' Compensation Programs (OWCP) if LHWCA compensation is suspended or terminated within 16 days and for failing to file a notice of injury within 10 days of a lost-time injury. Those same penalties were later marginally increased on January 13, 2017. The penalty for failure to file a notice of final payment or suspension of payment is now \$279, and the maximum penalty for an employer's failure to report a LHWCA-covered injury to the OWCP has increased to \$22,957.⁶

§ 134.02[1][d], p. 138-24.1 (3d ed. 2007). *See also American Electric Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) (“[F]ederal district judges, sitting as sole adjudicators, lack authority to render precedential decisions binding other judges, even members of the same court.”).

³ *See Amendments to Federal Rules: What Practitioners Should Know*, 85 U.S. Law Week 1503 (2017).

⁴ 33 U.S.C. § 910(f)(1).

⁵ Pub. L. 114-74.

⁶ 20 C.F.R. § 702.204; *See also* Industry Notice 160 (January 25, 2017), available at <https://www.dol.gov/owcp/dlhwc/lindustryntices/industryntice160.htm>.

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits

First appeared as part of the conference materials for the
26th Annual Admiralty and Maritime Law Conference session
"Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits"