



42nd ANNUAL
RIVER AND MARINE INDUSTRY SEMINAR

GNOBFA

**"SERVING THE MARINE INDUSTRY
FOR DECADES"**

April 22-24, 2026

*InterContinental New Orleans
New Orleans, Louisiana*





2026
RIVER AND MARINE
INDUSTRY SEMINAR

April 22 - 24, 2026
InterContinental Hotel
New Orleans, Louisiana

GNOBFA
"SERVING THE MARINE INDUSTRY FOR DECADES"

GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

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ACKNOWLEDGMENTS

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- ◆ Our thanks also to the members of the Seminar Committee, whose year-round efforts make this Seminar a professional presentation, as well as to their employers, who allow the Committee members to donate countless hours to benefit the Association:

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Seminar Co-Director
The COOPER GROUP of
Companies

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Ginger Grantham, GNOBFA
Kathy Savoie, GNOBFA

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AS OF FEBRUARY 1, 2026

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American River Transportation Co.

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American Waterways Operators (H)

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Blessey Marine Services, Inc.

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Board of Commissioners

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C & M Marine Ventures

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Office: 264 West 8th Street
Phone: 504/416-4695

Canal Barge Co.

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New Orleans, LA 70112
Phone: 504-581-2424

Cargo Carriers

2154 Highway 44
Reserve, LA 70084
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Carline Management Company, Inc.

P. O. Box 1360
Gonzales, LA 70707
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Celtic Marine Corp. (A)

3888 S. Sherwood Boulevard
Baton Rouge, LA 70816
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Chem Carriers, LLC

1237 Highway 75
Sunshine, LA 70780
Phone: 225-642-0060

CHS, Inc.

434 Ravenna Road
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Cooper Consolidated, LLC

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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
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AS OF FEBRUARY 1, 2026

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DMC Towing LLC

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Durward Dunn, Inc.

110 Veterans Boulevard, Suite 540
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Phone: 504-242-1976

EMR Southern Recycling Co.

3636 South I-10 Service Road West
Ste 101
Metairie, LA. 70001
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GNOTS Reserve, Inc.

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Harbor Towing & Fleeting, Inc.

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Host Terminals United Bulk Davant, LLC

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Independent Diving Services (A)

100 Herman Drive
Belle Chasse, Louisiana 70037
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Ingram Marine Group

Port Allen Fleet
3035 South River Road
Port Allen, LA 70767
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Ingram Marine Group

Triangle Fleet Custom Fuel Services
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International Marine Terminals

18559 Highway 23
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Associate (A)

Honorary (H)

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2026 MEMBERSHIP LISTING
AS OF FEBRUARY 1, 2026

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New Orleans, LA 70170
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J.P & Sons Services LLC

8233 River Rd
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L & L Marine Transportation, Inc.

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L & O Marine, Inc.

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Metairie, LA 70011
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LA Carriers, Inc.

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Consulting Engineers, Inc. (A)
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LeBeouf Bros Towing, LLC

P. O. Box 9036
Houma, LA 70361
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Louisiana Towing, Inc.

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Baton Rouge, LA 70810
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M&P Barge Co. Inc.

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2026 MEMBERSHIP LISTING
AS OF FEBRUARY 1, 2026

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Mouledoux, Bland, Legrand & Brackett

4250 One Shell Square
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New Orleans, LA 70139
Phone: 504-595-3000

National Maintenance & Repair, Inc.

5004 River Road
Harahan, LA 70123
Phone: 504-733-4190

Parker Towing Company, Inc.

P. O. Box 20908
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Southern Devall

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Plaquemine, LA 70764
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St. John Fleeting & Towing

P. O. Box 96
Garyville, LA 70051
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St. Paul Barge Line, Inc.

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Metairie, LA 70006
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Strategic Towing Services, LLC (A)

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AS OF FEBRUARY 1, 2026

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Marrero, LA 70072
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Turn Services, Inc.

3333 Chartres Street
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8th District (H)

501 Magazine Street, Room 1328
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2400 Veterans Memorial Boulevard
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Waterways Journal (H)

8820 Ladue Road, Suite 301
St. Louis, MO 63102
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Wood Towing Company

5821 River Road
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Zen-Noh Grain Corporation

8886 Highway 44
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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

2026 BOARD OF DIRECTORS

DIRECTORS

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SOUTHERN REGION:

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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

2026 BOARD OF GOVERNORS

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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION

PAST PRESIDENTS

1997 — present	Karl C. Gonzales
1996	James Fox Karl C. Gonzales
1993 — 1995	Cherrie Felder
1992	Richard Cottingham
1991	Alan Savoie
1990	Richard Paquette
1989	John Cagnolatti
1988	Jerry Clower
1987	Richard McCreary
1986	Steven Talbot
1985	Richard Paquette
1984	W. Scott Noble
1982	Gregory Derbes
1981	Bob O'Neil
1980	Alan Savoie
1979	Jeff Kindl
1978	Curt Anderson
1977	Gene Dalton
1976	Joe Hines



WEDNESDAY AGENDA

WEDNESDAY, APRIL 22, 2026

7:15 – 8:30 REGISTRATION
8:30 – 9:00 OPENING REMARKS

PRESIDENT OF GNOBFA

Karl C. Gonzales
Cooper-Marine
LaPlace, LA

SEMINAR CO-DIRECTORS

Alan J. Savoie
The Cooper Group of Companies
Hahnville, LA

Thomas G. Grantham
Ingram Barge Company
Port Allen, LA

SEMINAR MODERATOR

Marc C. Hebert, Esq.
Jones Walker LLP, Partner
New Orleans, LA

MODERATOR EMERITUS

Maurice C. Hebert, Jr., Esq.
Maurice C. Hebert, Jr., LLC
River Ridge, LA

KEYNOTE SPEAKERS

RADM Will Watson
District Commander
USCG 8th Coast Guard District
New Orleans, LA

Andrew Kilson
OMC Commander
New Orleans, LA

9:00 – 10:30 MARITIME LAW UPDATE

What current case law do you need to be aware of from the East Coast, Gulf Coast and West Coast that impacts your:

- litigation strategy
- day to day operations
- insurance coverage
- maintenance and cure decisions

Moderator:
Marc C. Hebert, Esq.

Panel Members:

Raymond Waid
Liskow and Lewis
Defense Attorney, Gulf Coast

Samuel Blatchley
Eckland & Blando
Defense Attorney, Northeast

Donald K. McLean
Bauer Moynihan & Johnson LLP
Defense Attorney, West Coast

10:30 – 10:45 BREAK

10:45 – 12:15 MAINTENANCE AND CURE 101, A GUIDE TO AN EMPLOYERS VERSUS SEAMAN'S RIGHTS AND OBLIGATIONS: HERE IT IS!

- What investigation am I, as the Employer, entitled to undertake before paying any Maintenance and Cure?
- If an Adjuster is involved, does the Employer or Insurer allow an Adjuster to “Call the Shots” on whether or not to pay Maintenance and Cure?
- How does the Employer handle the decision of Maintenance and Cure versus LSHW Compensation or even state Workman’s Compensation?
- What if a wrong decision is made? How is it rectified since there would be two (2) or more different insurers involved?
- If Maintenance is owed, how does the Employer calculate the amount and items to pay? Can Maintenance ever be suspended by the Employer?
- Who makes the “big decision” to pay or not to pay any Maintenance and Cure if the requirement for payment is really questionable?
- When should the Employer pay an injured Seaman either “Reduced Wages”, a “Partial Salary” or “Advance on Settlement” whatever you wish to call it? If so, does the Employer –
 - need the insurers approval for reimbursement?
 - withhold taxes?
 - give separate checks for Maintenance?
 - receive a credit from the Claimant if there is a Settlement with or Judgment against the Employer?
- Who selects the doctors for an IME versus daily care of an injured seaman?
- Who has control if any, of IME’s? Cost of Medical expenses? What if cost is not reasonable, can it be disputed and if so how? Maximum Medical Improvement (MMI) – means what? Is it different from MMC?
- Let’s explain “Palliative” and “Curative” regarding payment of Maintenance and providing Cure? When and how does it end?

- And of course, there is “Punitive Damage” exposure! How does exposure to Punitive Damages arise, and how are they avoided?
- Where do insurers stand on the issue of “Punitive Damage” and what are the coverage issues?

Moderator:

Marc C Hebert, Esq.

Panel Members:

Karen Shields

Kean Miller

Defense Attorney

Kristi A. Post, Esq.

Blake Jones Law Firm LLC

Plaintiff Attorney

12:15 – 1:30 LUNCH

1:30 – 3:30 **THE DOCTOR’S PANEL: WHAT ARE THE “TRICKS OF THE TRADE” THAT ARE USED IN THE INDEPENDENT MEDICAL EXAMINATION (IME), THE PROBLEMS CREATED BY THE COMPANY DOCTOR, AND WHY USE A NEUROSURGEON?**

- How do doctors view pre and post offer physical questionnaires, and what do they recommend for protecting the employer? What is the importance of and the “credibility” created by the “Post Offer Employment Questionnaire”?
- When the doctor’s nurse offers a patient by way of an electronic machine pertaining to authorization to the doctor and says “Sign Here” (often several times – is never read or only scantily explained to the Patient what it is – is that considered accepted by the Patient simply by him or her checking the box?
- Why do I want an “Occmed” doctor for my company, and what type of physical should he or she conduct prior to the seaman reporting for work?
- Does insurance cover any of these costs? If so, which insurer provides the coverage?
- What is the difference between a neurologist and orthopedist, and why might I prefer using a “neuro” as opposed to an ortho for a neck or back injury? Who should make that decision, the employer or insurer? When might it be necessary that I use both or go from one to the other?
- What type of “test” does the neuro or ortho conduct to establish whether the seaman is

injured and the injury belongs in the neuro or ortho field?

- What does with a “degree of medical certainty” mean to you and how will you respond to a question posed to you on that phrase in a deposition or legal proceeding?
- Is there a difference in “fit for duty” and “return to work”, and what is meant by “maximum medical improvement/cure” and how does a doctor make that determination? What happens if the IME doctor makes that determination but the treating doctor does not? What happens next?
- How do doctors that conduct an IME versus acting as a treating physician establish credibility for making a determination of MMC? How are IME doctors opinions viewed in this regard – from one doctor to the other? And thus what does an IME doctor in order to establish credibility for a decision of MMC?
- What rates will the insurance company pay for an IME? How is that determined?
- In the end can the Employer be legally liable for the negligence of the company’s doctor or the Claimant’s doctor? Is there insurance coverage for this type of claim?

Moderator:

Marc C Hebert, Esq.

Panel Members:

Brian Bourgeois, M.D.

Occupational Medicine

Jefferson, LA

Najeeb Thomas, M.D.

Neurosurgeon

Southern Brain and Spine

New Orleans, LA

Lauren Rasmussen, PsyD, ABN

Neuropsychologist

Baton Rouge, LA

3:30 – 3:45 BREAK

3:45 – 5:00 **A PRACTICAL UPDATE ON CHANGES IN UNITED STATES COAST GUARD REGULATIONS AND POLICY THAT IMPACT LEGAL LIABILITY AND OPERATIONAL COMPLIANCE FOR VESSEL OWNERS**

- What recent changes in USCG policy impacts vessel compliance in operations, changes in

liability, and modifications of insurance coverage.

- What are the new Cybersecurity regulations and how the USCG will apply and enforce the regulations? What impact will they have on Vessel Security Plans (FSP), Facility Security Plans (FSP), and the Towing Safety Management System (TSMS)?
- What changes may vessel owners and operators expect from The Coast Guard Reauthorization Act of 2026 and what legal impact will those changes have on brown water operations.
- How these new policies and regulations will impact marine legal liability and insurance coverage?

Moderator:

Marc C Hebert

Panel Members:

RDML Richard V. Timme (Retd.)

USCG

Washington, DC

CDR Judson Wheeler

First Coast Guard District Chief of Prevention

Boston, MA

5:00 – 6:30 NETWORKING RECEPTION

WEDNESDAY SPEAKERS

KARL C. GONZALES is President of the Greater New Orleans Barge Fleeting Association, Inc. and Vice President of Operations for Cooper-Marine, a division of the COOPER GROUP of companies. Prior, Mr. Gonzales served as clerk to the Honorable Douglas A. Allen and the Honorable James M. Lockhart, Jr., Judges of the First Parish Court for the Parish of Jefferson, Louisiana. In 1981, Mr. Gonzales was hired as Vice President and thereafter elected as President of RLB Boat Company, Inc. and Mid-Gulf Transportation Company, Inc. both of Harvey, Louisiana. From November 1985 until August 2017, Mr. Gonzales was Vice President –Operations and later became Executive Vice President of Gulf South Marine Transportation, Inc., a local marine towing company, and also held those same positions with Gulf South Marine Brokers, Inc., a local marine brokerage company. Mr. Gonzales currently serves (appointed) on several maritime related committees, including the United States Coast Guard-Lower Mississippi River Waterway Safety Advisory Committee (LMRWSAC), United States Coast Guard-Sector New Orleans- Area Maritime Security Executive Committee (AMSC), and as a member of the United States Coast Guard-Sector New Orleans Port Coordination Team (PCT). He is a former Vice President of The Mariner’s Club of the Port of New Orleans and is active in several other marine-related and charitable organizations.

ALAN J. SAVOIE, Seminar Co-Director and past president of the Greater New Orleans Barge Fleeting Association, is a consultant for the Cooper Group of Companies. He has served in many capacities in the marine industry since 1977. Mr. Savoie is formerly co-owner of Marine Centre, Inc., Kathryn Rae Towing, Inc. and LSK Towing, Inc., all local towing companies. Mr. Savoie has served in numerous GNOBFA capacities over the years.

THOMAS G. GRANTHAM is Vice President of the Greater New Orleans Barge Fleeting Association, Seminar Co-Director, and Continuing Education Coordinator. Prior to joining the marine industry in 1990, he served six years in the United States Navy Nuclear Power Program. Employed by Capital Fleet in 1990, he served as vice president of Capital Fleet until the company was acquired by Ingram Barge in 2008. Mr. Grantham is now a manager of vessel engineering for Ingram vessels in the Gulf area. He is a licensed vessel operator and holds a tankerman endorsement issued by USCG. He is a member of East Baton Rouge Local Emergency Planning Committee, American Legion and Veterans of Foreign War organizations. Mr. Grantham has served on various GNOBFA committees and in different capacities since 1999.

MAURICE C. HEBERT, JR., ESQ., Seminar Moderator Emeritus, formerly an attorney with Liskow & Lewis, APLC, retired in 2004, but maintains his license to practice law and engage in special projects, mediation, and arbitration. He graduated from LSU in 1959 with a degree in Electrical Engineering. He is a professional and registered Electrical and Environmental Engineer, (Retired) in the State of Louisiana. He graduated from Loyola University School of Law in 1966. He served as a law clerk to U.S. District Judge Richard Putnam. Mr. Hebert is admitted to numerous state and federal courts, including the U.S. Supreme Court. Mr. Hebert has served on numerous marine educational boards for both industry and educational institutions. He is a member of the GNOBFA Advisory Board and was a member of the Board of Directors of the Louisiana Association of Waterways Operators and Shipyards (L.A.W.S.). He has been

WEDNESDAY SPEAKERS

a speaker at numerous maritime and law related seminars, is the Co-Founder of the River and Marine Industry Seminar and has served as moderator of all of the prior River and Marine Industry Seminars.

MARC C. HEBERT, ESQ., Seminar Moderator, is a senior partner with Jones Walker and practices with the Maritime, Corporate, Litigation, and Government Relations groups. He is a member of the GNOBFA Seminar Committee, Greater New Orleans Port Safety Council Chairman 2011, 2016 to 2019 and currently serves as Chair Ex-Officio, serves on the Southern Yacht Club Junior Sailing Activities Committee, serves as Legal Counsel to the Mississippi Valley Trade & Transport Council (Board Member and Vice Chair 2006 to September 2016), and is certified/trained in Marine Incident Investigation and Root Cause Analysis (SafeMARINER, LLC). From 1995 to 2002, he worked for the U.S. House of Representatives Government Reform and Oversight Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs and was appointed in 2019 by U.S. Secretary of Commerce Wilbur Ross to serve on the Louisiana District Export Council. He also served as an Adjunct Professor at the Loyola University New Orleans College of Law from 2002-2005. Mr. Hebert graduated from Tulane University in 1991 with a B.A. in Economics, received his J.D. from Loyola University School of Law in New Orleans in 1994, and earned his LL.M. in Environmental Law from The National Law Center, George Washington University in Washington, D.C. in 1996. He is admitted to practice in Louisiana and Virginia, the District of Columbia, Federal Court in the Southern District of Texas, and before the U.S. Court of International Trade.

REAR ADMIRAL WILLE E. WATSON serves as the Director of Governmental and Public Affairs for the U.S. Coast Guard, where he is responsible for external engagement with Congress, the media and other inter-governmental entities. In his previous assignment, he served as Executive Assistant to the Vice Commandant, providing support and counsel on all matters pertaining to the administration of the Coast Guard.

Admiral Watson's operational tours include serving as Commander, Sector New Orleans where he directed all Coast Guard missions in an area of responsibility that includes the Louisiana Gulf Coast and the Mississippi River System from Baton Rouge to the Gulf of Mexico - among the largest, and most complex coastal and port areas in the United States. Of note, during this tour of duty, he served as Incident Commander for Hurricane Ida Response and Recovery Operations following the catastrophic impacts of one of the most powerful hurricanes to ever make landfall on the U.S. mainland. Admiral Watson also served as Commanding Officer at Marine Safety Unit Lake Charles, Louisiana, from 2012 to 2015 and as Executive Officer at Marine Safety Unit Texas City, Texas from 2010 to 2012. From 2005 to 2007, he served as Executive Officer at Marine Safety Unit Cleveland, Ohio. During this tour of duty, in 2005, he deployed to Joint Field Office Baton Rouge in support of Hurricanes Katrina and Rita Response and Recovery Operations.

Admiral Watson's staff assignments include serving as Senior Military Assistant to the Secretary of Homeland Security from 2015 to 2017, and as Congressional Affairs Liaison from 2007 to 2010.

Admiral Watson holds a Master of Science in National Security Strategy from the National War College in Washington, D.C., a Master of Business Administration from Loyola University, New

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Orleans, Louisiana, as well as a Master of Arts in Education and a Bachelor of Science in Biology from Xavier University in New Orleans, Louisiana. Admiral Watson is a 2016-2017 Fellow of the Massachusetts Institute of Technology Seminar XXI on Foreign Politics, International Relations and the National Interest.

Admiral Watson's military awards include the Legion of Merit, the Meritorious Service Medal, the Coast Guard Commendation Medal, the Coast Guard Achievement Medal, the Military Outstanding Volunteer Service Medal, the Armed Forces Service Medal and various service and unit awards.

ANDREW KILSHAW is a lifelong resident of Baton Rouge that brings extensive experience in public policy, infrastructure, and economic development at the local, state and congressional levels. He succeeds DOTD Deputy Secretary Julia Fisher-Cormier, who previously served as OMC commissioner. His multimodal experience includes managing operations for the Louisiana Ports and Waterways Investment Commission, where he helped broker the first unified marketing strategy for the state's five lower Mississippi River ports. Kilshaw also helped shape passenger and freight rail policy as a member of the Southern Rail Commission. Kilshaw comes to DOTD from the Office of Governor Jeff Landry, where he advised on infrastructure and healthcare issues.

SAMUEL P. BLATCHLEY (Sam) is a partner at Eckland & Blando. Sam, a longstanding member of the New England maritime bar and Proctor in Admiralty, represents clients in litigation and transactional matters with a focus on admiralty and maritime, insurance, fisheries, and environmental law.

He represents vessel owners and operators, insurers, charterers, construction and dredging firms, bunker suppliers, freight forwarders, inland carriers, lenders, marina operators, marine surveyors, marine trades providers, fishing associations, stevedores, and terminal operators in maritime litigation, as well as in marine-related commercial and corporate transactions. He serves as outside general counsel to a marine insurer covering, Hull & Machinery and Protection & Indemnity risks.

Sam's practice covers an array of maritime disputes, including maritime collisions and casualties, charter party and marine services agreements, personal injury and death claims, Admiralty Rules B, C, and D actions, insurance coverage disputes, fisheries disputes and Administrative Procedure Act claims, Endangered Species Act claims, and Marine Mammal Protection Act claims.

Sam also handles maritime financing, purchase and charter, documentation, and registration matters in connection with both commercial vessels and private yachts. Prior to joining Eckland & Blando, Sam was a partner and Chair of the Admiralty and Maritime Group at a leading New England law firm and worked for an admiralty boutique firm.

Sam received his J.D. and Maritime Law Certificate from Tulane University Law School, where he was the Notes and Comments Editor of the Tulane Maritime Law Journal and received a CALI Award in marine insurance. Before law school, Sam graduated from the University of Wisconsin at Madison with a Bachelor of Arts in History, with honors, and Political Science, with distinction. While at the University of Wisconsin, Sam was inducted into Phi Beta Kappa.

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Sam is admitted to practice in Massachusetts, Maine, New York, and Rhode Island. He is also admitted to the U.S. Court of Appeals for the First Circuit and D.C. Circuit, and the U.S. District Courts for the Districts of Connecticut, Rhode Island, District of Columbia, Eastern District of New York, Eastern District of Michigan, Western District of Michigan, Western District of Wisconsin, and Vermont. Sam was a member of the Ad-Hoc Subcommittee for the District of Rhode Island Local Rules Review Committee, which drafted the Local Admiralty Rules for the District of Rhode Island, effective as of January 15, 2013. Sam is designated as a Proctor in Admiralty by the Maritime Law Association of the United States, served as the Chairman of the Association's Practice and Procedure Committee, and currently serves as a member of its Board of Directors. He has been designated as a Massachusetts Super Lawyers Rising Star, Transportation and Maritime Law from 2013-2022, a Massachusetts Super Lawyer, Transportation and Maritime Law for 2023, and as one of the 2024 Best Lawyers in America® for Admiralty and Maritime Law.

BRIAN BOURGEOIS, M.D. is a graduate of the LSU School of Medicine. He was trained at LSU's Department of Surgery and is board certified General Surgeon. He has practiced general surgery and occupational / industrial medicine on the Westbank of New Orleans and Jefferson since 1999. Dr. Bourgeois is a board member of the Jefferson Parish Medical Society and the Louisiana State Medical Society. He is a licensed medical review officer (MRO) and a Fellow of the American College of Surgeons. He is also one of very few doctors in the state certified in the management of dive-related injuries and diver physicals. He is member of the ADCI Committee that created the current code of medical standards for divers. Dr. Bourgeois also actively trains and educates offshore medics and dive medical technicians.

