

Alexander v. Express Energy Operating Services, L.P.: The Fifth Circuit's Voyage Away from Reality and the Seamen Renounced in Its Wake

Colton V. Acosta

Repository Citation

Colton V. Acosta, *Alexander v. Express Energy Operating Services, L.P.: The Fifth Circuit's Voyage Away from Reality and the Seamen Renounced in Its Wake*, 78 La. L. Rev. (2018)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol78/iss4/15>

This Comment is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

***Alexander v. Express Energy Operating Services, L.P.:*
The Fifth Circuit’s Voyage Away from Reality and
the Seamen Renounced in Its Wake**

TABLE OF CONTENTS

Introduction	1382
I. From “One Who Lives His Life upon the Sea” to the Two-Pronged Test.....	1387
A. The Lower Courts’ First Formulations	1389
B. The Supreme Court Drops Anchor to Weigh in on Seaman Status.....	1390
II. <i>Alexander v. Express Energy Services, L.P.:</i> A Change in Course	1393
A. Procedural History and the Parties’ Arguments.....	1394
B. The Fifth Circuit’s Reasoning and Interpretation of <i>Chandris</i>	1395
III. <i>Alexander</i> : A Rigid Rule with Unfortunate Consequences	1396
A. How the Fifth Circuit Misinterpreted <i>Chandris</i>	1397
1. How the Fifth Circuit Misinterpreted <i>Chandris</i> Dicta Concerning “On Board a Vessel”.....	1399
IV. Suggested Solutions to These Unfortunate Consequences.....	1401
A. <i>Alexander</i> ’s Consequences in the Lower Courts	1401
1. Uniformity and Judicial Efficiency versus Discretion in the Lower Courts	1403
B. <i>Alexander</i> ’s Consequences for Employees and Employers	1405
1. What “Work on Board a Vessel” Means.....	1405
2. Greater Liability in Tort for Employers Under <i>Alexander</i>	1407
3. The Fifth Circuit Must Clarify Its Decision for Employees and Employers	1408
a. The “On Board a Vessel” Requirement Opposes the Purpose of the Jones Act.....	1410
Conclusion.....	1411

INTRODUCTION

George, a commercial diver,¹ is employed by Black Mud Diving, Inc. (“Black Mud”). Black Mud is a professional diving company based out of New Orleans, Louisiana, and it partners with Blue Mountain Drilling Co. to assist in its drilling operations.² For months at a time, George lives on Black Mud’s various vessels and goes out to numerous drilling rigs to dive and perform underwater operations off the drilling rigs and oil wells. He is not assigned to these vessels,³ but the vessels transport George and other divers to the drilling rigs and provide a platform from which they work and store their monitoring and diving equipment. George neither assists in the navigation of nor performs other work on any of the vessels. After several

Copyright 2018, by COLTON V. ACOSTA.

1. The Louisiana Supreme Court articulated a so-called “diver’s exception” to the jurisprudential requirement that an employee be working for an identifiable fleet of vessels to have seaman’s status in *Wisner v. Prof’l Divers of New Orleans*, 731 So. 2d 200, 205 (La. 1999). *Landry v. Specialty Diving of La., Inc.*, 299 F. Supp. 2d 629, 634 (E.D. La. 2003), *aff’d*, 110 Fed. App’x 386 (5th Cir. 2004). The *Wisner* court identified divers’ work as “inherently maritime.” *Wisner*, 731 So. 2d at 204. *Wisner*, however, dealt with a different issue—namely, the identifiable fleet of vessels requirement—and, at least within the Fifth Circuit, divers have only been held to be seaman if they satisfied 30% of their working time on board a vessel. *See Willis v. Fugro Chance, Inc.*, 278 F. App’x 443, 446–47 (5th Cir. 2008) (finding diver did not qualify as a seaman because he did not spend 30% of time on board a vessel); *see also Little v. Amoco Prod. Co.*, 734 So. 2d 933, 939 (La. Ct. App. 1999) (finding diver did not qualify as seaman even though he was on a vessel for 30% of his working time only because of an usual period of employment due to injury); *Landry*, 299 F. Supp. 2d 629 (finding diver did not qualify as a seaman because he did not spend 30% of time on board a vessel). *See Pickle v. Int’l Oilfield Divers, Inc.*, 791 F.2d 1237, 1240 (5th Cir. 1986) (finding that because diver spent 90% of his working hours on board a vessel, he qualified as a seaman). Other courts, however, have held that divers are seamen even without 30% of work done on a vessel. Rather than focusing on the 30% of time on a vessel requirement, these courts have examined whether the diver was exposed to marine perils and was in service to a vessel or fleet of vessels. *See, e.g., Pettis v. Bosarge Diving, Inc.*, 751 F. Supp. 2d 1222, 1230 (S.D. Ala. 2010) (holding that the diver was a seaman because of the inherently maritime nature of his work and that he worked in the service of the ship).

2. These facts are loosely derived from a Fifth Circuit Court of Appeals case, *Wallace v. Oceaneering Int’l*, 727 F.2d 427 (5th Cir. 1984), though the facts have been altered to illustrate the problem this Comment addresses. If its facts were the same as here, *Wallace* would have been overruled by *Alexander v. Express Energy Services Operating, L.P.*, 784 F.3d 1032, 1036 (5th Cir. 2015); thus, these facts highlight the problems for such workers if they were not assigned to the vessels.

3. *Wallace* was assigned to the vessels. *Wallace*, 727 F.2d at 430.

months on the vessels, he is paid and then taken back to New Orleans for a few weeks on land, where he works for Black Mud to maintain diving equipment and perform other related tasks.

Two days after coming on board on the latest venture, George's supervisor instructs him to make an extremely deep and dangerous dive.⁴ During the dive, a cable snaps, and its recoil throws him to the ocean floor.⁵ The cable rolls back and strikes him in his back and shoulders, leaving him dazed and injured.⁶ In response to this accident, George rises to his first decompression stop, where he is put on an inadequate decompression schedule.⁷ As a result, he contracts severe decompression sickness and, per proper recompression procedure, must be placed in a recompression chamber within five minutes.⁸ His supervisor causes a delay in the procedure that results in George sustaining serious injuries, including a drop in his intelligence quotient, debilitation of his motor faculties, double vision, and depression.⁹ George wishes to bring a negligence action against his employer. Additionally, George's wife, Susan, desires to bring an action for loss of consortium and other non-pecuniary losses.¹⁰ Their ability to bring these actions depends upon whether George is classified as a seaman. This Comment considers this question.

Accordingly, the couple's attorney files a claim in the Eastern District of Louisiana, and the litigation proceeds until Black Mud files a motion for summary judgment on the issue of seaman status.¹¹ Black Mud argues

4. *Id.* at 431.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. In *Wallace*, the injured worker also complained of an occasional nervous jerk and the permanent use of crutches. *Id.*

10. An action for loss of consortium is an action for loss of intimacy and companionship in the marital relationship. THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 168 (4th ed. 2004). These potential damages are not considered pecuniary damages. *Id.* Because seamen and their spouses are only allowed to recover pecuniary damages, the spouse of a seaman cannot sue for loss of consortium. *Id.* at 169–70 (“[L]oss of consortium and society are recoverable under the general maritime law except in actions by seamen against their employers and where the cause of action is based on a statute that precludes such damages.”).

11. Seaman status is important because seamen are granted greater protections than other marine workers and have an action under the Jones Act for negligence, under which it is easier to prove causation than that under general maritime law. Therefore, it is extremely beneficial in most instances for a worker to be a seaman rather than another type of maritime employee. *John W. deGravelles, Harbor Tug & Barge Co. v. Papai: Another Turn in the Labyrinth?*, 10 U.S.F. MAR. L.J. 209,

that George cannot be a seaman because he did not spend 30% or more of his working time¹² aboard a vessel.¹³ The only time he was on board a vessel was to store his equipment, eat, sleep, rest, or be transported to the places of his employment. These tasks, Black Mud argues, should not qualify as work on board a vessel for determining seaman status. The Eastern District grants Black Mud's motion to deny George seaman status, following the Fifth Circuit Court of Appeals' holding in *Alexander v. Express Energy Operating Services, L.P.*¹⁴

In *Alexander*, Michael Alexander worked on a fixed platform and was injured by a piece of equipment rolling onto his foot.¹⁵ Alexander sued his employer, Express Energy Operating Services, L.P. ("Express"), under the Jones Act¹⁶ in the Eastern District of Louisiana. The Eastern District granted Express's motion for summary judgment, finding that Alexander was not a seaman.¹⁷ On appeal, the Fifth Circuit Court of Appeals affirmed, holding that to qualify as a seaman per the second prong of *Chandris, Inc. v. Latsis*,¹⁸ a

209 (1998) (listing these protections as maintenance and cure, unseaworthiness, and a negligence action under the Jones Act); Andrew Hoang Do, *Seaman Remedies and Maritime Releases: A Practical Consideration*, 7 U.S.F. MAR. L.J. 379 (1995); see *Comeaux v. T.L. James & Co.*, 702 F.2d 1023, 1024 (5th Cir. 1983); *Charles v. W. Indies Transp.*, 631 F. Supp. 1023, 1025 (D.P.R. 1986).

12. This time would be calculated by factoring in the number of days George is employed by Black Mud. For instance, by this interpretation, if George is employed for 100 days and works for 30 days on board a vessel, he would have worked on board a vessel for 30% of the time.

