Admiralty and Maritime Litigation in State Court

David W. Robertson

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# Admiralty and Maritime Litigation in State Court

*David W. Robertson*

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* A.W. Walker Centennial Chair in Law, University of Texas at Austin.
I. INTRODUCTION

During the past five or ten years, an increasing number of admiralty or maritime cases have been brought in state courts, confronting many judges with a new body of law and a new set of issues.1 The trend appears destined to continue. There are several likely reasons for the shift of maritime cases from the federal to the state courts. (In assessing the plausibility of these reasons, bear in mind that the plaintiff chooses the forum.)2 First, in state court judgment can be rendered on the

1. Among the useful general treatises on admiralty and maritime law are Grant Gilmore & Charles Black, The Law of Admiralty (2d ed. 1975), and Frank Maraist, Admiralty in a Nutshell (2d ed. 1988).

"[T]he terms 'admiralty' and 'maritime law' are virtually synonymous in this country today, though the first derives from ... the system administered in a single English court, whereas the second makes a wider and more descriptive reference." Gilmore & Black, supra, at 1 (footnote omitted).

2. As will appear infra notes 86-91 and accompanying text, under the "saving to suitors" clause of 28 U.S.C. § 1333 (1988), the plaintiffs in most maritime disputes have the option of litigating in federal or state court. When a maritime plaintiff chooses state court, the defendant can rarely defeat that choice. Cases cannot be removed from state to federal court on the basis of admiralty jurisdiction, and Jones Act cases are not removable on any basis. Occasionally the defendant in a maritime case other than a Jones Act case instituted in state court will be able to
basis of a 9-3 jury verdict, whereas federal courts generally require unanimous verdicts. Second, a plaintiff can usually get to trial more quickly in a state court than in a federal court. Third, many lawyers find state courts considerably more “user friendly” than federal courts. Fourth, Louisiana Code of Civil Procedure article 1732(6), effective September 9, 1988, gave state-court maritime plaintiffs a new right to choose between a bench trial or a jury trial. Finally, the narrow limitations on the Louisiana law of forum non conveniens guarantee the retention of many transnational cases that the federal courts would quickly dismiss on forum non conveniens grounds.

The problems presented by potentially conflicting federal and state law in maritime cases filed in state courts are extremely varied and often individually complex. This article does not purport to exhaust the subject; but it does try to provide a broad conceptual background for state courts to intelligently address these problems, as well as to single out the most important or troublesome spots. The specific subject matter areas covered were selected on the principal basis of high visibility in recent litigation.

Three broad themes—each of them stressing state autonomy—unite this article. First, the procedural issues presented by maritime cases in state court should be determined according to state law; there is no valid reason for state courts to look to the practices of the federal courts on any matter properly deemed procedural. Second, in the realm of substantive law, there is great scope for the proper application of state law to supplement the federal maritime law—much greater scope than has been thought to exist. Third, the United States Supreme Court is the only federal court whose decisions are binding on the state courts. The decisions of the lower federal courts are properly treated as persuasive sister-jurisdiction authority rather than as authoritative.

II. GENERAL PRINCIPLES OF JURISDICTION

The story begins with three provisions of the United States Constitution. Article III, section 2 extends the judicial power of the United States to “all cases of admiralty and maritime jurisdiction.” Article I, section 8 gives Congress the power to “make all laws which shall be necessary and proper for carrying into execution ... all ... powers vested by this constitution in the government of the United States, or in any department or officer thereof.” The United States Supreme Court

remove it to federal court on the basis of diversity jurisdiction or on a federal-question basis for federal jurisdiction independent of admiralty.

5. See infra part IV.C.
6. Id.
7. Some sense of the breadth of the field in the world of torts alone can be gleaned from David W. Robertson, Judge Rubin’s Maritime Tort Decisions, 52 La. L. Rev. 1527 (1992).
has held that those two constitutional provisions empower the federal courts and Congress to create and interpret a nationally uniform maritime law. The third relevant constitutional provision, the Supremacy Clause, makes that body of federal law binding on the states.

The constitutional structure leaves most of the details to the courts and Congress. Indeed, the inclusion of "cases of admiralty and maritime jurisdiction" within the federal judicial power did not do anything to confer such jurisdiction on particular courts. In 1789, the first Congress took the essential first step by creating federal district courts and giving them admiralty jurisdiction in the following provision:

The district courts... shall... have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction,... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.

Once that step was taken, the remaining broad jurisdictional matters that had to be resolved in the case law were (a) establishing criteria for identifying a "civil cause[... ] of admiralty and maritime jurisdiction"; (b) deciding which aspects of the federal admiralty jurisdiction are exclusively for the federal courts and which are susceptible of being shared with the state courts; and (c) setting the limits of state authority as to those aspects of the admiralty field deemed appropriate for concurrent state court jurisdiction. All of these matters have been developed by the courts within the framework of the statutory grant of admiralty jurisdiction to the federal district courts, the present version of which is codified as 28 U.S.C. § 1333 and provides in pertinent part:

8. See Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 96, 101 S. Ct. 1571, 1583 (1981) ("[I]n admiralty,... the federal judiciary’s lawmaking power may well be at its strongest... ").
10. U.S. Const. art. VI, cl. 2 provides:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.
12. Article III, § 1 of the Constitution states in pertinent part that the "judicial power of the United States, shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." (Emphasis added.) The emphasized language meant Congress had to decide whether there were to be federal trial courts, and, if so, how much of the constitutionally authorized "judicial power" was to be vested in such courts.
The district courts shall have original jurisdiction, exclusive of the courts of the states of . . . [a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

The Supreme Court has indicated that, despite the changes in wording, 28 U.S.C. § 1333 has the same meaning as the original 1789 statute. 14

A. The Criteria for Identifying an Admiralty or Maritime Case

There is a large body of controlling federal case law establishing criteria for identifying a "civil case of admiralty or maritime jurisdiction." It is traditional to subdivide the area into the broad categories of tort and contract.

In both the tort and contract fields, many jurisdictional issues are controlled or affected by whether particular structures and apparatuses merit classification as vessels. A general definition of "vessel" is set forth in 1 U.S.C. § 3, where a vessel is defined as including "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." The definition has served as a benchmark in discussions of the vessel status issue. However, in the admiralty jurisprudence the specific criteria for vessel status has varied from context to context and over time. Consequently, this article discusses the vessel status issue as it arises in particular contexts rather than attempting a general treatment.

Another general jurisdictional factor is whether particular waters are deemed "navigable." Here—in contrast with the vessel status question—the case law has established a general definition that the courts apply with reasonable consistency. The definition of a navigable waterway for admiralty jurisdiction purposes is fairly commodious: the test is whether in its present condition the body of water—either in itself or by its connection with other waters—can be traveled by boat to another state or the ocean. 15 Wholly landlocked bodies of water within the boundaries of a single state are not navigable for these purposes. 16

15. See The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871):
They constitute navigable waters of the United States . . . when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.
See also Sanders v. Placid Oil Co., 861 F.2d 1374, 1377-78 (5th Cir. 1988); McFarland v. Justiss Oil Co., 526 So. 2d 1206, 1209-11 (La. App. 3d Cir. 1988).
I. Admiralty Tort Jurisdiction

Admiralty jurisdiction in matters of tort is presently delimited by four modern United States Supreme Court decisions: *Executive Jet Aviation, Inc. v. City of Cleveland*,\(^{17}\) denying admiralty jurisdiction as to litigation arising from the crash of a private airplane into Lake Erie; *Foremost Insurance Co. v. Richardson*,\(^{18}\) upholding admiralty jurisdiction over a lawsuit resulting from the collision of a bass boat and a water-ski boat on the Amite River; *Sisson v. Ruby*,\(^{19}\) upholding admiralty jurisdiction over litigation arising from a fire aboard a pleasure yacht moored at a marina in Lake Michigan; and *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*,\(^{20}\) upholding admiralty jurisdiction over litigation arising from extensive flooding occurring when pile-driving operations in the Chicago River ruptured the roof of a freight tunnel beneath the river. These cases establish that a tort is maritime—i.e., is within the admiralty jurisdiction—if and only if it (a) either occurred on navigable water\(^{21}\) or was "caused by a vessel on navigable water";\(^{22}\) (b) bore a significant relationship to traditional maritime activity; and (c) occurred under circumstances potentially disruptive of maritime commerce.

The first criterion focuses on the locality of the accident and hence provides a reasonably solid basis for adjudication.\(^{23}\) But the second and third crite-

\(^{17}\) 409 U.S. 249, 93 S. Ct. 493 (1972).
\(^{21}\) For admiralty jurisdiction purposes, a tort is considered to have occurred where the defendant's wrongful conduct first came significantly to bear on the victim. For example, suppose an airline mechanic's negligence on the land causes an airplane engine to fail over the ocean, where the plane's flailing frightens a passenger into a heart attack. The passenger is then returned to land, where he dies. The courts would treat this tort as having occurred over the ocean, where the fright started the ultimately fatal chain of events. See *Minnie v. Port Huron Terminal Co.*, 295 U.S. 647, 55 S. Ct. 884 (1935) (holding admiralty law applicable on the view that the tort occurred on the vessel when a longshoreman working on the vessel deck was struck by a hoist and knocked onto the pier); *T. Smith & Son v. Taylor*, 276 U.S. 179, 48 S. Ct. 228 (1928) (holding admiralty law inapplicable on the view that the tort occurred on the pier when a longshoreman working on the pier was struck by a sling and knocked into the water, where he died). Note that while *Minnie* and *T. Smith & Son* both involved issues of the applicability of state workers' compensation laws rather than admiralty tort jurisdiction as such, the cases are cited by the *Executive Jet* Court with apparent approval as illustrating how the locality criterion for admiralty tort jurisdiction should be applied. See *Executive Jet Aviation, Inc.*, 409 U.S. at 255, 93 S. Ct. at 498.
\(^{22}\) Until 1948, to be maritime a tort had to occur on navigable water. In that year Congress enacted the Admiralty Extension Act, 46 U.S.C. app. § 740 (1988), which states in pertinent part: "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."
\(^{23}\) As indicated, the first criterion—the "locality" criterion—can be satisfied by showing the tort occurred on navigable water or by showing the injury was caused by a vessel on navigable water. The jurisprudence is reasonably clear and consistent as to when a tort is deemed to have occurred.
ria—the "significant relationship" and "disruption of commerce" criteria—are extraordinarily amorphous. As a preliminary matter, it is questionable whether they should be listed as separate factors; an arguably more logical treatment would indicate that an incident's disruption (actual or potential) of maritime commerce is one easy way of satisfying the "traditional relationship" requirement. But we need not pause for long over such niceties, because whether they are deemed one criterion or two, they are too vague and elastic to provide much resolving or predicting power—in Judge Rubin's words, they are "so imprecise as to defy description by either a formula or an objective standard." In fact, the courts seem to conclude generally that admiralty tort jurisdiction exists if the injury either occurred on navigable water or was caused by a vessel on navigable water. Recent examples of torts found to be maritime by Louisiana courts include injury by a vessel to leased oyster beds, drownings resulting from the capsize of an airboat during a recreational frogging expedition, a slip-and-fall on the deck of a vessel caused by an offshore fixed platform's leaky fuel hose, a case of grain asthma contracted by a longshoreman from loading ships at grain elevators, injury to a worker on an oil drilling rig located on a pontoon barge in Catahoula Lake, and injuries to duck hunters whose boat collided with a submerged pipe in Catahoula Lake.

Perhaps the most important body of tort cases falling within the admiralty jurisdiction are those involving injuries to seamen. Typically a seaman's injury case will easily satisfy the requisites for admiralty jurisdiction under the criteria stemming from the Executive Jet-Foremost-Sisson-Grubart quartet. In addition, when a seaman sues his employer for negligence under the Jones Act, the Act is treated as providing an independent basis for admiralty

on navigable water. There is less consistency and clarity respecting the limits of the "caused by a vessel" concept. See infra text accompanying note 50. See also Community Coffee Co. v. Tri-Parish Constr. & Materials, Inc., 490 So. 2d 1109, 1114-15 (La. App. 1st Cir. 1986) (finding admiralty jurisdiction over incident in which vessel on navigable water snagged overhead electric lines, disrupting power to and thereby damaging plaintiff's distant coffee roasting machine).


31. Sanders v. Placid Oil Co., 861 F.2d 1374 (5th Cir. 1988).

32. In these cases the key jurisdictional concept is the issue of seaman status, discussed infra part V.A.

jurisdiction. Thus, for example, a seaman hurt on land whose injury was not caused by a vessel on navigable water would have an admiralty action against his negligent employer despite being unable to satisfy the first of the Executive Jet-Foremost-Sisson-Grubart criteria.

Recurrent categories of tort cases that generally do not fall within the admiralty jurisdiction include those involving injuries on fixed offshore platforms and similar structures—these injuries fall within the admiralty jurisdiction only when they are caused by a vessel—and products liability cases against the manufacturers of products that cause injury on water but were not specially designed or marketed for maritime use.

The admiralty tort jurisdiction area would clearly benefit from a further and more precise definition. Among the currently undecided questions is which of the potentially relevant maritime statutes provides an independent basis for admiralty jurisdiction. As indicated above, it is clear that the Jones Act does. It also seems clear that Section 905(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA)—granting to workers covered by that act a limited form of negligence action against vessels and vessel operators—does not. Nothing else is clear. Without any acknowledgment of the facial conflict

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35. See Herb's Welding, Inc. v. Gray, 470 U.S. 414, 417 n.2, 105 S. Ct. 1421, 1424 n.2 (1985) ("Offshore oil rigs are of two general sorts: fixed and floating. Floating structures have been treated as vessels . . . . [Fixed structures have been treated as land."]). See also David W. Robertson, Injuries to Marine Petroleum Workers: A Plea for Radical Simplification, 55 Tex. L. Rev. 973, 982-92 (1977), which was cited in Herb's Welding, Inc., 470 U.S. at 417 n.2, 105 S. Ct. at 1424 n.2.


38. By "providing an independent basis for admiralty jurisdiction" is meant allowing a case satisfying the statute's terms to be brought as an admiralty action despite the case's failure to satisfy one or more of the general criteria derived from the Executive Jet-Foremost-Sisson-Grubart quartet. See also supra note 34 and accompanying text.


40. See infra part V.C.4.

between the two decisions, the Supreme Court in 1972 indicated in the strongest possible terms that the Death on the High Seas Act\(^42\) does furnish an independent basis for admiralty jurisdiction in aircraft crash cases,\(^43\) having held in 1969 that it does not do so in cases of deaths on offshore oil and gas platforms.\(^44\) The Supreme Court has recently said that the Admiralty Extension Act\(^45\) and the Limitation of Liability Act\(^46\) may or may not afford independent bases for admiralty jurisdiction.\(^47\) The latter two expressions are much to be regretted, inasmuch as it would make hardly any sense for either statute to be construed to furnish an independent basis for jurisdiction; until the Supreme Court explicitly raised the questions, hardly anyone had thought either statute did.

Significant further clarification in the tort jurisdiction area is probably not likely to occur in the immediate future. The Supreme Court has just handed down its decision in Jerome B. Grubart, Inc., a major case arising from the flooding of many businesses in downtown Chicago that occurred when the roof of a freight tunnel beneath the Chicago River sprung a leak. The leak resulted from pile-driving activities that had been conducted by a vessel on the river six months earlier. The trial court denied admiralty jurisdiction over the ensuing litigation against the pile-driving company. The Seventh Circuit reversed and upheld admiralty jurisdiction.\(^48\) The Supreme Court also upheld admiralty jurisdiction.\(^49\) The decision does not answer whether the Admiralty Extension Act or the Limitation of Liability Act furnishes an independent basis for admiralty jurisdiction. However, it does shed some faint light on the meaning of the "caused by a vessel" component of the Admiralty Extension Act; Justice Souter's opinion for the five-member majority states that the term "caused" refers to "what tort law has traditionally called 'proximate causation.'"\(^50\) Justice Thomas' concurring opinion (joined by Justice Scalia) called for a simpler overall test for tort jurisdiction but did not quarrel with the majority's reading of the Admiralty Extension Act.\(^51\)

\(48\) Jerome B. Grubart, Inc., 115 S. Ct. at 1046-47.
\(49\) Id. at 1055.
\(50\) Id. at 1049.
\(51\) Id. at 1055-59 (Thomas, J., concurring).
2. Admiralty Jurisdiction in Contract Cases

For most of our history we have worked with a circular definition of a maritime contract as one that "touch[es] rights and duties appertaining to commerce and navigation." Professor Maraist has pointed out that there are a number of other equally "useless definitions." Justice Scalia recently wrote that the body of [admiralty contract jurisdiction] law has long been the object of criticism. The impossibility of drawing a principled line with respect to what, in addition to the fact that the contract relates to a vessel (which is by its nature maritime) is needed in order to make the contract itself "maritime," has brought ridicule upon the enterprise.

