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THE SPREAD OF PUNITIVE DAMAGES CLAIMS IN U.S. SEAMEN'S SUITS SINCE *ATLANTIC SOUNDING V. TOWNSEND*

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In the five years since the United States Supreme Court decided *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), there has been a significant increase in the number of published cases in which punitive damages claims have been asserted in connection with seamen's personal injury claims. Anecdotally, our firm, which sees in the order of 20 to 25 new seamen's personal injury claims each year, has seen punitive damages allegations in 80% of the new seamen's suits since the Supreme Court issued the *Atlantic Sounding* decision. This is no coincidence.

In *Atlantic Sounding*, the Supreme Court addressed the question of whether punitive damages could be awarded in a case in which the employer/vessel owner has willfully and wantonly denied maintenance and cure benefits to a seaman. Prior to *Atlantic Sounding*, the federal appeals courts across the United States were in disagreement, with some holding that punitive damages were available and some holding that they were not. In *Atlantic Sounding*, the Supreme Court settled the split between the federal appellate courts and ruled that punitive damages are available to punish an employer/vessel owner whose denial of maintenance and cure benefits is found to have been willful and wanton.

During the oral argument in front of the Supreme Court, Justice Alito asked the seaman's attorney whether a ruling allowing punitive damages would cause a proliferation of punitive damages claims against employers/vessel owners. The plaintiff's attorney responded by assuring the Justices that the issue of punitive damages will only come up in cases of grievous wrongdoing of employers/vessel owners.

Contrary to this assurance given by the seaman's attorney, the Supreme Court's decision has brought about the proliferation of punitive damages claims that Justice Alito feared. But *Atlantic Sounding* did not just trigger an increase in punitive damages claims in connection with maintenance and cure claims, *Atlantic Sounding* also triggered a wave of punitive damages claims in connection with vessel unseaworthiness claims, as well as claims of negligence under the statutory U.S. Jones Act.

We are told that the remedy of maintenance and cure traces its roots back to the Phoenicians and, in the United States, it is part of the body of judge-made law that we call the general maritime law of the United States. The general maritime law is to be distinguished from the statutory laws

created and passed by Congress. The Supreme Court's ruling in *Atlantic Sounding* was founded upon its conclusion, based upon a somewhat dubious study of very old maritime cases, that punitive damages have historically been available in connection with claims under the general maritime law and, therefore, since maintenance and cure is a general maritime law remedy, punitive damages can be awarded for a willful and wanton denial of those benefits.

It did not take long for that reasoning by the U.S. Supreme Court to make the "light bulb go off" in the heads of seamen's attorneys in the U.S. The Supreme Court had ***not*** said that punitive damages are available ***only*** in connection with maintenance and cure claims, the Supreme Court had said that punitive damages are available under the general maritime law. The seaman's remedy of vessel unseaworthiness is a remedy under the general maritime law. Most seamen's lawsuits in the U.S. allege a claim of unseaworthiness, as well as a negligence claim under the statutory Jones Act. As a result, *Atlantic Sounding* opened the door for seamen to seek punitive damages in connection with unseaworthiness claims. Seamen's lawyers have rushed through that door.

A claim of vessel unseaworthiness requires a finding that the vessel, or its appurtenances or appliances are not fit for their intended use. This is to be distinguished from a claim under the Jones Act, which requires a finding that the employer was negligent – that is, that the employer breached a duty of reasonable care that it owed to the seaman, resulting in his injury. A finding of unseaworthiness, on the other hand, requires no finding of fault on the part of the vessel owner. The vessel owner can be liable for an unseaworthy condition which arose just seconds before the seaman encountered it. Liability for unseaworthiness can attach even if the vessel owner had no knowledge, notice or opportunity to cure the defect.

An award of punitive damages, however, requires a finding that the vessel owner willfully or recklessly performed some act or omission that he knew or should have known would likely result in injury to the seaman. Therefore, the "no fault" aspect of an unseaworthiness claim is not relevant to a punitive damages claim based upon unseaworthiness. For punitive damages to be awarded, the seaman should have to prove that the vessel owner intentionally or recklessly created a dangerous condition on the vessel, or had knowledge of the condition and willfully failed to remedy the condition, knowing it would likely lead to an injury.

This would seem to be a very difficult claim to prove and, frankly, I cannot imagine that in the real world there are too many, or any, vessel owners who intentionally try to injure their seamen employees. But that has not stopped plaintiffs' attorneys in the U.S., since *Atlantic Sounding*, from claiming in most new suits that the vessel owner intentionally or recklessly created or failed to remedy an unseaworthy condition on the vessel. The federal trial courts were the first line of courts where the plaintiffs' attorneys began asserting punitive damages in connection with unseaworthiness claims and the majority of the federal trial courts held that *Atlantic Sounding*

allowed such claims. There was some hope from the defense side that the next level up – the federal appellate courts - would rule that *Atlantic Sounding* was limited to maintenance and cure claims. But that was significantly diminished in October of 2013, when the federal Fifth Circuit Court of Appeals ruled in *McBride v. Estis Well Serv., LLC*, 731 F.3d 505 (5th Cir. 2013) that punitive damages are available in connection with an unseaworthiness claim. The Fifth Circuit, which encompasses the states of Texas, Louisiana and Mississippi, is considered by many to be the leading maritime law circuit court of appeals in the federal court system in the U.S.