DONALD K. MCLEAN is an attorney at Bauer Moynihan & Johnson LLP in Seattle, Washington. During college, Don worked for a marine surveyor helping to produce condition and valuation and damage surveys for tugs, barges and fishing vessels. He subsequently attended Tulane Law School where he graduated cum laude and completed the Maritime Law Certificate program. Don joined the Bauer Moynihan & Johnson in 1994. He is admitted to practice in both Washington and Alaska and has tried cases in various venues in both locations. He has appeared before the Alaska Supreme Court, the Court of Appeals for the State of Washington and the Ninth Circuit Court of Appeals. Don has litigated cases involving charter parties, marine construction, bodily injury and insurance coverage. Don also provides general business advice to marine-based companies on such issues as vessel preference laws, charter parties, repair and construction agreements, use agreements, contract disputes and insurance coverage issues.

KRISTI A. POST, ESQ. is an attorney with Blake Jones Law Firm, L.L.C. in New Orleans, Louisiana. Her practice is primarily comprised of cases involving serious maritime injuries and fatalities, auto and commercial vehicular accidents, traumatic brain injuries, premises liability and Longshore and Harbor Workers Compensation Act cases in numerous state and federal courts as well as administrative agencies. Ms. Post has over 35 years of trial experience and has successfully litigated cases involving such diverse areas as the kidnapping of offshore workers by militant forces in Nigeria, casino gaming vessels, Hurricane Katrina insurance litigation, crane failures, aviation accidents, commercial diving accidents and one case involving a derrick barge capsizing and the dramatic rescue of its divers during a hurricane off the Yucatan Peninsula which became

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the subject of the novel *All the Men in the Sea*. She was also recently appointed as a member of the Claimants' Executive Committee in the SEACOR POWER liftboat case. Kristi is an Associate Professor of Trial Advocacy at Tulane Law School and is one of only 25 attorneys in the State of Louisiana board certified in civil trial law by the National Board of Trial Advocacy. She received her J.D. and LL.M. in Admiralty from Tulane Law School and is a member of the State Bar of Texas and the Louisiana State Bar Association.

DR. LAUREN WOODRUFF RASMUSSEN, PSYD, ABN is a board-certified clinical neuropsychologist who specializes in diagnosis and treatment planning of neurological diseases and disorders and health-related conditions.

Dr. Rasmussen has served as an expert in many cases involving traumatic brain injury, competency, posttraumatic stress disorder, and other psychological conditions as part of a claim involved in litigation. Dr. Rasmussen also specializes in workers' compensation claims and often provides second medical opinions on injuries/damages in question. She has a special interest in fitness for duty evaluations for individuals looking to return to work or whose capacity to complete their workplace duties are being questioned.

From a clinical perspective, Dr. Rasmussen frequently evaluates patients who are concerned about their memory or who have been diagnosed with progressive neurocognitive conditions. She also assesses for Attention-Deficit/Hyperactivity Disorder (ADHD), learning disabilities in adults (and for accommodations needed on standardized testing or in the classroom), and psychiatric conditions.

Dr. Rasmussen often works with bariatric surgery candidates and patients who need presurgical clearance for major spinal surgeries and implantable devices such as spinal cord stimulators and intrathecal pain pumps.

Outside of the office environment, Dr. Rasmussen enjoys rigorous fitness endeavors, spending time with her family, and traveling. She is also involved in consultation work with several neurorehabilitation hospitals throughout the state of Louisiana and occasionally has the privilege to serve as an adjunct faculty member at LSU. She offers practicum training experiences for LSU graduate students specializing in neuropsychology.

RDML RICHARD V. TIMME (RETD.) has over three decades of expertise in maritime safety and security, regulatory policy, and operational leadership. His distinguished career includes key roles such as Commander of the Eighth Coast Guard District, where he oversaw operations spanning 26 states and critical waterways, including the U.S. Gulf of Mexico, and Assistant Commandant for Prevention Policy, where he directed programs in waterways management, mariner credentialing, and vessel inspections. Admiral Timme also served as the Coast Guard's Budget Director, advising on a \$12 billion budget and guiding national security policy.

KAREN WATERS SHIELDS is a partner at Kean Miller in New Orleans, LA. An experienced and skilled advocate in and out of state and federal court, Karen Waters Shields brings a deep bench of honed skills to litigating, arbitrating, defending, and prosecuting a wide variety of admiralty and oil and gas casualty, personal injury, and property damage claims, as well as contract and breach of

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contract claims. Admitted to practice before the U.S. Supreme Court, Karen has a proven history of successful outcomes in resolving high-stakes personal claims and disputes.

Karen advises on Jones Act claims, General Maritime Law claims, and claims involving onshore and offshore Gulf of Mexico oil and gas exploration. She has handled and resolved lawsuits involving crane accidents, diving incidents, drilling rigs, vessels, platform explosions, well blowouts, oil and gas reservoir damage, vessel collisions and allisions, pipeline damage, vessel damage, platform damage, and barge damage.

In addition to her extensive and formidable litigation and dispute resolution practice, Karen drafts, reviews, and – if necessary – litigates various maritime and oil and gas commercial contracts. She has successfully negotiated, documented, and litigated a wide array of contracts and breach of contract claims, including charter agreements, master service agreements, contracts of affreightment, demurrage claims, and royalty and operating agreements. Moreover, Karen advises on and brings considerable skill to handling matters involving construction law, including construction defects, as well as matters involving product liability, consumer credit reporting, gaming industry claims, and general workplace personal injury.

The ultimate collaborator, Karen thrives on helping clients and colleagues find novel solutions to serious problems. On attack or defense, in and out of court, in tactical negotiation, at trial, or on appeal, Karen is all about devising the right strategy so that her clients realize the most favorable outcomes imaginable. Her authenticity is often a major component in establishing trust with everyone around her. And authenticity is one of her superpowers. Karen connects with clients on a personal level to understand what they are looking for and their tolerance for risk. She delivers straightforward advice, and her authenticity and straight-talk nature result in the highest levels of collaboration and effectiveness.

A smart and practical advocate who believes every client and matter is unique, Karen delivers customized legal solutions and strategies that address and overcome even the grayest area legal problems and complex disputes. She thrives in making novel arguments grounded in sound legal theory, which has resulted in a plethora of important, reported cases during her decades of practice. Karen proves, repeatedly, her natural ability to engage with people – whether the court, opposing counsel, witnesses, deponents, or others. She is particularly effective when de-escalating acrimony because that is often essential to realizing her client’s best outcome.

DR. NAJEEB THOMAS, M.D. is a distinguished native of Louisiana, hailing from the vibrant city of New Orleans. He is a prominent neurosurgeon known for his exceptional skills and groundbreaking work in complex and minimally invasive spinal procedures. He is currently the managing partner at Southern Brain & Spine, as well as the Chief Medical Officer at Crescent City Surgical Centre.

His journey into Neurosurgery began at Louisiana State University Health Sciences Center, where he completed his residency program in Neurosurgery. During his formative years, he had the privilege of training at the renowned Charity Hospital in New Orleans, an institution celebrated for its contributions to medical education and patient care.

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Dr. Thomas completed his fellowship in complex and minimally invasive spinal techniques in Memphis, Tennessee, under the direction of Dr. Kevin T. Foley. This specialized training equipped him to handle intricate spinal cases with a minimally invasive approach, providing his patients with improved outcomes and quicker recoveries.

Throughout his career, Dr. Thomas has been a global ambassador for spinal procedures, sharing his knowledge and experience with fellow surgeons worldwide. He has been an honored speaker at numerous international conferences, presenting on the latest advancements and techniques in spinal surgery. His dedication to collaboration has fostered interactions with hundreds of surgeons across five continents.

As an innovator in the field, Dr. Thomas remains committed to staying at the forefront of medical progress. He is deeply involved in the continuous development of minimally invasive spine procedures, ensuring that his patients receive the most advanced and effective care available anywhere in the world.

Beyond his groundbreaking work in spinal surgery, Dr. Thomas also takes a keen interest in regenerative technologies for patients with spinal pathologies. His exploration of regenerative medicine holds promise for those seeking alternative and regenerative treatment options.

Notably, Dr. Thomas has served as both President and Secretary-Treasurer of the Louisiana Association of Neurological Surgeons, demonstrating his commitment to advancing the field and advocating for the highest standards of patient care.

RAYMOND WAID, ESQ. is a Shareholder at Liskow in New Orleans. He is a maritime lawyer and veteran-naval officer focused on helping companies in the marine and energy sector. Vessel owners, operators and others involved in the marine and energy sector rely on Ray's advice and aggressive advocacy. They turn to him because he has the unique experience of operating a vessel at sea combined with a successful and diverse practice devoted to admiralty and maritime law, including both litigation and contracts.

Ray's experience is vital in the high-pressure environment immediately after marine casualties, when companies need a lawyer to quickly identify the legal issues, know what questions to ask, and what actions to take in order to put companies in the best position. This same experience makes him a highly effective advocate in marine and energy cases involving personal injury, property damage, and economic loss. As a full-time maritime lawyer, he has successfully handled the gambit of cases, including collision, allision, cargo, pollution, salvage, and injury cases.

THE MARITIME LAW UPDATE

What current case law do you need to be aware of from the East Coast, Gulf Coast and West Coast that impacts your:

- litigation strategy
- day to day operations
- insurance coverage
- maintenance and cure decisions

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Raymond Waid

Liskow and Lewis

Defense Attorney, Gulf Coast

Seaman Arbitration

***Kozur v. F/V Atlantic Bounty, LLC*, No. 1:2018cv08750 (D.N.J. August 18, 2020)**

Plaintiff, a longtime commercial fisherman, filed suit asserting Jones Act negligence, unseaworthiness, and maintenance and cure claims arising from an alleged slip-and-fall injury aboard the F/V Atlantic Bounty. The vessel's crew employment manifest contained a written arbitration provision covering all disputes arising out of work as a crewmember, including statutory Jones Act claims. The agreement included bold, capitalized waiver language and provided that New York law would govern enforceability if the FAA did not apply. Plaintiff challenged the agreement, asserting lack of assent and arguing that the Jones Act and maritime uniformity principles barred arbitration. The court conducted an evidentiary hearing to resolve factual disputes regarding execution of the agreement.

The court held that the FAA does not apply to contracts of employment of seamen but that the arbitration agreement could be enforced under state law. After hearing testimony and evaluating credibility, the court found that plaintiff had signed and assented to the agreement. The court rejected arguments that the Jones Act or maritime uniformity prohibited arbitration and granted the motion to compel arbitration, staying the federal action.

***Trejo v. Sea Harvest, Inc.*, 1:21-cv-10978 (D. Mass. September 22, 2021)**

Plaintiff, a seaman working aboard the F/V Atlantic Bounty, alleged that he was injured while lifting heavy cable during a fishing voyage and brought claims for Jones Act negligence, unseaworthiness, and maintenance and cure. His employment contract contained a comprehensive arbitration clause administered by JAMS and included language stating that New York law would govern enforceability if the FAA was found inapplicable. Both parties agreed that the FAA did not apply because plaintiff was a seaman within the meaning of § 1.

The court determined that although the FAA did not apply, enforceability was governed by state law. The arbitration provision expressly included disputes regarding the scope and applicability of the arbitration clause and incorporated the JAMS Comprehensive Arbitration Rules, which delegate jurisdictional and arbitrability disputes to the arbitrator. The court held that the parties clearly and unmistakably delegated questions of arbitrability to the arbitrator. Because plaintiff challenged the agreement as a whole and not the delegation clause specifically, the case was dismissed without prejudice so that the arbitrator could determine whether the claims must be arbitrated.

***Sanzo v. Atlantic Capes Fisheries, Inc., et al.*, _____ (January 8, 2025)**

Plaintiff, a deckhand aboard the F/V Enterprise, filed suit asserting Jones Act negligence, unseaworthiness, maritime negligence, maintenance and cure, and related claims after sustaining injuries during a voyage. Prior to the voyage, plaintiff signed a three-page 'Continuing Crew Terms of Employment' agreement containing a bold, capitalized arbitration provision stating that arbitration would be his exclusive remedy. The agreement included a fallback clause applying state

law if the FAA was inapplicable. Defendants removed the action to federal court and filed a Limitation of Liability Act proceeding before moving to dismiss and compel arbitration.

The court held that the FAA does not apply to seamen's employment contracts and that enforceability is governed by the Massachusetts Arbitration Act. Applying Massachusetts contract principles, the court found that plaintiff received reasonable notice of the arbitration provision, manifested assent by signing and initialing the agreement, and failed to establish unconscionability. The court also found that defendants had not waived their right to arbitration. The motion to dismiss and compel arbitration was allowed.

***Fulford v. Atlantic Harvesters, LLC, et al.*, 1:25-cv-13049 (D. Mass. January 22, 2026).**

Plaintiff filed suit asserting Jones Act and maritime claims arising from his employment as a crewmember. The employment agreement contained a mandatory arbitration clause. At the time defendants moved to dismiss and compel arbitration, arbitration proceedings had already been initiated and were underway pursuant to the agreement. The parties agreed that arbitration was required and governed by state law rather than the FAA.

The court denied the motion to compel arbitration as moot because arbitration was already in progress. The court further denied dismissal and instead stayed the case pursuant to the Massachusetts Arbitration Act, which provides that actions involving arbitrable issues shall be stayed pending arbitration. The matter was ordered stayed pending completion of the arbitration proceedings.

***John & Jane, LLC v. Russell Isabel*, 24-cv-11508 (D. Mass. February 9, 2026)**

The case arose from a NOAA enforcement action after a vessel master harvested scallops in a closed federal fishing area in violation of federal regulations. NOAA assessed a monetary penalty that included both a base penalty and proceeds of unlawful activity. The vessel owner paid a substantial portion of the assessment and sought indemnification from the master pursuant to a written maritime employment agreement requiring the master to indemnify the owner for administrative, civil, or criminal penalties resulting from the master's conduct.

The court held that the maritime employment agreement was valid and enforceable under general maritime law. The court determined that the entire NOAA assessment, including disgorgement of unlawful proceeds, constituted a penalty within the meaning of the indemnification clause. Summary judgment was granted in favor of the vessel owner for the amount it paid toward the assessment, and prejudgment interest was awarded.

Contractual Indemnity/Maritime Contract

***Offshore Oil Services, Inc. v. Island Operating Company, Inc., et al.*, 2025 US App. LEXIS 22908 (5th Cir. Sept. 4, 2025)**

The enforceability of a contract's indemnity and insurance terms often turns on whether maritime law or state law applies. Certain state laws invalid contractual risk allocations even when they are negotiated and agreed by sophisticated parties, such as the Louisiana Construction

Anti-Indemnity Statute and the Louisiana Oilfield Anti-Indemnity Act. As such, whether a contract is maritime is question frequently litigated when there is an incident in the Gulf of Mexico.

In *Offshore Oil Services, Inc. v. Island Operating Company, Inc.*, the Fifth Circuit addressed a contractual dispute arising from a claim for injuries sustained while disembarking a vessel via a personnel basket transfer to an oil platform located on the Outer Continental Shelf. In resolving the preliminary question of which body of law should to apply to the claim, the Fifth Circuit addressed whether a master service contract between the owner and operator of the oil platform was a maritime contract such that the employer under the contract would owe indemnity to the vessel and platform owners.

The contract met the first element of the Fifth Circuit’s *Doiron* maritime contract test, whether the contract provides services to facilitate the drilling or production of oil and gas on navigable waters. However, the court found the second element was not satisfied because the contract’s terms did not “provide that vessels would play a substantial role in the completion of the work” and because “any use of vessels was incidental to the work contemplated” even though vessels were mentioned in the contract.

The court specifically distinguished the contract in question from that in another recent Fifth Circuit maritime contract case, *Earnest v. Palfinger Marine USA, Inc.*, 90 F.4th 804 (5th Cir. Jan. 14, 2024), stating that while *Earnest* “involved a contract ‘for the repair and maintenance of vessels necessary to support offshore drilling and production of oil and gas, i.e., maritime commerce[.]’” the agreement in *Offshore Oil Servs.* “contemplated no requirements resembling such work, but instead called for services traditionally related to oil and gas production and considered nonmaritime, even when conducted on an offshore platform.” The Fifth Circuit’s decision again illustrates that the mere involvement of a vessel in an operation does not render the underlying contract a “maritime contract.” Instead, the vessel’s role must be a substantial part of the operation.

Maintenance and Cure

***Provost v. Cheramie Marine, LLC*, CV 24-1735, 2025 WL 27349 (E.D. La. Jan. 2, 2025) (Vance, J.); and 2025, WL 457890 (E.D. La. Feb. 11, 2025)**

Plaintiff, Christian Provost, filed Jones Act negligence, unseaworthiness and maintenance and cure claims arising out of an injury allegedly sustained while working as a deckhand for Defendant Cheramie Marine, LLC (“Cheramie”). Mr. Provost allegedly injured his right hand while attempting to deploy fenders alongside a tanker during lightering support operations. Mr. Provost asserted claims for injuries to his back, neck, and knee, as well as psychological injuries.

Cheramie conducted a pre-employment physical of Provost, where he had to complete a medical questionnaire and state whether he previously had certain medical conditions including “depression,” a “history of suicide attempts,” “anxiety,” “other psychiatric disease,” or “any hospitalization.” Provost selected “No” to all of these items when, in fact, he had a long history of depression, anxiety, concussions, bipolar disorder, and suicidality, including a suicide attempt

that resulted in hospitalization. Cheramie moved for partial summary judgment under *McCorpen v. Central Gulf Corp.*, 396 F.2d 547 (5th Cir. 1968).

Under *McCorpen*, maintenance and cure benefits “will be denied where [the seaman] knowingly or fraudulently conceals his illness from the shipowner.” (quoting *Id.*). To succeed under *McCorpen*, the movant must show that “(1) the seaman intentionally misrepresented or concealed medical facts, (2) the misrepresented or concealed facts were material to the employer’s hiring decision, and (3) there exists a causal link between the pre-existing disability that was concealed and the disability suffered during the voyage.” In this case, Provost did not contest that he had an extensive history of psychological conditions and that he failed to disclose them to Cheramie. Provost also did not dispute that these concealed conditions were material to Cheramie’s hiring decision. He did, however, contest that there was a causal link.

Cheramie contended that the Fifth Circuit’s “same body part test” applied to establish the causal link between Provost’s preexisting psychological conditions and his alleged injuries. The court noted that “[f]ew courts have considered *McCorpen* in the context of mental illness” and that it was “uneasy about applying the ‘same body part’ test to disqualify any two conditions that fall under the rubric of psychiatric conditions.” Regardless, the court did not need to rely solely on the “same body part” test, because an affidavit and report from Provost’s psychological experts, demonstrated that “the substantial likelihood that his undisclosed and asserted psychological conditions are interrelated.” The court concluded that there was no genuine dispute of material fact that Provost’s psychological injuries were related to his preexisting psychiatric conditions that he concealed from Cheramie. The court granted Cheramie’s motion, dismissing Provost’s claim for maintenance and cure, with prejudice, as it pertained to his alleged psychological injuries.

Cheramie also filed a second motion for summary judgment on *McCorpen* as to Provost’s complaints of hip, knee, back and pain. Judge Vance granted the second *McCorpen* Motion, finding that the plaintiff concealed his history of injuries to those body parts on his preemployment physical (marking “no” to every single preexisting condition), that the information was material to Cheramie’s hiring decision because it would have requested additional information about his conditions before hiring him, and that there was a causal link because evidence showed injuries to the same body parts.

In re Ingram Barge Company, LLC, 2025 WL 81546 (5th Cir. Jan. 13, 2025)

Jones Act seaman, Dustin Harris claimed he suffered a head and back injury during the collision between the tows of two inland towing vessels. Both vessel owners filed limitation of liability actions which were consolidated. Plaintiff filed Jones Act and maintenance and cure claims against his employer, Florida Marine, and general maritime law claims against the owner of the other vessel, Ingram Barge Company. During discovery, surveillance video from the galley and other parts of the vessel was found which showed that the Harris’ post incident statements and deposition testimony about how the incident occurred were simply not plausible.

Both vessel owners filed motions for summary judgment to dismiss his claims on the grounds that the video evidence obtained from several areas inside the vessel showed that the plaintiff could not have fallen down a flight of stairs and sustained serious injuries to his head,

neck, and back because he was not in the area of any stairwell long enough for such a fall to occur. Video obtained from the wheelhouse, head of tow, galley, and hallways established a clear timeline showing that a collision occurred, the general alarm sounded, the deckhands (including the plaintiff) mustered, the tow parted, and the vessel experienced a vibration, all while the plaintiff was in the view of one of the cameras except for approximately eight seconds, total. Despite the video footage, the plaintiff attempted to change his story of how the incident occurred arguing he was a new deckhand and did not realize what was caused by the collision of the tows versus the vessel slowing down and changing course. The District Court granted summary judgment finding that the video evidence contradicted Harris' story. Harris appealed and the Fifth Circuit affirmed noting that where the non-movant's version of events is "so utterly discredited by video evidence in the record" that no reasonable jury could believe him, the court is not required to afford such testimony credit, but "must instead view the facts in the light depicted by the videotape." (internal quotations omitted). The Fifth Circuit held that the video footage discredited Harris' version of the accident and affirmed summary judgment in favor of both vessel owners.

Jurisdiction

Beckwith v. ENI Petro. U.S., LLC, 569 P.3d 778 (Alaska 2025)

Beckwith involved an inlet on the Beaufort Sea that was frozen during the winter. In the inlet is a man-made island, Spy Island, that conducts oil and gas exploration. During the summer, supplies are delivered to the island by boat (which the plaintiff helped load and unload). During the winter, the supplies are generally delivered by hovercraft. In this case, however, the hovercraft was broken, and a sled towed by a tracked vehicle was used to deliver supplies. Beckwith was seriously injured when a person driving a forklift on the frozen ice lost control of the vehicle and rammed the sled, pinching Beckwith between the sled and forklift. Beckwith ultimately lost his leg.

Beckwith's employer paid benefits under the Alaska Workers' Compensation (AWC) system which provides immunity to general contractors/project owners who claimed immunity from suit. Plaintiff sued in State Court claiming he was entitled to benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), and therefore, the project owner was not immune from suit. Beckwith also sued under federal maritime law because the AWC does not provide immunity from federal maritime claims.

Holding:

1. Eligibility for benefits under the LHWCA was not properly before the Court. Furthermore, LHWCA coverage did not supplant coverage under the AWC. The AWC provided immunity to any state law claims.

2. The Court held that the inlet, even when frozen, remained a navigable waterway. It then applied the two-part test enunciated in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, (1995) and *Sisson v. Ruby*, 497 U.S. 358, 363-65 & 364 n.2, (1990) to determine whether there was a maritime nexus to the accident: 1) "Could the accident disrupt maritime commerce?"; and 2) "Is there a substantial connection to traditional maritime activity?" The court answered both questions affirmatively. The Court stated that injury to the workers disrupted the loading and unloading at the island and could prevent access to the facility which had the potential

to disrupt maritime commerce. The Court also stated that loading and unloading a man-made island from navigable waters was a traditional maritime activity. The question of fact remaining for general maritime jurisdiction was a factual dispute as to whether the accident happened on the ramp or on the navigable (frozen) waterways.