Fortunately, the lack of a meaningful general definition of a maritime contract does not matter very much in a workaday sense, because the courts have created what amounts to a laundry list of types of maritime and non-maritime contracts.

Recurring types of contract actions that are maritime, and hence within the admiralty jurisdiction, include suits on contracts for the carriage of goods and passengers by water; for the chartering (leasing) of vessels; for repairs, supplies, and other essentials furnished to vessels; for services (such as towage and wharfage) furnished to vessels; suits for recovery of indemnity or premiums on marine insurance policies; suits on claims for salvage; suits on claims for general average; petitions for limitation of shipowner’s liability; proceedings to foreclose preferred ship mortgages; and suits to recover ships wrongfully taken or withheld. The foregoing is not an exhaustive list.

Recurring types of contract actions that have been held not to be maritime include suits on contracts for the building of ships; suits on contracts for the sale of ships; suits for services to vessels laid up and out of navigation; and proceedings to foreclose ship mortgages that do not qualify as “preferred” under the federal Ship Mortgage Act. Again, this is not an exhaustive list.

The rules excluding contracts for the building of ships and for the sale of ships from admiralty jurisdiction are anomalous, often criticized, but seemingly well-settled. A third rather infamous anomaly of contract jurisdiction was recently cleared up, at least in major part, by the Supreme Court in Exxon Corp.

52. 3 Joseph Story, Commentaries on the Constitution of the United States 528 (1833).
53. Maraist, supra note 1, at 26. See also Charles Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Colum. L. Rev. 259, 264 (1950) ("[In the field of maritime contracts the] attempt to project some ‘principle’ is best left alone. There is about as much ‘principle’ as there is in a list of irregular verbs.").
55. See generally Gilmore & Black, supra note 1, at 22-29; Maraist, supra note 1, at 27-30.
v. Central Gulf Lines, Inc.\textsuperscript{57} An 1855 decision, Minturn v. Maynard,\textsuperscript{58} had come to stand for a rule excluding from admiralty jurisdiction suits on many types of "preliminary service" agreements such as an agency contract relating to the general management and handling of the affairs of a vessel.\textsuperscript{59} The continued validity of Minturn arose in the recent Exxon Corp. case in the context of a contract whereby the plaintiff had agreed to procure fuel (to be supplied by others) for defendant's vessel in certain ports. The unanimous Exxon Corp. Court concluded in favor of admiralty jurisdiction over the contract to procure fuel and overruled Minturn, stating:

We conclude that Minturn is incompatible with current principles of admiralty jurisdiction over contracts and therefore should be overruled. We emphasize that our ruling is a narrow one. We remove only the precedent of Minturn from the body of rules that have developed over what types of contracts are maritime. Rather than apply a rule excluding all or certain agency contracts from the realm of admiralty, lower courts should look to the subject matter of the agency contract and determine whether the services performed under the contract are maritime in nature.\textsuperscript{60}

Exxon Corp. establishes that agency contracts can be maritime, and it provides a potential basis for similar treatment of other types of "preliminary services" contracts such as agreements to procure a vessel charter or a policy of marine insurance.

Perhaps the most troublesome area in the general field of contract jurisdiction involves the "mixed contract," that is a contract in which some of the features are maritime in nature. In this area the federal courts have shown great inconsistency. On the one hand, it is said that "[c]ourts have long recognized that in breach of contract cases, admiralty jurisdiction arises only when the subject matter of the contract is 'purely' or 'wholly' maritime in nature."\textsuperscript{61} On the other hand:

Despite the veneration accorded the statement that a contract must be "wholly" maritime for a court to assert admiralty jurisdiction over it, courts have repeatedly qualified that rule in two ways. First, if a contract is partially maritime and partially non-maritime, the court will entertain admiralty jurisdiction if the maritime and non-maritime

\begin{itemize}
  \item \textsuperscript{57} 500 U.S. 603, 111 S. Ct. 2071 (1991).
  \item \textsuperscript{58} 58 U.S. (17 How.) 477 (1855).
  \item \textsuperscript{59} Roughly speaking, a preliminary service agreement is any contract whereby someone promises a vessel operator to arrange for someone else to furnish necessary services or supplies to the vessel.
  \item \textsuperscript{60} Exxon Corp., 500 U.S. at 612, 111 S. Ct. at 2076-77.
  \item \textsuperscript{61} Berkshire Fashions, Inc. v. M.V. Hakusan II, 954 F.2d 874, 880 (3d Cir. 1992) (citations omitted).
\end{itemize}
portions of the contract can be severed without prejudice to either party. Second, a federal court may exercise maritime jurisdiction over the entire contract if the non-maritime aspects of the [transaction] are "merely incidental." 62

One recurrent type of mixed contract is a lease-purchase agreement on a vessel. The lease (charter) features of such a contract are maritime, whereas the sale features are not. Courts have often severed the maritime and non-maritime aspects of such agreements so as to permit admiralty litigation on the maritime portion. 63

Another recurrent type of mixed contract case involves damage or loss of cargo that has been transported partially by sea and partially by land. Here, the severance technique is ordinarily not useful. 64 Courts have occasionally found that the land transport features are "incidental" to the main maritime contract for sea carriage, but more often they have been forced to conclude that the provisions for land transportation make the contract as a whole non-maritime. 65

Recent Louisiana decisions presenting contract jurisdiction issues have tracked the federal jurisprudence on such settled matters as the maritime nature of vessel charter contracts 66 and the non-maritime nature of contracts for the sale of vessels 67 (and of vessel engines 68). A number of the troublesome Louisiana cases have involved indemnity agreements in contracts relating to offshore oil and gas activities. 69 Here the admiralty jurisdiction issue is crucial,

62. Id. (citations omitted). The court actually wrote "if the non-maritime aspects of the transportation are 'merely incidental,'" but must have meant "transaction." (Emphasis added.)
64. See Berkshire Fashions, Inc., 954 F.2d at 881:
In cases in which there is one bill of lading and one total charge for all of the services performed in accord with that bill, courts have generally found the contract non-severable.
This is so because the consolidation of a number of transport services under one contract at one flat price renders the disentanglement of the various services difficult.
(Citations omitted.)
66. See Authement v. Conoco, Inc., 566 So. 2d 640, 644 (La. App. 5th Cir.) ("A ship charter is unquestionably a maritime contract . . . and thus . . . an indemnity clause in that [contract is governed by maritime law."]), writ denied, 569 So. 2d 960 (1990).
67. See Poche v. Bayliner Marine Corp., 632 So. 2d 1170 (La. App. 5th Cir. 1994) (resolving a redhibition suit against the seller of a vessel without mentioning admiralty jurisdiction or maritime law).
68. See MTU of N. Am. v. Raven Marine, 603 So. 2d 803, 807 (La. App. 1st Cir. 1992) (holding a redhibition suit against a manufacturer of ships' engines is not within the admiralty jurisdiction and therefore must be governed by state law), writ denied, 612 So. 2d 55 (1993).
69. Broadly speaking, these are contracts whereby a contractor doing work for an oil company promises to indemnify the oil company against any claims arising from injuries to person or property
because the Louisiana Oilfield Anti-Indemnity Act\textsuperscript{70} would nullify most such agreements,\textsuperscript{71} whereas they are valid under maritime law. The leading case setting forth the criteria for determining the maritime nature of particular indemnity agreements of this type is Judge Rubin’s decision for the federal Fifth Circuit in \textit{Davis & Sons, Inc. v. Gulf Oil Corp.},\textsuperscript{72} which lays down no clear rule but is generally regarded as having brought some reason to the process of characterizing these highly prevalent contracts.

In \textit{Davis & Sons, Inc.}, the court sustained admiralty jurisdiction over a contract for maintenance work conducted from spud barges in a fixed-platform oil field located in open water. Judge Rubin explained that most of the contracts giving rise to the recurrent jurisdictional issue consist of a blanket agreement between an oil company and a contractor, which is then fleshed out by specific work orders. The principal focus of inquiry should be the work order under which the injury giving rise to the indemnity claim was sustained. Looking at “the blanket contract as modified by the later work order,”\textsuperscript{73} Judge Rubin’s approach was as follows:

We consider six factors in characterizing the contract: (1) what does the specific work order in effect at the time of injury provide? (2) what work did the crew assigned under the work order actually do? (3) was the crew assigned to work aboard a vessel in navigable waters? (4) to what extent did the work being done relate to the mission of that vessel? (5) what was the principal work of the injured worker? and (6) what work was the injured worker actually doing at the time of injury?\textsuperscript{74}

Obviously, the six \textit{Davis & Sons, Inc.} factors in combination constitute a very elastic test, and the decisions using the \textit{Davis & Sons, Inc.} approach are difficult to harmonize.\textsuperscript{75} The Louisiana Supreme Court has denied writs in

\textsuperscript{71} See generally \textit{Daigle v. United States Fidelity & Guar. Ins. Co.}, 610 So. 2d 883 (La. App. 1st Cir. 1992).
\textsuperscript{72} 919 F.2d 313 (5th Cir. 1990).
\textsuperscript{73} \textit{Id.} at 315.
\textsuperscript{74} \textit{Id.} at 316.
\textsuperscript{75} In \textit{Domingue v. Ocean Drilling \\& Exploration Co.}, 923 F.2d 393 (5th Cir. 1991), \textit{cert. denied} sub nom. \textit{Ocean Drilling \\& Exploration Co. v. Dimensional Oilfield Servs., Inc.}, 502 U.S. 1033, 112 S. Ct. 874 (1992), the court used the \textit{Davis \\& Sons, Inc.} approach to label as non-maritime a contract remarkably similar to the one declared maritime in \textit{Davis \\& Sons, Inc.} \textit{Davis \\& Sons, Inc.} was distinguished on the principal basis that the injured worker in \textit{Davis \\& Sons, Inc.} was involved with self-propelled work barges that moved frequently whereas the \textit{Domingue} worker’s duties were on a jack-up barge involved in no movement at the time of the particular work. For state court cases using the \textit{Davis \\& Sons, Inc.} factors that reach seemingly irreconcilable outcomes, see \textit{Brennan v. Shell Oil Co.}, 612 So. 2d 929 (La. App. 4th Cir.) (holding a contract calling for indemnity against a claim by an injured welder on jack-up barge to be non-maritime), \textit{writ denied}, 614 So. 2d 1268
cases that apply Davis & Sons, Inc. to reach seemingly inconsistent results. In Rodrigue v. Legros, the supreme court's only modern decision addressing the general subject of offshore oil field indemnity contracts, the parties conceded that the contract was maritime and thus the court had no occasion to address the Davis & Sons, Inc. factors or to consider formulating an alternative approach to making the jurisdictional determination.

The issue whether particular indemnity agreements will be construed as maritime (and therefore valid) or as non-maritime (and therefore probably invalid) is likely to continue to be heavily litigated. When someone of Judge Rubin's expertise and analytical power attempts to reduce an area to a clear principle and comes up with a flexible six-factor approach, we can be assured that the area is genuinely complex and that greater simplification may be impossible. Still, after looking at the pattern of results in a large number of these cases, the temptation is to suggest that the single most important factor to consider may be the extent to which the worker whose injury gave rise to the indemnity claim was engaged in work involving the movement of a vessel.

B. When is Federal Court Admiralty Jurisdiction Exclusive?

As indicated above, the controlling statute (28 U.S.C. § 1333) states that the federal courts have exclusive original jurisdiction in admiralty cases, "saving to suitors in all cases all other remedies to which they are otherwise entitled." The statute has been interpreted as making federal court admiralty jurisdiction exclusive as to actions in rem against vessels or against other maritime property. Federal court admiralty jurisdiction is also exclusive in "certain
statutory actions," including petitions for limitation of liability and suits against the United States under the Suits in Admiralty Act and the Public Vessels Act.

Most admiralty cases, however, are cases of concurrent jurisdiction rather than exclusive jurisdiction. The plaintiff may bring the case in federal court on the basis of admiralty jurisdiction, or the plaintiff may take advantage of the "saving to suitors" clause, which has been interpreted as giving the plaintiff in most types of admiralty or maritime cases the option of bringing the suit in state court or, if the requisites of federal court jurisdiction on some other basis than admiralty can be made out, on the "law side" of federal court.

C. What Are the General Limits of State Authority in Concurrent Jurisdiction Cases?

When a maritime plaintiff takes advantage of the saving clause option to bring her case in state court, as a matter of general principle the state court is obligated by the Constitution's Supremacy Clause to follow the applicable substantive federal maritime law. On matters of procedure, the state court is generally free to follow the state's own rules. The Supremacy Clause restraint on the state courts is often called "the reverse-Erie doctrine." The label is intended to signal that the situation of a state court in a saving clause case is very closely analogous to that of a federal court exercising diversity jurisdiction under the constraints of *Erie Railroad v. Tompkins.*

In the words of the United States Supreme Court:

State courts occasionally say that they "have in rem jurisdiction" pursuant to seizures of vessels. *Barcelona v. Sea Victory Maritime, Inc.*, 619 So. 2d 741, 743 (La. App. 4th Cir.), *writ denied*, 626 So. 2d 1179 (1993). It is important to note such statements refer to in rem jurisdiction in "the broad sense" as oppose to the "strict" sense applicable to the maritime action in rem. *See* *Maraist*, *supra* note 1, at 334. The central characteristic of the maritime action in rem—in rem in the strict sense—is that "a judicial sale in the proceeding conveys title good against the world." *Id.* at 335. State courts cannot do that.

87. *See* *Robertson*, *supra* note 11, at 334.
88. *See* *Cason v. Diamond M Drilling Co.*, 436 So. 2d 1245, 1248 (La. App. 1st Cir.) ("In an action brought in state court under the 'saving to suitors' clause, federal substantive law applies, but where the result is not substantially affected, the procedural law of the forum applies."); *writ denied*, 441 So. 2d 1221 (1983), *cert. denied*, 466 U.S. 938, 104 S. Ct. 1911 (1984). *See also* *Perry v. Allied Offshore Marine Corp.*, 618 So. 2d 1033, 1036 (La. App. 1st Cir. 1993) (same).
89. *See*, e.g., *Robertson*, *supra* note 11, at 201.
90. 304 U.S. 64, 58 S. Ct. 817 (1938).
The "saving to suitors" clause allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-Erie" doctrine which requires that the substantive remedies afforded by the states conform to governing federal maritime standards.\[91\]

The operation of the reverse-\textit{Erie} doctrine is explored in detail in the next part.

\section*{III. When Are State Courts Bound to Follow the Federal Courts: Current General Views of Reverse-\textit{Erie} Preemption}

Almost a quarter-century ago this author published a book attempting to make sense of the United States Supreme Court's pronouncements on the proper interaction of federal and state law in maritime cases.\[92\] It has since become clear that those pronouncements taken in the aggregate simply do not make complete sense. The Louisiana Supreme Court has taken note of the difficulty:

\begin{quote}

Despite [the] multitude of cases involving the applicability of state law in maritime situations, the [United States Supreme] Court has developed no clear test for determining when such application is appropriate and when it violates the constitution. Instead, the Court has generally stated only its conclusion as to whether the application of state law was permissible, and these conclusions have not always been theoretically consistent.\[93\]
\end{quote}

And Justice Scalia has recently written:

\begin{quote}

It would be idle to pretend that the line separating permissible from impermissible state regulation is readily discernible in our admiralty jurisprudence, or indeed is even entirely consistent within our admiralty jurisprudence.\[94\]
\end{quote}

Justice Scalia's candor is welcome, albeit perhaps understated. The United States Supreme Court's maritime preemption decisions fall into no clear pattern. Part of the difficulty is that the Court is still paying lip service to its 1917 decision in \textit{Southern Pacific Co. v. Jensen}.\[95\] The narrow holding of \textit{Jensen} was that a state workers' compensation statute could not constitutionally be

\[92\] See Robertson, supra note 11.
\[93\] Rodrigue v. Legros, 563 So. 2d 248, 253 (La. 1990) (citation omitted).
\[95\] 244 U.S. 205, 37 S. Ct. 524 (1917). In the recent \textit{American Dredging Co.} case, Justice Stevens urged that \textit{Jensen} be overruled, but Justice Scalia, writing for the Court, refused to do so "without argument or even invitation" by the parties. \textit{American Dredging Co.}, 114 S. Ct. at 985 n.1.
applied to redress an injury to a longshoreman injured on navigable water. The broad thrust of Jensen was the permissible scope of state law in maritime cases is narrowly limited: the Jensen Court stated no state law can apply that "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." The quoted language has served as a framework for discussion in the reverse-Erie preemption cases. It is too elastic to answer any questions, yet its tone and tenor are misleading. The current United States Supreme Court's views of reverse-Erie preemption are a great deal more permissive than the Jensen holding and language would suggest.97

Clearly there are many settled areas in which federal maritime law preempts state law in cases falling within the admiralty jurisdiction. Familiar examples include Jones Act and unseaworthiness litigation, most features of which are fully governed by federal law; actions for loss of consortium, society, and companionship brought by the family members of fatally injured maritime workers, in which state wrongful death law may be completely inapplicable; and the applicability of the federal law of limitations (liberative prescription) to all maritime tort suits.100

The foregoing and other areas of clear federal law preemption subsist against a general background of applicable state law. An obvious practical truth about saving clause cases—one so obvious that it is rarely explicitly discussed—is that state judges, who operate on a daily basis on the assumption that the case at hand is governed procedurally and substantively by state law, do not abandon that assumption when they turn their attention to maritime cases. Unless a litigant brings forth a specific federal doctrine that is putatively preemptive, state...