13. *Alexander v. Express Energy Servs. Operating, L.P.*, 784 F.3d 1032, 1036 (5th Cir. 2015) (holding that because Alexander did not work on board a vessel for at least 30% of time, he was not a seaman).

14. *Id.*

15. *Id.*

16. The Jones Act, 46 U.S.C. § 30104 (2018). "A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer." *Id.* Prior to the passage of the Jones Act, a seaman could not sue for negligence against his employer. See *The Osceola*, 189 U.S. 158, 175 (1903); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995). Congress passed the Act to fill that gap in protection. *Chandris*, 515 U.S. at 354.

17. *Alexander v. Express Energy Operating Servs., L.P.*, 2014 WL 1763172 (E.D. La. Apr. 30, 2014) *aff'd on other grounds*, 784 F.3d 1032 (5th Cir. 2015).

18. The United States Supreme Court's seminal decision on this issue, *Chandris*, 515 U.S. at 357–68, delineated two prongs for seaman status: First, an employee's duties must contribut[e] to the function of the vessel or to the accomplishment of its mission Second, . . . a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

worker must have performed at least 30% of his work on a vessel or identifiable fleet of vessels.¹⁹ Accordingly, workers who perform a significant portion of their work on navigable waters, but not on board a vessel, no longer qualify as seamen. In this way, the Fifth Circuit misconstrued *Chandris* as requiring employees to do 30% of their work aboard a vessel when, instead, *Chandris* identifies the purpose of the second prong as distinguishing between those employees who are land-based and those who are regularly exposed to marine perils.²⁰ In *Alexander*, the court used the United States Supreme Court's language in *Chandris* to reach a result that will eliminate some amphibious workers'²¹ seaman status.²² After *Alexander*, workers like George who are regularly exposed to marine perils,²³ for which the Jones Act was passed,²⁴ and who are "doing the ship's work"²⁵ will not be afforded the protections of seaman status if they do not work on board a vessel for 30% of the time. George, then, would not necessarily lose his case for seaman status despite being exposed to marine perils and doing the ship's work.

(internal quotation marks omitted).

19. *Alexander*, 784 F.3d at 1036.

20. *Chandris*, 515 U.S. at 369–70 ("The fundamental purpose of this substantial connection requirement is . . . to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea." (citing 1B A. JENNER, BENEDICT ON ADMIRALTY § 11a (7th ed. 1994))).

21. Used primarily in the context of longshoremen, the term "amphibious workers" refers to those maritime workers whose work takes place both on land and over water. Here and elsewhere in this Comment, the term is used broadly.

22. *Alexander*, 784 F.3d at 1034 (reading *Chandris* as requiring a seaman to work on board a vessel for 30% of the time).

23. A term of art in maritime law, "perils of the sea" refers to all perils that are unique to navigable waters, such as rivers. *See Jones v. Pitcher Co.*, 3 Stew & P. 135, 176–77 (Ala. 1833). The term "marine perils" is used instead in this Comment to reflect more accurately the term's intent, which is any peril that occurs over water, such as the dangers of a vessel capsizing, drowning, storms, dangerous wildlife, among others. In a recent Fifth Circuit decision, the court noted that both workers who are employed on "the quiet waters of a Potomac creek" and "the angry waves of the Atlantic" are exposed to these marine perils. *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 934 (5th Cir. 2014) (quoting *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 497 (2005)).

24. *Chandris*, 515 U.S. at 385–86 (Stevens, J., dissenting).

25. *Id.* at 372 (majority opinion) (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)).

Meanwhile, *Alexander* exposes employers to greater liability because some of these non-seaman workers are able to bring general maritime tort claims.²⁶ For instance, in those limited situations in which the “dual capacity”²⁷ doctrine applies, workers like George may bring an action for punitive damages against their employers,²⁸ and spouses like Susan may sue for loss of consortium;²⁹ these actions are not available if the workers qualify as seamen.³⁰ Finally, the lower courts within the Fifth Circuit’s jurisdiction are left with less discretion in cases in which the employee is regularly exposed to marine perils by doing the ship’s work but is not working on board a vessel for 30% of time.

To explore these issues, Part I of this Comment provides background through a discussion of the evolution of seaman status—from the term’s original meaning under maritime law to the current two-pronged test from *Chandris*. It particularly focuses on the second prong of the United States Supreme Court’s test. Part II of this Comment describes the facts, procedural history, and reasoning of the Fifth Circuit in *Alexander*, arguing that its

26. See *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 390–91 (5th Cir. 2014) (holding that recovery for unseaworthiness under Jones Act or general maritime law is limited to pecuniary losses, which does not include punitive damages); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 37 (1990) (holding that a maritime cause of action for wrongful death does not include loss of society); see also *Murray v. Anthony J. Bertucci Const. Co.*, 958 F.2d 127, 132 (5th Cir. 1992) (extending *Miles* to deny punitive damages recovery to a seaman); *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), *abrogated by Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 424–25 (2009) (finding seaman is entitled to seek punitive damages for willful and wanton failure to pay maintenance and cure).

27. If the employer is also the vessel owner and acting in its capacity as vessel owner, then the injured worker may have a claim against the employer in that capacity. 33 U.S.C. §§ 904, 905(b), 933 (2018). See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *Jones v. Cooper T. Smith Stevedoring Co.*, 354 F. App’x 143 (5th Cir. 2009).

28. See *The Amiable Nancy*, 16 U.S. 546, 558 (1818) (stating that punitive damages may be awarded for gross, wanton, and outrageous conduct); *Gallagher v. The Yankee*, 9 Fed. Cas. 1091, 1093 (N.D. Cal. 1859) (finding that punitive damages could be awarded against a vessel master who illegally transported the plaintiff to the Sandwich Islands); see also *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir. 1972) (finding punitive damages were not available); *In re Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981) (holding that punitive damages may be awarded for gross, wanton, and outrageous conduct).

29. See SCHOENBAUM, *supra* note 10, at 169–70.

30. *Miles*, 498 U.S. at 37 (holding in part that loss of consortium is not included in an action under the Jones Act); *McBride*, 768 F.3d at 390–91 (holding that non-pecuniary damages, such as punitive damages for unseaworthiness, are not available to seamen).

holding severely impacts and improperly limits seaman status. Part III of this Comment presents solutions to these problems by suggesting a preferred reading of *Chandris*, considering the ramifications of such a reading on seaman status and the maritime industry. Part IV contains a brief conclusion summarizing these solutions.

I. FROM “ONE WHO LIVES HIS LIFE UPON THE SEA”³¹ TO THE TWO-PRONGED TEST

Maritime law has long recognized that the rights of seamen exceed those of non-seamen.³² Whether workers have attained seaman status determines the rights and remedies available to injured workers and informs employers when making hiring decisions, defending against claims, and purchasing insurance coverage.³³ Seamen are distinguished from longshoremen³⁴ and general maritime workers,³⁵ whose status and protections are notably different.

In general, courts view seamen as “wards of the admiralty,”³⁶ and their rights are protected both through general maritime law and congressional action in three separate but interconnected ways.³⁷ First, seamen have the right to recover maintenance and cure,³⁸ which includes wages, cost of living, and medical care owed to seamen “who become ill or injured while in service of

31. *Warner v. Goltra*, 293 U.S. 155, 157 (1934).

32. *deGravelles*, *supra* note 11.

33. *See id.*

34. Qualifying as such would grant them the protections of The Longshore and Harbor Workers’ Compensation Act (“LHWCA”), 33 U.S.C. § 902 (2018). The LHWCA defines those covered by the Act as “any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .” § 902(3).

35. Qualifying as such, and not as seamen or longshoremen, would grant them the standard of care owed after *Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

36. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (quoting *Harden v. Gordon*, 11 F. Cas. 480, 483–85 (C.C.D. Me. 1823)).

37. *See* Edward M. Bull III, *Seaman Status Revisited: A Practical Guide to Status Determination*, 6 U.S.F. MAR. L.J. 547, 552 (1994) (describing these protections as “the seaman’s remedial trident”).

38. *The Osceola*, 189 U.S. 158, 175 (1903); *see Cortes v. Balt. Insular Line, Inc.*, 287 U.S. 367, 370–71 (1932).

a vessel”³⁹ until they reach maximum medical improvement.⁴⁰ Second, seamen have a general maritime law claim for injuries incurred as a result of the unseaworthiness⁴¹ of a vessel.⁴² Finally, seamen have an action against their employer for negligence under the Jones Act.⁴³ These actions compose the “trilogy of heightened legal protections (unavailable to other maritime workers) that seamen receive because of their exposure to the ‘perils of the sea.’”⁴⁴ The law grants seamen greater protections than other marine workers,⁴⁵ and it is easier to prove causation under a Jones Act action for negligence than under general maritime law.⁴⁶ Therefore, it is extremely beneficial in most instances for a worker to be a seaman rather than another type of maritime employee.

Before 1920, general maritime law recognized only the first two of these rights of action for seamen.⁴⁷ Prior to the passage of the Jones Act, a seaman could not sue for negligence against his employer;⁴⁸ Congress passed the Act to fill that gap in protection.⁴⁹ Congress did not define

39. *Jefferson v. Baywater Drilling, L.L.C.*, No. 14-1711, 2015 WL 365526, at *4 (E.D. La. Jan. 27, 2015).