***Ranger v. Alamitos Bay Yacht Club*, 17 Cal. 5th 532, 329 Cal. Rptr. 3d 816, 563 P.3d 1112 (2025)**

A maintenance worker at a yacht club was injured when he slipped on a vessel that he had just launched into the water. The worker received benefits under the California State Workers' Compensation Act and sued his employer under federal maritime law. As a club employee, the worker was exempt from the provisions of the LHWCA. Nonetheless, the employer argued that the LHWCA preempted any maritime tort cause of action against the employer and instead substituted rights against the employer under the state act.

Holding:

1. The California Supreme Court held that although the work was covered by the LHWCA, the Act did not preempt maritime common law remedies (such as negligence or unseaworthiness) to persons not covered.
2. The grant of immunity in the California State Workers' Compensation Act did not provide immunity to claims arising under general maritime law.

Ranger v. Alamitos Bay Yacht Club, 114 Cal. App. 5th 328, 331, 336 Cal. Rptr. 3d 739 (2025)

Holding: On remand to the Court of Appeals, the Court found that there was maritime jurisdiction because the incident occurred on navigable waters, bore a connection to traditional maritime activity and had potential to disrupt maritime commerce. Importantly, it also found that the employee had an unseaworthiness claim.

***Crazy Pants LLC v. Kottmann (In re Crazy Pants LLC)*, No. 2:23-cv-00023, 2026 U.S. Dist. LEXIS 23574 (D. Idaho Feb. 3, 2026)**

This case arises from a June 2022 high-speed single vessel boating accident on the Pend Oreille River in Bonner County, Idaho. The Pend Orielle River runs from Idaho through Washington and into British Columbia, where it meets up with the Columbia River. The incident claimed the lives of four individuals aboard the boat, including the beneficial owner and operator.

The vessel had been manufactured in Missouri by Marine Technology, Inc. (MTI), a Missouri company, and purchased directly by a Montana limited liability company. After experiencing engine overheating issues following delivery in Montana (and usage in Arizona), the boat was returned to MTI in Missouri for warranty work in May 2021.

MTI referred the repairs to Performance LLC, a Missouri-based service provider, which performed work on the boat. This included fixing a faulty water line and installing a trim-sync device. All

such work occurred at Performance's facility in Osage Beach, Missouri. All repairs occurred entirely in Missouri, after which the boat was towed back to Montana for redelivery.

The subsequent accident occurred upstream of the Albeni Falls Dam, a structure that has permanently blocked vessel passage between Idaho and Washington since the early 1950s. The dam's historic log chute, once used for timber transport, has been inoperable for commercial purposes since 1958, remains blocked by several permanent barriers, shows structural undermining, and cannot be put back into service without significant rehabilitation and congressional funding.

A lawsuit was started in state court by one of the estates. The owner of the vessel filed a limitation of liability act claim in federal court in Idaho. In addition, it asserted third party claims against both the vessel manufacturer (MTI) and the repairer (Performance). The estates all filed claims in the Limitation Action. Additionally, separate complaints were filed by the estates of the other passengers against the manufacturer and repairer.

The repairer moved to dismiss for lack of personal jurisdiction. The repairer, manufacturer and other defendants challenged the court's admiralty subject-matter jurisdiction over the Limitation complaint.

Holding: The court first held that it did not have personal jurisdiction over the repairer. Applying Ninth Circuit standards for specific jurisdiction, the court determined that Performance lacked sufficient minimum contacts with Idaho. Key to the court's findings were that Performance conducted no business in Idaho, maintained no offices or employees there, performed all work on the boat in Missouri, and had no involvement in its original sale or delivery to Idaho. The court found that the single, isolated service engagement—initiated via referral from MTI and involving direct but limited communication with owner—did not constitute purposeful availment or direction toward Idaho.

The Court determined that even knowledge that the boat would ultimately operate in Idaho was insufficient, as the plaintiff's unilateral actions cannot create jurisdiction. The court denied requests for jurisdictional discovery, deeming them speculative, and dismissed Performance without prejudice from all pending complaints in the consolidated actions.

Turning to subject-matter jurisdiction, the court granted the motions to dismiss Crazy Pants' Limitation complaint. Applying the Supreme Court's two-part test from *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995), the court held that the accident did not occur on "navigable waters" of the United States.

Relying on Ninth Circuit precedent, including *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975), the court concluded that the Pend Oreille River system is not navigable in fact for admiralty purposes. In short, the Albeni Falls Dam eliminates any present capability for interstate commercial vessel traffic (or even log floating), rendering the waterway incapable of serving as an artery of commerce.

The court emphasized that navigability turns on *present* physical conditions, not historical use or hypothetical future restoration, and rejected Crazy Pants’ arguments that the log chute’s potential rehabilitation satisfied *Grubart*’s navigability requirements. Additional jurisdictional discovery was denied as futile. The court did not reach the second prong of the *Grubart* test concerning the incident’s relationship to traditional maritime activity.

As a result, the limitation-of-liability complaint was dismissed without leave to amend, while Crazy Pants’ amended third-party complaint remains pending in federal court under diversity jurisdiction. Performance was dismissed from the entire consolidated matter.

Limitation of Liability

***In re M/V REBEKAH*, 2025 U.S. Dist. LEXIS 201305; 2025 AMC 499; 2025 WL 2898670 (W.D. Wash., Oct 10, 2025)**

A seaman/engineer who was injured while working with a tow winch aboard a U.S.-flagged towing vessel docked in Louisiana filed suit in King County (Seattle) Superior Court against the owner, employer and purported charterer as defendants.

Defendants and related entities subsequently filed respective Limitation Actions under 46 U.S.C §§ 30501-30530 (the “Limitation Act”). The Superior Court action was accordingly stayed, and the federal limitation actions were consolidated.

Claimant/seaman sought summary judgment, contending his injury was proximately caused as a matter of law by: 1) an unseaworthy winch; and/or 2) the failure to conduct a pre-work safety briefing or job safety analysis. He further alleged the vessel owner and/or charter had privity or knowledge of the incident-causing events or conditions. The owner and charterers denied all allegations of negligence, unseaworthiness and “privity or knowledge.”

Earlier motions for partial summary judgment by and between the owner, operators and/or charterers of the vessel were denied owing to disputed facts relative to the existence of a charter and which entity(ies) had possession or control of the vessel.

Holding:

1. The Limitation Act requires a two-step inquiry: 1) identify the negligent acts or unseaworthy conditions that caused the injury; and 2) determine whether the owner or bareboat charterer had “privity or knowledge” of those same causal acts or conditions. The claimant bears the burden to prove negligence or unseaworthiness. The owner or charterer bears the burden to show lack of privity or knowledge.
2. The federal district court denied Claimant’s motion for summary judgment, finding that Claimant failed to meet his burden to show the absence of any material facts as to unseaworthiness, negligence, and causation. Having found that Claimant had not established unseaworthiness or negligence, the district court did not reach the second step of the limitation analysis; i.e., whether

the owners or charterers had the requisite privity or knowledge to bar their limitation of liability claims.

***Lynch v. Laughlin Watercraft Rentals, LLC*, No. 2:21-cv-01981-ART-DJA, 2025 U.S. Dist. LEXIS 145821 (D. Nev. July 29, 2025) (reported in AMC)**

A rental company rented a jet ski to a woman from a group of people who went to the Colorado River to celebrate the birthday of defendant Hernandez. The rental company required the women to sign a number of documents, including representations that the jet ski would not be operated by anyone who was intoxicated or anyone who had not signed a waiver. Nonetheless, Hernandez (who had done a line of cocaine and drank 4 to 5 beers) took the jet ski out and ultimately collided with another jet ski, the passenger on which was killed. The Estate brought claims against multiple defendants, including the company that rented the jet ski. The rental company then petitioned for exoneration or limitation of liability.

Holding: The estate argued that the jet ski company negligently entrusted the jet ski to the group that included Hernandez. The court applying admiralty law and Restatement (Second) of Torts § 390 found that in order for the rental company to be liable it had to “know or have reason know that the jet ski was likely to be used dangerously and that the dangerous use caused injury to the plaintiff.” The Court found that there was an issue of fact as to whether the rental company had reason to know that: 1) the renter would allow an unauthorized user to use the jet ski; and 2) that the unauthorized user might be intoxicated. The court based these facts on the renter’s indication that she would not be operating the jet ski and that the staff saw people in the river drinking and using the company’s jet skis.

The court also applied the test enunciated in Restatement (Second) of Torts § 442 to determine if the negligence of Hernandez was a superseding cause to relieve the rental company of liability. There are two sets of factors to consider. The first focus on the determination that the cause was reasonably foreseeable given the defendant’s negligence. The second consider the nature and culpability of the third person’s act or omission. Even though the action of Hernandez was criminal, the fact it could be found that the rental company should have known people would operate its jet skis while intoxicated meant that the issue of proximate cause would be for the jury.

The court then addressed a Nevada statute that requires a company to rent watercraft only to individuals who are over 18, sign an affidavit that they have completed a boater’s safety course, and have a license to operate a vessel or satisfy the law of the place or residency for operating a watercraft. The court found that the law was not preempted by federal maritime law because the rental company failed to show how it disrupted uniformity or otherwise contravened an act of Congress.

The court, however, refused to apply negligence per se to the rental company for violation of the statute. Although the document signed by the renter was not an affidavit, the Court found that the statute could be satisfied by substantial compliance. The issue of negligence per se, therefore, was an issue of fact for the jury.

The rental company also requested that the court bifurcate the trial with it deciding liability before submitting the damages case to the jury. The court found that judicial economy requires that the entire case be submitted to the jury in one instance and the court could address any limitation of liability issue in post-trial motions.

Marine Insurance

***Syndicates 1183, 1036, & 2007, Certain Underwriters at Lloyd's, London v. Cook Inlet Spill Prevention & Response, Inc.*, No. 23-35429, 2025 U.S. App. LEXIS 10983, at *3 (9th Cir. May 7, 2025) (Unpublished, but reported in AMC)**

This case arises out of a personal injury to a crew member related to a vessel docking at a platform. The vessel was under time charter to the owner of the platform. There was dispute between the charterer's legal liability policy on the vessel and the marine general liability policy.

Holding: The charterer's legal liability policy insures the platform owner only in its status as time charterer. A time charterer is generally not liable for injuries to the crew except for specific situations not found in the case. Because the fact finder found that the liability arose from the operation of the platform, the charter's legal liability policy did not provide any coverage.

905(B)

***Nystrom v. Khana Marine Ltd.*, No. 24-2553, 2025 U.S. App. LEXIS 22158, (9th Cir. Aug. 28, 2025) (Unpublished, but reported in AMC)**

A longshoreman was injured when he slipped on ice in a freezer hold. The trial court had granted the vessel owner summary judgment finding that the turnover duty of safe condition enunciated in *Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156 (1981) was not breached. After a bench trial, the trial court then found that the active control duty was also not breached.

Holding: The Ninth Circuit agreed that the vessel owner had not breached the turnover duty of safe condition which requires that the vessel owner turn over the vessel in a condition that an experienced stevedore could unload the vessel safely. The longshoreman did not offer any evidence that countered the declaration of the safety expert that icy conditions are anticipated and that an experienced longshoreman could work in the area safely.

The Ninth Circuit also affirmed on the active control duty. After holding that the active control duty "provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the 'active control of the vessel.'" The Ninth Circuit then stated that the trial court's finding (that the cargo deck in question was not covered in ice and that the conditions were not beyond the usual conditions) was supported by adequate evidence. Finally, the Ninth Circuit indicated that the crew's action were not substantive enough to implicate the active control duty.

***Palmer v. Nippon Yusen Kabushiki Kaisha*, No. 24-cv-00309-DMR, 2025 U.S. Dist. LEXIS 192294 (N.D. Cal. Sep. 29, 2025) (Reported in AMC)**

Plaintiff Palmer brought a suit for negligence against the vessel owner (NYK Line) under Section 905(b) of the Longshore & Harbor Workers' Compensation Act. When Mr. Palmer, a refrigerator mechanic, descended a ladder to a lower deck of containers he fell approximately nine feet through an open hatch at the base of the ladder and was seriously injured.

It was undisputed that the hatch had been shut several minutes before the accident, because Palmer had to step on it to climb up the ladder. The vessel crew stated that one of Palmer's fellow longshoremen had admitted leaving the hatch open, while Palmer and his expert blamed a crewman for leaving the hatch open while attempting to follow the progress of the longshoremen, a practice called "playing peek-a-boo". Plaintiff's expert testified the hatch's yellow-striped warning markers were faded; thus the hatch opening would have been difficult to see from the ladder.

Holding: Summary judgment was granted in part and denied in part, based on vessel duties under *Scindia Steam Nav. Co. v. De Lo Santos*, 451 U.S. 156, 101 S. Ct. 1614 (1994). Three general duties are owed by a vessel to longshoremen ("*Scindia* duties") such that violations of those duties could create an action for negligence:

1. Turnover Duty: Requires that the vessel turn over the ship and its equipment to stevedores in a condition that allows them to operate in "reasonable safety".

Evidence, including expert testimony, was sufficient to create a question of fact that an experienced longshoreman might not have noticed the open hatch due to the lack of high visibility paint, despite testimony by Plaintiff that he did not look down while descending the ladder. Defendant's Summary Judgment was *denied* as to the turnover safe condition duty.

Summary judgment was *granted* with regard to the vessel's turnover duty to warn. The open hatch was an open and obvious hazard, and Plaintiff failed to allege a breach of the duty to warn.

2. Active Control Duty: Once stevedoring operations have begun, the vessel must take reasonable care to prevent injuries to longshoremen in areas where the vessel retains "active control" of the vessel and to avoid negligently injuring a longshoreman from its "active involvement" in cargo operations.

Plaintiff argued that Defendant breached its active control duty because it failed to maintain paint around the hatch. The Court pointed out that the vessel had no control over the paint after turning over the ship to the stevedores, thus it could not have violated this duty. Defendant's motion for summary judgement was *granted*. However, evidence showed that a member of the vessel's crew may have left the hatch open while he was playing "peek-a-boo" during operations. Summary judgment as to active involvement duty was therefore *denied*.

3. Duty to Intervene: Defendant's motion was granted, as Plaintiff did not dispute a breach of this duty.

***Cooper v. Vigor Marine, LLC*, No. 22-00275 HG-RT, 2025 U.S. Dist. LEXIS 172776 (D. Haw. Sep. 4, 2025) (Reported in AMC)**

Plaintiff Ashley Cooper was employed by a subcontractor, International Marine and Industrial Applicators, LLC (IMIA) to remove paint from a U.S. Navy vessel at the Pearl Harbor Naval Shipyard. Plaintiff injured her right arm when it was sucked into an industrial vacuum used to clean up sandblast debris. She sought damages for negligence against several defendants, including Vigor Marine, who was hired by the U.S. government as the prime contractor to carry out repairs on the U.S.S. William P. Lawrence.

Vigor Marine moved for summary judgment, arguing that because it was a prime contractor, not the shipowner or Plaintiff's employer, it did not owe a duty of care to ensure the safety of its subcontractor's (IMIA's) employees.

Holding: The Court *granted* Defendant Vigor Marine's motion for summary judgment, holding that as a prime contractor it did not owe a duty of care to its subcontractor's employees that would support a negligence claim.

The Court noted that Claimant was a longshoreman employee of Vigor Marine's subcontractor, IMIA, and was thus entitled to (and receiving) statutory compensation from IMIA pursuant to the Longshore & Harbor Workers' Compensation Act. However, Claimant was barred under the same act from also recovering in tort for the negligence of her employer, IMIA.

The Court found that Vigor Marine could only be found negligent if in fact it owed some duty of care to ensure the safety of its subcontractor's employee. Under federal maritime law, a hirer of an independent contractor generally owes no duty of care to ensure the safety of the contractor's employee. The narrow exceptions to that rule were set out by the Ninth Circuit Court of Appeals in *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980). The *Nelson* court ruled that a duty of care was limited to two situations:

1. when the hirer of the independent contractor retains significant control and involvement over the safety aspects of the job; or
2. the prime contractor's own negligence aggravated the risk that caused the injury.

Nelson, 639 F.3d at 479.

The only evidence cited by Plaintiff that Vigor retained significant control over job safety was that it had the right to inspect or stop work at the site if it found a safety hazard. But that alone was insufficient to show "significant involvement" in the safety of the work. (*Kirk v. United States*, 270 F.2d 110, 116-17 (9th Cir. 1959).

As for actual negligence by Vigor Marine, Plaintiff pointed to alleged violations of OSHA at the jobsite. The Court rejected that claim, because several decisions in the 9th Circuit held that only employers are responsible for OSHA violations, not non-employer contractors. See, e.g. *Ralon v.*

San Juan Excursions, Inc. 252 Fed. App. 180, 182 (9th Cir. 2007); *Peters v. Titan Nav. Co.*, 857 F.2d 1342, 1345 (9th Cir. 1988).

***MSC Mediterranean Shipping Co. S.A. v. BNSF Ry. Co.*, No. 24-3957, 2025 U.S. App. LEXIS 17312, (9th Cir. July 14, 2025) (Unpublished, but reported in AMC)**

Cargo shipped on a MSC through bill of lading from China to Kansas City. The last portion of the cargo was done from rail from Los Angeles to Kansas City. The cargo arrived damaged. MSC settled the claim and requested indemnification from the railroad. BNSF refused. MSC waited more than 9 months after receipt of the written denial to instigate a lawsuit for indemnity. The trial court held that the Intermodal Rules barred the claim. MSC appealed.

Holding: After holding that there was admiralty jurisdiction under *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 18-19 (2004), the court reviewed the Intermodal Rules which provided that MSC was required to "file all loss or damage suits against BNSF within nine (9) months from the date BNSF declines the claim on which the suit is based." The Ninth Circuit held that the language was clear and that it barred the claims. In so holding, the Ninth Circuit rejected the idea that laches should apply to the equitable indemnity claim because such claim fell within the clear language of the agreement.

***Allen v. United States DOL Office of Worker's Comp.*, No. 3:25-cv-05139-TMC, 2025 U.S. Dist. LEXIS 168163 (W.D. Wash. Aug. 28, 2025) (reported in AMC)**

Plaintiff was a federal employee at the Puget Sound Naval Shipyards. In 1989, he was injured and found to be permanently disabled and entitled to benefits under the Federal Employee Compensation Act. In 2011, a doctor cleared him to return to work as a rigger. The OWCP terminated his permanent disability benefits. As a result, plaintiff attempted to return to work. Prior to approving his return, the Puget Sound Naval Shipyard required that he undergo a physical. Plaintiff, however, injured himself in the pre-employment physical and was hospitalized. Although OWCP paid for his hospital stay, it denied claim for further benefits because plaintiff was not an employee at the time of his accident. A subsequent review of his medical records showed that he should never have been cleared to return to work.

Plaintiff sued for his injuries under the Federal Tort Claim's Act because he was negligently cleared to return to work and that he suffered damages from the OWCP's action in improper termination his benefits. The plaintiff also filed a claim under the LHWCA.

Holding: The court held that plaintiff had presented a colorable claim for FECA benefits because all of the requested action arose out of his FECA claim. All claims under the FTCA were preempted. The Court, therefore, did not have jurisdiction over any dispute under the FTCA. Plaintiff had to present his FECA claim through the appropriate channels.

The Court also held that LHWCA did not apply to his case because the LHWCA exempts employees from coverage under the act.

Finally, the court dismissed all fraud and misrepresentation claims because the FTCA does not apply to such claims and, therefore, the government enjoys sovereign immunity.

Regulation of Shipping

Fiedler v. United States, 2026 U.S. App. LEXIS 3033 (9th Cir. Jan. 30, 2026)

The case relates to a 2019 fire aboard the dive boat *M.V. Conception* where 34 individuals perished. “[P]ersonal representatives of the deceased and one injured surviving crew member . . . sued the United States under the Suits in Admiralty Act (“SIAA”), 46 U.S.C. § 30901” alleging that the U.S. Coast Guard was negligent in its inspection of the vessel, whereby the Coast Guard “deemed the vessel ‘fit for route and serve as specified on the current COI,’ allowing the *Conception* to continue operating.”

The Government moved to dismiss the suit in May 2024 “for lack of subject matter jurisdiction under Rule 12(b)(1) based on the discretionary function exception to the SIAA’s waiver of sovereign immunity.[.]” The motion was granted and the matter appealed.

Holding: The Ninth Circuit affirmed in a 2-1 decision authored by Judge John B. Owens, applying the discretionary function exception to the Coast Guard, and finding that “inspectors have discretion in *how* to conduct” mandatory vessel inspections and “were not mandated to identify the electrical wires, plastic trash cans, and plastic chairs as fire hazards.” “[T]he Government’s actions fell within the discretionary function exception to the SIAA’s waiver of immunity.”

The court re-established *Earles v. United States*, 935 F.2d 1028, 1032 (9th Cir. 1991) (holding “the Discretionary Function Exception applies to the SIAA as well as to the FTCA.”) as good law, rejecting plaintiffs’ contention that the 1991 precedent was overruled by the Supreme Court’s decision in *Thacker v. TVA*, 587 U.S. 218, 223-28, 139 S. Ct. 1435 (2019) (finding no discretionary function exception for waiver of sovereign immunity in the Tennessee Valley Authority Act of 1933). The court reasoned that the SIAA “is more conditional[.]” in its waiver of sovereign immunity and does not contain a “sue-and-be-sued” clause (which was present in *Thacker*). The court also recognized the Coast Guard as a “traditional government actor[.] performing traditional ‘governmental activities,’”—like the Navy in *Earles*—“for which the *Thacker* Court explicitly preserved the ‘possibility of immunity.’” (quoting *Thacker*, 587 U.S. at 228).

The court also found support in public policy: “Coast Guard inspections are textbook discretionary judgments rooted in public policy considerations. . . . [And] the fact that the Coast Guard handles ten other missions—beyond just marine safety—further highlights that its judgments with respect to inspections are grounded in public policy considerations.”

***Buesking v. Princess Cruise Lines, Ltd.*, No. 2:24-cv-04935-MRA-PD, 2025 U.S. Dist. LEXIS 199660, C.D. Cal. Oct. 6, 2025) (Reported in AMC), 2025 U.S. Dist. LEXIS 199662 (C.D. Cal. Oct. 6, 2025) (Reported in AMC)**

A cruise ship passenger allegedly incurred “neck and spinal injuries while he was on an off-ship tour excursion to the Island of Capri. He sued defendants—including Princess Cruise Line, Ltd.’s (“Princess”), tour-provider Aloschi Bros. SRL. (“Aloschi”), and ferry owner SNAV S.P.A. (“SNAV”)—in maritime, claiming over \$1 million in damages. Plaintiff also “prayed for [Rule B] attachment and garnishment of property belonging to Aloschi and SNAV in the possession of Princess, Royal Caribbean Cruise Lines, Ltd., Celebrity Cruises Inc., Magical Cruise Company, Ltd., and MSC Cruises S.A.”.

Almost four months later, a Summons and Process of Maritime Attachment and Garnishment was issued, providing for attachment and garnishment of property possessed by Princess *et al.* and “belonging to Aloschi[,]” including “**past, present and future earnings from**” contract(s) between Princess and Aloschi.