96. Jensen, 244 U.S. at 216, 37 S. Ct. at 529.
97. See the discussion of American Dredging Co. v. Miller, infra notes 130-144 and accompanying text. Cf. O'Melveny & Myers v. FDIC, 114 S. Ct. 2048 (1994) (stressing the limits of federal authority in the course of holding that state law—not federal common law—governs whether the Federal Deposit Insurance Corporation, receiver for a failed S&L, is estopped by virtue of the S&L's fraudulent practices from pursuing tort claims on the S&L's behalf).
100. See infra part V.E.
law will probably govern fully. In this sense, a specific federal maritime doctrine can be seen as a slightly odd fish that may be allowed to swim in the circumambient state-law waters, provided that a litigant has produced the fish's reverse-Erie pedigree. The Louisiana Third Circuit Court of Appeal's recent decision in Lantier v. Aetna Casualty & Surety Co. is a good illustration of the phenomenon under discussion. This was a suit against an airboat operator and his liability insurer based upon the drowning of two of the operator's companions during a recreational frogging expedition on navigable waters. The plaintiffs correctly labeled it a saving clause case. (The case could clearly have been maintained as an admiralty case in federal court; this fact alone makes it a saving clause case by definition.) Yet the only feature of maritime law discussed in the decision was appellants' unsuccessful argument that a jury trial had been improper. As to the following matters, the third circuit used state law without any reverse-Erie alteration or comment: the standard of appellate review; the propriety of a direct action against the insurer; the rules for interpreting an insurance contract; comparative fault; res ipsa loquitur; the seatbelt statute; wrongful death damages; and survival damages. Any of these matters could have yielded a vigorous reverse-Erie argument between the litigants. None did, and the third circuit did not address any such matters.

In assessing the force of the modern reverse-Erie doctrine, it should also be noted that courts around the country have generally agreed that the parties to particular transactions can often choose the applicable law. Of course, it is clear that parties cannot by agreement, stipulation, or waiver confer admiralty jurisdiction on an incompetent federal court, nor can the parties confer jurisdiction on a state court as to matters committed to the exclusive jurisdiction of federal tribunals. However, there is considerable freedom to choose the applicable law. Courts have allowed parties to non-maritime disputes to agree to a binding stipulation that maritime law should govern the dispute, and

102. See Green v. Industrial Helicopters, Inc., 593 So. 2d 634, 638 (La.) ("[A] Louisiana state court should respect Louisiana law unless there is some federal impediment to application of that law contained in federal legislation or a clearly applicable rule in the general maritime law.").
103. 614 So. 2d 1346 (La. App. 3d Cir. 1993).
104. Id. at 1348.
106. See Lantier, 614 So. 2d at 1350-51. This feature of Lantier is treated infra part IV.C.
109. See Mentor Ins. Co. (U.K.) v. Brannkasse, 996 F.2d 506, 513 (2d Cir. 1993) ("Although
have allowed parties whose disputes were clearly maritime to choose to have the matter governed by state law. None of the decisions contain a satisfactory discussion of why forum jurisdiction constraints are beyond the parties’ control, whereas the dictates of the Supremacy Clause are rather freely waivable. The distinction is nevertheless well-settled, and the parties’ relative freedom to contract for state law in maritime affairs is yet another reason for believing that reverse-Erie preemption is a far less robust doctrine than the old Jensen rhetoric would suggest.

Aside from any stipulation or agreement of the parties, the Louisiana Supreme Court has occasionally been relatively bold in asserting the applicability of state law in maritime cases. In Green v. Industrial Helicopters, Inc., the supreme court held that the strict liability doctrine of Louisiana Civil Code article 2317 should be applied in an admiralty case involving an offshore helicopter crash. In Logan v. Louisiana Dock Co., the court upheld the applicability of Louisiana’s workers’ compensation laws to an injury on a floating drydock. (Logan is a sound modern decision, but the United States parties cannot confer admiralty jurisdiction by consent, parties in a diversity action may be bound by their assumption that admiralty law governs.”); Fanguy v. Dupre Bros. Constr. Co., 588 So. 2d 1251, 1257 n.6 (La. App. 1st Cir. 1991) (plaintiff’s having chosen “to bring this action under general maritime law and 33 U.S.C.A. § 905(b)” obviated any necessity of considering otherwise potentially applicable state law), writ denied, 594 So. 2d 892 (1992).

110. See Angelina Casualty Co. v. Exxon Corp., U.S.A., 876 F.2d 40, 41 (5th Cir. 1989) (containing dictum that parties to a maritime charter can validly contract to have it governed by state law); Dueringer v. General Am. Life Ins. Co., 842 F.2d 127, 130 (5th Cir. 1988) (holding a defendant had waived ERISA preemption and was hence subject to state law); Heci Exploration Co. v. Holloway, 862 F.2d 513, 520 (5th Cir. 1988) ("[A] preemption defense may be waived when availability of the defense affects not the forum in which the case is to be heard, but the law which is to govern resolution of the claim."); Stoot v. Fluor Drilling Servs., Inc., 851 F.2d 1514, 1516 (5th Cir. 1988) (holding that parties to a maritime contract can stipulate for the applicability of state law); Rodrigue v. Legros, 563 So. 2d 248, 255 (L.a. 1990) (holding parties to maritime indemnity contract could have chosen to contract for the application of Louisiana law); Authement v. Conoco, Inc., 566 So. 2d 640, 644 (La. App. 5th Cir.) (indicating that parties to vessel charter contract could have contracted for the applicability of state law), writ denied, 569 So. 2d 960 (1990); General Chem. Corp. v. De La Lastra, 852 S.W.2d 916, 919 (Tex.) (holding a defendant in maritime wrongful death action waived its federal preemption argument and was hence governed by state law; “preemption arguments which affect the choice of law, and not the choice of forum, are waivable”), cert. dismissed, 114 S. Ct. 490 (1993).

111. But see Rodrigue v. Legros, 563 So. 2d 248 (La. 1990) (applying maritime law rather than conflicting state law to an indemnity provision in a contract providing for the drilling of an oil well by a vessel in navigable waters).

112. 593 So. 2d 634 (La.), cert. denied, 113 S. Ct. 65 (1992).


114. Under the current lenient view of the Jensen prohibition, state workers’ compensation law and the federal LHWCA clearly do (and constitutionally overlap. See infra part V.C.1.

In a narrower sense, Logan has been legislatively overruled. La. R.S. 23:1035.2 (Supp. 1995) (effective January 1, 1990), provides: “No compensation shall be payable [under the Louisiana Workers’ Compensation Act] in respect to the disability or death of any employee covered by the Federal Employer’s Liability Act, the Longshoremen’s [sic] and Harbor Worker’s [sic] Compensation
justices who joined the 1917 Jensen majority must be spinning in their graves. And in Miller v. American Dredging Co., the Louisiana Supreme Court vigorously disagreed with several decisions of the federal Fifth Circuit in holding that state courts in maritime cases are free to follow Louisiana's law of forum non conveniens even though the federal courts apply a very different body of forum non conveniens law. The United States Supreme Court has recently affirmed American Dredging Co. in a decision that can be read as a very broad assertion of state court freedom in the area of procedure generally.

As indicated above, the oft-maligned but nevertheless indispensable substance-procedure distinction is typically used in general descriptions of maritime law's reverse-Erie doctrine. Roughly speaking, the thought is that in the substantive realm there is some room for state law supplementation of the federal maritime law, whereas in the procedural realm, the state courts are free to go their own way. Provided one is sufficiently wary of the difficulties of distinguishing substance from procedure, the general dichotomy is a useful organizing principle. As Justice Souter said in his concurrence in American Dredging Co.:

Act, or any of its extensions, or the Jones Act.” Presumably La. R.S. 23:1035.2 precludes only the receipt of Louisiana workers' compensation benefits by the indicated workers. It clearly does not mean Louisiana courts lack jurisdiction to hear cases involving matters that may fall under the indicated federal regimes. See Moss v. Dixie Mach., Welding & Metal Works, Inc., 617 So. 2d 959, 960 (La. App. 4th Cir.), writ denied, 620 So. 2d 845, cert. denied, 114 S. Ct. 469 (1993). Nor does it prevent a worker covered by the LHWCA from bringing a state-law intentional tort or retaliatory discharge suit in state court against the employer. Id. at 962. See generally infra part V.C.

Given the generally accepted validity of cases like Logan, it is not very clear just what the Jensen doctrine does currently prohibit in the worker-injury field. Presumably Jensen still stands for federal preemption on its own facts—an injury to a traditional longshoreman incurred on a vessel afloat on navigable water. And Jensen also presumably continues to mean a true seaman cannot constitutionally be subjected to a state workers' compensation regime. See Dupre v. Otis Eng'g Corp., 641 F.2d 229, 232 n.4 (5th Cir. 1981); Higgins v. State, 627 So. 2d 217, 220 (La. App. 4th Cir. 1993), writ denied, 634 So. 2d 374 (1994); Bearden v. Leon C. Breaux Towing Co., 365 So. 2d 1192, 1194 (La. App. 3d Cir. 1978), writ denied, 366 So. 2d 915 (1979); Apperson v. Universal Servs., Inc., 153 So. 2d 81, 86 (La. App. 1st Cir. 1963).

In the normal course of things Louisiana courts look to the federal Fifth Circuit for leadership in making and interpreting maritime law. See, e.g., Barks v. Magnolia Marine Transp. Co., 617 So. 2d 192, 196 (La. App. 3d Cir.), writ denied, 620 So. 2d 876 (1993). But cases like American Dredging Co. make it clear the state courts are of equal authority with the lower federal courts in these matters. See also Backhus v. Transit Casualty Co., 549 So. 2d 283, 292 (La. 1989) (refusing to follow Judge Rubin's decision in Baker v. Raymond Int'l, Inc., 656 F.2d 173 (5th Cir. 1981), cert. denied, 456 U.S. 983, 102 S. Ct. 2256 (1982), which held the owner of a bareboat chartered vessel remains responsible for unseaworthy conditions arising during the life of the charter, because “[t]he Baker rationale is contrary to the great weight of federal case law”). Only the United States Supreme Court can authoritatively bind the state courts to a particular maritime interpretation.

American Dredging Co. v. Miller, 114 S. Ct. 981 (1994). See also infra notes 130-144 and accompanying text.

See supra part II.C.
I join in the opinion of the Court [affirming Louisiana's freedom to follow its own concept of forum non conveniens] because I agree that in most cases the characterization of a state rule as substantive or procedural will be a sound surrogate for the conclusion that would follow from a more discursive preemption analysis. The distinction between substance and procedure will, however, sometimes be obscure. As to those close cases, how a given rule is characterized for purposes of determining whether federal maritime law pre-empts state law will turn on whether the state rule unduly interferes with the federal interest in maintaining the free flow of maritime commerce.120

IV. SELECTED DIFFICULTIES FROM THE PROCEDURAL REALM

A. Forum Non Conveniens

By 1980, the federal courts had developed a general federal doctrine of forum non conveniens giving trial judges broad discretion to decline to exercise their jurisdiction in virtually any case in which trial in another forum was thought more suitable.121 During the 1980s, several federal Fifth Circuit decisions held that under the reverse-Erie doctrine, state courts in saving clause cases were obliged to follow the federal approach to forum non conveniens.122 Noting several indications that the Louisiana courts were not disposed to follow the federal approach, one federal appellate judge wrote with some vehemence that "[a]t some point, Louisiana must bend to the federal courts' construction of federal law."123

When the reverse-Erie question came before the Louisiana Supreme Court, Louisiana did not bend. In Miller v. American Dredging Co.,124 Justice Marcus' opinion for the unanimous court125 noted that Louisiana has a clear statutory rule on forum non conveniens;126 that the United States Supreme

120. American Dredging Co., 114 S. Ct. at 990 (Souter, J., concurring).
123. Ikospentakis, 915 F.2d at 180.
125. Id. at 617-18.
126. See La. Code Civ. P. art. 123, the general effect of which is to confine the courts' authority
Court had treated forum non conveniens as a procedural matter in a 1950 FELA case;\textsuperscript{127} that the reverse-\textit{Erie} doctrine has generally been interpreted to allow state courts freedom to apply their own procedural rules and concepts; and that the lower federal courts in diversity cases have been holding that the \textit{Erie} rule itself allows them to follow their own notions of forum non conveniens rather than deferring to the forum state's rule.\textsuperscript{128} The Court found the last-mentioned factor especially persuasive:

Under the so-called "reverse-\textit{Erie}" doctrine . . . the forum non conveniens doctrine should not be considered part of the substantive federal admiralty law in a "saving to suitors" case, any more than the doctrine is part of the state substantive law for \textit{Erie} purposes. Further, the interests of self-regulation, administrative independence, and self-management which have influenced the federal courts to apply federal forum non conveniens in diversity cases are equally applicable to the [sic] Louisiana's interest (as expressed by our legislature in La.Code Civ.P. art. 123) in applying the state forum non conveniens rule in Jones Act/general maritime cases.\textsuperscript{129}

In other words, Justice Marcus believed what was sauce for the (federal \textit{Erie}) goose should be sauce for the (state reverse-\textit{Erie}) gander.

The United States Supreme Court affirmed the Louisiana Supreme Court's \textit{American Dredging Co.} decision in \textit{American Dredging Co. v. Miller},\textsuperscript{130} a 7-2 decision. Justice Scalia's opinion for the majority used the old \textit{Jensen} shibboleth\textsuperscript{131} as a framework for discussion. He first concluded that Louisiana's refusal to apply federal forum non conveniens does not work "material prejudice to [a] characteristic feature of the general maritime law"\textsuperscript{132} because the federal forum non conveniens doctrine is not a characteristic feature of maritime law; it "did not originate in admiralty or have exclusive application

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\textsuperscript{127} See Southern Ry. v. Mayfield, 340 U.S. 1, 71 S. Ct. 1 (1950) (holding Missouri was free to apply its own forum non conveniens rule in a FELA case).

\textsuperscript{128} See, e.g., \textit{In re Air Crash Disaster Near New Orleans,} La., 821 F.2d 1147, 1159 (5th Cir. 1987) (en banc) ("We hold that the interests of the federal forum in self-regulation, in administrative independence, and in self-management are more important than the disruption of uniformity created by applying federal forum non conveniens in diversity cases.")\textsuperscript{132}, \textit{vacated on other grounds,} 490 U.S. 1032, 109 S. Ct. 1928 (1988).


\textsuperscript{130} 114 S. Ct. 981 (1994).

\textsuperscript{131} See supra notes 95-97 and accompanying text.

\textsuperscript{132} \textit{American Dredging Co.}, 114 S. Ct. at 983 (quoting Southern Pac. Co. v. Jensen, 244 U.S. 205, 216, 37 S. Ct. 524, 529 (1917)).
there.’ Justice Scalia then concluded that Louisiana’s refusal to apply federal forum non conveniens does not impermissibly “interfere[] with the proper harmony and uniformity’ of maritime law.” The key to Justice Scalia’s reasoning on the “harmony and uniformity” point was the observation that forum non conveniens “is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: it is procedural rather than substantive, and it is most unlikely to produce uniform results.”

Forum non conveniens was seen by Justice Scalia as clearly procedural rather than substantive because it is “nothing more or less than a supervening venue provision.” Substantive admiralty rules are generally binding on state courts, and such matters as burden of proof and affirmative defenses have been classified as substantive. “Unlike burden of proof . . . and affirmative defenses . . . forum non conveniens does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct—how to manage their business and what precautions to take.”

And—in some respects the clinching argument from a functional point of view—Justice Scalia observed that imposing the federal rule of forum non conveniens on the states would not produce any appreciable increase in “harmony” or “uniformity.” “The discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application, . . . make uniformity and predictability of outcome almost impossible.”