40. *Id.*

41. A vessel owner owes a duty to a seaman to keep the vessel and all its appurtenances in a seaworthy condition. *The Osceola*, 189 U.S. at 175. *See Cortes*, 287 U.S. at 370–71. To be in a “seaworthy condition” means to be in a condition reasonably suitable and fit to be used for the purpose or use for which the vessel was provided or intended. 8TH CIR. MODEL CIV. JURY INSTR. §§ 4.70, 17.12 (2017). An unseaworthy condition may result from lack of an adequate crew, lack of adequate manpower to perform a particular task on the vessel, or improper use of otherwise seaworthy equipment. §§ 4.70, 17.12.

42. *The Osceola*, 189 U.S. at 175; *see also Cortes*, 287 U.S. at 370–71.

43. The Jones Act, 46 U.S.C. § 30104 (2018).

44. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354 (1995) (citing G. GILMORE & C. BLACK, LAW OF ADMIRALTY § 6–21, pp. 328–29 (2d ed. 1975)). In *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 935 (5th Cir. 2014), the court discussed that terms and phrases such as “perils of the sea,” “sea-based,” and “sea-based duties” should not be understood literally. Rather, “we have dozens of cases finding oilfield workers and other ‘brown-water’ workers on drilling barges and other vessels qualified as seamen even though they spent all their work time on these vessels submerged in quiet inland canals and waterways.” *Naquin*, 744 F.3d at 935.

45. *deGravelles*, *supra* note 11, at 209 (listing these protections as maintenance and cure, unseaworthiness, and a negligence action under the Jones Act).

46. *Hoang Do*, *supra* note 11, at 388; *see Comeaux v. T.L. James & Co.*, 702 F.2d 1023, 1024 (5th Cir. 1983); *Charles v. W. Indies Transp.*, 631 F. Supp. 1023, 1025 (D.P.R. 1986).

47. *Chandris*, 515 U.S. at 354.

48. *See The Osceola*, 189 U.S. 158, 175 (1903); *Chandris*, 515 U.S. at 354.

49. *Chandris*, 515 U.S. at 354.

“seaman” in the Jones Act,⁵⁰ and initially, the Supreme Court ruled that Congress intended to include all workers who fell within the established meaning under general maritime law: “a seaman is a mariner of any degree, one who lives his life upon the sea.”⁵¹ Congress later gave context to the Jones Act definition of “seaman” when it passed the Longshore and Harbor Worker’s Compensation Act (“LHWCA”).⁵² The LHWCA provides coverage to a variety of land-based workers but excludes from coverage “a master or member of a crew of any vessel.”⁵³

The Court interpreted this exclusion to mean that the definition of “seaman” in the Jones Act should be “a master or member of a crew of any vessel.”⁵⁴ Thus, the Jones Act and LHWCA are mutually exclusive,⁵⁵ and now, the essential requirement for Jones Act coverage appears in another statute.⁵⁶ For classic seamen—those workers who are assigned permanently to a vessel or fleet of vessels and spend all of their working time on board a vessel on navigable water—the question of seaman status is no question at all. For amphibious workers, however, the question remains more difficult. Notwithstanding this clarification of “seaman” in the Jones Act, the determination of seaman status remains challenging.⁵⁷

A. The Lower Courts’ First Formulations

In 1941, the First Circuit Court of Appeals developed the first jurisprudential test for seaman status.⁵⁸ In *Carumbo v. Cape Cod S.S. Co.*, the court held that the test contained the following elements: that (1) the vessel on which the seaman served be in navigation; (2) the worker have a more or less permanent connection with the vessel; and (3) the worker be aboard primarily to aid in navigation.⁵⁹ The Second Circuit Court of Appeals adopted this formulation⁶⁰ but modified the “more or less

50. *Id.* at 355; The Jones Act, 46 U.S.C. § 30104 (2018).

51. *Warner v. Goltra*, 293 U.S. 155, 157–59 (1934).

52. The Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 902 (2018).

53. § 902(3)(G); *Chandris*, 515 U.S. at 355.

54. *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 347 (1991) (citing § 902(3)(G)).

55. *Chandris*, 515 U.S. at 355–56.

56. *McDermott Int’l*, 498 U.S. at 347; § 902; The Jones Act, 46 U.S.C. §§ 30104–30106 (2018). *See Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 7 (1946).

57. *Chandris*, 515 U.S. at 358; deGravelles, *supra* note 11, at 210.

58. *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 994–95 (1st Cir. 1941).

59. *Id.*

60. *See Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750 (2d Cir. 1975).

permanent connection”⁶¹ language and, instead, required a connection that was “substantial in terms of its . . . duration and . . . nature.”⁶²

The Fifth Circuit Court of Appeals tried a different tack in *Offshore Co. v. Robison*.⁶³ In its holding, the court abandoned the traditional navigation requirement and devised two elements for seaman status: (1) the worker must be assigned permanently to a vessel or perform a substantial part of his work thereon; and (2) the worker’s employment must contribute to the function of the vessel and the accomplishment of its mission, maintenance, or anchorage for future trips.⁶⁴ After *Robison*, the Fifth Circuit modified its rule to include a worker who was employed on an “identifiable fleet” of vessels.⁶⁵ Then, in *Barrett v. Chevron, U.S.A., Inc.*, the court added a “temporal gloss” to the requirements and began to require substantial time spent on board a vessel.⁶⁶ Since *Barrett*, the court, as a “rule of thumb,” required that at least 30% of an amphibious worker’s employment time be spent working on board a vessel for that worker to qualify as a seaman.⁶⁷ Until *Chandris*, the other lower federal courts all required at least “a significant connection to a vessel in navigation,”⁶⁸ but all remained divided on the test for seaman status.⁶⁹

B. The Supreme Court Drops Anchor to Weigh in on Seaman Status

Attempting to resolve this conflict among the lower courts, the Supreme Court decided four cases on seaman status between 1991 and 1997.⁷⁰ The first, *McDermott Int’l, Inc. v. Wilander*, concerned a worker

61. *Carumbo*, 123 F.2d at 995.

62. *Salgado*, 514 F.2d at 755.

63. *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

64. *Id.*

65. *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523, 528 (5th Cir. 1960).

66. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 366 (1995) (discussing *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986) (en banc)).

67. *Id.* at 367 (1995) (noting that the Fifth Circuit has consistently required about 30% of a worker’s time to be spent on board a vessel).

68. *Id.*

69. See, e.g., *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 994–95 (1st Cir. 1941); *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (2d Cir. 1975); *Robison*, 266 F.2d at 779.

70. *deGravelles*, *supra* note 11, at 211; *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337 (1991) (holding that to be a seaman, the worker must be doing the ship’s work); *Sw. Marine v. Gizoni*, 520 U.S. 81 (1991) (holding that seaman status could not be denied to a maritime worker merely because his occupation fell within the parameters of the LHWCA); *Chandris*, 515 U.S. at 363; *Harbor Tug & Barge Co.*

who failed to aid in the navigational function of the vessels on which he served.⁷¹ Wilander was a paint foreman who was injured when a pressurized pipe exploded on the fixed platform where he was working.⁷² He brought an action for Jones Act negligence.⁷³ The Supreme Court granted Wilander seaman status, deciding that aiding in a vessel's navigation was not necessarily required to qualify as a seaman.⁷⁴ The Court held, instead, that to be seamen, workers must be "doing the ship's work"⁷⁵ by "contribut[ing] to the function of the vessel or to the accomplishment of its mission."⁷⁶ The Court concluded that the employees' jobs were not determinative; rather, their connection to a vessel was the determinative factor.⁷⁷

In *Chandris, Inc. v. Latsis*, the Court addressed the nature of that connection, using a "status-based standard"⁷⁸ to determine whether workers were fundamentally land-based or sea-based.⁷⁹ The Court emphasized that lower courts should not look at a mere "snapshot" of the work of the employees; rather, courts should look at the employees' overall connection to a vessel or fleet of vessels.⁸⁰ The *Chandris* Court then partially followed the test from *Robison*⁸¹ and delineated two requirements for seaman status. First,

an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission Second . . . a seaman

v. Papai, 520 U.S. 548 (1997) (holding that the identifiable group of vessels requirement needed the element of common ownership or control).

71. *McDermott Int'l*, 498 U.S. 337.

72. *Id.* at 339.

73. *Id.*

74. *Id.* at 347; see also Christine M. Gimeno, *Persons and Employments within Act*, 78A C.J.S. SEAMEN § 203 (2016).

75. *McDermott Int'l*, 498 U.S. at 355.

76. *Id.*

77. *Id.* at 353–54; see also deGravelles, *supra* note 11, at 212.

78. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 358 (1995); see also deGravelles, *supra* note 11, at 212.

79. *Chandris*, 515 U.S. at 363.

80. *Id.* (citing *Easley v. S. Shipbuilding Corp.*, 965 F.2d 1, 5 (5th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993)).