Aloschi moved to vacate, and Princess moved to quash the maritime attachment. Aloschi also sought dismissal for lack of jurisdiction. The court recommended Aloschi and Princess’ motions be granted.

Holding (Aloschi): Plaintiff failed to demonstrate “that Princess possessed money owed to Aloschi at the time the summons was served[,]” and failed to rebut Aloschi-cited “California caselaw that an attachment and garnishment is not effective against after-acquired property[.]” with “contrary” authority. (pp. 12-13) (citing *Smith v. Crocker First Nat’l Bank*, 152 Cal. App. 2d 832, 314 P.2d 237, 240 (1957)).

The court rejected plaintiff’s argument that the summons provided for “continuous service” where the summons for “future earnings” was not “limited . . . to specific timeframes[,]” the court did not specifically order same, and the Garnishees did not provide consent. (pp. 13-14) (citation omitted). The court likewise distinguished plaintiff’s citation to *Marco Polo Shipping Co. Pte. v. Supakit Prods. Co.*, 2009 U.S. Dist. LEXIS 19057, at *3-4 (S.D.N.Y. Mar. 4, 2009) (“ . . . a court may issue an attachment even if the plaintiff only anticipates that the defendant’s funds will pass through the district at some unknown future time.” But “a plaintiff must at least set forth enough facts to render it plausible that the defendant’s funds will be present in the district at some future time.”) (citations omitted), finding that “[a]dditional facts are needed to show that it was plausible Princess would sell the excursions in the future[.]” and that plaintiff failed “to provide binding authority to support that an attachment could apply to property acquired in the future indefinitely.”

3. “[F]uture payments flowing from” the contract between Princess and Aloschi were not attachable where plaintiff did not “show that the agreement . . . was executed[.]” Rather, the contract appeared to be executory “since it relies on Princess to first sell excursions to its passengers before conducting business with Aloschi.”

4. The court cannot attach after-acquired “funds held in London, England.” (p. 20). While the court considered discussion within *Boland Marine & Indus., LLC v. Bouchard Transp. Co.*, No.

1:20-CV-66-LY-ML, 2020 U.S. Dist. LEXIS 118520, at *16 (W.D. Tex. Feb. 28, 2020), *report and recommendation adopted*, No. 1:20-CV-66-LY, 2020 U.S. Dist. LEXIS 118518 (W.D. Tex. Mar. 26, 2020) (“the court is persuaded that the Texas Supreme Court would reject the separate entity rule and find that bank accounts are located wherever funds are available to the account holder.”), cited by plaintiff, the court did not follow suit. “In short, Plaintiff has not identified Ninth Circuit authority or California law to support attaching funds held in a foreign country and currency.”

5. Because “[p]laintiff failed to support the maritime attachment or provide an alternative basis for jurisdiction,” the court recommended that the order and summons for Aloschi’s property be vacated and Aloschi dismissed for lack of jurisdiction.

Holding (Princess):

1. The court tacitly adopted the position “that a maritime garnishment served before the garnishee comes into possession of the property to be garnished is void[,]” turning to cases from the Second Circuit supporting same. (pp. 14-15) (citations omitted). “Plaintiff has not provided evidence that Princess owed Aloschi any money when the summons was served.”

2. The court, again, found that Princess and Aloschi’s contract appeared to be executory: “Plaintiff has not set forth evidence or other legal argument showing that the funds that Princess obtained after the summons was served constituted unmatured debt.” (p. 18). Furthermore, the funds were not within the district for attachment, since they were “held in a bank in London, England[.]”

***Barnett v. United States*, No. 23-2221 (4th Cir. 2025)**

In *Barnett v. United States*, the Fourth Circuit Court of Appeals affirmed a judgment in favor of the U.S. Coast Guard regarding a fatal boat crash. Edward Barnett died after his boat struck a dike in the Cooper River, South Carolina, while a nearby navigation light was inoperable. His widow, Penny Jo Barnett, sued the United States under the Suits in Admiralty Act (SIAA), alleging negligence in maintaining navigational lights on a dike. The court determined that the Coast Guard’s decisions regarding the maintenance of the light were discretionary, and the defendant’s negligent operation of the vessel was the proximate cause of the accident.

Interlocutory Appeal

***McArthur v. Holland Am. Line Inc.*, 2025 U.S. Dist. LEXIS 223679; 2025 AMC 567; 2025 WL3171355 (W.D. Wash., Nov. 13, 2025)**

This case involved a fatal crash of a third-party floatplane tour during a stop in Ketchikan, Alaska, on a Holland America cruise. Passengers’ families sued the floatplane operator and Holland America entities. After settlement of claims against the floatplane operator, only the Holland America defendants remained. Holland America then moved for summary judgment on the duty to warn and other issues. The assigned magistrate recommended denial of the motion. The district judge adopted the magistrate’s report and recommendation (referred to as the “Order”). Holland America challenged the Order, then moved to certify it for interlocutory appeal under 28 U.S.C. §

1292(b). Holland America did not have the right to appeal the interlocutory order as a matter of right under 28 U.S.C. § 1292(a)(3).

Holding: The district court granted Holland America’s Motion for Certification for Interlocutory Appeal. Under 28 U.S.C. § 1292(b), a non-final order may be appealed if: 1) it involves a controlling question of law; 2) there is substantial ground for difference of opinion on that question; and 3) an immediate appeal may materially advance the ultimate termination of the litigation. Interlocutory appeals are described as an “extraordinary” remedy to be used sparingly, only when they may avoid protracted and expensive litigation.

The central question on Holland America’s motion was whether, and to what extent, a cruise line can owe a duty to warn of dangers associated with a non-sponsored, third-party excursion after passengers leave the ship. The district court concluded the duty-to-warn question was a pure, controlling issue of law and that an immediate appeal could either eliminate Holland America from the case or clarify and narrow the issues for trial. The court also held there is “substantial ground for difference of opinion” because: 1) no Ninth Circuit case squarely addressed whether a cruise line’s duty to warn extended to non-sponsored excursions beyond the point of disembarkation; 2) no federal court had clearly rejected such a duty on that basis; and 3) there was potentially competing guidance from an Eleventh Circuit decision which expressly recognized a duty to warn of known dangers beyond the point of disembarkation in areas where passengers are invited or reasonably expected to visit.

Holland America also challenged two other aspects of the district court Order: 1) the finding of a fact issue on whether the risks of floatplane tours in the Misty Fjords/Ketchikan area were open and obvious; and 2) the finding of a fact issue on Holland America’s actual or constructive notice of the risk-creating conditions. Because certification under § 1292(b) covered the entire Order once any certifiable issue existed, the district court stated it need not certify the issues separately. The court nevertheless noted that the two factual findings were not appropriate for interlocutory appeal in their own right because they involved application of settled law to specific facts rather than pure legal questions, and they did not present substantial grounds for differing legal opinions.

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JURISDICTION

Beckwith v. ENI Petro. U.S., LLC, 569 P.3d 778 (Alaska 2025)

Facts: *Beckwith* involved an inlet on the Beaufort Sea that was frozen during the winter. In the inlet is a man-made island, Spy Island, that conducts oil and gas exploration. During the summer, supplies are delivered to the island by boat (which the plaintiff helped load and unload). During the winter, the supplies are generally delivered by hovercraft. In this case, however, the hovercraft was broken, and a sled towed by a tracked vehicle was used to deliver supplies. Beckwith was seriously injured when a person driving a forklift on the frozen ice lost control of the vehicle and rammed the sled, pinching Beckwith between the sled and forklift. Beckwith ultimately lost his leg.

Beckwith's employer paid benefits under the Alaska Workers' Compensation (AWC) system which provides immunity to general contractors/project owners who claimed immunity from suit. Plaintiff sued in State Court claiming he was entitled to benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA), and therefore, the project owner was not immune from suit. Beckwith also sued under federal maritime law because the AWC does not provide immunity from federal maritime claims.

Holding:

1. Eligibility for benefits under the LHWCA was not properly before the Court. Furthermore, LHWCA coverage did not supplant coverage under the AWC. The AWC provided immunity to any state law claims.
2. The Court held that the inlet, even when frozen, remained a navigable waterway. It then applied the two-part test enunciated in *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534, (1995) and *Sisson v. Ruby*, 497 U.S. 358, 363-65 & 364 n.2, (1990) to determine whether there was a maritime nexus to the accident: 1) "Could the accident disrupt maritime commerce?"; and 2) "Is there a substantial connection to traditional maritime activity?" The court answered both questions affirmatively. The Court stated that injury to the workers disrupted the loading and unloading at the island and could prevent access to the facility which had the potential to disrupt maritime commerce. The Court also stated that loading and unloading a man-made island from navigable waters was a traditional maritime activity. The question of fact remaining for general maritime jurisdiction was a factual dispute as to whether the accident happened on the ramp or on the navigable (frozen) waterways.

Ranger v. Alamitos Bay Yacht Club, 17 Cal. 5th 532, 329 Cal. Rptr. 3d 816, 563 P.3d 1112 (2025)

Facts: A maintenance worker at a yacht club was injured when he slipped on a vessel that he had just launched into the water. The worker received benefits under the California State Workers' Compensation Act and sued his employer under federal maritime law. As a club employee, the worker was exempt from the provisions of the LHWCA. Nonetheless, the

employer argued that the LHWCA preempted any maritime tort cause of action against the employer and instead substituted rights against the employer under the state act.

Holding:

1. The California Supreme Court held that although the work was covered by the LHWCA, the Act did not preempt maritime common law remedies (such as negligence or unseaworthiness) to persons not covered.
2. The grant of immunity in the California State Workers' Compensation Act did not provide immunity to claims arising under general maritime law.

Ranger v. Alamitos Bay Yacht Club, 114 Cal. App. 5th 328, 331, 336 Cal. Rptr. 3d 739 (2025)

Holding: On remand to the Court of Appeals, the Court found that there was maritime jurisdiction because the incident occurred on navigable waters, bore a connection to traditional maritime activity and had potential to disrupt maritime commerce. Importantly, it also found that the employee had an unseaworthiness claim.

Crazy Pants LLC v. Kottmann (In re Crazy Pants LLC), No. 2:23-cv-00023, 2026 U.S. Dist. LEXIS 23574 (D. Idaho Feb. 3, 2026)

Facts: This case arises from a June 2022 high-speed single vessel boating accident on the Pend Oreille River in Bonner County, Idaho. The Pend Oreille River runs from Idaho through Washington and into British Columbia, where it meets up with the Columbia River. The incident claimed the lives of four individuals aboard the boat, including the beneficial owner and operator.

The vessel had been manufactured in Missouri by Marine Technology, Inc. (MTI), a Missouri company, and purchased directly by a Montana limited liability company. After experiencing engine overheating issues following delivery in Montana (and usage in Arizona), the boat was returned to MTI in Missouri for warranty work in May 2021.

MTI referred the repairs to Performance LLC, a Missouri-based service provider, which performed work on the boat. This included fixing a faulty water line and installing a trim-sync device. All such work occurred at Performance's facility in Osage Beach, Missouri. All repairs occurred entirely in Missouri, after which the boat was towed back to Montana for redelivery.

The subsequent accident occurred upstream of the Albeni Falls Dam, a structure that has permanently blocked vessel passage between Idaho and Washington since the early 1950s. The dam's historic log chute, once used for timber transport, has been inoperable for commercial purposes since 1958, remains blocked by several permanent barriers, shows structural undermining, and cannot be put back into service without significant rehabilitation and congressional funding.

A lawsuit was started in state court by one of the estates. The owner of the vessel filed a limitation of liability act claim in federal court in Idaho. In addition, it asserted third party claims against both the vessel manufacturer (MTI) and the repairer (Performance). The estates all filed claims in the Limitation Action. Additionally, separate complaints were filed by the estates of the other passengers against the manufacturer and repairer.

The repairer moved to dismiss for lack of personal jurisdiction. The repairer, manufacturer and other defendants challenged the court's admiralty subject-matter jurisdiction over the Limitation complaint.

Holding: The court first held that it did not have personal jurisdiction over the repairer. Applying Ninth Circuit standards for specific jurisdiction, the court determined that Performance lacked sufficient minimum contacts with Idaho. Key to the court's findings were that Performance conducted no business in Idaho, maintained no offices or employees there, performed all work on the boat in Missouri, and had no involvement in its original sale or delivery to Idaho. The court found that the single, isolated service engagement—initiated via referral from MTI and involving direct but limited communication with owner—did not constitute purposeful availment or direction toward Idaho.

The Court determined that even knowledge that the boat would ultimately operate in Idaho was insufficient, as the plaintiff's unilateral actions cannot create jurisdiction. The court denied requests for jurisdictional discovery, deeming them speculative, and dismissed Performance without prejudice from all pending complaints in the consolidated actions.

Turning to subject-matter jurisdiction, the court granted the motions to dismiss Crazy Pants' Limitation complaint. Applying the Supreme Court's two-part test from *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995), the court held that the accident did not occur on "navigable waters" of the United States.

Relying on Ninth Circuit precedent, including *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975), the court concluded that the Pend Oreille River system is not navigable in fact for admiralty purposes. In short, the Albeni Falls Dam eliminates any present capability for interstate commercial vessel traffic (or even log floating), rendering the waterway incapable of serving as an artery of commerce.

The court emphasized that navigability turns on *present* physical conditions, not historical use or hypothetical future restoration, and rejected Crazy Pants' arguments that the log chute's potential rehabilitation satisfied *Grubart's* navigability requirements. Additional jurisdictional discovery was denied as futile. The court did not reach the second prong of the *Grubart* test concerning the incident's relationship to traditional maritime activity.

As a result, the limitation-of-liability complaint was dismissed without leave to amend, while Crazy Pants' amended third-party complaint remains pending in federal court under diversity jurisdiction. Performance was dismissed from the entire consolidated matter.

LIMITATION OF LIABILITY

Williams Sports Rentals, Inc. v. Willis, 90 F.4th 1032 (9th Cir. 2024)

Facts: Williams Sports Rentals, Inc. (WSR) owns and rents jet skis on Lake Reno. A customer rented a jet ski and operated it with a passenger. After making a sharp turn into the wake of another boat, the passenger fell off and drowned. The company filed a Limitation Action, anticipating a lawsuit, and the court issued an injunction prohibiting causes of actions against WSR. The Estate filed a lawsuit against the other individuals involved in the lawsuit in state court and requested the court dissolve the injunction to allow it to add WSR to the state court action. The trial court refused. In a previous appeal, the Ninth Circuit held that the trial court abused its discretion because there was a single claimant who was willing to enter the appropriate stipulations. (i.e. the federal court has sole authority to decide the limitation issue and that plaintiff will not seek recovery in excess of the limitation amount in the state court action). On remand, the case expanded with other defendants filing claims against WSR for defense, indemnity and attorneys' fees.

Holding: Upon filing a Limitation Action, the federal court will issue an injunction stopping any claims against the vessel owner in state court. A federal court will dissolve an injunction in a limitation action in two situations: 1) the limitation fund is in excess of the amount claim; or 2) there is a single claimant who enters the appropriate stipulations to preserve the vessel owner's right to have the limitation issued decided in federal court.

In this case, the Court noted a split in the circuits whether claims for defense and indemnity against a vessel are considered additional claims to demand a concursus in federal court, requiring that all claims against the vessel owner proceed in federal court. The Sixth and Eighth Circuits take the position that defense and indemnity claims are just derivative claims which are not separate claims. The Second, Third, Fifth, Seventh and Eleventh Circuits hold that defense and indemnity claims are claims which transform the claims into a multiple claimant situation, where the federal court must provide a concursus. The Ninth Circuit refused to take a position because the claim for attorneys' fees made it a multiple claim case regardless of whether claims for defense and indemnity were merely derivative.

Finally, the court held that the claims against the non-vessel owning defendants should be allowed to proceed in state court. In so doing it rejected the arguments that the rental agreement should be treated like a demise charter.

Current Status: Upon remand, all the parties entered the appropriate stipulations to allow the state court proceedings to go forward. The state court action is scheduled to go to trial on May 16, 2026.

In re Live Life Bella Vita LLC, 115 F.4th 1188 (9th Cir. 2024)

Facts: A diver was dispatched by Company to do work on a yacht. During the work, the propeller was activated, seriously injuring the diver. The vessel owner filed a Limitation Action. The diver filed a lawsuit against other defendants in state court and a claim in the Limitation

Action. The diver also filed third party claims in the federal court against non-vessel-owning defendants. The non-vessel-owning defendants filed claims against the vessel owner for defense and indemnity. The diver agreed to a stipulation that he would not seek damages in excess of the limitation amount. The trial court dissolved the injunction.

Holding: After discussing the conflict between the Savings to Suitors Clause and limitation actions, the Ninth Circuit clarified that claims for defense and indemnity are claims that make a limitation action from a single claimant action a multiple claimant action for purposes of concursus. Given that only the diver had executed an appropriate stipulation, the Ninth Circuit reinstated the injunction.

In re M/V REBEKAH, 2025 U.S. Dist. LEXIS 201305; 2025 AMC 499; 2025 WL 2898670 (W.D. Wash., Oct 10, 2025)

Facts: A seaman/engineer who was injured while working with a tow winch aboard a U.S.-flagged towing vessel docked in Louisiana filed suit in King County (Seattle) Superior Court against the owner, employer and purported charterer as defendants.

Defendants and related entities subsequently filed respective Limitation Actions under 46 U.S.C §§ 30501-30530 (the “Limitation Act”). The Superior Court action was accordingly stayed, and the federal limitation actions were consolidated.

Claimant/seaman sought summary judgment, contending his injury was proximately caused as a matter of law by: 1) an unseaworthy winch; and/or 2) the failure to conduct a pre-work safety briefing or job safety analysis. He further alleged the vessel owner and/or charter had privity or knowledge of the incident-causing events or conditions. The owner and charterers denied all allegations of negligence, unseaworthiness and “privity or knowledge.”

Earlier motions for partial summary judgment by and between the owner, operators and/or charterers of the vessel were denied owing to disputed facts relative to the existence of a charter and which entity(ies) had possession or control of the vessel.

Holding:

1. The Limitation Act requires a two-step inquiry: 1) identify the negligent acts or unseaworthy conditions that caused the injury; and 2) determine whether the owner or bareboat charterer had “privity or knowledge” of those same causal acts or conditions. The claimant bears the burden to prove negligence or unseaworthiness. The owner or charterer bears the burden to show lack of privity or knowledge.

2. The federal district court denied Claimant’s motion for summary judgment, finding that Claimant failed to meet his burden to show the absence of any material facts as to unseaworthiness, negligence, and causation. Having found that Claimant had not established unseaworthiness or negligence, the district court did not reach the second step of the limitation analysis; i.e., whether the owners or charterers had the requisite privity or knowledge to bar their limitation of liability claims.

Lynch v. Laughlin Watercraft Rentals, LLC, No. 2:21-cv-01981-ART-DJA, 2025 U.S. Dist. LEXIS 145821 (D. Nev. July 29, 2025) (reported in AMC)

Facts: A rental company rented a jet ski to a woman from a group of people who went to the Colorado River to celebrate the birthday of defendant Hernandez. The rental company required the women to sign a number of documents, including representations that the jet ski would not be operated by anyone who was intoxicated or anyone who had not signed a waiver. Nonetheless, Hernandez (who had done a line of cocaine and drank 4 to 5 beers) took the jet ski out and ultimately collided with another jet ski, the passenger on which was killed. The Estate brought claims against multiple defendants, including the company that rented the jet ski. The rental company then petitioned for exoneration or limitation of liability.

Holding: The estate argued that the jet ski company negligently entrusted the jet ski to the group that included Hernandez. The court applying admiralty law and Restatement (Second) of Torts § 390 found that in order for the rental company to be liable it had to “know or have reason know that the jet ski was likely to be used dangerously and that the dangerous use caused injury to the plaintiff.” The Court found that there was an issue of fact as to whether the rental company had reason to know that: 1) the renter would allow an unauthorized user to use the jet ski; and 2) that the unauthorized user might be intoxicated. The court based these facts on the renter’s indication that she would not be operating the jet ski and that the staff saw people in the river drinking and using the company’s jet skis.

The court also applied the test enunciated in Restatement (Second) of Torts § 442 to determine if the negligence of Hernandez was a superseding cause to relieve the rental company of liability. There are two sets of factors to consider. The first focus on the determination that the cause was reasonably foreseeable given the defendant’s negligence. The second consider the nature and culpability of the third person’s act or omission. Even though the action of Hernandez was criminal, the fact it could be found that the rental company should have known people would operate its jet skis while intoxicated meant that the issue of proximate cause would be for the jury.

The court then addressed a Nevada statute that requires a company to rent watercraft only to individuals who are over 18, sign an affidavit that they have completed a boater’s safety course, and have a license to operate a vessel or satisfy the law of the place or residency for operating a watercraft. The court found that the law was not preempted by federal maritime law because the rental company failed to show how it disrupted uniformity or otherwise contravened an act of Congress.

The court, however, refused to apply negligence per se to the rental company for violation of the statute. Although the document signed by the renter was not an affidavit, the Court found that the statute could be satisfied by substantial compliance. The issue of negligence per se, therefore, was an issue of fact for the jury.

The rental company also requested that the court bifurcate the trial with it deciding liability before submitting the damages case to the jury. The court found that judicial economy requires

that the entire case be submitted to the jury in one instance and the court could address any limitation of liability issue in post-trial motions.

MARINE INSURANCE

Syndicates 1183, 1036, & 2007, Certain Underwriters at Lloyd's, London v. Cook Inlet Spill Prevention & Response, Inc., No. 23-35429, 2025 U.S. App. LEXIS 10983, at *3 (9th Cir. May 7, 2025) (Unpublished, but reported in AMC)

Facts: This case arises out of a personal injury to a crew member related to a vessel docking at a platform. The vessel was under time charter to the owner of the platform. There was dispute between the charterer's legal liability policy on the vessel and the marine general liability policy.

Holding: The charterer's legal liability policy insures the platform owner only in its status as time charterer. A time charterer is generally not liable for injuries to the crew except for specific situations not found in the case. Because the fact finder found that the liability arose from the operation of the platform, the charter's legal liability policy did not provide any coverage.

905(B) CASES

Nystrom v. Khana Marine Ltd., No. 24-2553, 2025 U.S. App. LEXIS 22158, (9th Cir. Aug. 28, 2025) (Unpublished, but reported in AMC)

Facts: A longshoreman was injured when he slipped on ice in a freezer hold. The trial court had granted the vessel owner summary judgment finding that the turnover duty of safe condition enunciated in *Scindia Steam Nav. Co. v. De Los Santos*, 451 U.S. 156 (1981) was not breached. After a bench trial, the trial court then found that the active control duty was also not breached.

Holding: The Ninth Circuit agreed that the vessel owner had not breached the turnover duty of safe condition which requires that the vessel owner turn over the vessel in a condition that an experienced stevedore could unload the vessel safely. The longshoreman did not offer any evidence that countered the declaration of the safety expert that icy conditions are anticipated and that an experienced longshoreman could work in the area safely.