About a month before the United States Supreme Court’s decision in American Dredging Co., the Supreme Court of Texas had decided the forum non conveniens/reverse-Erie issue oppositely; in Exxon Corp. v. Chick Kam Choo, the Texas court had held it was obliged to follow the federal forum non conveniens doctrine in a saving clause case. When American Dredging Co. was decided, the Chick Kam Choo plaintiff sought and received a rehearing; the Texas Supreme Court withdrew its earlier opinion and held unanimously—in accordance with American Dredging Co.—that forum non conveniens is a procedural doctrine governed by state law in saving clause cases.

The Texas Supreme Court’s unanimous decision on rehearing in Chick Kam Choo should help put to rest what had been a small but nagging doubt about the reach of American Dredging Co. The doubt existed because on its facts American Dredging Co. was not a typical maritime forum non conveniens

133. Id.
134. Id. at 987 (quoting Jensen, 244 U.S. at 216, 37 S. Ct. at 529).
135. Id. at 988.
136. Id.
137. Id. at 988-89.
138. Id. at 989.
139. 881 S.W.2d 301 (Tex. 1994).
140. Id. at 304-06.
dispute. Instead, it was a dispute between domestic litigants—the plaintiff was a Mississippi resident who had been hurt working on the Delaware River, and the defendant's forum non conveniens motion maintained that the proper forum for the case was a Pennsylvania state court. The vast bulk of the maritime forum non conveniens disputes—including *Chick Kam Choo*—have not involved domestic situations but rather contentions that the appropriate place of trial is a court in a foreign land. So the question arose, was *American Dredging Co.* confined to domestic forum non conveniens disputes, leaving the reasoning of the federal Fifth Circuit (and the Texas Supreme Court on original hearing in *Chick Kam Choo*) arguably correct as to international forum non conveniens disputes? In a strange and perhaps even mischievous 4 postscript at the end of his *American Dredging Co.* opinion—an opinion that was otherwise based on broad reasoning of equal applicability in the domestic and international contexts—Justice Scalia had ostentatiously raised that very question, stating:

> Amicus the Solicitor General has urged that we limit our holding, that *forum non conveniens* is not part of the uniform law of admiralty, to cases involving domestic entities. We think it unnecessary to do that. Since the parties to this suit are domestic entities it is quite impossible for our holding to be any broader.142

With the issuance of the unanimous *Chick Kam Choo* rehearing opinion by the Texas Supreme Court, one can reasonably hope that Justice Scalia's postscript will not be interpreted as having limited the principle of *American Dredging Co.* The Scalia postscript merely states a jurisprudential truism: A case's *holding* cannot possibly be broader than its facts. This truism expresses no view on whether the *principle* for which the case stands is so narrowly limited. In determining that *American Dredging Co.* controlled its decision in the transnational *Chick Kam Choo* case, the Texas Supreme Court looked to the breadth of the *American Dredging Co.* majority's reasoning as well as to a dissenting opinion authored by Justice Kennedy and joined by Justice Thomas. In that dissent Justice Kennedy indicated the jurisprudential truism is all Justice Scalia's postscript can sensibly mean. After setting out a detailed argument that the Court's failure to force the states to follow federal forum non conveniens is damaging to interstate and international maritime commerce, Justice Kennedy stated:

> The Court does seem to leave open the possibility for a different result if those who raise the *forum non conveniens* objection are of foreign nationality. The Court is entitled, I suppose, to so confine its holding,

141. As the following discussion in the text implies, this author thinks Justice Scalia was merely rebuking the Solicitor General's perceived officiousness. But the postscript is bound to encourage some fruitless litigation over the reach of *American Dredging Co.* Justice Scalia should not have indulged himself.

but no part in its reasoning gives hope for a different result in a case involving foreign parties. The Court’s substance-procedure distinction takes no account of the identity of the litigants, nor does the statement that forum non conveniens remains “nothing more or less than a supervening venue provision” . . . . The Court ought to face up to the consequences of its rule in this regard.143

On rehearing of Chick Kam Choo, the unanimous Texas Supreme Court quoted Justice Kennedy’s language, rejecting any notion that American Dredging Co. does not control international forum non conveniens disputes.144 Whatever the ultimate resolution of any remaining doubt about the reverse-Erie implications of federal forum non conveniens, there can be no doubt that Justice Scalia’s American Dredging Co. opinion is a broad charter of procedural freedom for state courts in saving clause cases. This message has potential utility well beyond the forum non conveniens context. The following subsections will address several procedural areas where American Dredging Co. affords state courts the opportunity to make great strides toward simplifying and clarifying the law.

B. Forum Selection Clauses

In the interval between the Louisiana Supreme Court’s American Dredging Co. decision and the United States Supreme Court’s affirmance thereof, the Louisiana Fourth Circuit Court of Appeal issued two decisions holding forum selection clauses in employment contracts signed by foreign seamen could be enforced to defeat jurisdiction in the trial courts in which the seamen sought relief.145 Enforcing the forum selection clauses in these cases produced the same effect as would have been achieved by applying the federal forum non conveniens doctrine.146 The fourth circuit’s opinions conveyed disagreement with the Louisiana Supreme Court’s American Dredging Co. resolution and noted that the United States Supreme Court then had the forum non conven-

143. Id. at 996 (Kennedy, J., dissenting) (emphasis added). Justice Kennedy’s intimation that in an international case it might be a foreign defendant who urged forum non conveniens dismissal is too broad. Most foreign defendants escape the reach of the American court on personal jurisdiction grounds before having to fall back on forum non conveniens. See, e.g., Cadawas v. Skibsakjeselskapet Storli, 630 So. 2d 289 (La. App. 5th Cir. 1993). The normal international forum non conveniens case will involve a motion by an American or multinational defendant seeking to have a case brought by a foreign plaintiff dismissed on the view it should be maintained abroad.

144. See Exxon Corp. v. Chick Kam Choo, 881 S.W.2d 301, 306 n.10 (Tex. 1994).


146. Indeed, the Prado court ordered a conditional dismissal of precisely the sort that has become routine in federal forum non conveniens cases. Prado, 611 So. 2d at 704. See Robertson, The Federal Doctrine of Forum Non Conveniens, supra note 121, at 369-71.
iens/preemption issue under advisement. Evidently the fourth circuit considered the narrow Louisiana limits on forum non conveniens to constitute a gap in the applicable law and looked to the forum selection clauses as a way to fill it. The Louisiana Supreme Court will ultimately have to decide whether such gap-filling is legitimate. On the analogy of the above discussed decisions, which disapprove of contractual efforts to confer jurisdiction on incompetent courts or to defeat the jurisdiction of competent courts, using forum selection clauses to defeat the exercise of jurisdiction by Louisiana courts appears dubious. Surely the functional point of American Dredging Co. is that the legislature has effectively mandated that a Louisiana court having subject matter and in personam jurisdiction must exercise that jurisdiction to decide the case, except in the narrowly exceptional areas spelled out in the Louisiana Code of Civil Procedure.

C. The Plaintiff's Right to Elect Bench or Jury Trial

Louisiana Code of Civil Procedure article 1732(6) states:

A trial by jury shall not be available in . . . [a] suit on an admiralty or general maritime claim under federal law that is brought in state court under a federal “saving to suitors” clause, if the plaintiff has designated that suit as an admiralty or general maritime claim.

This provision applies to suits filed on or after September 9, 1988. The courts have refused to apply it retroactively to actions filed before that date.

The provision’s intent and meaning are quite simple: In the supreme court’s words, the maritime plaintiff “has the right to decide if he wants a jury or non-jury trial in an admiralty or maritime case that is brought in state court.” Rule 9(h) of the Federal Rules of Civil Procedure affords the same right to the maritime plaintiff in federal court. Under both the state and federal provisions, the bench trial versus jury trial election is solely the plaintiff’s; the defendant has no say in the matter. The state-court plaintiff makes the election by specifically pleading that the case is an admiralty or maritime claim brought in state court under the saving

147. See Barcelona, 619 So. 2d at 743 (“The United States Supreme Court has granted writs on this [forum non conveniens] issue.”); id. at 744 (“Prado is dispositive.”). See also Prado, 611 So. 2d at 694 (expressing agreement with the federal forum non conveniens cases and disagreement with the Louisiana Supreme Court’s American Dredging Co. decision, noting that United States Supreme Court review of American Dredging Co. was being sought, and stating: “[W]e must either remand this case to the trial court to apply [Philippine law] or transfer it to a foreign forum on a basis as [sic] other than forum non-conveniens [sic].”).

148. See supra notes 107-110 and accompanying text.

149. See supra note 126.


clause and brought pursuant to Louisiana Code of Civil Procedure article 1732(6). By making that pleading designation, the plaintiff chooses a bench trial. If the plaintiff wishes a jury trial, she omits the pleading designation. Pleading the case pursuant to Louisiana Code of Civil Procedure article 1732(6) has no jurisdictional significance. The case does not thereby become exclusively a federal admiralty case. It does not become removable to federal court. It is still a state-court saving clause case. The provision's sole effect is on trial procedure. Recent decisions of the Louisiana Supreme Court, the federal Fifth Circuit, and the Louisiana Courts of Appeal have settled the foregoing propositions. These cases have also rejected a range of federal and state constitutional arguments whereby defendants have sought to persuade the courts that Louisiana Code of Civil Procedure article 1732(6) is invalid.

Louisiana Code of Civil Procedure article 1732(6) thus has a clear meaning, and the courts have determined there is no constitutional impediment to applying it. Yet the provision is controversial. It changed long-settled expectations about the mode of trial in saving clause cases. And to some observers it simply seems too one-sided, too pro-plaintiff. Perhaps for those reasons, a handful of reported cases have construed the provision in strangely constricted ways. Each of the following examples is aberrant in the sense that the weight of the jurisprudence is now firmly
to the contrary. The examples are nevertheless worth including as a cautionary note about potential judicial attitudes toward Louisiana Code of Civil Procedure article 1732(6). (1) For a while the courts took the view that Jones Act claims were not subject to the provision.\footnote{157} The supreme court’s decision in \textit{Parker v. Rowan Cos.},\footnote{158} has now settled that Jones Act claims are fully subject to Article 1732(6).\footnote{159} (2) Two intermediate appellate decisions have held that regardless of the plaintiff’s pleading, state court plaintiffs have no jury trial right in cases that are fully governed by the substantive general maritime law.\footnote{160} By granting a per curiam reversal in one of those cases,\footnote{161} the supreme court has indicated that viewpoint is erroneous. It is contradicted by other intermediate appellate courts\footnote{162} and implicitly but clearly by the supreme court’s \textit{Parker} decision. Under the weight of authority on the point, a state court plaintiff has always had a jury trial right in general maritime law cases. Louisiana Code of Civil Procedure article 1732(6) did not take that right away, but added to it; it gave the plaintiff the additional right to plead the case in such a way as to choose a bench trial at the plaintiff’s exclusive option. It cannot be correct that a plaintiff can inadvertently make the bench trial choice simply by relying on substantive maritime law. Justice Dennis has urged plaintiffs’ counsel to make their intentions clear. If the bench trial option is being exercised, the plaintiff should plead: “This is an admiralty or general maritime law claim brought pursuant to 28 U.S.C. § 1333, the saving to suitor’s [sic] clause, and [Article] 1732(6).”\footnote{163} If the jury trial mode is being chosen, the plaintiff’s pleading should omit those specific references. (3) Two courts have stated that under the governing law before the effective date of Louisiana Code of Civil Procedure article 1732(6), a state-court plaintiff in a

\footnote{157} \textit{See} Fontenot v. Zapata Gulf Marine Corp., 566 So. 2d 377, 377 (La. 1990) (Marcus and Lemmon, JJ., dissenting from a writ denial and indicating Article 1732(6) did not apply to Jones Act claims); Gauchet v. Chevron U.S.A. Inc., 541 So. 2d 272, 272 (La. App. 4th Cir. 1989) (containing dictum that Jones Act claims are not covered by Article 1732(6)). On the original hearing in \textit{Parker v. Rowan Cos.}, 628 So. 2d 1108 (La. 1991), the supreme court held Jones Act claims were not covered by Article 1732(6). On rehearing, \textit{Parker v. Rowan Cos.}, 599 So. 2d 296 (La. 1992), the court came firmly to the opposite view, settling the point. \textit{See infra} note 158.


\footnote{159} Note the potential confusion created by West Publishing Company. The Supreme Court’s controlling \textit{Parker} opinion—the rehearing opinion issued on May 26, 1992—is reported at 599 So. 2d 296. The original and now discredited opinion (December 2, 1991) is reported at 628 So. 2d 1108.


\footnote{163} \textit{Parker}, 599 So. 2d at 302 (Dennis, J., concurring).
maritime case had a right to jury trial only if the case could have been brought in federal court on the basis of its diversity jurisdiction. This viewpoint seems to be based on a misinterpretation of a passage in the supreme court's influential decision in *Lavergne v. Western Co. of North America*, where the court was talking about federal court saving clause cases, not state court saving clause cases.

**D. Prejudgment Interest**

The federal courts have developed a potentially confusing body of rules concerning awards of prejudgment interest. The state courts—operating on the assumption that the reverse- *Erie* doctrine obligates them to try to follow the federal courts on this matter—have added to the confusion by interpreting the somewhat contradictory federal pronouncements in occasionally eccentric ways. The resulting picture is far from clear and orderly.

The state courts could remedy the problem by reexamining their reverse- *Erie* assumption. Under the United States Supreme Court’s decision in *American Dredging Co.*, a matter as plausibly procedural as the method of calculating prejudgment interest could be governed by state-law rules without offending the Constitution's Supremacy Clause or any other federal preemption doctrine. It

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165. [371 So. 2d 807, 809-10 (La. 1979) (holding that state-court maritime plaintiffs have a right to trial by jury).]

166. As indicated *supra* part II.B, the general effect of 28 U.S.C. § 1333 (1988) is to make federal court admiralty jurisdiction exclusive as to actions in rem and selected other types of actions but (via the saving clause) leave most maritime plaintiffs free to pursue their actions in non-admiralty courts (sometimes called “saving clause courts”). The provision itself has no bearing on the subject matter jurisdiction requirements of the particular saving clause court selected by the plaintiff. If the saving clause plaintiff selects a state court, she must satisfy its subject matter jurisdiction requirements. If she selects the “law side” of the federal court, she must satisfy the subject matter jurisdictional requirements of that court. The *Lavergne* passage in question was a discussion of the requirements for taking a saving clause case to the law side of federal court on the basis of diversity jurisdiction. The court was not stating or implying Louisiana state courts have adopted the requisites of federal diversity jurisdiction as criteria for granting a jury trial in maritime matters.

167. See the reference to “our somewhat conflicting precedents” in *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 956 (5th Cir. 1984). *See also infra* notes 174-176.

would be far clearer (and on balance somewhat fairer) for state courts to follow their normal approach to prejudgment interest in all saving clause cases.

1. The Federal Court Picture in a Nutshell

a. Bench Trials

Courts routinely award interest from the date of injury in all maritime cases tried without juries under the federal courts' admiralty jurisdiction.

As a general rule, prejudgment interest should be awarded in admiralty cases—not as a penalty, but as compensation for the use of funds to which the claimant was rightfully entitled. Discretion to deny prejudgment interest is created only when there are "peculiar circumstances" that would make it inequitable for the losing party to be forced to pay prejudgment interest.169

It has been held to be reversible error for a trial judge to limit prejudgment interest by awarding it only from the date of judicial demand rather than from the date of the injury.170

Of course, prejudgment interest should not be awarded on items of damages for future losses, but only on that portion of the judgment representing losses occurring before the judgment.171 As one court recently explained:

We have held on numerous occasions that awards of prejudgment interest on future damages are not available, for the common-sense reason that those damages compensate future harm, for which no interest could possibly have accrued before trial.172

When a Jones Act case is tried without a jury, it is subject to the same prejudgment interest rules as any other bench-tried admiralty case: On the portion of the damages representing past injuries, prejudgment interest should be awarded from the date of the injury.173

2d 46, 47 (La. App. 3d Cir. 1978). See infra note 183 and accompanying text.


170. Reeled Tubing, Inc. v. M/V Chad G, 794 F.2d 1026, 1028-29 (5th Cir. 1986) (involving a property damage bench trial).

171. Snyder v. Whittaker Corp., 839 F.2d 1085, 1095 (5th Cir. 1988) (involving a products liability jury trial); Williams v. Reading & Bates Drilling Co., 750 F.2d 487, 491 (5th Cir. 1985) (involving a Jones Act bench trial).