81. *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959) (holding that there are two elements for seaman status: that (1) the worker must be assigned permanently to a vessel or perform a substantial part of his work thereon; and (2) the worker's employment must contribute to the function of the vessel, the accomplishment of its mission, its maintenance, or anchorage for future trips). In this way, the Supreme Court only partially adopted the rule because the requirement of work on board a vessel is missing from the *Chandris* holding. *Chandris*, 515 U.S. at 368.

must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.⁸²

Addressing the second prong, the *Chandris* Court directed the lower courts to stress that “the Jones Act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel [or fleet of vessels], and not land-based employees, who do not.”⁸³

The Court also partially adopted the Fifth Circuit’s rule about mixed employment: generally, to qualify as seamen, workers must spend about 30% of their time “in the service of a vessel in navigation.”⁸⁴ The Court in *Chandris* emphasized that this rule is relevant only in the context of mixed employment workers like George;⁸⁵ the rule is irrelevant when a worker is permanently assigned to a vessel-based or land-based position because in that case the court can determine seaman status based on the permanent employment status of the worker.⁸⁶ In the case of mixed employment, the Court noted that seaman status is a “fact specific” inquiry,⁸⁷ and lower courts have the flexibility to consider the circumstances surrounding the worker’s employment when applying the rule.⁸⁸

On the other hand, even before the Supreme Court decided *Chandris*, the Fifth Circuit was interpreting the “substantial connection”⁸⁹ requirement as time spent working on a vessel rather than merely in the service of that vessel.⁹⁰ In *Barrett*, the court addressed a case in which a worker spent

82. *Chandris*, 515 U.S. at 368. Post-*Chandris*, the Supreme Court ruled that for a worker who works on an “identifiable group of . . . vessels” to qualify as a seaman, the vessels must be subject to “common ownership or control.” *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 556 (1997).

83. *Chandris*, 515 U.S. at 376. In *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 935 (5th Cir. 2015), the court discussed that terms and phrases like “sea-based” and “sea-based duties” should not be understood literally. Rather, “we have dozens of cases finding oilfield workers and other ‘brown-water’ workers on drilling barges and other vessels qualified as seamen even though they spent all their work time on these vessels submerged in quiet inland canals and waterways.” *Naquin*, 744 F.3d at 935.

84. *Chandris*, 515 U.S. at 371.

85. *Id.*

86. *Id.*

87. *Id.* (citing *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)).

88. *Id.*

89. *Id.* at 375.

90. *See, e.g., Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1073–74 (5th Cir. 1986) (en banc); *Barrios v. Engine & Gas Compressor Servs., Inc.*, 669 F.2d 350, 353 (5th Cir. 1982); *Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 484 (5th Cir. 1976).

most of his time on an oil platform and performed only incidental work on an adjacent vessel.⁹¹ The *Barrett* court relied on its earlier case, *Robison*, in which it held that for workers to qualify as seamen, they must either be permanently assigned to a vessel or perform a substantial portion of their work thereon.⁹² The Fifth Circuit has continued to use this interpretation, even using the language in *Chandris*⁹³ to strengthen its argument that seaman status requires workers to spend at least 30% of their working time on a vessel to qualify as Jones Act seamen.⁹⁴ The Fifth Circuit's influence cannot be understated—the Supreme Court relied heavily on the Fifth Circuit's decisions when deciding *Chandris*, including partially adopting the Fifth Circuit's test for seaman status.⁹⁵ The Supreme Court further adopted the Fifth Circuit's 30% rule because of that court's "years of experience" with the issue.⁹⁶ The Fifth Circuit's influence on the Supreme Court in maritime issues, as illustrated in the Supreme Court's adoption of the *Robison* rule, also explains why the recent decision in *Alexander* is significant. The *Alexander* "on board a vessel" interpretation eventually may be adopted by the Supreme Court and become binding law in all jurisdictions.

II. *ALEXANDER V. EXPRESS ENERGY SERVICES, L.P.*: A CHANGE IN COURSE

The Fifth Circuit applied its interpretation of the *Chandris* two-pronged test to the facts of *Alexander*.⁹⁷ Michael Alexander worked for Express, an oilfield services company for well construction and well testing services,⁹⁸ as a lead hand in the company's plug and abandonment ("P&A") department.⁹⁹ The department worked to plug decommissioned oil wells on platforms off the coast of Louisiana.¹⁰⁰ Alexander's duties included supervising workers and ensuring that each operation was running smoothly

91. *Barrett*, 781 F.2d at 1068–70.

92. *Id.* at 1073 (citing *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959)).

93. "A worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act" *Alexander v. Express Energy Servs. Operating, L.P.*, 784 F.3d 1032, 1034 (5th Cir. 2015) (quoting *Chandris*, 515 U.S. at 371).

94. *Id.*

95. *Chandris*, 515 U.S. at 369.

96. *Id.* at 371.

97. *Alexander*, 784 F.3d at 1035.

98. *Company Overview of Express Energy Services, L.P.*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=33041463> (last visited Feb. 20, 2018) [<https://perma.cc/CS4B-VPTW>].

99. *Id.*

100. *Id.*

and completed successfully.¹⁰¹ Significantly, he was never assigned to a specific platform or vessel, and the lift boats that he used were owned by Aries Marine Corporation, a company working with Express.¹⁰² On August 11, 2011, Alexander was working on a P&A project on a platform containing four wells.¹⁰³ A lift boat was next to the platform with a catwalk connecting the boat to the platform.¹⁰⁴ Alexander was working on the platform when a wireline from a crane on the lift boat snapped, causing a bridge plug and tool combination to fall and injure him.¹⁰⁵

A. Procedural History and the Parties' Arguments

Alexander filed an action under the Jones Act against Express and other defendants in the Eastern District of Louisiana, arguing that Express was negligent.¹⁰⁶ Express filed a motion for summary judgment on seaman status, asserting that, as a platform-based worker, Alexander could not be a seaman.¹⁰⁷ Express further argued that Alexander failed to satisfy either prong of *Chandris* because he neither “contribute[d] to the function of a vessel or the accomplishment of its mission because he worked on the wells on non-vessel fixed platforms”¹⁰⁸ nor worked on a vessel for 30% of his employment time.¹⁰⁹ The court found the fact that 35% of Alexander’s jobs involved the use of a lift boat to be insufficient.¹¹⁰ Instead, Express argued that because Alexander did not spend 30% of his total employment time physically on board the lift boat, he should not qualify as a seaman under the second prong of *Chandris*.¹¹¹ Alexander argued that “he . . . contribute[d] to the function of the Aries liftboat” so as to satisfy the first *Chandris* prong.¹¹² He also wrongly asserted that he spent 35% of time on the Aries lift boats, though Express conceded that at least 35% of his time involved the use of the lift boats.¹¹³

101. *Id.*

102. *Alexander v. Express Energy Operating Servs., L.P.*, 2014 WL 1763172 (E.D. La. Apr. 30, 2014) *aff’d on other grounds*, 784 F.3d 1032 (5th Cir. 2015).

103. *Alexander v. Express Energy Operating Servs.*, 784 F.3d 1032, 1035 (5th Cir. 2015).

104. *Id.*

105. *Id.* at 1035–36.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

The Eastern District granted Express's motion for summary judgment,¹¹⁴ finding that Alexander did not satisfy the requirements for seaman status under the first prong of *Chandris* because his duties related to the fixed platform, not the vessel.¹¹⁵ The fact that Alexander engaged in various activities on board the lift boat, such as eating, sleeping, relaxing, storing his tools, and loading and unloading materials was not enough to qualify as seaman's work under the first *Chandris* prong.¹¹⁶ In a footnote, the court stated that Alexander also had failed to satisfy the second prong.¹¹⁷

B. The Fifth Circuit's Reasoning and Interpretation of Chandris

On appeal, the principal issue before the Fifth Circuit Court of Appeals was whether the district court erred in granting Express's motion for summary judgment on seaman status or if the facts were such that the question should have gone to the jury.¹¹⁸ The Fifth Circuit affirmed the Eastern District's decision on other grounds, focusing on the second prong of *Chandris* to determine whether Alexander qualified as a seaman.¹¹⁹ The

114. *Id.*

115. *Id.*

116. *Alexander v. Express Energy Servs. Operating, L.P.*, 2014 WL 1763172 (E.D. La. Apr. 30, 2014) *aff'd on other grounds*, 784 F.3d 1032 (5th Cir. 2015).

117. *Id.* at *4 n.6. The court in *Alexander* stated that Alexander's activities on the boats did not qualify for the 30% of working time:

In *Hufnagel*, the Fifth Circuit found that the plaintiff had no connection to the lift boat at issue, having never been on it before the job on which he was injured and having no expectation to ever return to that specific vessel, and that he had no connection with any other identifiable fleet of vessels . . . Here, Alexander offers no evidence that he had ever been assigned to the L/B RAM X [the lift boat] before or that he would in the future . . . He was never assigned to a specific platform or vessel. None of the lift boats used by Alexander were owned or operated by Express, rather it was Express's customers that contracted for the lift boats.

Id.

118. *Alexander*, 784 F.3d at 1032. The Supreme Court stated in *Chandris* that summary judgment was appropriate in a determination of seaman status only "where undisputed facts reveal that a maritime worker has a clearly inadequate connection to vessels in navigation, the court may take the question from the jury by granting summary judgment or a directed verdict." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 371 (1995).

