

Recent Developments in Maintenance and Cure and Punitive Damages
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Introduction

This CLE address noteworthy maintenance and cure and punitive damages decisions rendered between January 1, 2016 and May 1, 2017. The selection of cases included in this article reflects trends in the law, including continued application of the *McCorpen* defense, recovery of paid maintenance and cure benefits by the employer, the awarding of future cure, and the awarding of punitive damages post-*Townsend* for maintenance and cure, as well as unseaworthiness.

Medical Conditions Unrelated to the Service of the Vessel

In *Robinson v. F/V LILLI ANN, LLC, et al.*, the U.S. Western District of Washington addressed an employer's duty to investigate a seaman's medical condition, even for those conditions that are unrelated to service on the vessel.² Following a stroke, the seaman alleged that his employer and the owner of the fishing vessel on which he worked breached their maritime duty to provide maintenance and cure by failing to take all reasonable steps to ensure that plaintiff received proper care and treatment for his severe sleep apnea.³ Well before the incident, the captain of the vessel advised plaintiff to see a doctor about his serious snoring problem and even recommended a CPAP, which plaintiff had tried but did not believe worked.⁴ The plaintiff self-administered two sleep studies. If the diagnoses were sleep apnea, his doctor would recommend a tonsillectomy and surgery to repair his deviated septum.⁵ Following the sleep studies, the plaintiff did not receive any communications or discuss the results with his physician.⁶

The plaintiff noted on his start-of-season health questionnaire that he needed surgery on his tonsils and palate. He also testified that he told the captain that he would need to take off the next two fishing trips in order to have the tonsillectomy and palate surgery. The captain allegedly told him that he was needed on the next two fishing trips because no other crew member was available to attend training on new technology that the vessel had recently installed, and that plaintiff would have to postpone his surgery. The captain denied telling the plaintiff to postpone his surgery.⁷ The vessel left Seattle for Alaska and several days later the plaintiff began to feel unwell.⁸ He began to vomit, had trouble walking, and complained of a tingling sensation on the right side of his face.⁹ When the vessel arrived in Dutch Harbor, crew members brought the plaintiff to a health clinic,

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² 2017 U.S. Dist. LEXIS 24878, at *1 (W.D. Wash. Feb. 22, 2017)

³ *Id.* at *1.

⁴ *Id.* at *3.

⁵ *Id.*

⁶ *Id.* at *3-4.

⁷ *Id.* at *4.

⁸ *Id.*

⁹ *Id.* at *5.

where the right side of his face began to droop. He was transported via air ambulance to a hospital in Anchorage, where he was diagnosed with a stroke.¹⁰

The defendants moved for summary judgment, arguing that their maintenance and cure obligations did not extend to requiring plaintiff to get medical care for a medical condition unrelated to his employment — and that even if it did, they did not breach that duty.¹¹ The court held that the standard of care entailed by the duty to provide maintenance and cure requires vessel owners to take measures that are reasonable under the circumstances to furnish medical care for sick or injured employees, even when the seaman's employment is not the cause of his sickness or injury. However, the court disagreed with the plaintiff's argument that that the duty of maintenance and cure *necessarily* demanded that defendants investigate the plaintiff's illness.¹² “On the facts of a given case, failure to inquire into a seaman's health may constitute a breach of the duty to ensure proper care, but the Court declines to impose an affirmative duty to investigate in all cases.”¹³

Entitlement to Maintenance and Cure Accruing Post-Termination

In *Cepeda v. Orion Marine Constr., Inc.*, the Texas Court of Appeals addressed whether a seaman was entitled to maintenance and cure benefits when he was injured aboard a skiff taking him back to shore after he was fired.¹⁴ The employer argued that Cepeda was not a seaman at the time of the accident because it had terminated his employment on the dredge, before Cepeda boarded the skiff, and thus no employer-employee relationship existed at the time that Cepeda claimed to be injured.¹⁵ Relying on the U.S. Fourth Circuit's decision in *The Michael Tracy*,¹⁶ as well as the U.S. Supreme Court's decision in *Aguilar v. Standard Oil Co. of N.J.*,¹⁷ the court rejected the employer's argument, holding that a “seaman's remedies persist after discharge during the interval in which he disembarks the ship and safely returns to dry land.”¹⁸