172. Verdin v. C&B Boat Co., 860 F.2d 150, 158 (5th Cir. 1988) (involving a Jones Act and general maritime law bench trial). See also Pickle, 791 F.2d at 1241.

173. See Verdin v. C&B Boat Co., 860 F.2d 150 (5th Cir. 1988); Williams v. Reading & Bates
b. Jury Trials in Maritime Cases Not Involving the Jones Act

When (by way of the saving clause) a maritime case is tried on the “law side” of federal court, resulting in jury trial, the proper approach to prejudgment interest is less clear. Indeed, the federal Fifth Circuit decisions appear to conflict on the matter. In 1981, one panel of the Fifth Circuit held that in such a case arising in Louisiana, prejudgment interest from the date of judicial demand is proper under the Louisiana rule,74 but generally only if it is assessed by the jury rather than the judge.75 In 1988—without mentioning the earlier case—another panel held that the trial judge could award prejudgment interest from the date of the injury under the maritime law rule.176

c. Jury Trials in Jones Act Cases

When a Jones Act case is tried to a federal jury, prejudgment interest is disallowed.177 This is true even though the plaintiff may have joined a general maritime law claim to his Jones Act claim, except in the relatively rare event that a clearly separate recovery has been had on the non-Jones Act portion of the case.178

The rule prohibiting prejudgment interest in Jones Act jury cases is an anomaly. Various explanations have been offered for it.179 The clearest was set forth in Judge Rubin’s opinion in Barton v. Zapata Offshore Co.:180

The first F.E.L.A. was enacted in 1906, when pre-judgment interest was generally limited to liquidated claims. This distinction was carried over into decisions under the Jones Act, perhaps with good reason in view of the latter statute’s express incorporation of F.E.L.A. provisions. Both

Drilling Co., 750 F.2d 487 (5th Cir. 1985).
174. Havis v. Petroleum Helicopters, Inc., 664 F.2d 54, 55-56 (5th Cir. 1981) (involving a diversity action for injuries to a passenger in a maritime helicopter crash). The Havis opinion clearly stated interest was to be allowed under the Louisiana rule. However, a later opinion states Havis held “that federal, not state, law governs an admiralty plaintiff’s entitlement to prejudgment interest even though the plaintiff may have invoked diversity jurisdiction in his complaint.” Wyatt v. Penrod Drilling Co., 735 F.2d 951, 955 (5th Cir. 1984).
176. Snyder v. Whitaker Corp., 839 F.2d 1085, 1093-95 (5th Cir. 1988) (involving a diversity action for deaths of crewmen of sunken boat against boat manufacturer). Wyatt v. Penrod Drilling Co., 735 F.2d 951 (5th Cir. 1984), also suggests the proper rule is the maritime law rule rather than state law. (Note that Snyder was written by Judge Sam Johnson, who had been a member of the Havis panel).
178. See Wyatt, 735 F.2d at 956.
179. See, e.g., Snyder, 839 F.2d at 1094.
statutes provided for an action at law, with right to trial by jury, although Jones Act suits could also be brought in admiralty. Both statutes envisaged a recovery for pain and suffering and for injuries to the date of trial and thereafter, the computation of interest on which might well be far more confusing to the average jury than to a judge. . . . In any event, no one would be so naive as to suppose that juries do not throw into the scales the years that a plaintiff may have had to wait before his case can be heard by a jury. The practical reason why the courts in jury cases have refused to grant moratory interest may therefore be found in the judicial recognition that a jury usually makes some allowance for loss caused by delay.

On this view, prejudgment interest would amount to a double penalty and therefore should not be allowed. Of course, the explanation does not tell why other types of maritime personal injury cases tried to federal juries can properly yield prejudgment interest awards. Judge Rubin explained the anomalous Jones Act rule, but not the anomaly itself. The federal courts' distinction between Jones Act cases tried to juries and other maritime personal injury cases tried to juries seems to lack a principled justification.

d. Summary

In summary, here is what I believe to be the current federal-court picture: (1) Bench trials (including Jones Act cases): Prejudgment interest is awarded on all past-loss portions of the award, running from the date of the injury. (2) Jury trials other than Jones Act cases: Prejudgment interest can be awarded on past-loss portions of the award, running from the date of the injury. Generally the jury decides the prejudgment interest issue. Probably the trial judge has more discretion than in bench trials. Perhaps there is more room for argument than in bench trials about the proper role of state rules regarding prejudgment interest. (3) Jones Act jury trials: No prejudgment interest is allowed. The prohibition includes cases in which Jones Act claims are joined with general maritime law claims, with the possible exception that prejudgment interest might lie on past-loss portions of any part of the award clearly based on some liability ground other than the Jones Act.

2. The State Courts' View that They Must Follow the Federal Courts

Evidently the earliest Louisiana state court case holding that state courts are obliged to follow the federal prejudgment interest rules in Jones Act cases was the third circuit's 1978 decision in Morris v. Transworld Drilling Co. As authority for this view, the third circuit cited only a New Jersey FELA case

181. 365 So. 2d 46, 47 (La. App. 3d Cir. 1978).
(which itself mentioned no maritime authorities)\textsuperscript{182} and a treatise that had purportedly identified "a trend by the United States Supreme Court to narrow the area of the law which is deemed procedural and thereby to shrink the number of instances in which state law, as the law of the forum, will apply."\textsuperscript{183} As indicated above,\textsuperscript{184} the existence or applicability in the present context of any such trend is shown to be unlikely by the decision of the United States Supreme Court in \textit{American Dredging Co. v. Miller}.\textsuperscript{185} I believe the state courts could clearly follow their own rules and procedures on prejudgment interest without running afoul of any Supremacy Clause or other federal limitations. It should be noted that the Louisiana Supreme Court has apparently never put its imprimatur on the view that the federal prejudgment interest practices bind state courts.

The view that state courts must follow federal prejudgment interest rules in maritime cases not involving the Jones Act has proven untraceable. This assumption seems to have been carried forward, along with the \textit{Morris} rule respecting prejudgment interest under the Jones Act, without serious challenge or close scrutiny. It is time for such scrutiny because the state courts' efforts to follow the federal courts' lead on prejudgment interest issues have led to a welter of confusion.

\section*{3. State Court Rulings on Prejudgment Interest in Bench-Tried Cases}

In bench-tried cases—including Jones Act as well as general maritime law cases—the prevailing view in the state courts has been faithful to the federal approach: Prejudgment interest should ordinarily be awarded from the date of injury, and it should be limited to the past-loss portions of the award.\textsuperscript{186} But there are many divergent views. At least one court has held that prejudgment interest can not be awarded in any Jones Act case, including a bench-tried case.\textsuperscript{187} Others have held that prejudgment interest can be awarded in Jones Act cases only when the claim invokes general maritime law as well as the Jones

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\textsuperscript{183} \textit{Morris}, 365 So. 2d at 47 (citation omitted).
\textsuperscript{184} See \textit{supra} notes 130-144 and accompanying text.
\textsuperscript{185} 114 S. Ct. 981 (1994).
\textsuperscript{186} See Theriot v. McDermott, Inc., 611 So. 2d 129, 136 (La. App. 1st Cir. 1992), \textit{writ denied}, 615 So. 2d 342 (1993); Hae Woo Youn v. Maritime Overseas Corp., 605 So. 2d 187, 204 (La. App. 5th Cir.), \textit{writ denied}, 609 So. 2d 240 (1992), \textit{cert. denied}, 113 S. Ct. 2342, \textit{modified on other grounds}, 623 So. 2d 1257 (La. 1993), \textit{cert. denied}, 114 S. Ct. 1059 (1994); Spangler v. North Star Drilling Co., 552 So. 2d 673, 685 (La. App. 2d Cir. 1989). Note \textit{Theriot} and \textit{Hae Woo Youn} do not make clear whether prejudgment interest was awarded from injury or from judicial demand. However, both courts stated they were applying the federal rule, which has the interest running from injury. \textit{Spangler} made the matter clear, as did a number of other opinions.
\textsuperscript{187} Foret v. Terrebonne Towing Co., 632 So. 2d 344, 349 (La. App. 1st Cir. 1993).
\end{flushleft}
Act, and then only at the full discretion of the trial judge.88 Some courts have measured the prejudgment interest from the date of judicial demand rather than from the date of injury.89 One court has held prejudgment interest in bench-tried unseaworthiness cases should be awarded on all portions of the award, not just the past-loss portions.90 And among the courts that acknowledge the general inappropriateness of awarding prejudgment interest on future-loss items, there is an acknowledged split of authority91 on whether prejudgment interest is precluded for all future-loss portions of the award92 or only for future non-economic damages, i.e., future pain and suffering.93 (The view that prejudgment interest can properly be awarded for future economic losses seems difficult to justify in principle. It seems to have originated in a 1988 Louisiana Third Circuit Court of Appeal opinion that arguably misread a cryptic opinion of the federal Fifth Circuit.194)

_Barks v. Magnolia Marine Transport Co._195 was a bench-tried Jones Act and general maritime law case that illustrates a fairly typical tangle. The trial judge awarded prejudgment interest from the date of judicial demand on all items of recovery, including future damages. The court of appeal stated this was wrong in two respects: interest should have run from the date of injury, but on the other hand it should probably have been limited to past-loss items (or at the very least it should not have included prejudgment interest on future pain and suffering). The court of appeal went on to state:

> It is not necessary in the present case that we take sides on this difference of opinion [as to whether prejudgment interest is proper on the future economic loss portions of the award]. There are circumstanc-
es when a trial court may exercise its discretion to award prejudgment interest only from the date of judicial demand. We conclude that the trial judge properly exercised its discretion in the present case. If we consider post-judgment damages to include pecuniary damages found by the trial court, the post-judgment and prejudgment damages are about equal. The trial judge could have awarded prejudgment interest on past damages from the date of the accident, and could have denied post-judgment interest altogether. By making all damages subject to interest, but dating only from judicial demand, the result is fair and certainly not an abuse of the trial court’s discretion.\(^\text{196}\)

The court’s solution is attractive in its simplicity. We should resist the urge for infinite fine-tuning in these cases. Holding that prejudgment interest runs on the entire award from date of judicial demand may lack logical elegance, but it is a sensible, middle-of-the-road approach that seems workable.\(^\text{197}\)

4. State Court Rulings on Prejudgment Interest Issues in Jury-Tried Cases

In Jones Act cases tried to juries, the state courts follow the federal rule precluding the award of prejudgment interest.\(^\text{198}\) That is about the only matter on which the courts agree. As to virtually every other conceivable issue, there is discord in the case law. The jury trial decisions exhibit the same unacknowledged split as the bench-tried cases on whether, when prejudgment interest is available, it should run from the date of judicial demand or from the date of injury.\(^\text{199}\) There is also the same debate about the propriety of prejudgment interest on future economic loss damages.\(^\text{200}\) And there are a number of debatable areas involving the judge-jury allocation. For example, in cases not involving the Jones Act, some

\(^{196}\) Id. at 196. The court actually wrote: “There are circumstances when a trial court may exercise its discretion to award prejudgment interest only from the date of judicial demand.” (Emphasis added.) It is clear from the context, however, the court meant “from.”

\(^{197}\) For a less defensible “split-the-difference” response to the tangle of perceived rules in this area, see Mistich v. Pipelines, Inc., 609 So. 2d 921, 941 (La. App. 4th Cir. 1992), \textit{writ denied,} 613 So. 2d 996, \textit{cert. denied sub nom.} Brown & Root, Inc. v. Mistich, 113 S. Ct. 3020 (1993), in which the court of appeal upheld the trial judge’s arbitrary allocation of half the award to unseaworthiness and half to the Jones Act and the consequent determination to award prejudgment interest (whether from judicial demand or from injury does not appear from the opinion) on half the award.


\(^{199}\) \textit{See, e.g.,} Ronquillo v. Belle Chase Marine Transp., Inc., 629 So. 2d 1359 (La. App. 4th Cir. 1993) (reversing, for other reasons, the trial judge’s award of prejudgment interest from judicial demand).

\(^{200}\) \textit{See} Savoie v. McCall’s Boat Rentals, Inc., 491 So. 2d 94, 107 (La. App. 3d Cir.) (reversing entire prejudgment interest award when it could not be determined how much of it related to future-loss items), \textit{writs denied,} 494 So. 2d 334, 542 (1986).
courts apparently hold that only the jury can award prejudgment interest—that to be valid it must be part of the verdict—while others appear to approve the trial judge’s adding it to the verdict. In cases involving combined Jones Act and general maritime law claims, courts seem to generally agree that the jury must determine the prejudgment interest issue. But in these combined Jones Act and general maritime law cases, some courts have doubted that prejudgment interest can ever be awarded. Other courts hold that prejudgment interest can be awarded provided the jury is properly instructed to and does (a) apportion the recovery as between the Jones Act and the general maritime law grounds, and (b) award prejudgment interest limited to the non-Jones Act portions.

5. A Simple Proposal

The foregoing creates too much confusion, entailing too much judicial effort on a decidedly peripheral issue. The state courts should reexamine the assumption that there is a federal constitutional obligation to follow the federal courts on these matters. If state courts abandoned the assumption, they would be free to follow the sensible Barks approach in all cases. The Louisiana courts should heed the message of procedural freedom the United States Supreme Court’s American Dredging Co. opinion has delivered and use that freedom to treat all prejudgment interest issues alike: Interest should be awarded by the trial judge, not the jury, and it should run from judicial demand on all items of damages.

E. Appellate Review

Issues as to the proper scope of appellate review routinely arise in three broad matters: (1) liability or merits issues in Jones Act cases; (2) liability or merits issues in other types of maritime cases; and (3) quantum issues. On each of these matters, the Louisiana courts have intermittently tried to follow federal court standards and have fallen into substantial disagreement among themselves. Again, the United States Supreme Court’s American Dredging Co. decision offers the

206. See supra notes 195-197 and accompanying text.
207. See Corliss v. Elevating Boats, Inc., 599 So. 2d 434, 438 (La. App. 4th Cir. 1992) (stating that under state law, interest runs from judicial demand on all items).
opportunity for an attractive solution: Let all these matters be governed by the normal state rules.

1. Liability (Merits) Issues in Jones Act Cases

In its 1971 decision in *Trahan v. Gulf Crews, Inc.*[^208] the Louisiana Supreme Court said that merits review in Jones Act cases is "necessarily" the same as in the federal courts. The court principally relied upon FELA cases to support that supposed compulsion. However, as Justice Dixon demonstrated in his *Trahan* dissent, those cases did not hold that state courts are obligated to follow federal standards of appellate review.[^209] The *Trahan* majority appeared to have misread them.

Having thus more or less assumed that state courts are obliged to follow the federal review standards, the *Trahan* majority opinion then articulated two distinctly different federal standards, without giving any clear indication as to which one was controlling: (1) "Louisiana appellate courts . . . may not . . . disturb the finding of a trial jury on the merits in [Jones Act] cases unless there is no reasonable basis for the jury's conclusion [in favor of the plaintiff];"[^210] or (2) "Only when there is a complete absence of probative facts to support the conclusion reached (by the jury in plaintiff's favor) does a reversible error appear."[^221]

Not surprisingly, the lower courts have divided (without any acknowledgment of the split of authority) as between those two review standards. Perhaps such a division is not of supreme importance; practitioners often observe that articulated standards of appellate review seem to have little to do with the degree of scrutiny an appellate court will actually apply in any given case. But the disagreement is potentially confusing and not trivial: The "complete absence of probative facts" standard describes a much more limited appellate function than the "no reasonable basis" standard.

The "no reasonable basis" standard seems to have a slight numerical advantage in the reported cases[^212] but the "complete absence of probative facts" standard also has made a strong showing.[^213] And these are not the only two views. In a

[^209]: *Id.* at 54-57, 255 So. 2d at 72-75 (Dixon, J., dissenting).
[^210]: *Id.* at 40, 255 So. 2d at 67.
[^211]: *Id.* at 42, 255 So. 2d at 67 (quoting Lavender v. Kurn, 327 U.S. 645, 652, 66 S. Ct. 740, 743 (1946)).
[^213]: See Daigle v. Coastal Marine, Inc., 488 So. 2d 679, 681 (La. 1986); Mistich v. Pipelines,
third group of decisions, the courts have stated that the proper standard is the federal "clearly erroneous" rule.214

Finally, there is an emerging fourth view: appellate review in Jones Act cases should be conducted in accordance with normal state law rules. The Louisiana Supreme Court may have hinted a preference for that approach in its 1986 per curiam opinion in Daigle v. Coastal Marine, Inc.,215 and several courts of appeal have since recognized the hint, either holding or suggesting that ordinary state procedures should govern these matters.216 At the time those cases were decided, the only supportive authority from the United States Supreme Court was dictum in Icicle Seafoods, Inc. v. Worthington217 that "state courts are not required to apply Rule 52(a) [the federal 'clearly erroneous' rule] to their own appellate system for reviewing factual determinations of trial courts."218 That dictum was rather frail authority, inasmuch as Icicle Seafoods, Inc. was neither a maritime case nor a case that had come through the state courts. But the American Dredging Co. decision seems to be quite strong maritime authority for state court procedural freedom. The Daigle hint should be written into firm law.