But in February of this year, the Fifth Circuit agreed to rehear the *McBride* case *en banc*, meaning that all of the judges in the Fifth Circuit will participate in a review of the case. The initial decision in 2013, like most appellate court decisions, was made by just three members of the Court to whom the case had been assigned. The *en banc* rehearing took place on 24 May 2014 and, by the time of the International Maritime Law Seminar on 16 October 2014, the Fifth Circuit may have issued its *en banc* opinion. As of the writing of this paper in early September 2014, no opinion has been issued.

The *en banc* review means that the Fifth Circuit considers this issue to be of enough importance that all of the judges of that Court should put their minds to the task and it also means that the Fifth Circuit may reverse the initial decision and hold that punitive damages are not available in connection with an unseaworthiness claim. If the Fifth Circuit holds that punitive damages are not available in connection with an unseaworthiness claim, its holding will likely be related to the Jones Act.

The Jones Act, which gives seamen a right to sue their employer for negligence, was created by the U.S. Congress. Since most seamen's suits include both a claim under the Jones Act and a claim of vessel unseaworthiness, if punitive damages are recoverable in connection with an unseaworthiness claim, it is irrelevant whether punitive damages are or are not recoverable in connection with a Jones Act negligence claim. However, since *Atlantic Sounding*, a number of seamen's personal injury lawyers have tried to obtain an award of punitive damages in connection with a Jones Act negligence claim. This has happened most commonly when a seaman has been injured in the course and scope of his employment, but away from the vessel, where no allegedly unseaworthy condition is involved.

In those cases, the federal district courts have repeatedly and consistently held that punitive damages are not available under the Jones Act, unlike what the federal district courts have said about unseaworthiness claims. The courts have ruled that punitive damages are not available in connection with a Jones Act negligence claim based upon the 1990 U.S. Supreme Court ruling in *Miles v. Apex Marine Corp*., 498 U.S. 19 (1990). Virtually every federal court has read *Miles* to mean that Congress specifically did not include recovery of punitive damages when it passed the Jones Act into law, so courts cannot add an element that was intentionally excluded by Congress.

If the Fifth Circuit rules *en banc* in the *McBride* case that punitive damages are not available in connection with an unseaworthiness claim, it will likely base that ruling on the following reasoning: to allow punitive damages in connection with an unseaworthiness claim will effectively render *Miles* meaningless and it will also effectively trump, and render meaningless, Congress's intentional failure to include punitive damages as an element of recovery available under the Jones Act.

Having said that, we believe that it is more likely than not that the Fifth Circuit's *en banc* rehearing will result in that Court affirming the initial ruling and allowing punitive damages claims in connection with unseaworthiness claims. As noted, these predictions may be rendered meaningless by a ruling from the Fifth Circuit, prior to the time of the Seminar.

Notwithstanding such ruling, the trend towards more punitive damages claims in U.S. seamen's personal injury cases is very clear. The plaintiffs' attorneys see such claims, even where the facts do not remotely justify punitive damages as: (1) increasing the settlement value of injury claims and; (2) driving a wedge between the vessel owner and his insurer or club. A vessel owner in the U.S. is generally not insured against an award of punitive damages. When a vessel owner is faced with the threat of an award of uninsured punitive damages, he is often less enthusiastic about fighting the claim and more interested in seeing his insurer or club pay whatever amount is necessary to settle the case and remove the punitive damages threat.

With the *Atlantic Sounding* ruling, it appears that the U.S. Supreme Court thought it was just issuing a decision about maintenance and cure, but the bigger impact has been to expand the damages available to injured seamen in connection with unseaworthiness claims. The result is going to be bigger settlements, higher premiums and more stress on vessel owners operating in the United States. We hope that the majority on the Supreme Court did not intend those consequences and, if a case concerning the recoverability of punitive damages in connection with an unseaworthiness or a Jones Act claim makes its way to the Supreme Court, they will clarify that the *Atlantic Sounding* ruling should be limited to maintenance and cure claims.

For your reference, here is a survey of post-*Atlantic Sounding* federal district and appellate court decisions ruling upon the recoverability of punitive damages in connection with unseaworthiness or Jones Act negligence claims.

Effect of *Atlantic Sounding* on Unseaworthiness Claims

McBride v. Estis Well Serv., LLC, 731 F.3d 505 (5th Cir. 2013), the Fifth Circuit ruled that because the cause of action of unseaworthiness pre-dated the Jones Act, punitive damages could be awarded under a claim for unseaworthiness. As a result, district courts in the 5th Circuit now

are bound to follow suit, and punitive damages are being allowed in all district courts for claims of unseaworthiness.

Wagner v. Kona Blue Water Farms, LLC, 2010 U.S. Dist. LEXIS 96105 (D. Haw. Sept. 13, 2010) held that under *Atlantic Sounding* punitive damages are available as a remedy for a claim for unseaworthiness because unseaworthiness is a general maritime law cause of action that existed pre-Jones Act.