Award of Future Maintenance and Cure

Many are aware of the previous U.S. Fifth Circuit *en banc* decision in *McBride v. Estis Well Serv. L.L.C.*, which held that a seaman or his estate could not recover punitive damages for unseaworthiness.¹⁹ Following remand, the U.S. Western District of Louisiana held a bench trial in this matter involving an overturned truck-mounted drilling rig on a barge.²⁰ The district court found that while attempting to rescue his co-worker, plaintiff Touchet suffered an injury to his lumbar

¹⁰ *Id.* at *5.

¹¹ *Id.* at *5-6.

¹² *Id.* at *9 (emphasis in original).

¹³ *Id.* at *10. Trial is currently set for June 2017.

¹⁴ 2016 Tex. App. LEXIS 7527, at *1-2 (Tex. App. 1st – Houston Div. July 14, 2016).

¹⁵ *Id.* at *3.

¹⁶ 295 F. 680 (4th Cir. 1924).

¹⁷ 318 U.S. 724 (1943).

¹⁸ *Cepeda v. Orion Marine Constr., Inc.*, 2016 Tex. App. LEXIS 7527, at *5 (Tex. App. 1st – Houston Div. July 14, 2016).

¹⁹ 768 F.3d 382 (5th Cir. 2014).

²⁰ 2017 U.S. App. LEXIS 6159 (5th Cir. Apr. 10, 2017).

spine, for which his treating physician recommended a decompression and interbody fusion. The plaintiff also suffered from PTSD. The court ordered the defendant to pay future cure until Touchet reached maximum medical improvement and awarded \$55,185 in future medical expenses beyond Touchet's maximum medical improvement.²¹ The defendant argued that this was a double award of cure and that the court's award essentially left the cure period open indefinitely.²² The U.S. Fifth Circuit disagreed, holding that "when supported by a physician's testimony, it is appropriate for a district court to award future maintenance and cure until the plaintiff reaches maximum medical improvement."²³ Moreover, the court held that a plaintiff can be awarded both cure and tort damages for future medical expenses, so long as no duplication will occur, because the cure obligation is independent of tort law.²⁴ Because the district court made clear that the cure payments would cease once the plaintiff reached maximum medical improvement, and medical treatments thereafter would be compensated from the \$55,185 award for future medical expenses, the court affirmed.²⁵

Medicaid and Maintenance and Cure

In *Terrebonne v. B&J Martin, Inc.*, the U.S. Eastern District of Louisiana addressed the relationship between Medicaid benefits and maintenance and cure.²⁶ The seaman was working aboard the vessel when he began to experience chest pain.²⁷ He claimed that despite advising his employer of this pain for weeks, he was not permitted to leave the vessel to seek medical attention and that he eventually suffered a cardiac event.²⁸ He was advised that he need a small procedure for his heart, but alleged that the defendant refused to pay for the procedure, ultimately resulting in the seaman waiting five months to undergo a more extensive open heart surgery at a charity hospital in New Orleans.²⁹ The defendant moved for summary judgment on its cure obligation, arguing that plaintiff's Medicaid eligibility satisfied the cure obligation.³⁰ The court agreed, reasoning that many courts have found Medicaid to be the functional equivalent of the previously available free treatment at Public Health Service Hospitals.³¹ Accordingly, "a shipowner may avoid liability for cure payments to the extent that a plaintiff's medical bills are paid by Medicaid, as this medical care is provided at no cost to the injured seaman."³² The court granted summary judgment in favor of the defendants to the extent that Medicaid had provided payment for the plaintiff's medical expenses.³³

²¹ *Id.* at *8. (plaintiff's treating physician testified that his expected MMI date following the lumbar fusion was 12-18 months).

²² *Id.*

²³ *Id.* at *9 (citing *Lirette v. K & B Boat Rentals, Inc.*, 579 F.2d 968, 969-70 (5th Cir. 1978)).

²⁴ *Id.*

²⁵ *Id.*

²⁶ 2017 U.S. Dist. LEXIS 40058 (E.D. La. Mar. 21, 2017).