2. Liability (Merits) Issues in Other Maritime Cases

Several appellate courts have said that the correct review standard for liability issues in non-Jones Act cases is the "no reasonable basis" rule.219

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215. 488 So. 2d 679, 681 n.3 (La. 1986):

Even if Trahan controls the standard of review in state court on Jones Act claims, the standard of review for claims under general maritime law is different. Moreover, "state courts are not required to apply Rule 52(a) [the clearly erroneous standard of review]—a rule of federal civil procedure—to their own appellate system for reviewing factual determinations of trial courts."


217. See Hanks v. Barge Transp. Co., 563 So. 2d 1297, 1300 (La. App. 3d Cir.), writ denied, 569 So. 2d 964 (1990) (holding); Feyerabend v. State Dep't of Wildlife & Fisheries, 544 So. 2d 577, 579-80 (La. App. 1st Cir. 1989) (hinting). Cf. Caravalho v. Dual Drilling Servs., Inc., 631 So. 2d 725, 728 (La. App. 3d Cir. 1994) (applying state appellate review standard to a Jones Act case without mentioning Daigle). See also Butler v. Zapata Haynie Corp., 633 So. 2d 1274, 1278-82 (La. App. 3d Cir. 1994). In Butler, Judge Stoker (joined by Chief Judge Domegeaux) dissented on the merits, but agreed that the state law on appellate review should obtain. Id. at 1291-92 (Stoker, J., dissenting). Judge Stoker explicitly relied on Daigle and Icicle Seafoods, Inc. Id. (Stoker, J., dissenting) His opinion also discusses the divergent views in other circuits. Id. at 1292-93 (Stoker, J., dissenting).


219. Id. at 712, 106 S. Ct. at 1529.
Others have opted for the federal "clearly erroneous" rule. But the Louisiana Supreme Court's Daigle opinion in 1986 said that state law should govern, and most of the subsequent court of appeal decisions have followed. It seems to be the only sensible approach, and American Dredging Co. gives it great comfort.

3. Quantum Issues

The portion of the Trahan majority opinion most criticized by Justice Dixon in his dissent stated:

State appellate review of jury awards under maritime law and the Jones Act is, as in the federal courts, "extremely limited." They must stand unless the appellate courts find there is no law and no evidence to sustain them, rendering them, as some courts have put it, so excessive as to be obviously punitive, motivated by prejudice, passion, partiality, or corruption.

Some courts of appeal have attempted to apply that standard. Others have simply conducted quantum review under state standards without com-

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221. See supra note 215.


224. See Hae Woo Youn v. Maritime Overseas Corp., 605 So. 2d 187, 201 (La. App. 5th Cir.) (relying on Sutton v. Central Gulf Lines, Inc., 433 So. 2d 888 (La. App. 5th Cir. 1983)), writ denied,
Now that courts review merits issues in general maritime law cases under normal state standards—and now that there is at least a slight movement in the same direction as to merits issues in Jones Act cases—certainly courts may and should review quantum under the normal state law approach.

F. Summary Proceedings to Obtain Maintenance and Cure?

When a seaman becomes ill or is injured in the course of employment, the employer owes maintenance (daily subsistence) and cure (medical care). The employer's maintenance and cure obligation is strict; there are few defenses. The seaman is entitled to the prompt provision of maintenance and cure. An employer who unjustifiably withholds or delays these payments will be liable for compensatory damages to redress any further harm brought about by the delay as well as punitive damages if the refusal to pay was arbitrary or callous.

Seamen whose employers have denied, delayed, or prematurely terminated maintenance and cure benefits sometimes desperately need summary judicial relief. For an ailing and needy seaman, the uncertain prospect of compensatory and punitive damages down the judicial road may be small solace. The federal courts will sometimes sever maintenance and cure claims from other issues that may be in litigation between the seaman and his employer and grant an early trial on the maintenance and cure portion of the case. Federal courts will also grant summary judgment for the seaman on maintenance and cure issues in appropriate cases. But "federal maritime law does not mandate a remedy more expeditious than summary judgment to a plaintiff seeking maintenance and cure."
When seamen have sought maintenance and cure by summary proceedings in Louisiana state courts, some district courts have used the highly expeditious “rule to show cause” procedure set forth in Louisiana Code of Civil Procedure article 963 to order the employer to make the payments. However, two Louisiana courts of appeal have concluded Louisiana Code of Civil Procedure article 2592 presents an impediment to that procedure. Louisiana Code of Civil Procedure article 2592 sets forth an eleven-item list of the “only” matters as to which summary proceedings may be used. Despite the fact at least two of these eleven items are set forth in quite elastic and general terms, decisions of the first and third circuits have held that the procedure article precludes the use of summary proceedings to order the payment of maintenance and cure. Some judges have suggested that “the Legislature ... should take steps to enable injured seamen the opportunity to obtain maintenance and cure by summary proceedings.” As matters now stand, at least in those two circuits, the seaman must be content with somewhat slower relief—by way of a motion for summary judgment after appropriate discovery or for an expedited trial of severed maintenance and cure claims—and hope that the threat of liability for compensatory and punitive damages will discourage employer recalcitrance.

V. SOME MATTERS OF SUBSTANTIVE LAW

A. Seaman Status

The established federal maritime law holds (virtually without exception) that a worker must be classified as a seaman to qualify for the protection of the Jones Act, the doctrine of unseaworthiness, and the law of maintenance and cure.

232. See id. (disapproving of “the long-standing practice in the 16th Judicial District of deciding issues of maintenance and cure through the use of summary proceedings on rule days”).

233. La. Code Civ. P. art. 2592(3) allows summary proceedings to dispose of “[a]n issue which may be raised properly by an exception, contradictory motion, or rule to show cause.” La. Code Civ. P. art. 2592(11) allows summary proceedings respecting “[a]ll other matters in which the law permits summary proceedings to be used.”


235. Bourque, 634 So. 2d at 1365.


237. In some (but not all) of the federal circuits there is a tiny category of non-seamen who may occasionally be protected by the unseaworthiness doctrine. See the discussion in Smith v. Harbor Towing & Fleetng, Inc., 910 F.2d 312 (5th Cir. 1990), cert. denied, 499 U.S. 906, 111 S. Ct. 1107 (1991).
For all of these purposes, seaman is defined as a "master or member of the crew of any vessel." The criteria for seaman status are indisputably governed by federal law that binds the state courts.

In its 1991 decisions in *Southwest Marine, Inc. v. Gizoni* and *McDermott International, Inc. v. Wilander,* the United States Supreme Court significantly liberalized and clarified this area of law. *Gizoni* held that a rigging foreman at a ship repair facility who worked on and rode floating work platforms in the sheltered waters of the shipyard could qualify as a seaman on the basis of his connection with the floating platforms. *Wilander* held that a paint foreman working in a fixed-platform offshore oil field could qualify as a seaman on the basis of his connection to the "paint boat" that took him among the platforms to perform sandblasting, painting, and related maintenance.

Both *Wilander* and *Gizoni* jettisoned important bits of doctrine that had developed in some of the lower courts as ways of limiting seaman status. *Wilander*—the earlier and more important of the two decisions—jettisoned an "aid to navigation" requirement that had been imposed by many lower courts, explicitly holding that a worker need not be aboard his vessel in aid of navigation to qualify as a seaman. *Gizoni* made clear that whether the worker seeking seaman status was engaged in a type of work listed as covered employment in the LHWCA is not of major importance; a ship repairman is a seaman if he has the requisite connection with a vessel or fleet of vessels.

The federal Second Circuit's recent decision in *Latis v. Chandris, Inc.* constitutes an excellent discussion and summary of the effects of *Wilander* and *Gizoni,* concluding:

[A]fter Wilander and Gizoni the test of seaman status under the Jones Act is an employment-related connection to a vessel in navigation. The test will be met where a jury finds that (1) the plaintiff contributed to the function of, or helped accomplish the mission of, a vessel; (2) the plaintiff's contribution was limited to a particular vessel or identifiable group of vessels; (3) the plaintiff's contribution was substantial in terms of its (a) duration or (b) nature; and (4) the course of the plaintiff's employment regularly exposed the plaintiff to the hazards of the sea.

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238. The LHWCA excludes from its coverage "a master or member of a crew of any vessel." Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 902(3)(G) (1988). Swanson v. Marra Bros., Inc., 328 U.S. 1, 66 S. Ct. 869 (1946), held that the LHWCA term "master or member of a crew of any vessel" defines the Jones Act term "seaman" and that the two acts are mutually exclusive in their respective coverages. Id. at 6-8, 66 S. Ct. 871-72.
243. Id. at 57.
The Wilander, Gizoni, and Latsis decisions make clear that "hazards of the sea" is a term of art that includes not only all of the obvious dangers presented by the oceans, but also the dangers presented by vessel movement and traffic in rivers and other inland waters.244 (After this article was prepared, the Supreme Court granted certiorari in Latsis.245 It was argued on February 21, 1994.)

Decisions like Latsis indicate that Wilander and Gizoni constituted major liberalizations in the law of seaman status. However, some panels of the federal Fifth Circuit have shown resistance to that message. For example, that court has recently held that a lower Mississippi River pilot, whose work continually exposed him to sea perils, was not a seaman because "he was not permanently assigned to any particular vessel or fleet of vessels."246 (By contrast, the Latsis court held that a "permanent assignment" requirement could not have survived Wilander.247) Other Fifth Circuit panels have denied seaman status by construing the vessel ingredient somewhat narrowly.248

In post-Wilander/Gizoni decisions, the Louisiana Supreme Court has refused to adopt the narrower views of the federal Fifth Circuit judges. Instead, the supreme court has read Wilander much as the federal Second Circuit reads it—as completely jettisoning the purported aid-to-navigation requirement as well as requiring significant modification of any idea that the worker's connection with the vessel or group of vessels must be "permanent" or (in terms of duration) "substantial." It is noteworthy that the federal Second Circuit's Latsis decision relied in substantial part on the Louisiana Supreme Court's decision in Folse v. Western Atlas International,249 in which the supreme court reversed a summary judgment for the defendant and held that seaman status for a seismographic survey worker who frequently went to sea on short trips on a number of different vessels presented a question of fact.

244. See Robertson, A New Approach, supra note 236, at 80-81, 118-20, where the "perils of the sea" concept is proposed as a key ingredient of seaman status determinations. The Latsis opinion referred to this piece as "the Robertson article" and relied on it extensively. Latsis, 20 F.3d at 50-51, 53 n.3, 57. The Supreme Court's Wilander decision also relied on this article. See Wilander, 498 U.S. at 354, 111 S. Ct. at 817.


247. See Latsis, 20 F.3d at 52-55.

248. See, e.g., Ducrepont v. Baton Rouge Marine Enters., 877 F.2d 393 (5th Cir. 1989). Ducrepont was decided before Gizoni, but is still being cited as good law. See DiGiovanni v. Traylor Bros., Inc., 959 F.2d 1119, 1123 (1st Cir.), cert. denied, 113 S. Ct. 87 (1992).

249. 593 So. 2d 341 (La. 1992). See the Latsis discussion of Folse at Latsis, 20 F.3d at 56-57. Folse, like Latsis and Wilander, relies to a considerable extent on "the Robertson article." Folse, 593 So. 2d at 342-43. See supra note 244.
The Louisiana Supreme Court’s other major post-Wilander/Gizoni seaman status decision was *Ebanks v. Reserve Marine Enterprises*, in which the court of appeal had denied seaman status on the view that a crane barge spudded into a river bottom was not a vessel for Jones Act purposes. The supreme court granted a writ and summarily remanded the case, issuing a per curiam opinion citing *Gizoni* and stressing that “whether a floating structure is a vessel,” like all of the other issues involved in the seaman status determination, is normally a question of fact.

By rejecting some of the federal Fifth Circuit’s doctrines that seem to limit seaman status more narrowly than is consistent with the United States Supreme Court’s *Wilander* and *Gizoni* decisions, the *Folse* and *Ebanks* decisions have once again demonstrated that state courts are of equal authority with the lower federal courts in interpreting and applying maritime law. The state courts of appeal have reflected the spirit of *Ebanks* and *Folse* by holding that the seaman status issue normally presents a question for the trier of fact.

250. 625 So. 2d 1050 (La. 1993), cert. denied, 114 S. Ct. 1400 (1994). In an earlier decision the supreme court used a liberal definition of the term “vessel” for purposes of the tort action permitted by § 905(b) of the LHWCA, while indicating the Jones Act concept of “vessel” may be narrower. Orgeron v. Avondale Shipyards, 561 So. 2d 38 (La. 1990). However, the *Ebanks* court cited *Orgeron* right alongside *Gizoni*, thereby suggesting the term “vessel” should be defined the same way for Jones Act and § 905(b) purposes. *Ebanks*, 625 So. 2d at 1050. See infra note 280 for a discussion of 33 U.S.C. § 905(b) (1988).


252. *Ebanks*, 625 So. 2d at 1050.

253. See supra note 117 and accompanying text. See also the more general formulation of the point in Justice Thomas’ concurring opinion in *Lockhart v. Fretwell*, 113 S. Ct. 838, 846 (1993) (Thomas, J., concurring): “An Arkansas trial court is bound by this Court’s (and by the Arkansas Supreme Court’s and the Arkansas Court of Appeals’) interpretation of federal law, but if it follows the Eighth Circuit’s interpretation of federal law, it does so only because it chooses to and not because it must.”

B. Choice of Law (and Choice-of-Law Contractual Provisions) in Transnational Cases

Three famous United States Supreme Court decisions (often called "the Lauritzen trilogy") provide a methodology for determining when American law applies to transnational cases involving injured seamen and similarly situated tort victims: *Lauritzen v. Larsen*, *Romero v. International Terminal Operating Co.*, and *Hellenic Lines Ltd. v. Rhoditis*. The 1982 amendment to the Jones Act augments the law of the *Lauritzen* trilogy by severely limiting foreign offshore oil and gas workers' access to American law. All of this choice-of-law apparatus is substantive federal law that binds the state courts.