119. The Fifth Circuit essentially disregarded the first *Chandris* prong and addressed whether Alexander satisfied the second prong (discussing whether Alexander had "a connection to a vessel in navigation . . . that [was] substantial in terms of both its duration and its nature"). *Alexander*, 784 F.3d at 1036–37.

court held that because Alexander failed to satisfy this second prong and did not qualify as a seaman, the issue did not need to go to a jury.¹²⁰ Based on the Fifth Circuit's interpretation, *Chandris* requires at least 30% of an employee's work to occur on board a vessel.¹²¹ Consequently, the court required that Alexander must have spent 30% or more of his working time on board either the lift boat or Express's main vessel to qualify as a seaman.¹²² The fact that Alexander worked merely in connection with the lift boats for 30% of his time was insufficient to meet the test for seaman status; as a result, the court found that summary judgment was proper.¹²³

Under the facts in *Alexander*, the Fifth Circuit correctly found that Alexander had not satisfied the test for seaman status. Alexander had not spent 30% of working time on board a vessel to satisfy the two *Chandris* prongs because his work was performed in connection to the platforms and not a vessel. But the Fifth Circuit's reasoning is flawed because it ignores and misstates important language in *Chandris* regarding the appropriate test for seaman status, leading to a result that will prove detrimental to the courts and the maritime community. Instead of the Fifth Circuit's rigid "on board a vessel" interpretation, the test for seaman status should more accurately conform to the holding in *Chandris* and the purpose of the Jones Act: (1) whether the employee is "[doing] the ship's work"¹²⁴ to satisfy the first prong of *Chandris*;¹²⁵ and (2) whether the employee is regularly exposed to marine perils for the requisite 30% of time to satisfy both the nature and duration elements of the second prong of *Chandris*.¹²⁶

III. ALEXANDER: A RIGID RULE WITH UNFORTUNATE CONSEQUENCES

Rather than providing clarity in this murky area of maritime law, the Fifth Circuit further muddled the issue in *Alexander*. The *Alexander* holding complicates the issue of seaman status for courts and frustrates the interests of maritime employees and employers. The Fifth Circuit in *Alexander* interpreted the second prong of *Chandris* as applying the "on board a vessel" requirement that workers be employed strictly on a vessel for 30% of their working time to be seamen.¹²⁷ In fact, *Chandris* requires

120. *Id.* at 1037.

121. *Id.* at 1034; *Chandris*, 515 U.S. 347.

122. *Alexander*, 784 F.3d at 1034.

123. *Id.*

124. *Chandris*, 515 U.S. at 368 (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355 (1991)).

125. *Id.*

126. *Id.*

127. *Alexander*, 784 F.3d at 1037.

that the worker be both working in the service “of the vessel or to the accomplishment of its mission”¹²⁸ and have a “connection to [a] vessel . . . that is substantial in terms of both its duration and nature.”¹²⁹ Express and Alexander’s opposing arguments in *Alexander* highlight the crux of the argument surrounding the exact meaning of the second prong.¹³⁰

A. How the Fifth Circuit Misinterpreted *Chandris*

The Fifth Circuit stated in *Alexander* that the *Chandris* Court applied its rule from *Robison*,¹³¹ and, therefore, the second prong requires work on board a vessel.¹³² *Chandris*, however, neither requires workers to be assigned to a vessel nor to spend 30% of their time working on board a vessel.¹³³ Addressing the second prong, the *Chandris* Court held that the worker’s connection to a vessel must be substantial in duration and nature.¹³⁴ The Supreme Court discussed how work on board a vessel could lead to a finding of seaman status: “[i]f it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity, the test for seaman status will be satisfied.”¹³⁵ The underlying purpose of the substantial connection prong, however, is to separate sea-based maritime employees who regularly are exposed to marine perils from land-based workers who are not as sufficiently connected to a vessel.¹³⁶ This purpose represents the spirit of the second prong. Rather than interpreting *Chandris* to require work on board a vessel, the lower courts should interpret the case to require work in service of a vessel as the first prong of the test for seaman status, paired with regular contact with marine perils for 30% of working time as the second prong of the test.

The Fifth Circuit should clarify its decision by attempting to adhere more closely to *Chandris*. The Fifth Circuit and other lower courts should

128. *Chandris*, 515 U.S. at 368 (citing *McDermott Int’l*, 498 U.S. at 355).

129. *Id.*

130. See discussion *supra* Part II.A (discussing that although Express argued that Alexander had to be working on board a vessel for 30% of time, Alexander argued that he had to be in service of a vessel for 30% of time).

131. The rule requires a worker to be either permanently assigned or perform a substantial amount of work on the vessel to qualify as a seaman. *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

132. *Alexander*, 784 F.3d at 1034.

133. *Chandris*, 515 U.S. at 376.

134. *Id.* at 375.

135. *Id.* at 368–69 (quoting JENNER, *supra* note 20, § 11a).

136. *Id.* at 368.

follow *Chandris* and emphasize that the second prong reserves the Jones Act remedy for employees whose work regularly exposes them to “the special hazards and disadvantages to which they who go down to sea in ships are subjected.”¹³⁷ Not only is this distinction emphasized in *Chandris*,¹³⁸ but it also stresses the purpose of seaman status and avoids the test for that status from becoming a test in itself.¹³⁹ In determining the Jones Act coverage qualifications, the Court “focus[ed] upon the essence of what it means to be a seaman and . . . eschew[ed] the temptation to create detailed tests . . . that tend to become ends in and of themselves.”¹⁴⁰ A rigid requirement that disregards the purpose of seaman status is an “end in and of [itself]”¹⁴¹ that does not accurately reflect the reality of modern maritime law.¹⁴²

In actuality, seamen are employees whose work takes place in the service of a vessel; consequently, they are exposed to marine perils in the course and scope of their employment that should warrant their protection under the Jones Act, even if those employees do not work on board a vessel for 30% of time.¹⁴³ For instance, George and workers like him who do not work on board a vessel for 30% of their employment nevertheless are doing the ship’s work when, as in the hypothetical, the vessel’s function is to transport them to the rigs to work as well as to provide a platform from which the divers can store their diving and monitoring equipment and receive help from other workers still on the vessel.¹⁴⁴ Diving and performing related tasks should qualify as doing the ship’s work because the mission of the vessel is to bring the diver to the site and serve as a platform. The fact that these workers are exposed to the same perils as classic seamen for a substantial period,¹⁴⁵ coupled with the fact that they are doing the ship’s work, should classify them as seamen despite not working on a vessel for that time period. If courts keep the purpose of the

137. *Id.* at 370 (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)). See *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 934 (5th Cir. 2014) (discussing how these dangers apply also in brown-water situations in which the worker is not strictly at sea).

138. *Chandris*, 515 U.S. at 376.

139. *Id.*

140. *Id.* at 369.

141. *Id.*

142. *Id.* at 376.

143. *Id.* at 378.

144. See Introduction *supra* p. 2.

145. See *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 934 (5th Cir. 2014) (discussing how these dangers apply also in brown-water situations in which the worker is not strictly at sea).

Jones Act in mind,¹⁴⁶ they should find seaman status for employees who do not qualify under the *Alexander* Court's "on board a vessel" interpretation.¹⁴⁷ This interpretation more closely aligns with the central purpose of the Jones Act and is preferable to the Fifth Circuit's misinterpretation, which will bar those latter employees from the Act's protection.

1. How the Fifth Circuit Misinterpreted Chandris Dicta Concerning "On Board a Vessel"

When deciding *Alexander*, the Fifth Circuit cited to specific language in *Chandris* in support of its conclusion that *Alexander* could not qualify as a seaman because he did not work 30% of time on board a vessel.¹⁴⁸ Though it may appear as if the Supreme Court intended the substantial connection prong to require time spent working on a vessel,¹⁴⁹ the Court did not require work literally on board a vessel when determining its test for seaman status.¹⁵⁰ The language in *Chandris* cited by the Fifth Circuit originated from A. Jenner, *Benedict on Admiralty*,¹⁵¹ in which the writer discussed that "if it can be shown that the employee performed a significant part of his work onboard the vessel on which he was injured, with at least some degree of regularity and continuity, the test for seaman status will be satisfied."¹⁵² The Fifth Circuit also cited language which emphasized that if a worker's duties take place on board a vessel for only a fraction of time, the worker is land-based and not a seaman.¹⁵³ The Fifth Circuit interpreted the Supreme Court's citation of this language as the Court's adoption of its own rule derived from *Robison* and its progeny, which required a worker to work on board a vessel for at least 30% of time to be a seaman.¹⁵⁴

Under the second prong of *Chandris*, however, "the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature."¹⁵⁵ If the Supreme Court intended this prong to require working on board a vessel,

146. *Chandris*, 515 U.S. at 368.

147. *Alexander v. Express Energy Operating Servs., L.P.*, 784 F.3d 1032, 1034 (5th Cir. 2015).

148. *Id.* (citing *Chandris*, 515 U.S. at 368–71).

149. *Chandris*, 515 U.S. at 368–69.

150. *Id.* at 376.

151. *Id.* at 368–69 (citing JENNER, *supra* note 20, § 11a, pp. 2-10.1 to 2-11).

152. *Id.*

153. *Alexander*, 784 F.3d at 1034 (citing *Chandris*, 515 U.S. at 371).

154. *Id.*

155. *Chandris*, 515 U.S. at 376.

that language would have been simple to include, as the Fifth Circuit did in *Robison* and subsequent cases.¹⁵⁶ Instead, the Supreme Court articulated the Fifth's Circuit's rule of thumb for the ordinary case: "A worker who spends less than about 30% of his time *in the service of a vessel in navigation* should not qualify as a seaman under the Jones Act."¹⁵⁷ The Supreme Court used the language "in the service of a vessel"¹⁵⁸ rather than "on board a vessel."¹⁵⁹ By refusing to adopt the "on board a vessel" language, the Supreme Court did not intend to require that 30% of employees' working time be spent on a vessel.