The Ninth Circuit also affirmed on the active control duty. After holding that the active control duty "provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the 'active control of the vessel.'" The Ninth Circuit then stated that the trial court's finding (that the cargo deck in question was not covered in ice and that the conditions were not beyond the usual conditions) was supported by adequate evidence. Finally, the Ninth Circuit indicated that the crew's action were not substantive enough to implicate the active control duty.

Palmer v. Nippon Yusen Kabushiki Kaisha, No. 24-cv-00309-DMR, 2025 U.S. Dist. LEXIS 192294 (N.D. Cal. Sep. 29, 2025) (Reported in AMC)

Facts: Plaintiff Palmer brought a suit for negligence against the vessel owner (NYK Line) under Section 905(b) of the Longshore & Harbor Workers' Compensation Act. When Mr. Palmer, a refrigerator mechanic, descended a ladder to a lower deck of containers he fell approximately nine feet through an open hatch at the base of the ladder and was seriously injured.

It was undisputed that the hatch had been shut several minutes before the accident, because Palmer had to step on it to climb up the ladder. The vessel crew stated that one of Palmer's fellow longshoremen had admitted leaving the hatch open, while Palmer and his expert blamed a crewman for leaving the hatch open while attempting to follow the progress of the longshoremen, a practice called "playing peek-a-boo". Plaintiff's expert testified the hatch's yellow-striped warning markers were faded; thus the hatch opening would have been difficult to see from the ladder.

Holding: Summary judgment was granted in part and denied in part, based on vessel duties under *Scindia Steam Nav. Co. v. De Lo Santos*, 451 U.S. 156, 101 S. Ct. 1614 (1994). Three general duties are owed by a vessel to longshoremen ("*Scindia* duties") such that violations of those duties could create an action for negligence:

1. Turnover Duty: Requires that the vessel turn over the ship and its equipment to stevedores in a condition that allows them to operate in "reasonable safety".

Evidence, including expert testimony, was sufficient to create a question of fact that an experienced longshoreman might not have noticed the open hatch due to the lack of high visibility paint, despite testimony by Plaintiff that he did not look down while descending the ladder. Defendant's Summary Judgment was *denied* as to the turnover safe condition duty. Summary judgment was *granted* with regard to the vessel's turnover duty to warn. The open hatch was an open and obvious hazard, and Plaintiff failed to allege a breach of the duty to warn.

2. Active Control Duty: Once stevedoring operations have begun, the vessel must take reasonable care to prevent injuries to longshoremen in areas where the vessel retains "active control" of the vessel and to avoid negligently injuring a longshoreman from its "active involvement" in cargo operations.

Plaintiff argued that Defendant breached its active control duty because it failed to maintain paint around the hatch. The Court pointed out that the vessel had no control over the paint after turning over the ship to the stevedores, thus it could not have violated this duty. Defendant's motion for summary judgment was *granted*. However, evidence showed that a member of the vessel's crew may have left the hatch open while he was playing "peek-a-boo" during operations. Summary judgment as to active involvement duty was therefore *denied*.

3. Duty to Intervene: Defendant's motion was granted, as Plaintiff did not dispute a breach of this duty.

Cooper v. Vigor Marine, LLC, No. 22-00275 HG-RT, 2025 U.S. Dist. LEXIS 172776 (D. Haw. Sep. 4, 2025) (Reported in AMC)

Facts: Plaintiff Ashley Cooper was employed by a subcontractor, International Marine and Industrial Applicators, LLC (IMIA) to remove paint from a U.S. Navy vessel at the Pearl Harbor Naval Shipyard. Plaintiff injured her right arm when it was sucked into an industrial vacuum used to clean up sandblast debris. She sought damages for negligence against several defendants, including Vigor Marine, who was hired by the U.S. government as the prime contractor to carry out repairs on the U.S.S. William P. Lawrence.

Vigor Marine moved for summary judgment, arguing that because it was a prime contractor, not the shipowner or Plaintiff's employer, it did not owe a duty of care to ensure the safety of its subcontractor's (IMIA's) employees.

Holding: The Court *granted* Defendant Vigor Marine's motion for summary judgment, holding that as a prime contractor it did not owe a duty of care to its subcontractor's employees that would support a negligence claim.

The Court noted that Claimant was a longshoreman employee of Vigor Marine's subcontractor, IMIA, and was thus entitled to (and receiving) statutory compensation from IMIA pursuant to the Longshore & Harbor Workers' Compensation Act. However, Claimant was barred under the same act from also recovering in tort for the negligence of her employer, IMIA.

The Court found that Vigor Marine could only be found negligent if in fact it owed some duty of care to ensure the safety of its subcontractor's employee. Under federal maritime law, a hirer of an independent contractor generally owes no duty of care to ensure the safety of the contractor's employee. The narrow exceptions to that rule were set out by the Ninth Circuit Court of Appeals in *Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980). The *Nelson* court ruled that a duty of care was limited to two situations:

1. when the hirer of the independent contractor retains significant control and involvement over the safety aspects of the job; or
2. the prime contractor's own negligence aggravated the risk that caused the injury.

Nelson, 639 F.3d at 479.

The only evidence cited by Plaintiff that Vigor retained significant control over job safety was that it had the right to inspect or stop work at the site if it found a safety hazard. But that alone was insufficient to show "significant involvement" in the safety of the work. (*Kirk v. United States*, 270 F.2d 110, 116-17 (9th Cir. 1959).

As for actual negligence by Vigor Marine, Plaintiff pointed to alleged violations of OSHA at the jobsite. The Court rejected that claim, because several decisions in the 9th Circuit held that only employers are responsible for OSHA violations, not non-employer contractors. See, e.g. *Ralon v. San Juan Excursions, Inc.* 252 Fed. App. 180, 182 (9th Cir. 2007); *Peters v. Titan Nav. Co.*, 857 F.2d 1342, 1345 (9th Cir. 1988).

CARGO CASES

MSC Mediterranean Shipping Co. S.A. v. BNSF Ry. Co., No. 24-3957, 2025 U.S. App. LEXIS 17312, (9th Cir. July 14, 2025) (Unpublished, but reported in AMC)

Facts: Cargo shipped on a MSC through bill of lading from China to Kansas City. The last portion of the cargo was done from rail from Los Angeles to Kansas City. The cargo arrived damaged. MSC settled the claim and requested indemnification from the railroad. BNSF refused. MSC waited more than 9 months after receipt of the written denial to instigate a lawsuit for indemnity. The trial court held that the Intermodal Rules barred the claim. MSC appealed.

Holding: After holding that there was admiralty jurisdiction under *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 18-19 (2004), the court reviewed the Intermodal Rules which provided that MSC was required to "file all loss or damage suits against BNSF within nine (9) months from the date BNSF declines the claim on which the suit is based." The Ninth Circuit held that the language was clear and that it barred the claims. In so holding, the Ninth Circuit rejected the idea that laches should apply to the equitable indemnity claim because such claim fell within the clear language of the agreement.

LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

Total Terminals Int'l, LLC v. Dir., OWCP, 118 F.4th 1235, 1237 (9th Cir. 2024)

Facts: Longshoreman suffered from hearing loss in one ear (monaural). In addition, he suffered binaural tinnitus. The Longshore Act has scheduled and unscheduled injuries. For a scheduled injury, the claimant is entitled to a set amount of recovery based on his average weekly wage prior to the injury. For unscheduled injuries, the claimant is awarded two-thirds of the claimant's loss of wage earning capacity. Hearing loss is a scheduled injury that provides a set recovery for both monaural and binaural hearing loss.

The AMA guide has a formula that changes monaural hearing loss to binaural hearing loss. However, the rule is that in determining compensation under the LHWCA, monaural hearing loss is **not** converted to binaural hearing loss. Additionally, tinnitus frequently impacts hearing loss and the AMA guide allows for 5% to be added to binaural hearing impairment.

The treating audiologist diagnosed a monaural hearing loss with tinnitus. He converted the monaural loss to binaural and added 4% for a tinnitus for a total impairment of 5.56%. The ALJ ruled that the claimant was only entitled to an impairment rating based on his monaural hearing loss. The Board reversed, claiming that he should be compensated for his tinnitus which requires the conversion from monaural to binaural.

Holding: The Ninth Circuit first addressed the Director's argument that it lacked jurisdiction over the claim. The order from the Board had only remanded the case for a determination and award. The Ninth Circuit explained that when a remand is merely ministerial (requires the ALJ to just implement the Board's decision) it is considered final and appealable. Both the claimant

and the employer agreed that it was appealable. The Ninth Circuit found that the Board had determined both liability and damages and, therefore, the decision was appealable.

The Ninth Circuit then turned to the merits. It found that the Board's decision was incompatible with the language of the Longshore Act and previous precedent. The act treats monaural hearing loss different from binaural hearing loss. Since the claimant only had monaural hearing loss, the claim had to be adjudicated on that basis.

Allen v. United States DOL Office of Worker's Comp., No. 3:25-cv-05139-TMC, 2025 U.S. Dist. LEXIS 168163 (W.D. Wash. Aug. 28, 2025) (reported in AMC)

Facts: Plaintiff was a federal employee at the Puget Sound Naval Shipyards. In 1989, he was injured and found to be permanently disabled and entitled to benefits under the Federal Employee Compensation Act. In 2011, a doctor cleared him to return to work as a rigger. The OWCP terminated his permanent disability benefits. As a result, plaintiff attempted to return to work. Prior to approving his return, the Puget Sound Naval Shipyard required that he undergo a physical. Plaintiff, however, injured himself in the pre-employment physical and was hospitalized. Although OWCP paid for his hospital stay, it denied claim for further benefits because plaintiff was not an employee at the time of his accident. A subsequent review of his medical records showed that he should never have been cleared to return to work.

Plaintiff sued for his injuries under the Federal Tort Claim's Act because he was negligently cleared to return to work and that he suffered damages from the OWCP's action in improper termination his benefits. The plaintiff also filed a claim under the LHWCA.

Holding: The court held that plaintiff had presented a colorable claim for FECA benefits because all of the requested action arose out of his FECA claim. All claims under the FTCA were preempted. The Court, therefore, did not have jurisdiction over any dispute under the FTCA. Plaintiff had to present his FECA claim through the appropriate channels.

The Court also held that LHWCA did not apply to his case because the LHWCA exempts employees from coverage under the act.

Finally, the court dismissed all fraud and misrepresentation claims because the FTCA does not apply to such claims and, therefore, the government enjoys sovereign immunity.

REGULATION OF SHIPPING

Fiedler v. United States, 2026 U.S. App. LEXIS 3033 (9th Cir. Jan. 30, 2026)

Facts: The case relates to a 2019 fire aboard the dive boat *M.V. Conception* where 34 individuals perished. “[P]ersonal representatives of the deceased and one injured surviving crew member . . . sued the United States under the Suits in Admiralty Act ("SIAA"), 46 U.S.C. § 30901” alleging that the U.S. Coast Guard was negligent in its inspection of the vessel, whereby the Coast Guard “deemed the vessel ‘fit for route and serve as specified on the current COI,’ allowing the *Conception* to continue operating.”

The Government moved to dismiss the suit in May 2024 “for lack of subject matter jurisdiction under Rule 12(b)(1) based on the discretionary function exception to the SIAA's waiver of sovereign immunity.[.]” The motion was granted and the matter appealed.

Holding: The Ninth Circuit affirmed in a 2-1 decision authored by Judge John B. Owens, applying the discretionary function exception to the Coast Guard, and finding that “inspectors have discretion in *how* to conduct” mandatory vessel inspections and “were not mandated to identify the electrical wires, plastic trash cans, and plastic chairs as fire hazards.” “[T]he Government's actions fell within the discretionary function exception to the SIAA's waiver of immunity.”

The court re-established *Earles v. United States*, 935 F.2d 1028, 1032 (9th Cir. 1991) (holding “the Discretionary Function Exception applies to the SIAA as well as to the FTCA.”) as good law, rejecting plaintiffs’ contention that the 1991 precedent was overruled by the Supreme Court’s decision in *Thacker v. TVA*, 587 U.S. 218, 223-28, 139 S. Ct. 1435 (2019) (finding no discretionary function exception for waiver of sovereign immunity in the Tennessee Valley Authority Act of 1933). The court reasoned that the SIAA “is more conditional[.]” in its waiver of sovereign immunity and does not contain a “sue-and-be-sued” clause (which was present in *Thacker*). The court also recognized the Coast Guard as a “traditional government actor[.] performing traditional ‘governmental activities,’”—like the Navy in *Earles*—“for which the *Thacker* Court explicitly preserved the ‘possibility of immunity.’” (quoting *Thacker*, 587 U.S. at 228).

The court also found support in public policy: “Coast Guard inspections are textbook discretionary judgments rooted in public policy considerations. . . . [And] the fact that the Coast Guard handles ten other missions—beyond just marine safety—further highlights that its judgments with respect to inspections are grounded in public policy considerations.”

United States v. Korotkiy, 118 F.4th 1202, 1204 (9th Cir. 2024)

Facts: It is illegal to dump polluted bilge water while at sea. Ships are required to log their bilge water operations in an Oil Record Book. Defendants in this case dumped oily water at sea and covered it up with misleading entries in the Oil Record Book. The chief engineer was prosecuted for his failure to accurately maintain the Oil Record Book.

Holding: The Ninth Circuit provided a history of IMO (United Nations' Inter-Governmental Maritime Consultative Organization) and MARPOL (Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships). MARPOL was ratified by the United States. MARPOL requires the vessel to either filter the bilge water before dumping or to store the dirty bilge water until it can be disposed of at an approved facility. The Oil Record Book contains a running log of these efforts and of any accidental spill. Violations of MARPOL on the high seas are to be enforced by the flag state. Only violations that occur in territorial waters or the port state can be enforced by the port state.

The vessel dumped its oily bilge water in ocean in international waters. A whistleblower contacted the United States Coast and informed it that the dumping occurred. Because this occurred in international water, the United States did not have jurisdiction to prosecute the chief engineer for dumping the bilge water. However, the Oil Record Book did not reflect what actually occurred. Therefore, the Coast Guard prosecuted the chief engineer for failure to accurately maintain the Oil Record Book.

The chief engineer appealed arguing that the regulations only require that he keep an Oil Record Book, not require that the Oil Record book to be kept accurately. The United States, therefore, was attempting to prosecute him for misconduct on the high seas in violation of MARPOL. Over a lengthy dissent, the Ninth Circuit joined the First, Second, Third and Fifth Circuit in holding that the United States can prosecute an individual for falsely maintaining the Oil Record Book. The “maintenance” must obligate the record keeper to keep accurate records in the Oil Record Book. The rationale is that the Oil Record Books are necessary for proper investigation of the polluters and the chief engineer’s keeping of an inaccurate Oil Record Book in United States Water is a separate violation of MARPOL that can be enforced by the Port State.

CHARTER PARTY

Milos Prod. Tanker Corp. v. Valero Mktg. & Supply Co., 117 F.4th 1153 (9th Cir. 2024)

Facts: Milos Product Tanker Corp. (“Owner”) entered into a charter party with GP Global PTE Ltd on behalf of Gulf Petrochem FCZ (“Charterer”). The Captain signed the bills of lading, but the original bills of lading were not available when the ship arrived. The Owner released the cargo to the consignee under a letter of indemnity from Charterer. The Charterer had financial difficulties and Owner requested that the consignee pay the charter hire. Consignee refused because the cargo (“jet fuel”) was purchased freight prepaid. The Trial court held that consignee was liable for the charter hire.

Holding: The Ninth Circuit held that there was no contract between the Owner and the consignee and, therefore, the consignee was not liable for charter hire. In so doing, it distinguished *States Marine International, Inc. v. Seattle-First National Bank*, 524 F.2d 245, 248 (9th Cir. 1975), which held that consignee had an implied obligation to pay charter freight. The Ninth Circuit found that although the charter party made the consignee liable for charter hire, the bills of lading were issued by the captain which incorporated the terms of the charter party. Generally, the bills of lading are presented by the consignee to receive the cargo. This generally binds the consignee to the terms of the charter party. However, in the present case, the cargo was released without the consignee presenting the bills of lading. Because the consignee was a party to neither the charter party nor the bills of lading, it was not obligated to pay charter hire.

The Ninth Circuit then distinguished *States Marine International, Inc. v. Seattle-First National Bank* 524 F.2d 245, 248 (9th Cir. 1975) which implied a duty on the consignee to pay freight. After discussing the filed rate doctrine under the Interstate Commerce Act which mandated a form bill of lading that made consignees liable for freight, it pointed out that *States Marine* relied on the common law developed specifically in light of the Interstate Commerce Act and the

regulation of common carriers. The Ninth Circuit then held that *States Marine* only applied to common carriers operating under tariffs. The rule does not apply to private charter parties. Because there was no implied or express contractual obligation to pay charter hire, the consignee did not have to pay.

Finally, the Ninth Circuit rejected a Quantum Merit argument that the consignee unjustly benefited from the charter party. The Ninth Circuit focused on the fact that the consignee had paid for the freight as part of the purchase price and, therefore, it had not been unjustly enriched.

RULE B ATTACHMENT

Sikousis Legacy, Inc. v. B-Gas Ltd., 97 F.4th 622 (9th Cir. 2024)

Facts: *Sikousis Legacy, Inc.*, is a Rule B attachment case, complicated by the intricacies of corporate structuring and business law. In 2014, plaintiffs Sikousis Legacy, Inc., Bahla Beauty, Inc., and K Investments, Inc. began chartering liquid petroleum gas carrier vessels to corporation Bepalo, which—according to plaintiffs—was insufficient in its payments.

In May 2020, Bepalo was composed of three shareholders: Bergshav Shipping Ltd., Pareto Maritime Secondary Opportunity Fund AS, and Lorentzens Skibs AS. The majority shareholder, Bergshav Shipping Ltd., had a wholly owned subsidiary, Aframax, which owned the vessel *Berica*. In June 2020, Bergshav Shipping Ltd., its directors, and related corporate entities (collectively, the “Bergshav Group”) began restructuring efforts, including the directors of Bergshav Shipping Ltd. agreeing to sell its 51% share of Bepalo to B-Gas Holding Ltd. (another entity of the Bergshav Group).

“Plaintiffs commenced arbitration proceedings against Bepalo under their charter agreements[]” and were ultimately awarded approximately \$10 million total. To satisfy the judgments, plaintiffs initiated “admiralty proceedings against the Bergshav Group under Rule B through attachment of the vessel *Berica* . . . on a theory of alter ego liability.” Aframax refuted that it “was not the alter ego of Bepalo” and “moved to vacate the attachment under Rule E(4)(f).”

The district court granted Aframax’s motion under a “probable cause standard, requiring Plaintiffs to demonstrate that they are reasonably likely to prevail on the merits of their veil-piercing claim.” The Ninth Circuit affirmed on appeal.

Holding:

1. The Ninth Circuit adopted the district court’s “probable cause” standard as “consistent with the procedural posture of Rule E(4)(f) proceedings[]” and “consistent with other circuits.” The court held that, “where a party challenges a plaintiff’s Rule B attachment at a Rule E(4)(f) hearing, the plaintiff has the burden of establishing probable cause to continue attachment of the property. A plaintiff meets his burden by establishing a reasonable probability of success as to each element of his claim. A reasonable probability requires less than a preponderance but requires more than a mere possibility of success.[]” (citation omitted). Once the defendant “provides evidence that undermines an essential element of a plaintiff’s claim, the plaintiff then has the burden to submit

evidence to the contrary or explain why the defendant's evidence is not material to survive a motion to vacate the attachment.” In so holding, the court reasoned that a higher standard—“such as a preponderance standard[.]”—“would tend to require” a plaintiff to “prove its case at the Rule E(4)(f) stage[.]” which is not required under Ninth Circuit precedent (discussing *Equatorial Marine Fuel Mgmt. Servs. PTE v. MISC Berhad*, 591 F.3d 1208 (9th Cir. 2010)).

2. The court reiterated a nine-item “non-exhaustive list” of instructive indicia that courts may use when evaluating “domination, injustice, and ill intent[.]” to pierce the corporate veil (citing *Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134-35 (9th Cir. 2003)). Still, “courts must look to the ‘totality of the record and circumstances’ to determine whether the three elements of the test are satisfied[.]”(citing *Harris Rutsky*, 328 F.3d at 1134-35 (9th Cir. 2003)).

Plaintiffs did not demonstrate that Bepalo was dominated and controlled by Aframax’s parent company (or the Bergshav Group more generally). Therefore, plaintiffs failed to pierce the corporate veil and the district court’s ruling to vacate attachment was affirmed.

Buesking v. Princess Cruise Lines, Ltd., No. 2:24-cv-04935-MRA-PD,
2025 U.S. Dist. LEXIS 199660, C.D. Cal. Oct. 6, 2025) (Reported in AMC)
2025 U.S. Dist. LEXIS 199662 (C.D. Cal. Oct. 6, 2025) (Reported in AMC)

Facts: A cruise ship passenger allegedly incurred “neck and spinal injuries while he was on an off-ship tour excursion to the Island of Capri. He sued defendants—including Princess Cruise Line, Ltd.’s (“Princess”), tour-provider Aloschi Bros. SRL. (“Aloschi”), and ferry owner SNAV S.P.A. (“SNAV”)—in maritime, claiming over \$1 million in damages. Plaintiff also “prayed for [Rule B] attachment and garnishment of property belonging to Aloschi and SNAV in the possession of Princess, Royal Caribbean Cruise Lines, Ltd., Celebrity Cruises Inc., Magical Cruise Company, Ltd., and MSC Cruises S.A.”.

Almost four months later, a Summons and Process of Maritime Attachment and Garnishment was issued, providing for attachment and garnishment of property possessed by Princess *et al.* and “belonging to Aloschi[.]” including “**past, present and future** earnings from” contract(s) between Princess and Aloschi.

Aloschi moved to vacate, and Princess moved to quash the maritime attachment. Aloschi also sought dismissal for lack of jurisdiction. The court recommended Aloschi and Princess’ motions be granted.

Holding (Aloschi):

Plaintiff failed to demonstrate “that Princess possessed money owed to Aloschi at the time the summons was served[.]” and failed to rebut Aloschi-cited “California caselaw that an attachment and garnishment is not effective against after-acquired property[.]” with “contrary” authority. (pp. 12-13) (citing *Smith v. Crocker First Nat’l Bank*, 152 Cal. App. 2d 832, 314 P.2d 237, 240 (1957)).

The court rejected plaintiff's argument that the summons provided for "continuous service" where the summons for "future earnings" was not "limited . . . to specific timeframes[.]" the court did not specifically order same, and the Garnishees did not provide consent. (pp. 13-14) (citation omitted). The court likewise distinguished plaintiff's citation to *Marco Polo Shipping Co. Pte. v. Supakit Prods. Co.*, 2009 U.S. Dist. LEXIS 19057, at *3-4 (S.D.N.Y. Mar. 4, 2009) (" . . . a court may issue an attachment even if the plaintiff only anticipates that the defendant's funds will pass through the district at some unknown future time." But "a plaintiff must at least set forth enough facts to render it plausible that the defendant's funds will be present in the district at some future time.") (citations omitted), finding that "[a]dditional facts are needed to show that it was plausible Princess would sell the excursions in the future[]" and that plaintiff failed "to provide binding authority to support that an attachment could apply to property acquired in the future indefinitely."