It follows from the established characterization of the choice-of-law issue as federal substantive law that the validity and interpretation of choice-of-law clauses in maritime contracts is also a matter of federal law. On the other hand, recall that the validity and interpretation of forum selection clauses may well be regarded as a procedural matter that is entirely controlled by state law. Courts and litigants have sometimes seemed to overlook the distinction between choice-of-law clauses and forum selection clauses. Whatever the proper resolution of the unsettled question whether state or federal law governs forum selection clauses, it does not advance sensible debate to equate forum selection clauses with choice-of-law clauses. The distinction between the two types of clauses has a useful analogy in the jurisprudence holding that while parties to a dispute generally cannot confer or withhold judicial jurisdiction by

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255. See, e.g., Mihalopoulos v. Westwind Africa Line, Ltd., 511 So. 2d 771, 774 (La. App. 5th Cir. 1987).
256. 345 U.S. 571, 73 S. Ct. 921 (1953).
259. 46 U.S.C. app. § 688(b) (1988) generally denies such workers access to American law except when it is shown that neither the worker's home country nor the place of injury provides any remedy.
260. See Powell v. McDermott Int'l, Inc., 588 So. 2d 84, 86 (La. 1991) (using the *Lauritzen* trilogy to uphold the applicability of United States law on behalf of an American oil and gas worker hurt off the coast of West Africa and noting the issue "is governed by federal substantive admiralty or maritime law"); Mihalopoulos v. Westwind Africa Line, Ltd., 511 So. 2d 771, 774 (La. App. 5th Cir. 1987) (taking the trilogy as authoritative to uphold the applicability of United States law on behalf of a Greek sailor hurt in France).
262. See supra part IV.B.
263. See, e.g., Prado v. Sloman Neptun Schiffahrts-A.G., 611 So. 2d 691, 695-99 (La. App. 4th Cir. 1992) (discussing federal cases involving forum selection and/or choice-of-law clauses and eliding the distinction), writ not considered, 613 So. 2d 986 (1993); Mihalopoulos, 511 So. 2d at 773, 779 (noting the defendant had mistakenly attempted to treat a forum selection clause as a choice-of-law provision).
contract or stipulation, they can choose the substantive law that governs their dispute. 264

C. Litigation Concerning the Longshore and Harbor Workers' Compensation Act (LHWCA) 265

1. Coverage of the LHWCA and of the State Workers' Compensation Act

The LHWCA excludes seamen—"master[s] or member[s] of a crew of any vessel"—from its coverage. 266 For most other maritime workers, it provides a federal workers' compensation remedy. 267 Its principal coverage requisites are a so-called "status" requirement that the worker be "engaged in maritime employment" 268 and a "situs" requirement that the injury have occurred "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 269

Obviously this broad federal compensation statute goes well onto the land and covers many workers and injuries that are also within the general coverage of state workers' compensation statutes. Both the United States Supreme Court and the Louisiana Supreme Court have held there is nothing in the LHWCA or in the federal constitution hindering the applicability of state workers' compensation remedies to workers hurt on land under circumstances giving rise to coverage by the LHWCA; 270 from that perspective the coverages of the two

264. See supra notes 107-110 and accompanying text.
267. The LHWCA was originally enacted in 1927. It was so extensively amended in 1972—when its coverage was greatly expanded and many substantive and procedural changes were made—as to amount to a virtually new Act. The Supreme Court has worked out the coverage of the new Act in Herb's Welding, Inc. v. Gray, 470 U.S. 414, 105 S. Ct. 1421 (1985) (holding that, despite the fact the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b) (1988), makes the LHWCA applicable to oil and gas workers hurt on fixed platforms on the Shelf—i.e., beyond three geographical miles from shore—there is no LHWCA coverage for such workers hurt on fixed platforms in territorial waters, i.e., waters within three geographical miles of the shore); Director v. Perini N. River Assocs., 459 U.S. 297, 103 S. Ct. 634 (1983) (holding that workers hurt on vessels afloat in navigable waters are covered without further inquiry into whether they were engaged in maritime employment); P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 100 S. Ct. 328 (1979) (establishing that moving cargo between a vessel and land transportation is LHWCA-covered maritime employment); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249, 97 S. Ct. 2348 (1977) (explaining the LHWCA's "status" and "situs" requirements).
269. Id. § 903(a).
regimes are concurrent in the substantial area of overlap. However, the Louisiana legislature has recently amended the state workers' compensation statute to provide that "[n]o [state workers'] compensation shall be payable in respect to the disability or death of any employee covered by the Federal Employer's Liability Act, the Longshoremen's [sic] and Harbor Worker's [sic] Compensation Act, or any of its extensions, or the Jones Act." This amendment excludes most maritime workers from the state regime and leaves the LHWCA as their sole remedy against their employers.272

2. "Statutory Employers" Under the LHWCA and Under State Law

Before the amendment to the Louisiana statute eliminated concurrent LHWCA and state compensation coverage, a worker whose injury was covered under both regimes could choose the compensation remedy to pursue. During that era much litigation was produced by the marked difference between the LHWCA and the Louisiana workers' compensation statute in their delimitation of the entities to be immunized from tort liability by virtue of the compensation remedy. The Louisiana statute extends tort immunity to a broad range of so-called "statutory employers"—entities who are not the injured workers' employers and who would enjoy no tort immunity under the federal act.273 By choosing the federal compensation remedy, could an injured worker keep the broad Louisiana statutory employer immunity from applying?

For a time the lower courts were divided on this question,274 but the Louisiana Supreme Court eventually settled it affirmatively; Brown v. Avondale


272. Recall it has always been regarded as unconstitutional under the Jensen doctrine for a state to attempt to provide workers' compensation benefits to seamen. See supra note 115. Furthermore, La. R.S. 23:1037 (1985) already contained a "seaman's exclusion." See Dupre v. Otis Eng'g Corp., 641 F.2d 229, 230 (5th Cir. 1981); Higgins v. State, 627 So. 2d 217, 220 (La. App. 4th Cir. 1993), writ denied, 634 So. 2d 374 (1994). See also infra text and notes 296-297. To this extent, the 1989 amendment to La. R.S. 23:1035 (1985 & Supp. 1994) seemingly makes no change. But the provision cutting all LHWCA-covered injuries out of state compensation coverage is radical.

273. Under the LHWCA, entities that would be called "statutory employers" in Louisiana have immunity from tort liability only if they actually provided workers' compensation benefits. See 33 U.S.C. § 904(a) (1988).

Industries, Inc. held that when a worker elects federal compensation benefits, he is then free to sue the non-employer entity in tort without having to contend with the Louisiana statutory employer doctrine. Presumably, now that the legislature has decreed that any injury compensable under the LHWCA is ipso facto not covered by the state workers’ compensation statute, the Brown decision will stand for the proposition that the statutory employer doctrine has no application to LHWCA-covered cases.

3. The “Borrowed Employee” Doctrine(s)

Under the LHWCA as under virtually all workers’ compensation regimes, the injured worker’s employer is obligated to provide compensation benefits and in return is immunized from all or most tort liability. The courts have devised a “borrowed employee” doctrine that sometimes treats an entity who was not the nominal or formal employer of the injured worker as an employer (both for purposes of that entity’s responsibility for providing workers’ compensation benefits and its immunity from tort liability). There is a nine-factor test for borrowed employee status under the LHWCA, which is clearly an issue controlled by federal law (although it is said that state law uses identical criteria for determining borrowed employee status for state-law purposes).

4. Tort Litigation by LHWCA-Covered Workers Against Non-Employers

As indicated, the LHWCA generally precludes tort litigation by covered workers against their employers. But Section 905(b) of the Act allows those workers to bring negligence actions against the non-employer operators of vessels whose fault may have contributed to their injuries. The Section 905(b)
negligence action is "exclusive of all other remedies against" vessel operators. Here federal law is preemptive. Section 905(b) precludes workers covered by the LHWCA from suing vessel operators under state law. Section 905(b) was enacted to abolish the unseaworthiness remedy formerly enjoyed by LHWCA workers. It does not provide any detail as to the content of the negligence remedy to which LHWCA workers are now confined. Determining the attributes of the Section 905(b) negligence cause of action has been left to the courts. The nature and content of this negligence remedy is a substantive maritime law issue as to which the state courts are bound to follow the federal law.

The United States Supreme Court has established the major features of the Section 905(b) cause of action in Scindia Steam Navigation Co. v. De los Santos and the recent Howlett v. Birkdale Shipping Co. Under these decisions, the vessel operator's duty is considerably more limited than under mainstream negligence law. For example, in many circumstances in which normal negligence law would impose a duty of inspection and vigilance, the vessel operator's responsibility is dependent upon its actual knowledge of the danger. For another example, vessel operators are often able to invoke an "open and obvious" defense that mainstream negligence law would disapprove as being essentially identical to the now-discredited assumption of risk doctrine. (The Louisiana fourth circuit's well-reasoned decision in Young v. Armadores de Cabotaje, limiting the "open and obvious" defense, has seemingly turned out to be wrong under the United States Supreme Court's new Howlett decision. Indeed, after this article was prepared the United States Supreme Court vacated Young and remanded it for further consideration in light of Howlett.)

281. See the final sentence of 33 U.S.C. § 905(b) (1988).
282. See Birden v. Dravo-Mechling Corp., 573 So. 2d 524 (La. App. 4th Cir. 1990); Dean v. State, 542 So. 2d 742 (La. App. 4th Cir.), writ denied, 544 So. 2d 410 (1989). Cf. May v. Transworld Drilling Co., 786 F.2d 1261 (5th Cir.) (holding that LHWCA workers hurt on the land under circumstances beyond the reach of admiralty tort jurisdiction have no remedy under § 905(b) and intimating that § 905(b) is nevertheless preclusive of state tort law under such circumstances), cert. denied, 479 U.S. 854, 107 S. Ct. 190 (1986).
286. See, e.g., Howlett, 114 S. Ct. at 2061-62.
Note that the LHWCA has no direct bearing on tort litigation by covered workers against entities who are neither employers nor vessel operators. If such cases, whether maritime law or state law controls will depend upon whether the injury fell within the general admiralty tort jurisdiction. If not, state law will govern. If so, general maritime tort law (as contrasted with the limited negligence remedy of Section 905(b)) will govern. Here—as with other instances falling within the admiralty tort jurisdiction—there is considerable room for state law supplementation of the general maritime tort law.

D. Maritime Workers Employed by Government Units

Regarding state and local government-employed maritime workers other than seamen, matters are extremely simple: These workers’ rights against their employers are exclusively governed by state law. The LHWCA excludes state and local government employees from its coverage, and the Louisiana Worker’s Compensation Act explicitly provides that state workers’ compensation benefits constitute the “exclusive, compulsory, and obligatory” remedy of such workers against their employers.

Regarding seamen employed by the state or local government, the situation is not quite so simple but apparently just the reverse: It seems that these workers’ rights against their employers are exclusively governed by federal maritime law. Nothing in the Jones Act excludes state and local government workers from its coverage, and there are at least three reasons for believing that the Louisiana Worker’s Compensation Act has no application to seamen.

289. 33 U.S.C. § 933 (1988) gives the compensation-providing employer or insurance carrier an interest in the employee’s tort rights against non-employer entities, but does not directly affect the tort litigation itself.

290. See the discussion of the requisites for general admiralty tort jurisdiction supra part II.A.1. Note the broadened geographic coverage of the LHWCA did not effect any corresponding broadening of general admiralty tort jurisdiction. See supra note 41 and accompanying text.

291. See, e.g., Green v. Industrial Helicopters, 593 So. 2d 634, 636 (La.) ("[The strict liability doctrine of Louisiana Civil Code article] 2317 applies as a supplement to the remedies available under the general maritime law . . . ."), cert. denied, 113 S. Ct. 65 (1992). Green is discussed supra note 112.


296. First, it is probably unconstitutionual under the remnants of the Jensen doctrine for a state workers’ compensation regime to attempt to cover seamen. See supra note 115. Second, La. R.S. 23:1035.2 (Supp. 1995) states in pertinent part that “[n]o [state workers’] compensation shall be payable in respect to the disability or death of any employee covered by . . . the Jones Act.” Third, La. R.S. 23:1037 (1985) states in pertinent part that “nothing in this Chapter shall be construed to
Thus it follows that these government workers can sue their employers under the Jones Act and related maritime law doctrines. However, because of the Eleventh Amendment to the United States Constitution, states are not subject to suit in federal court without their consent; hence the state-employed seaman must normally pursue his Jones Act and related claims in state court.

E. The Aftermath of Miles: Non-Pecuniary Compensatory Damages in “Derivative” Actions

Non-pecuniary compensatory damages may be defined as damages for injuries that cannot be quantified or measured in monetary terms. As a general proposition, American tort law gives broad recognition to such damages, not only routinely allowing recovery for pain and suffering caused by physical injuries but also in some circumstances recognizing a right to recover for purely emotional harms. The federal maritime law is in general accord in these respects. The victims of maritime torts regularly are awarded pain and suffering damages and similar items of damages, and the courts have recognized that some maritime injury victims can recover for purely emotional injuries.

The foregoing paragraph addresses the recovery of non-pecuniary damages by the primary victim of the tort. When we turn to what are sometimes called “derivative” actions—actions brought by the family members of the primary victim—the law is quite different. In many jurisdictions there is a marked reluctance to allow non-pecuniary damages in derivative actions. Under this view, there should be no right of consortium in non-fatality cases; and wrongful death damages should not include damages for loss of companionship, consortium, or society, but instead should be limited to loss of economic support and loss of services.

Recently the federal maritime law has been moving toward eliminating non-pecuniary damages in derivative actions. In *Miles v. Apex Marine Corp.* the United States Supreme Court held that surviving family members of a deceased

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299. *See generally David W. Robertson, Liability in Negligence for Nervous Shock, 57 Mod. L. Rev. 649 (1994).*

300. *See Gibbs v. Petroleum Helicopters, Inc., 629 So. 2d 437 (La. App. 3d Cir. 1993) (discussing the jurisprudence and recognizing a seaman’s right to recover for mental or emotional injuries under the Jones Act).*

301. *498 U.S. 19, 111 S. Ct. 317 (1990).*
seaman seeking wrongful death recovery on the basis of general maritime law are limited to pecuniary loss damages and cannot recover for loss of society (companionship). In several respects the decision was broadly framed. It affirmed the decision of the Fifth Circuit Court of Appeals, but on broader grounds than those used in Judge Rubin's opinion for that court. It articulated a strong policy of interpreting the general maritime law in accordance with the provisions of analogous statutes such as the Jones Act\textsuperscript{302} and the Death on the High Seas Act.\textsuperscript{303} (Both of these statutes are limited to pecuniary losses in their wrongful death features, hence precluding the recovery of damages for loss of society in actions brought under them.)

However, in one puzzling respect the \textit{Miles} opinion departed from its generally broad thrust. Sixteen years earlier in \textit{Sea-Land Services, Inc. v. Gaudet}\textsuperscript{304} the Court had held that general maritime wrongful death plaintiffs \textit{could} recover damages for loss of society. In the intervening years the \textit{Gaudet} decision had been steadily whittled down. By the time \textit{Miles} was decided, \textit{Gaudet}'s generosity was limited to the surviving spouses of LHWCA-covered workers killed in territorial waters (i.e., within a marine league from shore). Oddly, \textit{Miles} did not overrule \textit{Gaudet},\textsuperscript{305} thus leaving a small group of maritime wrongful death plaintiffs who are still apparently entitled to recover damages for loss of society.

The post-\textit{Miles} cases in the lower courts have easily concluded that the survivors of deceased seamen can no longer recover for loss of society. It has also been apparent that the logic of \textit{Miles} must preclude allowing the family members of non-fatally injured seamen to recover for loss of consortium or companionship.\textsuperscript{306} The Louisiana courts have so held.\textsuperscript{307} These holdings entail the view that state wrongful death and loss of consortium law can not validly apply in cases involving deaths and injuries of seamen.

The difficult questions presented by post-\textit{Miles} cases relate to injuries (both fatal and non-fatal) to workers other than seamen. At least one Louisiana appellate court has held that \textit{Gaudet} should no longer be followed—i.e., that the widow and children of an LHWCA-covered worker killed in territorial waters should not be allowed to recover damages for loss of society.\textsuperscript{308} Other judges

\textsuperscript{303} \textit{Id.} §§ 761-768.
\textsuperscript{304} 414 U.S. 573, 94 S. Ct. 806 (1974).
\textsuperscript{305} \textit{See Miles}, 498 U.S. at 31, 111 S. Ct. at 325 ("The holding of \textit{Gaudet} applies only in territorial waters, and it applies only to longshoremen.").
\textsuperscript{306} \textit{See}, e.g., Michel v. Total Transp., Inc., 957 F.2d 186 (5th Cir. 1992).
\textsuperscript{308} \textit{See} Vedros v. Public Grain Elevator of New Orleans, Inc., 620 So. 2d 1376 (La. App. 4th
disagree, contending that *Miles* should be confined to Jones Act and unseaworthiness litigation involving injured or deceased seamen, and that the family members of LHWCA-covered workers, as well as those of seamen in litigation against defendants other than the typical Jones Act and unseaworthiness targets, should be allowed to recover their non-pecuniary losses.

Essentially the issue is how broadly should *Miles* be read? It appears likely that those who contend for a broad reading will prevail. Probably it will soon be settled that no maritime-worker injury, whether fatal or nonfatal, provides a basis for an award of damages for loss of consortium, companionship, or society.

F. The Aftermath of Miles: Punitive Damages

There is not a word in the *Miles* decision about punitive damages, but a number of lower courts around the country have seized upon it as a basis for concluding that punitive damages are no longer awardable in general maritime law cases. In brief, the reasoning of such courts is this: *Miles* rests upon a strong policy of conforming the general maritime law to the Jones Act and the Death on the High Seas Act. It is thought to be settled that these statutes preclude the award of punitive damages. Ergo, punitive damages should not be awardable under the general maritime law either.

In *Mistich v. Pipelines, Inc.* the Louisiana fourth circuit strongly rejected the foregoing view of *Miles*, stating:

> We disagree with the proposition that after *Miles* punitive damages are no longer available under the maritime law in claims based on unseaworthiness. There is no definitive federal or state appellate court decision in this circuit or state holding that punitive damages are not recoverable under the Jones Act, much less under the general maritime law. Punitive damages are in a class apart from other non-pecuniary damages. They serve the purpose of punishing the particular defendant, hopefully teaching him not to engage in the willful and wanton conduct again. Perhaps even more importantly, punitive damages deter others from following that defendant's example. Also, unlike the damages for loss of society addressed in *Miles*, and similar non-pecuniary but...
compensatory damages, punitive damages are by nature non-compensatory.  

Most of the Louisiana decisions discussing the point have agreed in general terms with the Mistich court. In addition, without discussing the point, several courts have apparently assumed that the applicable law of punitive damages on behalf of seamen is unaffected by Miles. (After this article was prepared, the fourth circuit overruled Mistich.)