²⁷ *Id.* at *1.

²⁸ *Id.*

²⁹ *Id.* at *1-2.

³⁰ *Id.* at *3.

³¹ *Id.* at *4 (citing *Lovell v. Master Braxton, LLC*, 2016 U.S. Dist. LEXIS 159884 (E.D. La. Nov. 18, 2016)).

³² *Id.*

³³ *Id.* at *5.

Proper Defendants for a Maintenance and Cure Claim

The issue in *Daughtry v. Jenny G. LLC, et al*, was whether the seaman brought his maintenance and cure claim against the correct defendant.³⁴ The seaman alleged that he slipped and fell aboard the subject vessel, resulting in a broken leg.³⁵ He brought suit against the corporate owner of the vessel, as well as that entity's individual owners.³⁶ One of the individual owners brought a Motion for Summary Judgment, arguing that in his individual capacity, he was not the owner of the vessel or the plaintiff's employer. Thus, the seaman's claim for maintenance and cure against him, individually, failed as a matter of law.³⁷ The U.S. Southern District of Florida agreed, granting the Motion for Summary Judgment, and holding that the seaman's claims for failure to provide maintenance and cure could be maintained only against his employer, the owner of the vessel *in personam*, or the vessel itself *in rem*.³⁸

Restitution for Overpayment of Maintenance and Cure

The issue in *Block Island Fishing, Inc. v. Rogers*, was whether the employer could recover overpayment of maintenance to a seaman based on an alleged misrepresentation in living expenses by the seaman.³⁹ As addressed by the U.S. District of Massachusetts, the "sticking point" was the seaman's claimed expenditures for rent.⁴⁰ The employer paid the seaman a daily maintenance rate calculated using the monthly expenditure information provided by the seaman. In particular, the seaman claimed a monthly rental expense of \$1,600, when in actuality the seaman's rent was half of that amount or \$800 per month.⁴¹ The employer sought "restitution" from the plaintiff for overpayment of maintenance. Relying on the U.S. Fifth Circuit's decision in *Boudreaux v. Transocean Deepwater, Inc.*, the court held that the employer could not recover restitution: "[O]nce a shipowner pays maintenance and cure to the injured seaman, the payments can be recovered only by offset against the seaman's damages award — not by an independent suit seeking affirmative recovery."⁴²

Reimbursement for Maintenance and Cure

In *Williams v. Cent. Contr. & Marine, Inc.*, the U.S. Southern District of Illinois addressed an employer's ability to obtain reimbursement of allegedly wrongfully paid maintenance and cure.⁴³ The seaman brought Jones Act, unseaworthiness, and maintenance and cure claims arising out of an accident involving a fall.⁴⁴ The employer counterclaimed, alleging that although it did not

³⁴ 2016 U.S. Dist. LEXIS 119157 (S.D. Fla. Sept. 1, 2016).

³⁵ *Id.* at *2.

³⁶ *Id.*

³⁷ *Id.* at *3-4.

³⁸ *Id.* at *4.

³⁹ 149 F. Supp. 3d 214 (D. Mass. Mar. 3, 2016).

⁴⁰ *Id.* at 217.

⁴¹ *Id.*

⁴² *Id.* at 218 (quoting *Boudreaux v. Transocean Deepwater, Inc.*, 721 F.3d 723, 728 (5th Cir. 2013)).

⁴³ 2017 U.S. Dist. LEXIS 2793 (S.D. Ill. Jan. 9, 2017).