3. "[F]uture payments flowing from" the contract between Princess and Aloschi were not attachable where plaintiff did not "show that the agreement . . . was executed[.]" Rather, the contract appeared to be executory "since it relies on Princess to first sell excursions to its passengers before conducting business with Aloschi."

4. The court cannot attach after-acquired "funds held in London, England." (p. 20). While the court considered discussion within *Boland Marine & Indus., LLC v. Bouchard Transp. Co.*, No. 1:20-CV-66-LY-ML, 2020 U.S. Dist. LEXIS 118520, at *16 (W.D. Tex. Feb. 28, 2020), *report and recommendation adopted*, No. 1:20-CV-66-LY, 2020 U.S. Dist. LEXIS 118518 (W.D. Tex. Mar. 26, 2020) ("the court is persuaded that the Texas Supreme Court would reject the separate entity rule and find that bank accounts are located wherever funds are available to the account holder."), cited by plaintiff, the court did not follow suit. "In short, Plaintiff has not identified Ninth Circuit authority or California law to support attaching funds held in a foreign country and currency."

5. Because "[p]laintiff failed to support the maritime attachment or provide an alternative basis for jurisdiction," the court recommended that the order and summons for Aloschi's property be vacated and Aloschi dismissed for lack of jurisdiction.

Holding (Princess):

1. The court tacitly adopted the position "that a maritime garnishment served before the garnishee comes into possession of the property to be garnished is void[.]" turning to cases from the Second Circuit supporting same. (pp. 14-15) (citations omitted). "Plaintiff has not provided evidence that Princess owed Aloschi any money when the summons was served."

2. The court, again, found that Princess and Aloschi's contract appeared to be executory: "Plaintiff has not set forth evidence or other legal argument showing that the funds that Princess obtained after the summons was served constituted unmatured debt." (p. 18). Furthermore, the funds were not within the district for attachment, since they were "held in a bank in London, England[.]"

PASSENGER LIABILITY

Ehart v. Lahaina Divers, Inc., 92 F.4th 844, 846 (9th Cir. 2024)

Facts: Husband and wife were passengers on a snorkel/scuba cruise from Maui to Molikini, which is a crater approximately 2.5 miles off the coast of Hawaii. As part of the cruise, the couple had to sign liability waivers which exculpated the cruise operator. During the snorkel expedition, the wife disappeared. The cruise operator was sued and raised the liability waiver as an affirmative defense. The trial court held the waiver was invalid under 46 U.S.C. § 30527(a). Despite the trial court refusing to certify the decision, the cruise operator brought an interlocutory appeal of the decision pursuant to 28 U.S.C. § 1292(a)(3) that allows interlocutory appeals in admiralty as a matter of right.

Holding: The Ninth Circuit held that because the trial court ruled on the applicability of the waiver that it was a decision “determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed” from which appeal was allowed as matter of right. The Court compared it to cases which allowed interlocutory appeal as a matter of right where defendants were entitled to limit their liability pursuant to COGSA and under a cruise ticket. This represents an expansion of the right to cases where the defendant is not entitled to so limit its liability.

The Ninth Circuit then held that 46 U.S.C. § 30527(a) did not apply to the snorkel cruise. The statute provides:

The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting

(A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or
(B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.

(2) Voidness--A provision described in paragraph (1) is void.

The Ninth Circuit held that the provision “between ports” necessarily meant between two different ports in the United States. Because the voyage went out to sea and returned to the same port it was not covered by the statute.

INTERLOCUTORY APPEAL

McArthur v. Holland Am. Line Inc., 2025 U.S. Dist. LEXIS 223679; 2025 AMC 567; 2025 WL3171355 (W.D. Wash., Nov. 13, 2025)

Facts: This case involved a fatal crash of a third-party floatplane tour during a stop in Ketchikan, Alaska, on a Holland America cruise. Passengers’ families sued the floatplane

operator and Holland America entities. After settlement of claims against the floatplane operator, only the Holland America defendants remained. Holland America then moved for summary judgment on the duty to warn and other issues. The assigned magistrate recommended denial of the motion. The district judge adopted the magistrate's report and recommendation (referred to as the "Order"). Holland America challenged the Order, then moved to certify it for interlocutory appeal under 28 U.S.C. § 1292(b). Holland America did not have the right to appeal the interlocutory order as a matter of right under 28 U.S.C. § 1292(a)(3).

Holding: The district court granted Holland America's Motion for Certification for Interlocutory Appeal. Under 28 U.S.C. § 1292(b), a non-final order may be appealed if: 1) it involves a controlling question of law; 2) there is substantial ground for difference of opinion on that question; and 3) an immediate appeal may materially advance the ultimate termination of the litigation. Interlocutory appeals are described as an "extraordinary" remedy to be used sparingly, only when they may avoid protracted and expensive litigation.

The central question on Holland America's motion was whether, and to what extent, a cruise line can owe a duty to warn of dangers associated with a non-sponsored, third-party excursion after passengers leave the ship. The district court concluded the duty-to-warn question was a pure, controlling issue of law and that an immediate appeal could either eliminate Holland America from the case or clarify and narrow the issues for trial. The court also held there is "substantial ground for difference of opinion" because: 1) no Ninth Circuit case squarely addressed whether a cruise line's duty to warn extended to non-sponsored excursions beyond the point of disembarkation; 2) no federal court had clearly rejected such a duty on that basis; and 3) there was potentially competing guidance from an Eleventh Circuit decision which expressly recognized a duty to warn of known dangers beyond the point of disembarkation in areas where passengers are invited or reasonably expected to visit.

Holland America also challenged two other aspects of the district court Order: 1) the finding of a fact issue on whether the risks of floatplane tours in the Misty Fjords/Ketchikan area were open and obvious; and 2) the finding of a fact issue on Holland America's actual or constructive notice of the risk-creating conditions. Because certification under § 1292(b) covered the entire Order once any certifiable issue existed, the district court stated it need not certify the issues separately. The court nevertheless noted that the two factual findings were not appropriate for interlocutory appeal in their own right because they involved application of settled law to specific facts rather than pure legal questions, and they did not present substantial grounds for differing legal opinions.

Ehart v. Lahaina Divers, Inc., 92 F.4th 844, 846 (9th Cir. 2024)

Facts: [*See discussion in Passenger Liability section.*]

Holding: The Ninth Circuit held that because the trial court ruled on the applicability of the waiver that it was a decision "determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed" from which appeal was allowed as matter of right. The Court compared it to a case finding that the defendants were entitled to limit their liability pursuant to COGSA and under a cruise ticket.

VESSEL ARREST – INTERLOCUTORY SALE

Centennial Bank v. M/Y Marluy, No. 8:25-cv-00545-JWH-KES, 2025 U.S. Dist. LEXIS 228594 (C.D. Cal. Nov. 4, 2025) (Reported in AMC)

SMG v. That Certain 1985 Wellcraft 3200 Express Cruiser Motor Yacht of Approximately 35.6-Feet in Length, No. 2:25-cv-1008 DC AC, 2025 U.S. Dist. LEXIS 212676 (E.D. Cal. Oct. 28, 2025) (Reported in AMC)

Marine Grp. Boat Works, LLC v. F/V Heather G, No. 25-cv-00319-BAS-DDL, 2025 U.S. Dist. LEXIS 195829 (S.D. Cal. Oct. 1, 2025) (Reported in AMC)

Facts: The above three cases involve parties arresting a vessel to enforce a maritime lien or mortgage. In each case, the owner did not claim the vessel and the Court outlined the standard for interlocutory sale of the vessel.

Holding: Each Court applied the same test as outlined in Supplemental Admiralty rule E(9)(i). This allows an interlocutory sale of the res if one of the three conditions arises:

- (A) the attached or arrested property is perishable, or liable to deterioration, decay, or injury by being detained in custody pending the action;
- (B) the expense of keeping the property is excessive or disproportionate; or
- (C) there is an unreasonable delay in securing release of the property.

In each case, the plaintiff argued that the vessel should be sold for each reason.

Each plaintiff claimed that the arrested property was liable for deterioration, decay or injury by being detained. There was a split in the district courts over what is necessary to show such deterioration. The Central District Court found that because the order allowed the substitute custodian to perform some maintenance, additional evidence was necessary to show deterioration to justify a sale. In the Eastern District, the plaintiff offered the declaration of the yacht broker to establish that deterioration was inevitable and justified a sale. The Southern District court, again relying on a declaration for a yacht brokers, found that deterioration justified a sale.

Turning to the second test (Cost of Keeping the Property), each court found that the condition justifying interlocutory sale was met. The Central District found that costs of \$6,900 per month on a boat worth \$1.1 million (3.5%) was excessive when there was no effort to release the yacht. The Eastern District easily found that costs of \$106 per day were excessive on a boat worth \$2,500. The Southern District found that monthly costs of \$7,570 per day on a boat worth \$350,000 was excessive.

Each court found that the failure of an owner to post a bond or otherwise release the vessel for over four months after arrest generally justify its sale. The Central District found that a delay of more than five months justified the sale. The Eastern District found that six months' time was

adequate to post a bond to release the vessel. The Southern District likewise found a delay of over six months justified the sale of the vessel.

BAREBOAT CHARTER

United States ex rel. Curtin Mar., Corp. v. Trade W. Constr., Inc., No. 6:24-cv-00810-MC, 2025 U.S. Dist. LEXIS 217360 (D. Or. Nov. 3, 2025) (Reported in AMC)

Facts: This case involved the bareboat charter of barge to be used in to construct a project a breakwater in Coos Bay, Oregon. The barge was being used to transport the rock being used to construct a breakwater. The charter party made the charterer responsible for damage to the barge that occurred during the charter period. The charter also required an on-hire and an off-hire survey that was to be conducted in precisely the same manner. The survey was to be conclusive as to the damage that occurred during the charter party.

The on-hire charter was conducted with instructions only to look at external condition and no notation was made about the interior condition of the barge.

During the charter, it was noticed that the barge was incurring damage. The parties agreed to use LIDAR scans to determine whether in term repairs were to be conducted.

The off-hire survey included discussions of the internal and external structural conditions. The off-hire survey also made use of the LIDAR scans. The off-hire survey showed “newly observed damage to the internal tanks, including buckling of the bulkheads and deck distortions.”

The barge had not been repaired at the time of the decision.

Both parties brought cross motions for summary judgment.

Holding: The court recited the terms of the contract which provided that the charterer was to be responsible for damage to the barge, less ordinary wear and tear. The court then explained that the charter defined the on-hire and off-hire surveys were going to be conducted, primarily focusing on the requirement that the on-hire and off-hire should be conducted using the same method. Finally, the court found that the charter was a fully integrated contract.

The charter first moved for summary judgment arguing that the owner could not prove the damage occurred during the policy period. The basic argument was that because LIDAR was used in the off-hire, the off-hire survey was not conducted in the same method as the on-hire survey, and, therefore, the owner breached the agreement. The owner provided a declaration from the surveyor that the LIDAR was not used in conducting the off-hire. The court held, therefore, that there was an issue of material fact as to whether the surveys were conducted using the same method.

The owner filed a motion for summary judgment requesting the court dismiss the claims that the owner failed to provide a barge fit for the purpose to which it was intended. The Court granted

this motion, finding that the charter was integrated and that it clearly disclaimed any warranties as to the condition of the barge. The barge was delivered “as is, where is.”

SEAMAN’S BODILY INJURY

Peak v. Dep’t of Transportation, 2024 Wash. App. LEXIS 2093 (Wash. Ct. App. Oct. 14, 2024) (Reported in AMC)

Facts: Thomas Peak, an oiler aboard the ferry M/V *TILLIKUM*, fell down a vessel stairway in October 2019 and injured his back. Peak alleged that an unsecured rubber mat located on the upper landing caused him to slip and fall down the stairs. He sued the Washington Department of Transportation (“WSDOT”) asserting claims for (1) negligence under the Jones Act, 46 U.S.C. § 30104, (2) unseaworthiness, and (3) maintenance and cure.

The trial court granted summary judgment dismissing all claims, concluding that Peak lacked evidence of causation on the liability claims. Peak appealed.

Holding: The Division One Court of Appeals reversed dismissal of the Jones Act negligence and unseaworthiness claims and remanded for trial.

1. Jones Act Negligence: The Court of Appeals identified the “very low evidentiary threshold” applicable to Jones Act claims. Under federal precedent, the test is whether employer negligence played “any part, even the slightest,” in producing the injury. (quoting *Ferguson v. Moore-McCormack Lines Inc.*, 352 U.S. 521, 523 (1957)). WSDOT argued that Peak could not establish causation because he did not specifically remember the mat slipping and no witness observed the exact moment of the fall. The court rejected that framing, finding that circumstantial evidence is sufficient, and causation is ordinarily for the jury unless “reasonable minds could reach but one conclusion.”

The record included testimony that the mat had a “very slick bottom,” that a crew member had slipped on it earlier in the shift, and that the mat had shifted position after Peak’s fall. Viewing the evidence in the light most favorable to Peak, a reasonable jury could conclude that the unsecured mat played at least some role in causing the fall. Summary judgment was improper.

2. Unseaworthiness: The Court of Appeals likewise reversed dismissal of the unseaworthiness claim. A vessel is unseaworthy if it is not “reasonably fit for its intended use.” Although unseaworthiness requires that the condition play a “substantial part” in causing injury, the same evidentiary record created a triable issue.

3. Maintenance and Cure: The trial court also held that Peak had reached maximum medical improvement (“MMI”) and was not entitled to additional maintenance and cure. Peak provided no evidence to contradict his own physician’s findings, leaving no factual dispute, and the Court of Appeals affirmed

Aird v. Dep't of Transportation, 2024 Wash. App. LEXIS 1027 (Wash. Ct. App. May 20, 2024) (reported in AMC)

Facts: Matthew Aird, a Washington State Ferries seaman, injured his back in 2017. The Washington State Department of Transportation (“WSDOT”) began paying maintenance and cure. In January 2020, Aird’s treating physician determined that he had reached maximum medical improvement (MMI), and WSDOT terminated benefits. Aird did not dispute the determination at the time.

Aird subsequently filed suit and, nearly three years later, obtained testimony from a different physician stating that he had not reached MMI and could benefit from additional treatment. Aird moved to reinstate maintenance and cure. The trial court granted reinstatement, applying the “unequivocal evidence” standard derived from *Dean v. Fishing Co. of Alaska*, 177 Wn.2d 399 (2013). WSDOT appealed.

Holding: The Washington Division One Court of Appeals reversed the reinstatement order and remanded for trial.

The court began by outlining the governing maritime framework: maintenance and cure continues until the seaman reaches MMI, defined as when the condition “permanently stabilizes or cannot be improved further.” Turning to *Dean v. Fishing Co. of Alaska*, the Court of Appeals affirmed the Washington Supreme Court holding that the shipowner must establish MMI by “unequivocal evidence” when it seeks to unilaterally *terminate* maintenance and cure based on its own determination of MMI when conflicting medical opinions exist. The Court of Appeals affirmed that the rule reflects the “virtually automatic” nature of maintenance and cure and the strong solicitude afforded to seamen under maritime law.

The Court of Appeals, however, held that the *Dean* standard did not apply to Aird. Unlike in *Dean*, the WSDOT did not terminate benefits in the face of conflicting medical evidence or based on an employer-retained physician’s contrary view. Rather, Aird’s own treating physician determined that he had reached MMI, and that determination was uncontested at the time of termination. WSDOT relied on that medical opinion in closing the claim. No contradictory medical evidence existed until years later and the dispute over reinstatement was a question of fact “for the trier of fact to decide.” Where a genuine issue of material fact exists regarding MMI, the matter must be resolved at trial under ordinary summary judgment principles.

In short, the court concluded that the reinstatement order improperly resolved a disputed factual issue under the *Dean* heightened standard that was inapplicable to the circumstances of the case. The proper course was to allow the jury to determine whether Aird had in fact reached MMI.

Additional issues on appeal included whether Aird had properly pled a claim for maintenance and cure, and whether the WSDOT should be entitled to a continuance for the purpose of investigating Aird’s claim for reinstatement of maintenance and cure. The Court of Appeals found that the claim for maintenance and cure was properly pled under Washington’s notice pleading standard because the complaint identified the injury and sought “maintenance and cure”

as damages. It denied WSDOT's motion for continuance, noting that WSDOT failed to identify specific evidence additional discovery would produce that would alter the material factual dispute regarding MMI.

**MAINTENANCE AND CURE 101, A GUIDE TO AN EMPLOYERS VERSUS SEAMAN'S RIGHTS
AND OBLIGATIONS: HERE IT IS!**

- What investigation am I, as the Employer, entitled to undertake before paying any Maintenance and Cure?
- If an Adjuster is involved, does the Employer or Insurer allow an Adjuster to “Call the Shots” on whether or not to pay Maintenance and Cure?
- How does the Employer handle the decision of Maintenance and Cure versus LSHW Compensation or even state Workman’s Compensation?
- What if a wrong decision is made? How is it rectified since there would be two (2) or more different insurers involved?
- If Maintenance is owed, how does the Employer calculate the amount and items to pay? Can Maintenance ever be suspended by the Employer?
- Who makes the “big decision” to pay or not to pay any Maintenance and Cure if the requirement for payment is really questionable?
- When should the Employer pay an injured Seaman either “Reduced Wages”, a “Partial Salary” or “Advance on Settlement” whatever you wish to call it? If so, does the Employer –
 - need the insurers approval for reimbursement?
 - withhold taxes?
 - give separate checks for Maintenance?
 - receive a credit from the Claimant if there is a Settlement with or Judgment against the Employer?
- Who selects the doctors for an IME versus daily care of an injured seaman?
- Who has control if any, of IME’s? Cost of Medical expenses? What if cost is not reasonable, can it be disputed and if so how? Maximum Medical Improvement (MMI) – means what? Is it different from MMC?
- Let’s explain “Palliative” and “Curative” regarding payment of Maintenance and providing Cure? When and how does it end?
- And of course, there is “Punitive Damage” exposure! How does exposure to Punitive Damages arise, and how are they avoided?
- Where do insurers stand on the issue of “Punitive Damage” and what are the coverage issues?

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR

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**MAINTENANCE AND CURE 101:
A GUIDE TO EMPLOYERS' VERSUS SEAMEN'S
RIGHTS AND OBLIGATIONS: *HERE IT IS!***

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Maintenance and cure is a centuries-old maritime doctrine providing an injured or ill seaman with a per diem living allowance (maintenance) and payment for all reasonable medical expenses (cure) until they reach a point of maximum recovery. This area of law is heavily litigated, particularly regarding who qualifies for these benefits, what should be covered and in what amount, and when an employer can legally stop paying.

Maintenance and cure is a strict liability obligation arising from the vessel owner-seaman relationship. As the Fifth Circuit repeatedly emphasizes, fault is irrelevant. *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995). The entitlement to maintenance and cure continues until the seaman reaches 'maximum cure'—a recovery as complete as the injury allows. Importantly, "The obligation of maintenance and cure is not predicated on the fault or negligence of the employer," making it a no-fault benefit. *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724 (1943). The only traditional defense to maintenance and cure is the seaman's willful failure to disclose a material pre-existing condition. *McCorpen v. Central Gulf S.S. Corp.*, 396 F.2d 547 (5th Cir. 1968). A vessel owner who arbitrarily or unreasonably refuses maintenance and cure faces attorney's fees and penalties under *Vaughan v. Atkinson*, 369 U.S. 527 (1962), and *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009).

To establish entitlement to maintenance and cure, a seaman must prove: (1) they were employed as seaman and their injuries or illnesses occurred, manifested, or were aggravated while in the ship's service. The inquiry is not one of causation, but of timing: did the illness for which the seaman seeks maintenance and cure begin or become aggravated while he was "serving the ship"? *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441 (2001). The standard for determining seaman status for maintenance and cure purposes is identical to that used for Jones Act claims.

1. **Determining Seaman Status: Jones Act vs. Longshore & Harbor Workers' Compensation Act/State Compensation**

Seaman status is determined by a two-pronged test established by the Supreme Court in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995): (1) the worker's duties must contribute to the function of the vessel or accomplishment of its mission, and (2) the worker must have a connection to a vessel in navigation that is substantial in both duration and nature. The Jones Act and Longshore and Harbor Workers' Compensation Act (LHWCA) are mutually exclusive regimes, but maritime workers in LHWCA-enumerated occupations can still qualify as seamen if they meet the vessel connection requirements. The determination is fact-specific and cannot be resolved based solely on job title or work location.

The first prong, the contribution to function/mission of a vessel, is set forth in *McDermott Intern., Inc. v. Wilander*, 498 U.S. 337 (1991) and it requires that the worker perform "the ship's work." As the Supreme Court explained in *Wilander*, "The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we believe the requirement that an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission' captures well an important requirement of seaman status." *Id.* at 355. This threshold requirement is broadly construed, as the Supreme Court noted that "All who work at sea in the service of a ship" are eligible for seaman status. *Chandris*, 515 U.S. at 368.

The substantial connection requirement serves 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." *Id.* The *Chandris* Court emphasized that

both duration and nature must be substantial, rejecting the lower court's formulation that would require substantial connection in duration "or" nature.

Regarding duration, the Supreme Court endorsed a temporal guideline established by the Fifth Circuit: "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." *Id.* at 371. However, the Court cautioned that "This figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases." *Id.*

The 5th Circuit now uses a strict two-pronged test, refined recently in *Sanchez v. Smart Fabricators of Texas, LLC*, 997 F.3d 564 (5th Cir. 2021), to distinguish a "seaman" from a land-based worker covered by the LHWCA or state workers' compensation. *Sanchez* refined the *Chandris* "substantial connection test" by focusing on the nature element, mandating that the Jones Act seaman's work be "sea-based" or "seagoing." *Sanchez* tightened the test by requiring that workers show allegiance to a specific vessel (or fleet) rather than a shoreside employer's mission, narrowing eligibility for temporary, land-based workers on vessels. Prior 5th Circuit rulings overemphasized the "perils of the sea" factor, making almost any work on a floating vessel count as sea-based. The 5th Circuit maintained the *Chandris* 30% rule for duration but added that even if a worker spends 30% of their time on a vessel, they may fail the "nature" test if they are just a land-based worker doing discrete repairs. At least in the 5th Circuit, *Sanchez* makes it more difficult for transient, shore-based employees (like temporary welders or contractors) to qualify as seaman, pushing them towards the LHWCA.