Several other post-Miles cases have involved punitive damage claims in the rather specialized context of seamen employers' wrongful failure to provide maintenance and cure. This is the one area where (at least until Miles) the allowance of punitive damages as a matter of general maritime law was not in the least controversial. Aside from one highly questionable decision, the Louisiana courts have been in accord in continuing to uphold the availability of such damages in appropriate cases without any indication that Miles may cast doubt on the propriety of the practice. This is the correct view; it would be

314. Id. at 935 (citation omitted).
315. See Duplantis v. Texaco, Inc., 771 F. Supp. 787, 788-89 (E.D. La. 1991) (holding punitive damages may be awarded in seaman's suit based on general maritime negligence); Butler v. Zapata Haynie Corp., 633 So. 2d 1274, 1283 (La. App. 3d Cir. 1994) (“Punitive damages are available under a Jones Act claim for negligence and a claim for the arbitrary denial of maintenance and cure to an injured seaman.”).
316. See Seymour v. CIGNA Ins. Co., 622 So. 2d 839, 845 (La. App. 5th Cir.) (denying punitive damages to a seaman suing under the Jones Act, based on the factual merits of the case at hand and without mentioning Miles), writs denied, 629 So. 2d 1136 (1993); Thomas v. B.J. Titan Servs. Co., 595 So. 2d 1275, 1276 (La. App. 4th Cir.) (holding that on an appropriate factual showing a seaman can be awarded punitive damages against his employer under Louisiana Civil Code article 2315.3, which concerns reckless storage, handling, or transportation of hazardous or toxic substances), writ denied, 600 So. 2d 603 (1992). Cf. Bergeron v. Mike Hooks, Inc., 626 So. 2d 724, 727-28 (La. App. 3d Cir. 1993) (denying punitive damages on the merits in a collision case without any mention of Miles).
318. See generally Judge Rubin’s excellent opinion in Morales v. Garijak, Inc., 829 F.2d 1355 (5th Cir. 1987).
319. See Gray v. Texaco, Inc., 610 So. 2d 1090, 1096 (La. App. 3d Cir. 1992) (“[i]n order that we be consistent with the decision in Miles . . . we hold that punitive damages in maintenance and cure claims are denied.”), writs denied, 616 So. 2d 686, 687 (1993).
astonishing (and somewhat alarming) if the *Miles* decision could be read to abolish a well-settled category of maritime law damages without having mentioned it. (After this article was prepared, the federal Fifth Circuit granted en banc rehearing on the issue of punitive damages for withholding maintenance and cure.\textsuperscript{321})

\textit{G. Comparative Fault Issues}

Conflicts between state law and federal maritime law can arise as to at least four aspects of the law of comparative fault. First is the basic rule governing the effect of the fault of a tort victim. Here the law is clear. The general maritime law rule of pure comparative fault—whereby a plaintiff who is assessed with ninety-nine percent of the fault is awarded one percent of the total damages—controls over any conflicting state law rule.\textsuperscript{322} Of course, on this matter there is no conflict in Louisiana, which also follows the rule of pure comparative fault.\textsuperscript{323}

The second potential conflict concerns the responsibility of multiple defendants who have been assessed fault. The maritime law rule is that such defendants are jointly and severally liable (solidarily liable) to the plaintiff for the full amount of the recoverable damages;\textsuperscript{324} they have contribution rights against each other such that (assuming full solvency) each will ultimately bear its individual percentage share of the damages.\textsuperscript{325} The Louisiana rule on this matter differs in only one respect: Under the recently amended Louisiana Civil Code article 2324, in many cases a solidarily obligated tortfeasor will not owe the plaintiff’s full recoverable damages but only fifty percent thereof.\textsuperscript{326}

Given that the Louisiana and maritime rules differ as to the extent of a co-tortfeasor’s solidary (joint and several) responsibility, one must know which rule will control in a saving clause case. No authority directly on point exists, but the Louisiana Supreme Court’s 1986 per curiam decision in *Daigle v. Coastal* 321. See Guevara v. Maritime Overseas Corp., 34 F.3d 1279 (5th Cir.) (per curiam), reh’g granted en banc, No. 92-4711 (5th Cir. Nov. 4, 1994).


Marine, Inc.\textsuperscript{327} definitively implies that the maritime rule will govern.\textsuperscript{328} Given the United States Supreme Court’s demonstrated commitment to the full array and implications of its comparative fault regime,\textsuperscript{329} Daigle’s answer seems correct.

The third potential conflict arises when one of several tortfeasors has entered into a partial settlement with the plaintiff.\textsuperscript{330} Under settled Louisiana law, the plaintiff’s damages are reduced by the settling tortfeasor’s percentage-fault share of the damages, and the settling tortfeasor is neither amenable to contribution nor (except in rare instances\textsuperscript{331}) able to assert a contribution claim.\textsuperscript{332} Until recently, the maritime law treatment of partial settlements was much less lucid. But in two recent maritime law decisions, the United States Supreme Court has (at least for the time being) obviated any conflict. McDermott, Inc. v. AmClyde\textsuperscript{333} establishes that percentage-fault credit is the correct approach, and that ordinarily a settling tortfeasor has “no right of contribution against other defendants.”\textsuperscript{334} Boca Grande Club, Inc. v. Florida Power & Light Co.\textsuperscript{335} adds (as was already implicit in AmClyde) that “actions for contribution against settling [tortfeasors] are neither necessary nor permitted.” Thus the United States Supreme Court has settled a long-simmering conflict among the federal admiralty courts by adopting a settlement-credit system that is identical to Louisiana’s.

The fourth potential conflict involves the potential effect of the fault of “phantom tortfeasors,” defined as tortfeasors who have neither settled with the plaintiff nor been made parties to the lawsuit. (One type of phantom tortfeasor is an employer who is immune under a workers’ compensation statute from being sued by the plaintiff or by the defendant for contribution or indemnity. Another type is a hit-and-run driver. These are merely examples. The key feature all

\begin{thebibliography}{9}
\bibitem{327} 488 So. 2d 679 (La. 1986).
\bibitem{328} In \textit{Daigle}, a passenger-injury case, the Court said maritime law would control “on the issue of [the defendant’s] liability for the fault of . . . absent . . . tortfeasors.” \textit{Id.} at 682. \textit{A fortiori}, maritime law would control on the more fundamental solidarity issue.
\bibitem{329} See the cases cited supra notes 322, 324, and 325. In the recent AmClyde decision, the United States Supreme Court strongly reaffirmed “the well-established principle of joint and several liability”; and it chose a percentage-fault approach to giving credit for a partial settlement in major part because of that approach’s “consistency with Reliable Transfer’s basic pure comparative fault rule.” McDermott, Inc. v. AmClyde, 114 S. Ct. 1461, 1463, 1470 (1994).
\bibitem{330} See Steptoe v. Lallie Kemp Hosp., 634 So. 2d 331, 337 & n.1 (La. 1994) (Watson, J., concurring and noting that decisions of some lower federal courts using a dollar-for-dollar credit approach conflict with Louisiana law and that the Supreme Court had the matter under consideration in McDermott, Inc. v. AmClyde).
\bibitem{331} See Ducote v. Commercial Union Ins. Co., 616 So. 2d 1366 (La. App. 3d Cir.) (involving a tortfeasor who settled the entire debt acquired contribution rights against co-tortfeasors via legal subrogation), \textit{writ denied}, 620 So. 2d 877 (1993).
\bibitem{333} 114 S. Ct. 1461 (1994).
\bibitem{334} \textit{Id.} at 1467.
\bibitem{335} 114 S. Ct. 1472 (1994).
\end{thebibliography}
phantom tortfeasors have in common is that they have neither settled with the victim nor been made a party defendant or a third-party defendant in the lawsuit). Under current Louisiana law it is proper to assign to a phantom tortfeasor a percentage of the total fault, which is then reallocated as between the plaintiff and defendant(s) in proportion to the plaintiff's and defendant(s)' respective degrees of fault as between themselves. The maritime law rule on this matter is not as clear as might be wished, but in all probability it provides that phantom tortfeasor fault should not be assessed.

The federal-state conflict on the proper treatment of phantom tortfeasors is potentially troublesome, and it is fortunate that the Louisiana Supreme Court is on record with the resolution. In *Daigle v. Coastal Marine, Inc.* the trier of fact assessed fault against the plaintiff (a boat passenger), the defendant Coastal Marine, and "absent tortfeasors." The Supreme Court reversed and remanded the case on other grounds, stating: "If there is any conflict with federal law on the issue of Coastal's liability for the fault of the absent . . . tortfeasors, federal law would prevail."

Thus, *Daigle* provides the answer: On issues of phantom tortfeasor fault, the federal maritime law preempts contradictory state law. But it is unfortunately not so easy to know what that answer means in particular contexts. On remand in *Daigle*, the court of appeal purported to follow the federal approach; reassessed the fault percentages so that they were twenty percent to the plaintiff, forty-five percent to the defendant, and thirty-five percent to the phantom tortfeasors; and awarded the plaintiff eighty percent of the total damages, thus in effect assigning to the defendant its own percentage plus the percentage

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336. See Gauthier v. O'Brien, 618 So. 2d 825 (La. 1993); Robertson, supra note 326.
337. Samuels v. Empresa Lineas Maritimas Argentinas, 573 F.2d 884, 885 (5th Cir. 1978), cert. denied, 443 U.S. 915, 99 S. Ct. 3106 (1979), held an immune employer's fault should not be assessed. See also Young v. Armadores de Cabotaje, S.A., 617 So. 2d 517, 534 (La. App. 4th Cir.) ("[I]t has been held that . . . the issue of an employing stevedore's negligence should not be submitted to the jury."); writs denied, 625 So. 2d 170, 171 (1993), vacated on other grounds, 114 S. Ct. 2701 (1994). Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256, 270-71 & nn. 28-30, 99 S. Ct. 2753, 2762 & nn. 28-30 (1979), strongly implied an immune employer's fault should not be assessed. *AmClyde* spoke approvingly of the Uniform Comparative Fault Act, which provides against assessing the fault of phantom tortfeasors. And the *AmClyde* opinion states that having the parties argue about the fault of the "empty chair" [the settling tortfeasor] is an unavoidable (and therefore acceptable) disadvantage of the percentage-fault approach to settlement credit. *AmClyde*, 114 S. Ct. at 1470. This passage in *AmClyde* implies the disadvantage would not be countenanced except as to a settling tortfeasor.
338. See Young, 617 So. 2d at 534 (expressing relief that under the then-applicable (pre-Gauthier) state of Louisiana law there was no conflict, so that it was clear that an immune employer's fault should not be assessed).
339. 488 So. 2d 679 (La. 1986).
340. *Id.* at 682.
342. *Id.* at 827.
attributed to the phantom tortfeasors. This is not what the federal approach called for. After reading the controlling federal decisions, one must conclude it was error for the Daigle trial court to have assigned percentage fault to the phantom tortfeasors. Thus, the court of appeal should have either remanded the case for new percentage fault findings confined to the plaintiff and defendant, or (under the usual Louisiana appellate practice) itself reassessed the fault of the plaintiff and the defendant so that those two percentages totaled one-hundred percent. Alternatively, the court of appeal should have done what appellate courts in all systems occasionally must do when confronted with irrelevant fault assessments: use a ratio approach to bracket or ignore the unwanted finding. Under such a ratio approach in Daigle, the plaintiff’s share would have become 20/65ths and the defendant’s share 45/65ths. Defendant would then have owed 45/65ths of the damages (sixty-nine percent), rather than eighty percent.

The fact that potential conflicts between state and federal law continue to exist over some comparative fault issues should not be permitted to obscure the main message of this subsection: The United States Supreme Court’s AmClyde and Boca Grande decisions provide major clarification. To reiterate, in those cases the unanimous Court has (a) adopted a percentage fault system for giving credit for partial settlements; (b) indicated settling tortfeasors are neither amenable to nor able to seek contribution; (c) reaffirmed the rule of full joint and several liability; and (d) suggested that it is a bad idea to assign percentage fault to phantom tortfeasors. In the first two respects, the maritime law now fully conforms with Louisiana law. In the last two respects, the maritime law and Louisiana law will occasionally be in conflict. When such conflict occurs, according to the Louisiana Supreme Court’s Daigle opinion the maritime law should govern.

H. Direct Actions Against Marine Insurers

It is an odd fact that there is very little established federal law governing marine insurance contracts. As Professor Maraist explains:

[It]n Wilburn Boat Company v. Fireman’s Fund Insurance Co., the Supreme Court ruled that a marine insurance contract is governed by state law unless there is an applicable federal statute or a settled maritime common law rule governing the issue. . . . The lower courts have been faithful to Wilburn; although they have found and applied some “well-established” federal rules, they have disposed of most marine insurance questions by applying state law.

343. Id. at 828.
344. See Robertson, supra note 332, at 77-80.
345. See Robertson, supra note 326, at 228-29.
346. Maraist, supra note 1, at 110-11.
Louisiana courts have typically looked to state law in deciding marine insurance questions. 347 Probably the most dramatic feature of Louisiana insurance law is the direct action statute, 348 which “allows an injured party to proceed directly against an insurance company which has issued a policy or contract of insurance against the liability of the insured tortfeasor.” 349 The Louisiana Supreme Court has recently settled an old controversy over whether marine protection and indemnity (P&I) insurers are subject to direct actions; under Justice Kimball’s decision for the unanimous court in Grubbs v. Gulf International Marine, 350 they are. Grubbs was the supreme court’s answer to a certified question from the federal Fifth Circuit. The issue had created difficulty for the lower courts because of facially conflicting language in the Louisiana insurance statutes. The direct action statute itself covers “all liability policies,” 351 whereas the statute delimiting the “scope” of Part XIV of the Louisiana Insurance Code (where the direct action statute appears) states in pertinent part that “[t]he applicable provisions of this Part shall apply to insurance other than ocean marine ... insurance.” 352 On the settled understanding that P&I insurance is both liability insurance 353 and also a type of “ocean marine insurance,” 354 the direct action statute and the “scope” statute seemed to collide. Grubbs resolved the conflict by concluding that the “applicable provisions” language of the “scope” statute was not meant to embrace the direct action statute. For many years before the direct action statute became part of the Insurance Code, it had been well settled that P&I insurers were subject to direct actions. The Grubbs court could find no plausible indication that the legislature’s bringing the direct action statute into the Insurance Code had been intended to change that settled understanding, and concluded:

In sum, the text, purpose, and legislative history of the Louisiana Direct Action Statute and the Louisiana Insurance Code lead us to conclude that within its terms the statute permits all injured persons to maintain direct actions against all liability insurers, including P&I insurers. 356

347. See, e.g., Sledge v. Louisiana Dep’t of Transp. & Dev., 492 So. 2d 139, 143-44 (La. App. 1st Cir.), writ denied, 494 So. 2d 1176 (1986).
348. See Colleman v. Jahncke Serv., Inc., 341 F.2d 956, 961 (5th Cir. 1965) (“[H]istorically no love has been lost between the direct action statute and the Fifth Circuit . . . .”), cert. denied, 382 U.S. 974, 86 S. Ct. 538 (1966)
351. Id.
354. See Maraist, supra note 1, at 115: “The primary purpose of modern P&I insurance is to provide public liability coverage to the shipowner . . . .”
355. See Backhus v. Transit Casualty Co., 549 So. 2d 283, 289 (La. 1989) (“[T]he term ‘ocean marine insurance’ includes protection and indemnity insurance . . . .”).
VI. CONCLUSION

The imagined reader has been a state-court judge, charged with the responsibility of sorting out an argument between maritime litigants about the content and preemptive force of some federal doctrine and wishing for more impartial guidance than the lawyers are providing. In these matters the lawyers before the court will sometimes seem less than sufficiently helpful. The normal problems of partisanship will often be exacerbated by a tendency of some admiralty experts to use the field's arcane vocabulary and conceptual apparatus as an instrument of power rather than of communication.\textsuperscript{7}

To the imagined reader this article has offered some specific information and the following three broad pieces of advice. All of this general advice is meant to help the state judge find fair and relatively simple ways to disentangle these disputes.

First, do not be persuaded by the decisions of lower federal courts unless they are in fact persuasive. Sometimes they are not. Your beacons are the Louisiana Supreme Court and the United States Supreme Court. The federal Fifth Circuit can be your friend, sometimes, but not your mentor.

Second, if the matter is plausibly procedural, apply state law absent an unmistakable showing of federal compulsion. Unless \textit{American Dredging Co.} is dramatically modified, such a showing will rarely appear.

Third, as to matters that are straightforwardly substantive in their nature, clearly established federal maritime rules must be regarded as binding. Even here, though, the significant possibility exists that state law can intelligently supplement the federal law.