The Court notes that the purpose of the second prong is to distinguish between land-based workers and sea-based workers who are subjected to the kinds of maritime dangers as classic seamen.¹⁶⁰ Though working on board a vessel is the classic nature of a seaman's work, the Court notes that seamen are those maritime employees whose work "regularly expose[s] [them] to the perils of the sea."¹⁶¹ Working on board a vessel is one way that the worker may be subjected to these marine perils, but it is not the only way. George, for example, faces these same perils during his employment, but he is not working on board a vessel for the requisite period. Because he faces these perils for 30% of time, George and others like him should qualify as seamen. If the workers are regularly exposed to these perils for 30% of their working time, thus satisfying the "nature" and "duration" elements, the second prong of *Chandris* is satisfied. It does not follow that the Court's citation of the quote from *Jenner, Benedict on Admiralty* should be understood to require 30% of work to be done on board a vessel. This misinterpretation of the *Chandris* language will lead to unwelcome consequences in the lower courts and to maritime employers and employees.

156. See, e.g., *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1073–74 (5th Cir. 1986) (en banc); *Barrios v. Engine & Gas Compressor Servs., Inc.*, 669 F.2d 350, 353 (5th Cir. 1982) ("To perform a substantial part of his work aboard a vessel, it must be shown that he performed a significant part of his work aboard the vessel with at least some degree of regularity and continuity."); *Holland v. Allied Structural Steel Co.*, 539 F.2d 476, 485 (5th Cir. 1976) ("[W]e have continued to analyze the question of seaman status by focusing on . . . the time spent aboard or in the service of a vessel . . .").

157. *Chandris*, 515 U.S. at 371 (emphasis added).

158. *Id.*

159. *Alexander*, 784 F.3d at 1034.

160. *Chandris*, 515 U.S. at 368–72.

161. *Id.* at 368.

IV. SUGGESTED SOLUTIONS TO THESE UNFORTUNATE CONSEQUENCES

The *Alexander* court's holding, which ignored the purpose of the Jones Act and misconstrued the language of *Chandris*, presents two main problems. First, the lower courts are faced with less discretion in cases, like George's, that demand such discretion. Second, the decision creates practical problems for employees and employers when determining status and coverage, problems that could expose employers, in some limited but important circumstances, to greater liability in general maritime tort.

A. *Alexander's Consequences in the Lower Courts*

Because of the "on board a vessel" reading of the *Chandris* two-prong test, the lower courts within the Fifth Circuit's jurisdiction have less discretion in determining seaman status.¹⁶² This lack of discretion is especially problematic in cases in which the nature of the employees' work and their exposure to marine perils should warrant seaman status, but these employees have not spent 30% of their working time on board a vessel. For instance, though a court could determine that George should qualify as a seaman because he is doing the ship's work and is exposed to maritime dangers for 30% of his working time,¹⁶³ it cannot grant seaman status after *Alexander*. George does not perform his work on board a vessel; instead, his working time takes place off the vessel. After *Alexander*, his time exposed to marine perils cannot be counted in the 30% of time calculation. To avoid this problem, courts should follow the spirit of *Chandris* and consider the nature of employees' work in the service of a vessel and their exposure to marine perils, regardless of whether their work is physically on board that vessel, in determining whether the employees meet the requisite 30% of working time on board a vessel.

When the *Chandris* Court discussed the Fifth Circuit's 30% rule, it noted that although "departure from [the rule] will certainly be justified in appropriate cases,"¹⁶⁴ the general rule arose because of "years of experience."¹⁶⁵ The *Alexander* "on board a vessel" requirement misapplies the 30% rule by not allowing the courts to consider off-vessel work in the service of the vessel where the worker is exposed to marine perils.¹⁶⁶ Instead, the *Alexander* requirement necessitates that the courts look only at "on the vessel" work rather than at the nature of employees' work, that

162. Cf. Gimeno, *supra* note 74, § 203.

163. *Chandris*, 515 U.S. at 368.

164. *Id.* at 371.

165. *Id.*

166. *Id.* at 372 (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)).

is, work for the vessel that exposes them to marine perils. Further, *Alexander* ignores the *Chandris* language “in the service of a vessel”¹⁶⁷ and instead applies the language “on board a vessel”¹⁶⁸ to create a more rigid rule that takes away the courts’ discretion. This lack of discretion may appear to make ruling on summary judgment easier,¹⁶⁹ but applying this rigid rule ultimately will be more challenging without further guidance on the definition of work “on a vessel.”¹⁷⁰ Further, the *Alexander* rule will prove fatal to cases like George’s, in which a worker spends a significant portion of his time exposed to marine perils in the service of a vessel or accomplishment of its mission.

In response to this issue, the “on board a vessel” requirement from *Alexander* should be clarified by the Fifth Circuit.¹⁷¹ One way to improve this requirement is to apply a different methodology to the nature and the duration elements of the prong. This approach would allow courts to look collectively at the nature and duration of work done while exposed to classic marine dangers when factoring in the seaman’s connection to a vessel. If an employee like George is doing work to “contribut[e] to the function of a vessel or accomplishment of its mission,” and George is regularly exposed to those typical seaman perils, his work should count in the 30% of time calculation.¹⁷² Another way to remedy this issue is to limit the *Alexander* holding to those cases in which a worker does more work

167. *Id.* at 369.

168. *Alexander v. Express Energy Operating Servs., L.P.*, 784 F.3d 1032, 1036 (5th Cir. 2015).

169. David W. Robertson & Michael F. Sturley, *Recent Developments in Admiralty and Maritime Law at the National Level and in the Fifth and Eleventh Circuits*, 40 TUL. MAR. L.J. 343, 400 (2016). *But see* *Hurst v. Baker Hughes, Inc.*, 2015 WL 4397136 (E.D. La. July 16, 2015) (declining to grant summary judgment on seaman status); *Pellegrin v. Monto Oilfield Contractors, L.L.C.*, 2015 WL 3651159 (E.D. La. June 11, 2015) (ruling that there were other issues of fact that precluded summary judgment).

170. *Alexander*, 784 F.3d at 1036; *see infra* discussion Part IV.B.1.

171. This Comment does not advocate for *Alexander* to be overruled. The Fifth Circuit likely decided *Alexander* correctly even without changing the *Chandris* language because *Alexander* worked very little in the service of the lift boats or the main vessel. *Id.* Instead, this Comment argues that the “on board a vessel” requirement be clarified so as to either only apply to *Alexander*’s factual circumstances or that it should be only one of the ways in which, in this fact-intensive methodology, courts can find seaman status.

172. *Chandris*, 515 U.S. at 368.

on land or a fixed platform¹⁷³ than on navigable waters, thus not extending the holding to all amphibious workers.

Because the courts could consider the work employees perform while consistently in contact with marine perils, rather than merely the amount of work they perform on a vessel, courts could find seaman status for employees like George who do not perform 30% of work strictly on a vessel. This interpretation would ensure that workers employed in the service of a vessel and exposed to marine perils rightly qualify as seamen. If *Alexander* were limited to its facts, this limitation would allow for the courts' discretion in deciding whether to grant summary judgment while leaving the rigid rule from *Alexander* intact. Without either this revised interpretation or limitation of *Alexander*, these workers for whom the Jones Act was passed will be barred from seaman protections.¹⁷⁴

1. Uniformity and Judicial Efficiency versus Discretion in the Lower Courts

Although it may appear as though discretion in the courts creates problems for maritime law, which at its core strives to maintain uniformity,¹⁷⁵ the Fifth Circuit's 30% rigid requirement conflicts with the purpose of the Jones Act. The Supreme Court in *Chandris* noted that the federal courts were divided in determining the proper test for seaman status,¹⁷⁶ particularly in addressing the second prong of the *Robison* test.¹⁷⁷ Creating a bright-line rule, which eliminates this division among the courts, seems to fulfill this purpose. It will be easier for the courts to grant summary judgment,¹⁷⁸ the goal of which is judicial efficiency.¹⁷⁹ With this principal concern in mind, this "on a vessel" rule could be an ostensible step toward furthering uniformity and consistency in maritime law.

173. See *Hufnagel v. Omega Serv. Indus., Inc.*, 182 F.3d 340 (5th Cir. 1999) (ruling that employee who worked on a fixed platform was not a seaman).

174. *Chandris*, 515 U.S. at 369–70 (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104 (1946) (Stone, C.J., dissenting)). See *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 934 (5th Cir. 2014) (discussing how these dangers apply also in brown-water situations in which the worker is not strictly at sea).

175. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 215 (1917).

176. See, e.g., *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991 (1st Cir. 1941); *Salgado v. M.J. Rudolph Corp.*, 514 F.2d 750, 755 (2d Cir. 1975); *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

177. *Chandris*, 515 U.S. at 366.

178. *Gimeno*, *supra* note 74, § 203.

179. *Summary Judgment*, WEST'S ENCYCLOPEDIA OF AMERICAN LAW (2d ed. 2005) ("The purpose of summary judgment is to avoid unnecessary trials.").

Although a court-led effort in creating a bright-line rule would be beneficial, the purpose of the Jones Act is to benefit injured employees.¹⁸⁰ To protect the interests of these employees, the courts should weigh the factual circumstances concerning the worker's connection to a vessel in determining whether the worker is a seaman.¹⁸¹ The question of seaman status is a mixed question of law and fact,¹⁸² and the Supreme Court stated in *Chandris* that only "where undisputed facts reveal that a maritime worker has a clearly inadequate temporal connection to vessels in navigation, the court may take the question from the jury by granting summary judgment or a directed verdict."¹⁸³ When evaluating a case for seaman status, the courts should apply a fact-intensive inquiry to both the nature and duration elements of the worker's employment rather than merely addressing whether the employee's work occurred on board a vessel.