Rowe v. Hornblower Fleet, 2012 U.S. Dist. LEXIS 164402 (N.D. Cal. 2012) court applied *Atlantic Sounding* test and held that punitive damages are indeed available for a claim for unseaworthiness because unseaworthiness is a general maritime law cause of action.

In re Osago Marine Servs., 2012 U.S. Dist. LEXIS 28483 (E.D. Mo. 2012) applied *Atlantic Sounding* and held that punitive damages are available for claims of unseaworthiness because cause of action and remedy existed pre-Jones Act.

Wolf v. McCulley Marine Servs., 2012 U.S. Dist. LEXIS 132107 (M.D. Fla. 2012) held that under *Atlantic Sounding* punitive damages are available in an unseaworthiness action when the plaintiff can prove "wanton, willful or outrageous conduct."

Ainsworth v. Caillou Island Towing Co., 2013 U.S. Dist. LEXIS 162323 (E.D. La. Nov. 13, 2013) held that punitive damages are available for the general maritime law claim of unseaworthiness where there is a finding of willful and wanton conduct by the shipowner in the creation of the unseaworthy condition.

Maddux v. United States, 2010 U.S. Dist. LEXIS 132466 (S.D. Ohio Dec. 15, 2010) Court declined to rule on availability of punitive damages for claim for unseaworthiness on motion to dismiss.

Snyder v. L&M Botruc Rental, Inc., 2013 AMC 1491 (E.D. La. 2013) held that because the Supreme Court held that *Miles* was still good law, the Jones Act restricted the availability of punitive damages for an unseaworthiness claim for seamen.

Bloodsaw v. Diamond Offshore Mgmt. Co., 2013 U.S. Dist. LEXIS 117061 (E.D. La. Aug. 19 2013) the court refused to give a punitive damages instruction for an unseaworthiness claim because in *Atlantic Sounding* the Supreme Court stated that "[t]he reasoning of *Miles* remains sound.

Todd v. Canal Barge Co., 2013 U.S. Dist. LEXIS 137702 (E.D. La. Sept. 25, 2013) court dismissed claim for punitive damages under unseaworthiness cause of action because *Atlantic Sounding* was limited to quasi-contract claim for maintenance and cure and was not applicable to tort claims of negligence and unseaworthiness, which are dealt with by Jones Act.

Stowe v. Moran Towing Corp., 2014 U.S. Dist. LEXIS 7782 (E.D. La. Jan 22, 2014) holding that under *McBride*, punitive damages are available as a remedy to seamen under the general maritime law claim of unseaworthiness.

Effect of *Atlantic Sounding* on Jones Act Negligence Claims

In *Atlantic Sounding* the Supreme Court stated that *Miles v. Apex Marine Corp*., 498 U.S. 19 (1990) remains good law. *Miles* held that punitive damages were not permitted under the Jones Act. As a result, district courts evaluating punitive damages requests based on negligence or gross negligence under the Jones Act have uniformly denied such requests and ruled that punitive damages are not available for an employer's negligence or gross negligence.

Wilson v. Noble Drilling Corp., 2009 U.S. Dist. LEXIS 124302 (E.D. La. Aug. 12, 2009) the court evaluated the plaintiff's motion for leave to amend his complaint to add a request for punitive damages on the issue of willful failure to pay maintenance and cure on willful conduct causing him personal injury. The court ruled that under *Atlantic Sounding*, amendment to allow the request for punitive damages for willful failure to pay M&C was allowed, but the court denied the request as to the plaintiff's personal injury. The court held that *Atlantic Sounding* did not reach that far, and under *Miles*, punitive damages were not allowed for negligence actions.

Frawley v. Exxon Mobil Corp., 2010 U.S. Dist. LEXIS 129604 (E.D. Pa. Oct. 5, 2010) court denied (without prejudice) defendant's motion to dismiss punitive damages request under Jones Act.

In *Scott v. Cenac Towing Co., LLC*, 2013 U.S. Dist. LEXIS 135992 (E.D. La. Sept. 24, 2012) the court granted motion for summary judgment as to plaintiff's claim for punitive damages under the Jones Act because *Atlantic Sounding* did not affect *Miles'* holding concerning the limitation on damages under Jones Act.

In *Hackensmith v. Port City S.S. Holding Co.*, 938 F.Supp. 2d 824 (E.D. Wis. 2013) the court denied plaintiff's motion to amend complaint to add request for punitive damages to Jones Act negligence claim because punitive damages are not available under the Jones Act.

Snyder v. L&M Botruc Rental, Inc., 2013 AMC 1491 (E.D. La. 2013) ruled that seaman cannot circumvent the bar on punitive damages under the Jones Act by couching a claim for punitive damages as being for general maritime law of negligence or gross negligence

Todd v. Canal Barge Co., 2013 U.S. Dist. LEXIS 137702 (E.D. La. Sept. 25, 2013) ruled that a claim for gross negligence was encompassed in a Jones Act claim, and therefore punitive damages were not available to seaman alleging gross negligence any more than they would be for seaman alleging regular negligence under Jones Act.