⁴⁴ *Id.* at *1-2.

require the plaintiff to undergo a pre-employment physical, had he disclosed his previous injuries, he would not have been hired. Based on the *McCorpen* defense, the employer sought reimbursement for the maintenance and cure it has already paid to the plaintiff.⁴⁵ The plaintiff moved to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court granted the plaintiff's motion, reasoning that employers "have the opportunity and right to investigate maintenance and cure claims such as this before payments are tendered and they can do so without subjecting themselves to liability for compensatory or punitive damages."⁴⁶ In addition, the court held that the employer's inability to seek reimbursement would not result in a windfall for the seaman, because even absent fraud, the employer would be entitled to a setoff against any Jones Act damages.⁴⁷

Intervention to Recover Maintenance and Cure Payments

Can insurance underwriters intervene in a seaman's suit to recover for past payments of maintenance and cure, airing that the alleged seaman is actually a longshore worker? In *Loveall v. Nordic Underwater Services, Inc., et al*, the U.S. Eastern District of Louisiana held that such intervention was improper.⁴⁸ The court reasoned that the underwriters had no valid claim for a lien in the seaman's Jones Act suit because any recovery on the purported lien would be premised on the plaintiff being a seaman—meaning that the underwriters had been properly paying maintenance and cure benefits.⁴⁹ Furthermore, the underwriters had no right to litigate seaman status in the plaintiff's case beyond what its own insured — represented by the same attorney — was already doing.⁵⁰ Most importantly, the underwriters claim would only arise when and if the plaintiff was determined not to be a seaman.⁵¹ Therefore, the underwriters could not intervene in the case "to prosecute a claim that has not even accrued and may never accrue."⁵² The Court dismissed the underwriters' Intervention finding them to be an "interloper."⁵³

Dismissal of Punitive Damages Claim when Seaman Status is Reasonably Contested

Facing what it described as an issue of first impression, the U.S. Western District of Washington, in *Ward v. EHW Constructors*, dismissed a plaintiff's claim for punitive damages for alleged failure to pay maintenance and cure benefits when the employer had a reasonable basis for contesting seaman status.⁵⁴ The employer contended that the plaintiff was part of a construction crew, rather than a seaman, and relied on information from its pile driving foreman in contesting that the plaintiff was a longshore worker.⁵⁵ Importantly, the court had previously denied the plaintiff's Motion for Summary Judgment, in which he sought a determination that he was a Jones

⁴⁵ *Id.* at *2.

⁴⁶ *Id.* at *5.

⁴⁷ *Id.*

⁴⁸ 2016 U.S. Dist. LEXIS 110656, at *2 (E.D. La. Aug. 19, 2016).

⁴⁹ *Id.* at *6.

⁵⁰ *Id.* at *8.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 2016 U.S. Dist. LEXIS 177640, at *11 (W.D. Wash. Dec. 22, 2016).

⁵⁵ *Id.* at *5.

Act seaman as a matter of law, finding that genuine issues of material fact existed.⁵⁶ Accordingly, the court dismissed the plaintiff's punitive damages claim on summary judgment: "Because reasonable minds could differ on whether Plaintiff's duties rendered him a seaman, no rational juror could find that Defendants' opposition to maintenance and cure was in bad faith."⁵⁷

Choice of Law in Employment Contract and Punitive Damages

In another interesting punitive damages decision issued by the U.S. Western District of Washington, *Fox v. Holland America Line, Inc.*, the court addressed whether a claim for punitive damages for failure to pay maintenance and cure was available to a seaman where the employment contract called for application of the law of the British Virgin Islands.⁵⁸ The court held that the choice-of-law clause in the employment contract would force the seaman to forego her Jones Act claims, "similarly allowing Defendants to evade liability," and, thus, was void under Section Five of the Federal Employer's Liability Act (FELA).⁵⁹ Because the choice-of-law clause did not control, the court turned to the factors set forth by the U.S. Supreme Court in *Lauritzen v. Larsen*,⁶⁰ to determine the applicable law: (1) the place of the wrongful act; (2) the vessel's flag; (3) the injured party's allegiance or domicile; (4) the shipowner's allegiance; (5) the place of contract; (6) accessibility of a foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations.⁶⁰ In sum, the court found that the mater involved an American plaintiff who was hired in California by a company registered in Washington and conducting business in the United States.⁶¹ Furthermore, application of U.S. law would allow the plaintiff to invoke her "important rights under the Jones Act, which would otherwise be precluded."⁶² Thus, the United States' interests were "sufficiently implicated to warrant the application of United States law," United States' law applied, and the seaman could seek to recover punitive damages under the U.S. Supreme Court's decision in *Atlantic Sounding Co., Inc. v. Townsend*.⁶³