Particularly in close cases, there are underlying questions of fact concerning the nature of the workers' employment and their connection to a vessel. If the employee regularly faces marine perils for 30% of time and the nature of the employee's work is in the service of a vessel, then the court should deny summary judgment on seaman status and submit the issue to the jury. If a judge decides the case based only on the *Alexander* "on board a vessel" requirement without considering other facts and circumstances, then summary judgment has been improperly granted. These facts and circumstances should include the question of whether the employee's work on navigable waters satisfies the nature element, that is, whether the worker is regularly exposed to marine perils, and whether the worker has been employed for 30% of time in the service of a vessel to satisfy the duration element of the second prong. Because the purpose of the Jones Act is to protect the rights of workers exposed to classic maritime dangers,¹⁸⁴ the goal of uniformity and appeal of a bright-line rule for judicial efficiency should not justify depriving these workers the protections of seaman status.

180. *Chandris*, 515 U.S. at 385–86 (Stevens, J., dissenting).

181. *Id.* at 372 (majority opinion) (citing *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)) (asserting that the test for seaman status is fact-intensive).

182. *McDermott Int'l*, 498 U.S. at 356; *Chandris*, 515 U.S. at 369; *In re Endeavor Marine, Inc.*, 234 F.3d 287, 290 (5th Cir. 2000) (citing *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997)).

183. *Chandris*, 515 U.S. at 371.

184. *Id.* at 385–86 (Stevens, J., dissenting).

B. Alexander's Consequences for Employees and Employers

Finally, *Alexander* creates practical problems when determining employees' status and coverage. The extent of the *Alexander* holding is unclear and may apply only to employees like Alexander or to a larger group of amphibious workers. Employees will be unsure whether they qualify as seamen when attempting to sue for injuries. When employees and employers attempt to determine seaman status in a lawsuit, both will need to determine whether sufficient time has been spent working on a vessel. To accomplish this task, they must understand what it means to do work on a vessel. In short, the nature or duration elements of the second *Chandris* prong have not been clarified for either employees or employers. This decision in *Alexander* further frustrates the interests of employers,¹⁸⁵ as the inapplicability of the Jones Act to their employees exposes them to greater liability.¹⁸⁶

1. What "Work on Board a Vessel" Means

The *Alexander* decision will cause employees and employers to question whether employees' work qualifies as work on board a vessel. The *Alexander* Court complicated the question in its finding that eating and sleeping in the lift boat, as well as loading and unloading materials from the lift boat, did not qualify as work on board the vessel.¹⁸⁷ These remaining questions will cause employees concern and create further tensions between employers and employees, potentially erupting in lawsuits over coverage and status. If the purpose of the Jones Act is to

185. Though this Comment focuses on the uncertainty and greater liability this *Alexander* decision creates, there could be other ramifications that are outside the scope of this Comment. For instance, employers may have to purchase more liability insurance, the costs of litigation may be greater, employees' fees may change depending on their status, among other things. These issues may arise as the unfortunate ramifications of *Alexander* continue to ripple outward.

186. See *Murray v. Anthony J. Bertucci Const. Co.*, 958 F.2d 127 (5th Cir. 1992) (extending *Miles* to deny loss of society damages to a seaman in an injury case); *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), *abrogated by Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 424–25 (2009) (finding seaman is entitled to seek punitive damages for willful and wanton failure to pay maintenance and cure, not for Jones Act negligence); *McBride v. Estis Well Serv., L.L.C.*, 768 F.3d 382, 390 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 2310 (2015); see also SCHOENBAUM, *supra* note 10, at 170.

187. *Alexander v. Express Energy Operating Servs., L.P.*, 2014 WL 1763172 (E.D. La. Apr. 30, 2014), *aff'd on other grounds*, 784 F.3d 1032 (5th Cir. 2015).

protect maritime workers who are “exposed to the perils of the sea,”¹⁸⁸ the Act should protect workers who are exposed constantly to potential injury or death doing the ship’s work, even if they are not on board a vessel for 30% of their employment. Commercial divers like George are the paradigmatic example¹⁸⁹ because very little of their work takes place on board a vessel.¹⁹⁰ Yet even those workers who are on board a vessel for less than 30% of time may be employed in work that exposes them to marine perils for a temporally significant period.¹⁹¹ Nonetheless, if an employee does not work on board a vessel for that period, regardless of the nature of their work or their exposure to marine perils, that employee will be precluded from enjoying seaman status after *Alexander*.

Employees should not have to contend with a rule that has the potential to deprive them of seaman status. Classic seamen, who work on board a vessel for the clear majority of their employment, will not experience the effects of this rule, nor will those employees who are obviously land-based and are only incidentally on vessels. But *Alexander* will prove fatal to seaman status for amphibious employees who are not employed on a vessel for the requisite time—like George the diver. Obviously, however, these workers should be “sea-based”¹⁹² employees for purposes of receiving Jones Act protections.¹⁹³ The employees’ work on navigable waters should count toward the 30% of time calculation—not only because they are exposed to marine perils for which the Jones Act was passed but also because they are working in the service of a vessel or accomplishment of its mission, even when not literally on board the vessel. The *Alexander* holding requires clarification to determine what qualifies as work on board a vessel and the breadth of the decision.

188. *Chandris*, 515 U.S. at 358.

189. Independent pilots are another example; although they may work in the service of a vessel or fleet of vessels every day to easily satisfy the first prong of *Chandris*, they do not necessarily work on board a vessel for 30% of their employment. *See* *Bach v. Trident S.S. Co., Inc.*, 947 F.2d 1290 (5th Cir. 1991), *cert. granted and remanded*, 500 U.S. 949 (1991). Nevertheless, they are regularly exposed to marine perils for which seaman’s protections exist.

190. John R. Hillsman, *Have All the Recent Twists and Turns in the Jones Act Left Deep Sea Divers High and Dry?*, 11 U.S.F. Mar. L.J. 47, 62–63 (1999).

191. *Wallace v. Oceaneering Int’l*, 727 F.2d 427, 436 (5th Cir.1984) (“A diver’s work necessarily involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land.”).

192. *Chandris*, 515 U.S. at 363; *see* *Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 934 (5th Cir. 2014) (quoting *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 497 (2005)) (illustrating that “sea-based” should not be taken literally, and applies in brown-water situations).

193. *Chandris*, 515 U.S. at 376.

2. Greater Liability in Tort for Employers Under *Alexander*

The *Alexander* decision at first glance appears to benefit employers, who no doubt will welcome the decision in *Alexander* for a variety of reasons. First, the decision helps employers to determine which of their employees are Jones Act seamen by creating a bright-line rule that is easy to apply. This rule makes it harder for at least some amphibious workers to qualify as seamen. It is advantageous for an employee to qualify as a seaman because seamen are granted protections that other marine workers are not,¹⁹⁴ in addition to having the ability to bring a Jones Act action for negligence that employs an easier burden of proof for causation than general maritime law.¹⁹⁵ The *Alexander* interpretation appears to limit employers' Jones Act liability from those workers who will no longer qualify as seamen. Although seamen are usually given greater protection under the Jones Act, in certain limited instances the Jones Act minimizes employers' liability.¹⁹⁶ This limitation of liability is particularly applicable in the context of certain non-pecuniary damages, such as claims for loss of society, loss of consortium, and punitive damages.

Courts have ruled that under the Jones Act, the spouse of an injured seaman cannot sue for loss of society or loss of consortium.¹⁹⁷ Thus, if George qualified as a seaman, Susan could not bring an action for loss of society or consortium against Black Mud. Further, seamen themselves are precluded from recovering certain kinds of non-pecuniary damages,

194. deGravelles, *supra* note 11, at 209 (listing these protections as maintenance and cure, unseaworthiness, and a negligence action under the Jones Act).

195. Hoang Do, *supra* note 11, at 386; *see* Comeaux v. T.L. James & Co., 702 F.2d 1023, 1024 (5th Cir. 1983); Charles v. West Indies Transp., 631 F. Supp. 1023, 1025 (D.P.R. 1986).

196. *See* McBride v. Estis Well Serv., L.L.C., 768 F.3d 382, 390–91 (5th Cir. 2014) (holding that recovery for unseaworthiness under Jones Act or general maritime law is limited to pecuniary losses, which does not include punitive damages); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 37 (1990) (holding that a maritime cause of action for wrongful death does not include loss of society); *see also* Murray v. Anthony J. Bertucci Const. Co., 958 F.2d 127 (5th Cir. 1992) (extending *Miles* to deny loss of society damages to a seaman in an injury case); *Guevara v. Mar. Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), *abrogated by* Atl. Sounding Co. v. Townsend, 557 U.S. 404 (2009) (seaman is entitled to seek punitive damages for willful and wanton failure to pay maintenance and cure, not for Jones Act negligence).

197. *Miles*, 498 U.S. at 37 (holding that a maritime cause of action for wrongful death does not include loss of society); *Butler v. Ingram Barge Co.*, 2015 WL 1517438, at *1 (W.D. Ky. Apr. 1, 2015).

including punitive damages, against their employer.¹⁹⁸ If these workers are not covered under the Jones Act, then they typically will be covered exclusively under the LHWCA and will have no tort remedy against their employers.¹⁹⁹ For cases in which an employer owns the vessels on which workers are injured and workers are injured by vessel negligence, however, the dual capacity doctrine may apply.²⁰⁰ These workers, like George, may bring actions for punitive damages,²⁰¹ and their spouses, like Susan, may bring an action for non-pecuniary damages, such as loss of society and consortium.²⁰² In this limited but important situation, *Alexander* has the potential to expose employers to greater liability in general maritime tort.