Tasks performed ashore, maintenance of equipment not part of a vessel, or duties not leading to substantial connection to a vessel, do not satisfy seaman status criteria. The Jones Act and the LHWCA are mutually exclusive, with seaman status excluding applicability of the

LHWCA. Further, courts have recognized seamen’s entitlement to maintenance and cure while on shore leave or even post-sign off if they remain “in the service of the ship,” reinforcing the broad protective scope of maintenance and cure obligations.

In sum, to be a seaman under the *Chandris/Sanchez* test, the worker must meet both of the following criteria:

- **Contribution to Function:** The worker’s duties must contribute to the function of the vessel or the accomplishment of its mission. This is a "broad threshold" that most maritime workers meet.
- **Substantial Connection:** The worker must have a connection to a vessel in navigation (or an identifiable fleet) that is substantial in both **duration** and **nature**.
- **Duration:** If a worker spends less than **30% of their time** in the service of a vessel in navigation, they generally do not qualify as a seaman.
- **Nature:** Following *Sanchez*, the courts now emphasize whether the worker's duties "take them to sea" and expose them to the "perils of the sea." A welder working on a jacked-up rig next to a pier (as in *Sanchez*) may meet the duration test but fail the nature test because they are effectively a land-based worker.

2. Comparative Table: Jones Act vs. LHWCA vs. State Comp

Feature	Jones Act (Seaman)	LHWCA (Longshoreman)	State Workmen’s Comp
Primary Remedy	Tort suit (Negligence) + Maintenance & Cure	Statutory No-Fault Benefits	Statutory No-Fault Benefits
Exposure Requirement	Must face "perils of the sea"	Maritime employment (status) on navigable waters (situs)	General employment on land
Status Test	30% rule + <i>Sanchez</i> "Nature" test	Specific tasks like loading/unloading or ship repair	Varies by state; non-maritime

3. Investigation of Maintenance and Cure Claim

Vessel owners face a dilemma: they must investigate claims to protect against fraud and abuse, but they cannot arbitrarily delay payment of maintenance and cure while conducting lengthy investigations. The question is deceptively simple: What constitutes a "reasonable time" to investigate before commencing maintenance and cure payments?

The Fifth Circuit has not established a bright-line rule, instead applying a fact-intensive reasonableness analysis. In *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496, 1499 (5th Cir. 1995), the court held that an employer acts unreasonably when it "fails to pay on the basis of cursory investigations or for no discernible reason at all."

Key factors include:

- The complexity of the medical condition
- The clarity of the causal relationship to maritime employment
- The availability of medical records
- Whether the employer is actively investigating or simply delaying
- Whether the seaman cooperated with reasonable requests

i. Daily Maintenance Amount Determinations

Daily maintenance rates have evolved to \$30-68+ per day depending on locality, with courts requiring evidence-based determinations rather than arbitrary amounts. Courts consistently require that maintenance payments reflect reasonable costs for food and lodging for a single seaman living in the seaman's locality, with seamen bearing the burden to prove actual expenses.

The court in *Singerman v. PBC Management Inc.*, 552 F.Supp.3d 611 (W.D. La. 2021), notes that "an injured Jones Act seaman is not required to accept the standard rate of maintenance if he can prove to the trier of fact that he is entitled to a higher rate," and "where parties do not stipulate to the standard rate of maintenance, maintenance is an issue for the trier of fact." *Id.*, citing to *Hall v. Noble Drilling (U.S.) Inc.*, 242 F.3d 582, 587-588 (5th Cir. 2001). The court

outlined various methods for proving reasonable costs: “the seaman's own testimony, proof of the seaman's actual expenditures, expert testimony about the cost of living in the seaman's locale, evidence of maintenance rates negotiated by unions, per diem allowances for seamen in port when the vessel's facilities are unavailable, the cost of food and lodging equivalent to food and lodging on the vessel.” *Id.*, citing to *Curry v. Fluor Drilling Servs., Inc.* 715 F.2d 893, 896 (5th Cir. 1983) and *Hall*, 242 F.3d. at 387-388.

The burden-shifting framework requires seamen to make a *prima facie* showing of actual expenses before employers must demonstrate unreasonableness. The court in *Wilcox v. Hamilton Construction, LLC*, 426 F.Supp.3d 788, 791 (W.D. Wash. 2019) explained that “the plaintiff must first make a *prima facie* showing of his actual living expenses that were necessary to incur during the plaintiff's convalescence,” after which “the burden shifts to the defendant to demonstrate that the plaintiff's actual expenses were unreasonable, based upon the average cost of a seaman living alone in the plaintiff's locality.”

Daily maintenance rates vary significantly by geographic location and individual circumstances. The defendants in *Singerman*, 552 F.Supp.3d 611 (W.D. La. 2021) paid rates that increased from \$30 to \$40 per day. In the *Ramirez v. Winter Blues, Inc.* case in Alaska, the court awarded the seaman a rate of \$59.41 per day in maintenance, denying the seaman's request for \$64 per day. 2020 WL 6204624, at *1 (D. Alaska Sept. 11, 2020).

The Western District of Washington noted that the highest maintenance rate defendant was able to identify was in California and was \$68.72 per day, but the court awarded the Plaintiff seaman only \$56 per day in that case, finding the plaintiff's requested \$103 per day unreasonable. *Wilcox*, 426. F.Supp.3d. 788.

Nevertheless, the evidence standard for proving maintenance entitlement remains relatively low. *Upper River Services, L.L.C. v. Heiderscheid*, 481 F.Supp.3d 907, 919 (D. Minn. 2020) confirmed that while the seaman's "burden of producing evidence of expenses is 'feather light,'" courts will deny maintenance entirely if seamen "present no evidence of actual expenses." The court in *Hurtado v. Balerno International Ltd.*, 408 F.Supp.3d 1315, 1330 (S.D. Fla. 2019) noted that "if the seaman presents evidence of his expenses, the court must then estimate both the seaman's 'actual costs of food and lodging' and the 'reasonable cost of food and lodging for a single seaman in the locality of the plaintiff.'"

ii. Medical Provider Payment Obligations

Medical provider payment obligations are increasingly defined by negotiated or accepted amounts rather than full billing charges, providing cost certainty for employers. Courts have been focused on whether the employer must pay the full amount billed by medical providers or only the actual amount paid (or negotiated) by the seaman's private insurance and more and more, those amounts can be substantially different.

The Fifth Circuit applies an "actual and reasonable" medical expenses standard with a proactive duty to ensure proper care that extends beyond mere reimbursement. *Boudreaux v. U.S.*, 280 F.3d 461 (5th Cir. 2002). In *Manderson v. Chet Morrison Contractors, Inc.*, 666 F.3d 373, 382 (5th Cir. 2012), the Fifth Circuit looked at whether a cure award should include the difference between what the seaman's doctors charged and the lesser amount the doctors accepted in full payment, which was an issue of first impression at the time. Generally, such a collateral source would not be allowed to reduce the amount claimed by a plaintiff, but the Fifth Circuit recognized an exception to the general prohibition of the collateral source rule in the context of maintenance and cure. This applies whether the charges are incurred by a seaman's insurer on his behalf and

then paid at a written-down rate, or incurred and then paid by the seaman himself, including at a non-discounted rate. *Id.* Thus, in Manderson's case, regardless of what his medical providers charged, those charges were satisfied by the much lower amount paid by his insurer and consequently, the Fifth Circuit held that the district court erred by awarding the higher, charged (but *not* totally paid) amount. *Id.* Thus, in the Fifth Circuit, "cure" only covers expenses "actually incurred" by the seaman. If a seaman's private health insurance negotiates a lower rate with a hospital, the employer is only obligated to pay the lower, discounted amount, not the original, higher, "billed" amount.

The Sixth Circuit also limits cure recovery to actual financial harm suffered by the seaman. In *Al-Zawkari v. American S.S. Co.*, 871 F.2d 585 (6th Cir. 1989), the court held that "the purpose of cure is purely compensatory and unrelated to the negligence of the employer and restricts a seaman's recovery to only out-of-pocket cure expenses." The Sixth Circuit's focus on actual out-of-pocket expenses means seamen with good insurance coverage may receive no cure benefits, even if their maritime injuries require expensive treatment.

Several other circuits follow variations of the out-of-pocket expense limitation. The Fourth Circuit in *Gosnell v. Sea-Land Service, Inc.*, 782 F.2d 464, 468 (4th Cir.1986), decided that plaintiff seaman was entitled to no recovery for cure because his medical expenses had already been paid by the union's medical and hospitalization plan. The Third Circuit, in *Shaw v. Ohio River Co.*, 526 F.2d 193, 200 (3d Cir.1975), also decided that the vessel owner should not be found liable for cure where Blue Cross/Blue Shield paid for the seamen's medical expenses. Similarly, the Second Circuit, in *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 172 (2d Cir.1973), decided that the seaman had no right to cure because she received most of her treatment

at a public service hospital and “there is no evidence that she had any out-of-pocket medical expenses.” *Id.*

Under Louisiana law, an insurer can use the reasonable and customary costs of surgery to argue for a reduced cost of surgery. This principle is supported by the following cases. In the case of *Adler v. Hospital Service, Ass’n of New Orleans*, 278 So.2d 177 (La. App. 4th Cir. 5/15/1973), the Louisiana Fourth Circuit found that the insurer was justified in paying only a portion of the surgical fees based on what was considered “customary and reasonable” under the terms of the policy. The court emphasized that the reasonableness of a medical fee depends on what is customary in the community for similar operations and the extent of the insurer’s responsibility under the policy, rather than the amount billed by the surgeon. *Id.*

In Louisiana, the Legislature has proposed House Bill No. 427 which, if passed, would create a new legal mechanism called a “reversionary medical trust” for handling all future medical expenses in personal injury claims. Under this law, when a defendant is found liable for damages and the court determines the plaintiff requires ongoing medical treatment, the liable insurer can create a specialized trust to manage and pay for the future expenses. The trust must be administered by a Trustee appointed by the insurer. Once the trust is terminated, either by the death of the plaintiff or termination of the trust, any remaining funds would return to the insurer who established the trust.

While this would not apply to maintenance and cure cases, it perhaps provides a glimpse of what could lie ahead in terms of tort reform measures concerning medical damages. Imagine the practical implications for insurers:

- How are insured’s rates calculated if you have funds in trust which could at some undetermined future date be reverted to their credit?
- How do you account for and assign the cost of the Trustee when it is for an undetermined period of time?

- If you have a relatively young plaintiff in a personal injury case, you could be looking at bearing the responsibility of having a Trustee for decades to manage the trust.
- Are these additional Trustee costs, monitoring costs, and accounting costs worth it for the insurer?

These future costs are highly uncertain, but one thing is certain – medical inflation consistently outpaces general economic inflation. Here's what the data shows:

Most Recent Data (December 2025 - January 2026) from the U.S. Bureau of Labor Statistics (BLS) - Consumer Price Index:

- **Medical care inflation:** 3.2% (12 months ending December 2025)
- **Overall inflation:** Not specified in the latest report, but trending around 2.8- 3.0%
- **Medical care services specifically:** 3.5%
- **Medical care commodities:** 1.5%

Source: U.S. Bureau of Labor Statistics, Medical Care Index, January 2026 report (via USInflationCalculator.com)

In fact, medical inflation varies significantly by category. Here's the breakdown from the Peterson-KFF analysis for the period from March 2023-March 2024 alone, which uses the U.S.

Bureau of Labor Statistics data:

- **Hospital services generally:** 7.7% increase
- **Hospital inpatient services:** 6.9% increase
- **Hospital outpatient services:** 8.3% increase
- **Nursing homes:** 3.9% increase
- **Physicians' services:** 0.7% increase
- **Prescription drugs:** 0.4% increase

Source: <https://www.kff.org>

Hospital services are driving medical inflation, increasing at **2-3 times the rate** of overall medical care inflation. Here are some reasons why:

1. **Wage inflation in healthcare sector:** Healthcare wages are increasing faster than average wages in other sectors due to workforce shortages
2. **Consolidation of providers:** Hospital and health system consolidation increases negotiating power, leading to higher prices for private insurers

3. **Technology and innovation:** New medical technologies, treatments, and pharmaceuticals are inherently more expensive than what they replace
4. **Aging population:** Increasing demand from aging demographics
5. **Administrative costs:** Healthcare has higher administrative overhead than most industries
6. **Inelastic demand:** Healthcare is not discretionary—people need care regardless of price
7. **Information asymmetry:** Patients cannot effectively shop for price/quality, reducing competitive pressure

The issues raised caused by the realities of medical inflation are many and given the maritime industry and maritime underwriter's desire to deal more in certainties than uncertainties, this is unsettling. This leads us into our next topic, which focuses on future care cure costs.

4. **Maximum Medical Improvement and Palliative v. Curative Care Distinctions**

The obligation to continue maintenance and cure ceases when qualified medical opinion concludes that no further improvement is medically expected, including when treatment shifts from curative to palliative care, such as for pain relief without structural improvement. The Supreme Court in *Farrell v. United States* established that a shipowner's duty to pay maintenance and cure continues until the seaman reaches the point of maximum medical recovery, also known as maximum medical improvement (MMI), 336 U.S. 511, 519-520 (1949). The determination of MMI is fundamentally medical rather than legal. However, courts retain authority to evaluate the sufficiency and credibility of medical evidence presented.

Courts consistently hold that MMI determinations must be based on medical rather than legal conclusions, with any doubts resolved in favor of continuing benefits. In *Vaughn v. American Commercial Barge Line, LLC*, 672 F.Supp.3d 184 (E.D. La. 2023), the Eastern District of Louisiana explained that "any ambiguities or doubts regarding entitlement to cure or the date of maximum medical improvement must be resolved in favor of the seaman." MMI is reached when

the seaman recovers from the injury, the condition permanently stabilizes, or the condition cannot be improved further. *Id.* at 189.

The distinction between palliative and curative care represents a critical limitation on maintenance and cure obligations. The distinction extends beyond surgical interventions to any treatment that could provide functional improvement. Courts examine whether proposed treatments merely manage symptoms or could meaningfully improve the seaman's underlying medical condition. Where treatments address structural deficits or offer prospects for functional restoration, MMI determinations become factually disputed. The maintenance and cure duty does not extend to treatment which is only palliative in nature and results in no betterment in the claimant's condition.

Cases on Both Sides:

Cases Finding MMI Not Reached:

Vaughn v. American Commercial Barge Line, LLC, 672 F.Supp.3d 184 (E.D. La. 2023) — The court denied summary judgment because Dr. Todd's statement about "nonsurgical Maximum Medical Improvement" while requiring ongoing treatment created ambiguity that must be resolved in the seaman's favor. The physician's qualified opinion that the seaman "will continue to require treatment going forward" prevented an unequivocal MMI finding.

Hurtado v. Balerno International Ltd., 408 F.Supp.3d 1315 (S.D. Fla. 2019) — The court found MMI had not been reached because the treating physician testified that additional corrective surgery was required to repair an improperly performed hernia operation. The defendant's failure to conduct an independent medical examination left uncontroverted medical testimony supporting continued treatment needs.

Smith v. Omega Protein, Inc., 459 F.Supp.3d 787 (S.D. Miss. 2020) — The court denied summary judgment when a later medical determination contradicted an earlier MMI finding, recognizing that seamen have the right to bring serial suits to collect maintenance payments as they come due. Medical evidence showed that the seaman's condition had not stabilized despite an initial MMI determination.

Cases Finding MMI Reached:

Thibodeaux v. Gulf Coast Tugs, Inc., 668 F.Supp.3d 486 (E.D. La. 2023) — The court granted summary judgment finding MMI when the treating physician's recommendations for a spinal cord stimulator and intrathecal pump were determined to be palliative treatments directed at pain relief rather than correcting underlying conditions. The physician acknowledged that orthopedic surgery could not provide further improvement.

Stemmler v. Interlake Steamship Co., 621 F.Supp.3d 326 (E.D. N.Y. 2022) — The court found MMI after the seaman received a heart transplant because no further medical treatments were available beyond monitoring and time passage, which do not constitute curative measures. The seaman's employment and physical activities demonstrated medical stabilization despite ongoing cardiac health improvements. The court, quoting *Messier v. Bouchard Transp.*, 688 F.3d 78 (2nd Cir. 2012), emphasized that maintenance and cure obligations do not constitute "a source of lifetime or long-term disability income" and are not intended to be a "pension or disability program."

Adams v. Liberty Maritime Corporation, 560 F.Supp.3d 698 (E.D. N.Y. 2020) — The court determined MMI was reached on the second of two MMI dates because later medical issues could not be causally traced to the original maritime injury. While a heart attack between MMI

determinations was related to the shipboard incident, subsequent conditions like diabetes were pre-existing and unrelated.

Tisdale v. Marquette Transportation Co., LLC, No. CV 22-237, 2023 WL 4446961 (E.D. La. July 11, 2023)—though not about determination of MMI, this case is interesting and informative here because the parties held a limited trial focused solely on the Plaintiff’s entitlement to certain cure benefits sought—namely whether the employer was obligated to pay for a three-level lumbar spine fusion surgery recommended by his treating physician, or a one-level lumbar spine fusion surgery recommended by the employer’s retained independent medical evaluation physician. Also, at issue was whether a radio frequency ablation (RFA) procedure was curative or palliative. After a one-day trial before the Judge, the Court found that the RFA was palliative and was therefore outside the cure obligation. The Court also found the employer’s physician more credible and that, therefore, the employer did not have to pay for the three-level fusion. The Court also denied the Plaintiff’s claim for punitive damages, finding them inappropriate with respect to the refusal to pay for the RFA, given the Court’s finding that it was merely palliative care.

Ultimately, for seamen pursuing maintenance and cure claims, understanding the distinction between curative and palliative treatments becomes crucial for protecting ongoing benefits. Conflicting medical opinions create valuable opportunities to survive summary judgment motions, as courts must resolve medical ambiguities in favor of the seaman. Economic necessity forcing return to work does not automatically terminate maintenance and cure rights when shipowners callously disregard maintenance claims, providing protection for seamen who must work while still requiring medical treatment.

For employers seeking to terminate maintenance and cure obligations, conducting thorough medical investigations before discontinuing benefits helps establish the unequivocal

evidence required for MMI determinations. Independent medical examinations can provide valuable supporting evidence but must demonstrate clear consensus with treating physicians to avoid factual disputes. The burden of proof remains squarely on employers, requiring comprehensive documentation that no further curative treatment could benefit the seaman's underlying medical condition rather than merely managing symptoms.

Modern medical advances create new questions about what constitutes reasonable medical expenses and when maximum cure is achieved, particularly with expensive new treatments and life-extending therapies, as discussed below.

5. Are GLP-1 Medications Covered as Cure?

It's no secret that we are facing an obesity epidemic in the United States. The American Medical Association formally recognized obesity as a disease in 2013. According to CDC data, approximately 42% of American adults are obese (BMI ≥ 30). Obesity complicates nearly every medical condition and treatment. Pertinent to the maintenance and cure obligation:

- Orthopedic surgeons often refuse to operate on patients with BMI >40
- Wound healing is significantly impaired
- Anesthesia risks increase substantially
- Physical therapy outcomes deteriorate
- Medication dosing becomes more complex

This reality is colliding with maritime law in uncomfortable ways. The medical consensus has shifted from viewing obesity as a personal failing to understanding it as a complex, chronic disease with multiple etiologies. If obesity is a disease rather than a lifestyle choice, this strengthens the argument that employers must provide treatment when obesity interferes with cure of a maritime injury. Here's why:

Maritime law has long recognized that vessel owners must treat pre-existing diseases when they're aggravated by a maritime injury or when they complicate treatment of a maritime injury.

For example, in diabetes cases: If a seaman develops a foot wound in service, and the wound won't heal because of pre-existing diabetes, courts have held that the employer must pay for diabetic management (insulin, monitoring, endocrinology consultations) as part of treating the maritime injury. The diabetes wasn't caused by the maritime injury, but treating it becomes necessary to achieve cure. If obesity is a disease (like diabetes), and that disease is preventing cure of a maritime injury (surgeon won't operate until weight loss occurs), then treating the obesity-disease follows the same logic as treating diabetes to achieve wound healing.

Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938) held that vessel owners must treat conditions "arising out of" the maritime injury. If we view obesity as a disease entity (not just a risk factor), and it becomes an impediment to treatment, one could argue it "arises out of" the treatment scenario even if not caused by the injury itself.

Paradoxically, recognizing obesity as a disease might also limit the cure obligation in certain circumstances:

Disease independence: If obesity is truly a distinct disease entity, separate from the maritime injury, the traditional rule that vessel owners need not pay for unrelated pre-existing conditions would apply. The employer would argue: "We must cure the back injury. We don't have to cure a separate, pre-existing disease (obesity) that happened to complicate treatment."

The line-drawing problem becomes clearer: Once we acknowledge obesity as a disease, it becomes easier to draw lines. Consider:

Seaman has a pre-existing heart disease that makes anesthesia risky for orthopedic surgery → Employer doesn't have to cure the heart disease first

Seaman has pre-existing kidney disease that contraindicates certain medications needed for maritime injury → Employer doesn't have to cure kidney disease

Seaman has pre-existing obesity-disease that prevents surgery → Why is this different?

It is also crucial to examine the distinction between causation and complication in this scenario. For example, assume you have a seaman who weighs 220 pounds at time of injury. And then the maritime injury causes severe immobility. Over 18 months of treatment and limited activity, the seaman gains 60 pounds, reaching 280 pounds. The weight gain impedes surgical treatment. Here, the obesity (or at least the aggravation) is directly traceable to the maritime injury. The immobility caused by the compensable injury caused the weight gain. Under traditional aggravation principles, the employer must treat the obesity because it arose from the maritime injury's consequences. Whether we call obesity a disease or a condition doesn't matter here—the employer caused it (or worsened it) through the maritime injury and the employer must pay for weight loss treatment, including GLP-1 drugs if medically necessary.

On the other hand, let us consider the case of a seaman who had pre-existing obesity (BMI 42) for 15 years before the maritime injury. A maritime injury occurs. The surgeon says he won't operate at the patient's current weight due to surgical risks and poor outcomes data. This is where the disease-classification debate becomes critical.

Traditional Analysis: Pre-existing obesity is unrelated to the maritime injury. The employer's obligation is to cure the maritime injury, not to cure every pre-existing condition that complicates treatment. No cure obligation for obesity treatment.

Disease-classification analysis: Obesity is a chronic disease that requires medical treatment. Just as an employer must manage diabetes to achieve wound healing, the employer must treat obesity-disease to achieve surgical treatment of the maritime injury. Yes, cure obligation exists.

So, how will Courts treat obesity in maintenance and cure cases? Courts are likely to develop a functional nexus test that considers such things as:

- **Medical necessity versus health optimization** – Does the surgeon refuse to operate due to the seaman's weight or does the surgeon believe that the outcome would be better if the seaman lost weight?
- **But For Argument** – “But for” the maritime injury, would the employer have any obligation to treat the seaman's obesity?

- **Temporal and Causal Connection** – Did the obesity develop or worsen after the maritime injury? Did the obesity result from the seaman being sedentary post-accident? Does the obesity prevent or postpone treatment that would have otherwise been immediately available? Did the obesity pre-exist the maritime injury?