Punitive Damages Claim Denied

The seaman in *In re GIS Marine, LLC*, sought punitive damages for an alleged delay in approving his cure, as well as an alleged refusal by the employer to approve a nerve conduction treatment.⁶⁴ The court held that the employer's 4 day delay in approving the seaman's epidural steroid injections was not unreasonable under the circumstances and did not amount to willful refusal.⁶⁵ In regards to the nerve conduction ceremony, the employer presented evidence that, when the seaman first requested approval for the treatment, it asked for a copy of his primary care physician's report and referral for the nerve conduction treatment in order to investigate the

⁵⁶ *Id.* at *15.

⁵⁷ *Id.*

⁵⁸ 2016 U.S. Dist. LEXIS 44145, at *2 (W.D. Wash. Mar. 31, 2016) (the defendant also argued that if the laws of the British Virgin Island were inapplicable, then the laws of the Netherlands would apply).

⁵⁹ *Id.* at *3-4.

⁶⁰ *Id.* at *4-5 (citing *Lauritzen v. Larsen*, 345 U.S. 571 (1953); *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 309 (1970)).

⁶¹ *Id.* at *9.

⁶² *Id.*

⁶³ *Id.* at *9-10 (citing *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404, 414 (2009)).

⁶⁴ 2016 U.S. Dist. LEXIS 69241 (E.D. La. May 26, 2016).

⁶⁵ *Id.* at *7-8.

medical necessity of the treatment through an independent medical examination.⁶⁶ Because this information was never provided to the employer, the court held that the employer did not act willfully, and that the plaintiff and his counsel had refused to follow through with the employer's "reasonable requests" for medical records.⁶⁷

Punitive Damages Claim Available for Maintenance and Cure

In *Hottmann v. Hatch*, the U.S. District of Oregon addressed whether the defendants' assertion that an injury or illness did not occur in the service of the ship was a legal defense to the plaintiff's claim for punitive damages.⁶⁸ The seaman alleged that he injured his back while working aboard the vessel. The defendant, disagreed, contending that his injury occurred after his time on the vessel.⁶⁹ The defendants moved for Partial Summary Judgment, arguing that the plaintiff's punitive damages claim should be dismissed because he could not establish the requisite willful and wanton standard.⁷⁰ The court held that "[a] ship owner's mere assertion that an injury or illness did not occur in the service of the ship is not a conclusive 'reasonable basis' or 'colorable legal defense' that shields them from a punitive damages or attorney's fees award."⁷¹ Because a question existed regarding whether the "defendants' justification for denying Plaintiff's maintenance and cure claim is rooted in pretext or a good faith belief," the claim for punitive damages was allowed to proceed to the jury.⁷²

In *Bland v. Omega Protein, Inc.*, the seaman argued that his employer failed to adequately investigate his renewed claim for maintenance and cure and refused to pay maintenance and cure benefits without consulting a medical professional, as to those renewed claims, which the seaman argued amounted to a willful and wanton refusal to pay benefits and warranted the imposition of punitive damages.⁷³ The seaman's original treating physician reported that he reached maximum medical improvement on May 30, 2013. Thereafter, another physician retained by the seaman opined the he had suffered a traumatic brain injury due to the subject accident.⁷⁴ The employer's retained physician opined that there was no evidence of brain injury relating to the subject accident and the plaintiff's cognitive defects were to be expected given his borderline IQ and history of cognitive deficits.⁷⁵ Based on the conflicting medical opinions, the U.S. Western District of Louisiana denied the employer's Motion Summary Judgment, holding that genuine issues of material fact existed as to whether its denial was arbitrary and capricious.⁷⁶

⁶⁶ *Id.* at *8.

⁶⁷ *Id.* *8.

⁶⁸ 2017 U.S. Dist. LEXIS 20608 (D. Or. Feb 14, 2017)

⁶⁹ *Id.* at *1-2.

⁷⁰ *Id.* at *2.

⁷¹ *Id.* at *4 (citing *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Deisler v. McCormack Aggregates, Co.*, 54 F.3d 1074 (3d Cir. 1995); *Stermer v. Archer-Daniels-Midland Co.*, 140 So.3d 879 (La. Ct. App. 3d Cir. 2014)).