3. The Fifth Circuit Must Clarify Its Decision for Employees and Employers

If the Fifth Circuit clarifies its decision in *Alexander*, employees and employers will be better informed as to their responsibilities and coverage. The Fifth Circuit needs to clarify what it means to perform work “on board a

198. See *Murray*, 958 F.2d 127 (extending *Miles* to deny loss of society damages to a seaman in an injury case); *Guevara*, 59 F.3d 1496 (seaman is entitled to seek punitive damages for willful and wanton failure to pay maintenance and cure, not for Jones Act negligence); *McBride*, 768 F.3d at 390–91.

199. The Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. § 902 (2018).

200. If the employer is also the vessel owner and is acting in its capacity as vessel owner, then the injured worker may have a claim against the employer in that capacity. 33 U.S.C. §§ 904, 905(b), 933. See *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *Jones v. Cooper T. Smith Stevedoring Co.*, 354 F. App’x 143 (5th Cir. 2009).

201. See *The Amiable Nancy*, 16 U.S. 546, 558 (1818) (stating that punitive damages may be awarded for gross, wanton, and outrageous conduct); *Gallagher v. The Yankee*, 9 Fed. Cas. 1091, 1093 (C.C.N.D. Cal. 1859) (No. 18124) (finding that punitive damages could be awarded against a vessel master who illegally transported the plaintiff to the Sandwich Islands); see also *In re Marine Sulphur Queen*, 460 F.2d 89, 105 (2d Cir. 1972) (finding that the death claimants’ motion for punitive damages was properly denied because there was no showing of gross negligence, actual malice, or criminal indifference); *In re Complaint of Merry Shipping, Inc.*, 650 F.2d 622, 626 (5th Cir. 1981) (finding that general maritime law affords the remedy of punitive damages upon a showing of willful and wanton misconduct by the shipowner). If the worker qualifies as a longshoreman, he has punitive damages rights in his general maritime law claims. See *Rutherford v. Mallard Bay Drilling, L.L.C.*, 2000 WL 805230 (E.D. La. June 21, 2000); *Robert Force, The Legacy of Miles v. Apex Marine Corp.*, 30 TUL. MAR. L.J. 35, 50 (2006).

202. See SCHOENBAUM, *supra* note 10, at 170.

vessel,”²⁰³ in terms of the nature and duration of the work being done and explain the breadth of the *Alexander* holding. At this point, the Fifth Circuit may confine the holding to the facts of *Alexander*-like workers—those who work on fixed platforms—or may apply the holding to all workers with mixed employment.²⁰⁴ If the court determines that the *Alexander* holding does not extend to all amphibious workers, defining “work on board a vessel” may not be necessary.

If the holding of *Alexander* extends to all amphibious employees, then this decision has greater bearing on those workers who will be barred from coverage if their work does not qualify as work on board a vessel. From the language of the *Alexander* opinion, it appears that the Fifth Circuit intended this “on a vessel” rule to apply to all workers with mixed employment. Indeed, the Eastern District of Louisiana is already interpreting *Alexander* in this way.²⁰⁵ It is unclear whether this interpretation reflects the Fifth Circuit’s true intent. The Fifth Circuit must clarify the breadth of its decision because answering this question is crucial to the subsequent development of the test for seaman status.

For employers, the solution is more difficult. The Fifth Circuit, through *Alexander*, has denied seaman status to a class of amphibious workers, and if this class seeks damages, these awards could include punitive damages²⁰⁶ and damages for loss of society and loss of consortium.²⁰⁷ Some of these workers will qualify for coverage under the LHWCA, which will be their exclusive remedy against their employer.²⁰⁸ The “dual capacity” doctrine, however, may apply,²⁰⁹ which could expose the employer to paying worker’s

203. *Alexander v. Express Energy Operating Servs., L.P.*, 784 F.3d 1032, 1036 (5th Cir. 2015).

204. *See id.* at 1035.

205. *See Pellegrin v. Montco Oilfield Contractors, L.L.C.*, 2015 WL 3651159 (E.D. La. June 11, 2015) (applying *Alexander*’s 30% of time on board a vessel rule in its determination of whether granting summary judgment on seaman status was appropriate).

206. *See The Amiable Nancy*, 16 U.S. at 558 (stating that punitive damages may be awarded for gross, wanton, and outrageous conduct); *Gallagher*, 9 Fed. Cas. at 1093 (finding that punitive damages could be awarded against a vessel master who illegally transported the plaintiff to the Sandwich Islands); *see also In re Marine Sulphur Queen*, 460 F.2d at 1972; *In re Complaint of Merry Shipping, Inc.*, 650 F.2d 622.

207. *See* SCHOENBAUM, *supra* note 10, at 170.

208. The Longshore and Harbor Worker’s Compensation Act, 33 U.S.C.A. § 902 (2018).

209. If the employer is also the vessel owner and acting in its capacity as vessel owner, then the injured worker may have a claim against the employer in that capacity. 33 U.S.C. §§ 904, 905(b), 933. *See Jones & Laughlin Steel Corp. v.*

compensation under the LWHCA and general tort damages.²¹⁰ Further, within the Fifth Circuit, if the worker is not covered under either the Jones Act or the LHWCA but is injured through employer negligence, then that employee may bring a general maritime law tort claim against his employer.²¹¹ Under these circumstances, the employer is exposed to greater liability. The solution will depend on the Fifth Circuit's clarification of the issue of the employee's duration and nature requirements. The class of seamen no longer covered under the Jones Act will affect the employer's liability.

a. The "On Board a Vessel" Requirement Opposes the Purpose of the Jones Act

Arguably, clarification is unnecessary because the *Alexander* rule is easier to apply than the process of looking at whether the amphibious worker is doing the ship's work and is exposed to marine perils. Yet the Jones Act was enacted in 1920 to further protect sea-based employees from the dangers of working on navigable waters.²¹² This "on board a vessel" interpretation, which detracts from this protection, opposes the purpose of the Jones Act and the policy behind its creation.²¹³ It cannot be justified by merely aiding employers in determining coverage because aiding employers while unjustly depriving "sea-based" employees of seaman status opposes the purpose of the Jones Act.²¹⁴

Further, even though general maritime claims for punitive damages and certain non-pecuniary damages have a higher burden of proof²¹⁵ than in Jones Act cases,²¹⁶ non-seamen workers still will be able to bring claims against their employers in dual-capacity situations.²¹⁷ Some of these claims will result in awards for punitive damages, loss of consortium, and loss of society. The Fifth Circuit should clarify what it means to be doing work on a vessel and

Pfeifer, 462 U.S. 523 (1983); *Jones v. Cooper T. Smith Stevedoring Co.*, 354 F. App'x 143 (5th Cir. 2009).

210. *See supra* note 209.

211. *Green v. Vermilion Corp.*, 144 F.3d 332 (5th Cir. 1998); *see Kermerac v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

212. *Chandris, Inc. v. Latsis*, 515 U.S. 347, 385–86 (1995) (Stevens, J., dissenting).

213. *Id.*

214. *Id.*

215. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406 (1953); *Estate of Callas v. United States*, 682 F.2d 613 (7th Cir. 1982).

216. *Hoang Do*, *supra* note 11; *see Comeaux v. T.L. James & Co.*, 702 F.2d 1023, 1024 (5th Cir. 1983); *Charles v. West Indies Transp.*, 631 F. Supp. 1023, 1025 (D.P.R. 1986).

217. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983); *Jones v. Cooper T. Smith Stevedoring Co.*, 354 F. App'x 143 (5th Cir. 2009).

the breadth of its holding in *Alexander*. Without clarification, the issue of determining status and coverage will not only continue to plague employers and employees but also make the process even more challenging. Finally, amphibious employees like George should qualify as Jones Act seamen because of the nature of their work and their time spent exposed to marine perils. These solutions conform to the purpose of the Jones Act and balance the concerns of maritime employers and employees.

CONCLUSION

The Fifth Circuit erroneously interpreted the *Chandris* holding, reaching a result that produced unwelcome consequences. The “on a vessel” requirement will affect the lower courts within the Fifth Circuit’s jurisdiction as well as maritime employees and employers. Some “sea-based” employees will be barred from seaman coverage, whereas their employers will need to reevaluate the nature of their employees’ work to determine whether they qualify as seamen, longshoreman, or otherwise. Additionally, employers will face greater potential liability for workers who no longer qualify as seamen. *Alexander* should be clarified to reflect the intended purpose of the Jones Act²¹⁸ and the true spirit of *Chandris*.²¹⁹ Until either the Fifth Circuit clarifies the decision or the breadth of the *Alexander* holding, the court’s “on board a vessel” interpretation of *Chandris* and the resulting consequences directly conflict with the purposes underlying seaman’s protections.

*Colton V. Acosta**

218. *Chandris*, 515 U.S. at 385–86 (Stevens, J., dissenting).

219. See discussion *supra* Part III.B.1.

* J.D./D.C.L., 2018. Paul M. Hebert Law Center, Louisiana State University. I am in everlasting debt to Judge John deGravelles for identifying this issue and guiding my research, and for his invaluable and incisive edits to my various drafts. I also owe this Comment to Dean Tom Galligan, without whose expertise and editing I would have been adrift. This Comment would also not have been possible without the help of all those who edited it along the way, in particular the Volume 77 and Volume 78 Boards of Editors. Finally, to my parents and anchors, Kyle and Susie Acosta, may you be blessed beyond measure for everything you have done.