⁷² *Id.* A jury trial is scheduled for September 2017.

⁷³ 2016 U.S. Dist. LEXIS 7887 (W.D. La. Jan. 21, 2016).

⁷⁴ *Id.* at *11.

⁷⁵ *Id.*

⁷⁶ *Id.*

In *Satterfield v. Harvey Gulf Int'l Marine*, the seaman sought punitive damages as a result of an alleged delay by his employer in providing cure.⁷⁷ The seaman alleged that while working as a relief captain aboard the defendant's vessel, he began to experience flu-like symptoms that were in fact manifestations of congestive heart failure.⁷⁸ He further alleged that his symptoms were reported to his superior on the vessel and to Defendant's onshore personnel, who refused to relieve him of his duties, provide any medical assistance while aboard the vessel, and provide any medical personnel upon the vessel's arrival at its port.⁷⁹ The U.S. Eastern District of Louisiana discussed maintenance and cure as "the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship."⁸⁰ This duty encompasses the duty to provide medical care to a seaman while aboard the vessel, and a breach of this a duty gives rise to an action for breach of the maritime duty of maintenance and cure.⁸¹ Thus, the court denied the employer's Motion for Summary Judgment as to punitive damages.⁸²

Punitive Damages Awarded

In *Weeks Marine, Inc. v. Watson*, the U.S. Eastern District of Louisiana, following a bench trial, awarded punitive damages and attorney's fees to a seaman as a result of the employer's arbitrary and capricious failure to pay maintenance and cure, despite the employer obtaining an independent medical examination report refuting the treating physician.⁸³ The court found that the employer arbitrarily terminated the seaman's maintenance and cure benefits, even though his treating orthopedic surgeon reported that the seamen needed further diagnostic and clinical work up, including a left knee MRI.⁸⁴ Rather than authorize the tests, the employer obtained a second opinion and relied solely on the IME to unilaterally terminate benefits.⁸⁵ The employer refused to authorize the treating physician to continue treating the seaman and the treating physician was never able to render a final diagnosis or prognosis. As a result, the treating physician never determined that the seaman reached MMI.⁸⁶ The court found the actions of the employer to be arbitrary and capricious and awarded the seaman \$100,000 in punitive damages and \$50,000 in attorney's fees.⁸⁷

Availability of Punitive Damages for Unseaworthiness

The Washington State Supreme Court recently addressed whether a seaman may recover punitive damages arising out of a general maritime law unseaworthiness claim.⁸⁸ In *Tabingo v. Am. Triumph LLC*, a lever used to operate a hatch in the fishing trawler's deck broke when an operator

⁷⁷ 2016 U.S. Dist. LEXIS 138272 (E.D. La. Oct. 5, 2016).

⁷⁸ *Id.* at *1.

⁷⁹ *Id.* at *1-2.

⁸⁰ *Id.* at *7 (citing *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001)).

⁸¹ *Id.*

⁸² *Id.* at *7-8.

⁸³ 2016 U.S. Dist. LEXIS 69912, 2016 AMC 1651 (E.D. La. May 27, 2016).

⁸⁴ *Id.* at *16.

⁸⁵ *Id.*

⁸⁶ *Id.* at *16-17.

⁸⁷ *Id.* at *19-20.

⁸⁸ *Tabingo v. Am. Triumph LLC*, 2017 Wash. LEXIS 328 (Wash. Mar. 9, 2017).

tried to stop the hatch from closing, resulting in the hatch closing on the seaman's hand and the eventual amputation of two fingers.⁸⁹ Allegedly, the vessel owner knew of the broken lever for two years prior to the incident.⁹⁰ Relying upon the Supreme Court of the United States' holding in *Atl. Sounding Co. v. Townsend*, which allowed for the recovery of punitive damages in maintenance and cure claims,⁹¹ the *Tabingo* court reasoned that "at common law punitive damages were available and common law remedies extended to general maritime law, and there is no reason to believe unseaworthiness has been excluded from this general maritime rule."⁹² The court distinguished the Supreme Court of the United States' decision in *Miles v. Apex Marine Corp.* (holding that non-pecuniary damages, including punitive damages were unavailable) as non-controlling due to it being limited "solely to wrongful death claims."⁹³ The Washington State Supreme Court further rejected the U.S. Fifth Circuit's *en banc* decision in *McBride v. Estis Well Serv., LLC*, as a "plurality opinion" that misinterpreted the relationship between *Miles* and *Townsend*.⁹⁴ Applying *Townsend*'s rationale, the *Tabingo* court found that punitive damages are available for unseaworthiness claims.⁹⁵

Unavailability of Punitive Damages against a Non-Employer Third Party

Most recently, in *Rinehart v Nat'l Oilwell Varco L.P.*, the U.S. Eastern District of Louisiana addressed the availability of punitive damages for a seaman against a non-employer third party.⁹⁶ The plaintiff was a Jones Act seaman who was injured when a pallet fork slipped from NOV's crane hook onto the back of his head while loading pallets onto the vessel's deck.⁹⁷ The plaintiff suffered severe head injuries, including the inability to swallow normal food, resulting in him eating through a feeding tube implanted into his stomach.⁹⁸ He brought claims under the Jones Act and the general maritime law, including a claim for punitive damages, which the non-employer third party (National Oilwell) moved to dismiss as a matter of law.⁹⁹ The court reasoned that although there was a longstanding tradition of availability of punitive damages under common law and general maritime law, the Supreme Court held in *Miles v. Apex* that a seaman cannot recover non-pecuniary damages from his Jones Act employer under either a Jones Act negligence claim or a under a general maritime law unseaworthiness claim.¹⁰⁰ In *Miles*, the Supreme Court explained that "it would be inconsistent with this Court's place in the constitutional scheme to sanction more expansive remedies for the judicially created unseaworthiness cause of action, in which liability is without fault, than Congress has allowed in cases of death resulting

⁸⁹ *Id.* at *2.

⁹⁰ *Id.* at *4.

⁹¹ 557 U.S. 404 (2009).

⁹² *Tabingo*, 2017 Wash. LEXIS 328, at *12.

⁹³ *Id.* (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)).

⁹⁴ *Id.* at *14-15 (citing *McBride v. Estis Well Serv., LLC*, 768 F.3d 382 (5th Cir. 2014)).

⁹⁵ *Id.* at *15.

⁹⁶ 2017 U.S. Dist. LEXIS 60270 (E.D. La. Apr. 20, 2017).

⁹⁷ *Id.* at *2.

⁹⁸ *Id.* at *2-3.

⁹⁹ *Id.* at *3-4.

¹⁰⁰ *Id.* at *7-8 (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)).

from negligence.”¹⁰¹ The court noted that following the Supreme Court’s *Townsend* decision, there was brief uncertainty as to the availability of punitive damages under the general maritime law for non-maintenance and cure claims.¹⁰² However, the U.S. Fifth Circuit, sitting *en banc*, clarified in *McBride v. Estis Well Serv., LLC*, that neither a seaman nor his survivor can recover punitive damages for personal injury or wrongful death claims based on either the Jones Act or general maritime law.¹⁰³ The *McBride* court held that the reasoning in *Miles* remained sound regarding seaman personal injury and wrongful death claims, thus limiting *Townsend* only to maintenance and cure claims.¹⁰⁴ In *Scarborough v. Clemco Industries*, the Fifth Circuit held that a seaman may not recover punitive damages against either his employer or against a non-employer third party.¹⁰⁵ Based on the Fifth Circuit’s holdings in *McBride* and *Scarborough*, the court dismissed the plaintiff’s punitive damages claim as a matter of law.¹⁰⁶

¹⁰¹ *Id.* at *8 (citing *Miles*, 498 U.S. at 20).

¹⁰² *Id.* at *8-9.

¹⁰³ *Id.* *9 (citing *McBride v. Estis Well Serv., LLC*, 768 F.3d 382, 391 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015)).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at *9-10 (citing 391 F.3d 660, 668 (5th Cir. 2004)).

¹⁰⁶ *Id.* at *10.