Can the employer offer alternatives? If a treating physician recommends a GLP-1 (potential costs of \$900-\$1,400/month for months to years) to reduce weight prior to surgery, may the employer offer such alternatives as dietary counseling, exercise (gym membership or trainer), or even a different doctor who will agree to perform the surgery at the seaman's current weight? Consider that GLP-1 drugs produce average weight loss of 15-20% of a person's body weight—far more effective than diet/exercise alone (5% average). If a seaman needs to lose 50 pounds for surgery, GLP-1 drugs may be the only realistic path to achieving surgical clearance within a reasonable timeframe. Realistically, if a board-certified physician prescribes a GLP-1 as medically necessary for a seaman to reach surgical weight requirements, and it's an FDA-approved medication for obesity (now classified as a disease), courts may find it falls within "reasonable and necessary medical treatment."

At the end of the day, the medical reclassification of obesity as a disease is a double-edged sword in maintenance and cure jurisprudence. It strengthens seamen's arguments that pharmaceutical obesity treatment (including expensive GLP-1 drugs) constitutes legitimate medical treatment that employers must provide when necessary to cure maritime injuries. But it also clarifies boundaries by establishing obesity as a distinct disease entity, potentially separate from the maritime injury—which could support employer arguments that they need not treat every pre-existing disease that complicates a maritime injury.

The resolution will likely turn on proximate causation and medical necessity: When treating obesity becomes a necessary step in the pathway to curing a maritime injury (not just

beneficial, but necessary), courts will probably require employers to provide that treatment, recognizing obesity as a disease requiring medical intervention. This is cutting-edge law. We will likely see substantial litigation on this issue over the next 3-5 years.

6. Radio Frequency Ablations (RFA)

Radio frequency ablation (RFA) is a minimally invasive procedure that uses heat to destroy nerve tissue, thereby interrupting pain signals. It's commonly used for facet joint pain (lower back), sacroiliac joint pain, knee osteoarthritis pain, and other chronic pain conditions. RFA typically provides pain relief for 6-12 months, after which nerves regenerate and the procedure must be repeated.

This distinction matters enormously because cure ends at maximum medical improvement. If RFA is merely palliative (managing symptoms without addressing the underlying condition), the seaman hasn't reached maximum cure, and the vessel owner must continue paying maintenance and cure indefinitely while the seaman receives repeated RFA procedures.

If RFA is curative (actually treating the condition to maximum improvement), the seaman reaches maximum cure, and the vessel owner's obligation terminates—though the seaman may be left with chronic pain requiring ongoing procedures.

The palliative versus curative arguments for RFAs can be broken down as follows:

Palliative Arguments:

- RFA doesn't repair or regenerate damaged tissues
- It merely masks pain by destroying nerve function
- The underlying pathology (arthritis, disc degeneration) continues to worsen
- The temporary nature (6-12 months) demonstrates it is not curative
- Patients require repeated procedures indefinitely

Curative Arguments:

- RFA allows patients to function, work, and engage in rehabilitation
- Pain itself is the condition being treated; eliminating pain is cure

- Many chronic conditions (diabetes, hypertension) require ongoing management but aren't considered "uncured"
- The procedure brings patients to their maximum achievable medical state
- The need for maintenance treatment doesn't negate that maximum cure was achieved

The Fifth Circuit hasn't definitively resolved this issue, but the relevant precedent suggests a functional approach:

In *Jauch v. Nautical Services, Inc.*, 470 F.3d 207 (5th Cir. 2006), the court examined when maximum cure is reached, emphasizing that it is "when it appears reasonably clear that further treatment will not result in any material improvement in the seaman's condition." The question becomes: Does each RFA procedure constitute "further treatment" resulting in "material improvement," or is it maintenance of a maximally improved state?

So, what is a reasonable number of RFAs for a seaman to undergo if he/she is getting relief of 6 months? There is no specific answer and this is something that needs to be addressed on a case-by-case basis. RFAs are invasive, costly, only performed by physicians and are considered treatment. So, do they differ from pain medications, steroid injections or physical therapy? All of these are utilized to achieve MMI and maintain function.

Plaintiff's attorneys like RFAs because they are potential long-term damage enhancers. But the Court must be convinced in a maintenance and cure case that they are ongoing cure. Some questions to pose to the doctors: How many of your patients have returned for a second injection? Third injection? Fourth injection? And so on. Most will have no meaningful numbers since they only do them on a patient at intervals between 6 months and 2 years. So, it may be difficult to get a doctor to back up the need for long-term RFAs.

Reluctance to award damages for long-term RFAs can be found in the jurisprudence. In *Brandner v. State Farm Auto Insurance Co.*, 2019 WL 636423 (E.D. La. Feb. 14, 2019), the court excluded the testimony of two physicians who recommended that the plaintiff receive RFAs for the remainder of his life as long as he benefited from the procedures. The testimony was excluded

on the basis that neither doctor had established that their opinions were supported by generally accepted scientific methodology. However, there is also support for repeat, long-term RFAs. In *Tankersly v. Protective Insurance Company*, 2024 WL 3171842 at *7 (M.D. La. June 25, 2024), the Court found support for RFAs every six months for 7 years to be reasonable and supported by the evidence. The Court awarded the costs of annual RFAs to a plaintiff in *DePerrodil v. Bozovic Marine*, 2015 WL 8542829 (W.D. La. December 10, 2015). Additionally, see *Miles v. Minor*, 2021 WL 3042687 (E.D. La. June 16, 2021) where a physician testified that he had not performed more than 10 RFAs on any patient and the most he had seen in one patient was 14, which he encountered during his training. See also *Tyson v. National Specialty Insurance Co.*, 2020 WL 3547952 (W.D. La. June 29, 2020). and *Salgado v. Electric Insurance Co.*, 2020 WL 6370992 (M.D. La. Oct. 29, 2020), in which plaintiffs cited to the Spinal Intervention Society materials which state that based on the nature of the RFA procedure and nerve regeneration, “[t]here appears to be no limit to the number of times that neurotomy might be successfully repeated” and the courts allowed the physicians to testify that they recommended annual RFAs for the subject plaintiffs. One can easily see that this could vary by provider – some having more temporal experience with administering repeat RFAs – and lead to very different results.

Also recently, in *Tisdale v. Marquette Transportation Co., LLC*, No. CV 22-237, 2023 WL 4446961 (E.D. La. July 11, 2023) the parties held a limited trial focused solely on the Plaintiff’s entitlement to certain cure benefits sought—namely whether the employer was obligated to pay for a three-level lumbar spine fusion surgery recommended by his treating physician, or a one-level lumbar spine fusion surgery recommended by the employer’s retained independent medical evaluation physician. Also, at issue was whether a radio frequency ablation (RFA) procedure was curative or palliative. After a one-day trial before the Judge, the Court found that the RFA was

palliative and “will not serve to improve” Plaintiff’s back injury and was therefore outside the cure obligation. *Id.* at *6. The Court therefore found that the employer did not, therefore, improperly deny Plaintiff’s request for payment of the RFA as it was “beyond the scope of Marquette’s cure obligation.” The Court also found the employer’s physician more credible and that, therefore, the employer did not have to pay for the three-level fusion. The Court also denied the Plaintiff’s claim for punitive damages, finding them inappropriate with respect to the refusal to pay for the RFA, given the Court’s finding that it was merely palliative care.

7. **Spinal Cord Stimulators and Intrathecal Drug Delivery Systems**

A spinal cord stimulator (SCS) is an implantable device that delivers low-voltage electrical impulses to the spinal cord to interrupt pain signals before they reach the brain. It consists of three basic components: a battery pack, electrodes, and an external programmer. A SCS works on the principle that non-painful electrical stimulation can "close the gate" to pain signals traveling along nerve pathways to the brain. SCSs are typically used for the following conditions:

- Failed back surgery syndrome (FBSS)
- Complex regional pain syndrome (CRPS/RSD)
- Chronic radiculopathy (nerve root pain)
- Peripheral neuropathy
- Post-laminectomy pain
- Chronic leg or arm pain

In order to meet the criteria for a SCS, a seaman must meet the following:

- Conservative treatments have failed (physical therapy, medications, injections)
- Pain has been present for at least 6 months
- Psychological evaluation shows the patient is an appropriate candidate
- Successful trial period (temporary external stimulator worn for 5-7 days)

The SCS “trial” is performed by placing temporary leads in the epidural space, the external battery pack is worn on a belt. The patient uses this for approximately 7 days. If pain relief is \geq 50%, the patient is approved for a permanent implant. If there is inadequate relief, the leads are

removed and there is no permanent implant. About 50-60% of patients proceed to permanent implant after a successful trial.

The issue with SCSs is that they require a lifetime of maintenance and periodic battery replacement. There are chargeable and non-chargeable SCS devices. The former lasts for 8-10 years with the patient recharging the battery weekly. Replacement surgery is simple and only requires replacement of the battery pack. Ongoing maintenance includes programming sessions with a pain management provider when necessary.

The effectiveness of SCSs is that 50-70% of patients report a 50% or greater reduction in pain, especially radicular pain, reduction of medication usage (especially opioids), improved sleep, increased activity level ability, and enhanced quality of life. The drawbacks are that 20-30% lose effectiveness over time, lead (electrode) migration is a common complication requiring surgical revision, and some patients end up removing the device altogether if they are experiencing extensive complications.

An intrathecal drug delivery system (also called an “IDDS” or “pain pump”) is an implantable device that delivers pain medication directly into the intrathecal space (the cerebrospinal fluid surrounding the spinal cord). The pump reservoir containing the medication is implanted in the abdomen along with a catheter from the pump to the intrathecal space. An external programmer device is used by the physician to adjust the dosage. A refill kit is used to refill the pump reservoir every 1 – 6 months. Medications are delivered directly into the cerebrospinal fluid, bathing the spinal cord. Some advantages to an IDDS are that it bypasses the blood-brain barrier, delivers medication specifically to the target site, requires much smaller doses than oral medications, and has far less side effects.

IDDSs are used to treat a variety of common conditions including chronic cancer pain, failed back surgery syndrome, severe chronic low back pain, complex regional pain syndrome, post-laminectomy pain syndrome, and spinal cord injury. The selection criteria for patients include severe chronic pain unresponsive to other treatments, the patient is already opioid-tolerant (usually on high doses of oral opioids), life expectancy >3 months (for cancer patients), psychological evaluation confirms appropriateness, and a successful trial demonstrates effectiveness.

The trial for IDDSs is less complex as it consists of either a one-time injection via spinal tap, observation for 8 hours to determine efficacy, and if the pain reduction is $\geq 50\%$, proceed to the permanent implant OR a temporary catheter used to deliver constant medication for 3 – 7 days.

Refills are performed in a physician's office via a needle inserted into the pump port. Physicians can also adjust the dosage via the external programmer without the necessity of any invasive treatment. The battery life is 5 – 7 years and surgery is required to replace the pump.

Curative versus Palliative?

Both devices present the same fundamental legal question as radio frequency ablation, but with even higher stakes given the cost and invasiveness. Arguments that these devices are palliative would include:

- Neither repair discs, nerves or other anatomical structures
- The pain is masked, not eliminated
- SCSs require reprogramming, battery replacements and possible revision surgery for leads
- IDDS pumps require refills every 1 – 6 months indefinitely
- Patients require these devices for an indefinite, possibly lifelong, period
- SCSs may lose effectiveness requiring upgrades, revisions, or removal
- IDDS medications require increased dosages due to a buildup in the patient's tolerance level
- IDDS pumps simply deliver pain medications more efficiently. If oral opioids are considered palliative, should the IDDS be treated the same?

Arguments favoring categorization of these devices as curative include:

- They improve the function achievable for the patient's condition
- Improved quality of life and ability to engage in activities of daily living
- The implantation is usually a one-time treatment for implantation
- Both are generally accepted medical treatments for chronic pain, not simply symptom management
- By the time a patient goes through the trial for either and they have already exhausted all conservative and surgical options, these are the cure

So, with a seaman who has had either a SCS or IDDS implanted, when do they achieve MMI? Is the initial implantation the end of treatment or does it continue indefinitely as long as the device is implanted? Some considerations in making this determination would include whether the implantation allows the seaman to return to some form of work since Courts generally do not find a seaman in need of ongoing medical intervention or maintenance to have achieved MMI. Think of this in terms of ongoing medication management for pain, implant replacement or prosthetic maintenance. The maintenance of these, as with SCSs and IDDSs, require medical intervention by a physician.

In pure maintenance and cure cases, where the medical costs are not shifted to the liable party and their insurer, these long-term costs become a potentially costly issue for employers. Courts are likely to parse their determinations of coverage by considering such dividers as initial implantation, refills and battery replacements, pump refills, and failed devices.

For Vessel Owners/Insurers:

1. Cover initial implantation without question

- This is clearly curative treatment
- Denying coverage risks *Vaughan* penalties
- Get good documentation that conservative treatments failed first

2. Consider covering first battery replacement

- Shows good faith
- Cost is significant (\$30-50K) but finite
- Demonstrates employer fulfilled cure obligation

3. **Draw line at ongoing maintenance refills**

- After stable functioning is achieved (6-12 months post-implant)
- Document that maximum cure has been reached
- Obtain IME opinion supporting maximum cure determination

4. **Always cover complications**

- Infections from refills
- Lead migrations requiring surgery
- Catheter revisions
- Device malfunctions requiring replacement
- These are treatment of the maritime injury, not maintenance

5. **Prepare for litigation on battery replacements**

- This is the gray area most likely to generate disputes
- Consider settlement value vs. litigation costs
- Each battery replacement surgery becomes a new litigation opportunity

For Seamen's Counsel:

1. **Emphasize ongoing medical intervention**

- Pump refills are invasive procedures requiring physicians
- Battery replacements are surgeries
- Programming sessions require pain specialists
- This isn't taking a daily pill—it's continuous medical treatment

2. **Build a record on medical necessity**

- Document that device is necessary to achieve maximum cure
- Show that without device, seaman cannot function
- Emphasize physician's role in ongoing device management

3. **Challenge "maximum cure" determination at implantation**

- Maximum cure can't be reached while still optimizing device setting
- Should be at least 6-12 months post-implant before maximum cure determination
- Ongoing adjustments, reprogramming, and dose changes indicate treatment continues

4. Document functional limitations

- If seaman cannot return to maritime work despite device
- If significant pain remains even with device
- If side effects limit function
- These argue against maximum cure being reached

5. Preserve claims for each intervention

- Each battery replacement is a new surgical procedure
- Each refill is a medical procedure
- Each programming session is medical treatment
- Frame these as discrete cure obligations, not maintenance

8. Concealment, Failure to Mitigate and Medical Compliance

Maintenance and cure may be awarded “even where the seaman has suffered from an illness pre-existing his employment.” *McCorpen v. Central Gulf Steamship Corp.*, 396 F.2d 547 (5th Cir. 1968). But as a “general principle,” the benefits “will be denied where he knowingly or fraudulently conceals his illness from the shipowner.” *Id.*; see also *Jauch v. Nautical Servs., Inc.*, 470 F.3d 207, 212 (5th Cir. 2006) (“A seaman may recover maintenance and cure even for injuries or illnesses pre-existing the seaman's employment unless that seaman knowingly or fraudulently concealed his condition from the vessel owner at the time he was employed.”). Specifically, if the shipowner requires a prospective seaman to undergo a pre-hiring medical evaluation, and the seaman either intentionally misrepresents or conceals material medical facts, then the seaman is not entitled to an award of maintenance and cure. See *McCorpen*, 396 F.2d at 549. “Failure to disclose medical information in an interview or questionnaire that is obviously designed to elicit such information ... satisfies the ‘intentional concealment’ requirement.” *Brown v. Parker Drilling*, 410 F.3d 166, 174 (5th Cir. 2005).

For a shipowner or an employer to deny a seaman's maintenance and cure claim under *McCorpen*, the employer must establish that: (1) the seaman intentionally misrepresented or

concealed medical facts; (2) the misrepresented or concealed facts were material to the employer's hiring decision; and (3) there exists a causal link between the pre-existing disability that was concealed and the disability suffered during the voyage. *Id.*; see also *Brown v. Parker Offshore Drilling*, 410 F.3d 166, 171 (5th Cir. 2005) (finding the *McCorpen* defense established).

The Eastern District of Louisiana recently granted summary judgment under *McCorpen* where the Plaintiff applied for the job and completed and signed a pre-employment medical history questionnaire, in which he denied any history of “injured back/back pain,” “injured leg,” “back surgery/injury,” “ruptured/herniated disc,” “recurrent neck/back pain,” “any other disease/surgery,” and “MRI,” but discovery revealed he had had several prior injuries to those areas of his body and had previous MRIs revealing same. *Martinez v. Crosby Dredging, LLC*, 686 F. Supp. 3d 479, 484–85 (E.D. La. 2023). However, the court noted that “the failure of a seaman to disclose his medical history on the pre-employment questionnaire does not necessarily amount to intentional concealment of a preexisting illness when he lacks the requisite literacy skills to understand and complete the questionnaire.” *Id.* at 486.

Seamen forfeit maintenance and cure benefits only in narrowly defined circumstances involving willful rejection of reasonable medical care. *Theriot v. REC Marine Logistics, LLC*, 668 F.Supp.3d 499 (E.D. La. 2023) established that “a seaman forfeits maintenance and cure only under certain well-defined and narrowly limited circumstances such as where the seaman voluntarily stops short of maximum medical recovery or the seaman's willful rejection of the recommended medical aid.”

The willful rejection standard requires more than simple non-compliance. The Eastern District of Louisiana recently held that “a seaman does not forfeit his right to maintenance and cure if he has reasonable grounds for refusing care or extenuating circumstances which made his

failure to follow the prescribed regimen either reasonable or something less than a willful rejection." *Theriot v. REC Marine Logistics, LLC*, 668 F.Supp.3d at 506. In *Theriot*, the court refused to grant summary judgment to the employer on the issue of maintenance and cure despite the fact that the seaman had failed to comply with physical therapy, failed to complete a prescribed course of antibiotics leading to an infection, abused methamphetamine, and was aggressive towards medical staff, finding that genuine issues of material fact existed and a reasonable factfinder could conclude that Plaintiff's failure to fully comply with medical treatment was reasonable or less than a willful rejection of medical care.

9. Punitive Damages for Non-Payment

An injured seaman may recover punitive damages as well as attorney's fees for "his employer's willful failure to pay maintenance and cure." *Vaughan v. Atkinson*, 369 U.S. 527, 529-30 (1962) (explaining the plaintiff was entitled to attorney's fees after he was forced to hire an attorney to recover maintenance and cure); *Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 407 (2009).

In *Vaughan v. Atkinson*, the Supreme Court explained that as shipowner's duty to pay maintenance and cure is "among 'the most pervasive' of all and that it was not to be defeated by restrictive distinctions nor 'narrowly confined.'" 369 U.S. at 532 (quoting *Aguilar v. Standard Oil Co. of N.J.*, 318 U.S. 724, 730 (1943)). Applying that principle, the Supreme Court held in *Vaughan* that a seaman had the right to recover attorneys' fees where the shipowner made no effort to investigate his claim. The Court observed:

In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one.

369 U.S. at 530–31. As explained by the Fifth Circuit Court of Appeals:

[T]here is an escalating scale of liability: a shipowner who is in fact liable for maintenance and cure, but who has been reasonable in denying liability, may be held liable only for the amount of maintenance and cure. If the shipowner has refused to pay without a reasonable defense, he becomes liable in addition for compensatory damages. If the owner not only lacks a reasonable defense but has exhibited callousness and indifference to the seaman's plight, he becomes liable for punitive damages and attorney's fees as well.

Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir. 1987), *abrogated on other grounds by, Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995), *abrogated on other grounds by, Townsend*, 557 U.S. at 424.

There is no specific rule or definition of what constitutes conduct entitling a seaman to punitive damages with respect to maintenance and cure. Examples include “(1) laxness in investigating a claim; (2) termination of benefits in response to the seaman's retention of counsel or refusal of a settlement offer; (3) failure to reinstate benefits after diagnosis of an ailment previously not determined medically.” *Harper v. Zapata Off-Shore Co.*, 741 F.2d 87, 90 (5th Cir. 1984). The bad faith standard requires more than simple unreasonableness. *Vaughn v. American Commercial Barge Line, LLC*, 672 F.Supp.3d 184 (E.D. La. 2023).

Recent substantial punitive awards demonstrate courts' willingness to impose meaningful sanctions. The Court in *Hurtado v. Balerno International Ltd* awarded \$300,000 in pain and suffering damages plus \$373,836.16 in punitive damages after finding the yacht owner improperly denied benefits—showing “not just indifference to Hurtado’s medical emergency, but outright cruelty.” 408 F.Supp.3d 1315, 1333 (S.D. Fla. 2019).

In *Adams v. Liberty Maritime Corporation*, 475 F.Supp.3d 91 (E.D.N.Y. 2020), the Eastern District of New York denied punitive damages for failure to pay maintenance and cure but awarded \$98,475 in punitive damages for the captain's gross negligence in providing medical care.

The court distinguished between these two separate maritime duties, finding that while defendants failed to timely pay some maintenance and cure obligations, this conduct was not willful or wanton. Significantly, the court observed that "in total, Defendants ultimately failed to pay only a small fraction of Adams's total medical expenses," suggesting that the scope and impact of any payment delays were limited. However, the captain's egregious failure to report the seaman's breathing difficulties to medical personnel and subsequent falsification of medical records constituted gross negligence warranting punitive damages. The court found this particularly troubling given the captain's position of responsibility for the seaman's care. This finding suggests that deliberate falsification or concealment of medical information can independently support punitive damages even when it does not directly cause physical harm. The court calculated this award as "one-third of the pain and suffering, lost wages and maintenance & cure awarded to Plaintiff," totaling \$98,475.

As an aside, the availability of punitive damages for maintenance and cure claims contrasts with their general unavailability for other Jones Act claims. In *The Dutra Group v. Batterton*, the Supreme Court observed that "the Jones Act 'limits recovery to pecuniary loss,'" and that "the Federal Courts of Appeals have uniformly held that punitive damages are not available under the Jones Act." 588 U.S. 358, 373 (2019) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990)). The Supreme Court then held that "a plaintiff may not recover punitive damages on a claim of unseaworthiness." *Id.* at 378. However, it had earlier held in *Atlantic Sounding Co. v. Townsend* "that punitive damages are not categorically barred as part of the award on the traditional maritime claim of maintenance and cure" and the Supreme Court did not disturb this decision in *The Dutra Group*, but instead cited it favorably. *Id.* at 361.

10. **Independent Medical Exams – When Are Sanctions Warranted?**

An injured seaman's failure to undergo an independent medical examination can have numerous ramifications for both the seaman and their attorneys. In *All Coast, LLV v. Shore Offshore Services, LLC, et al*, 2023 WL 4996551 (E.D. La. July 11, 2023), a worker was injured during Hurricane Zeta when the vessel he was assigned to broke free from the dock on Bayou Lafourche. Numerous requests were made to the seaman's counsel for an IME yet the seaman underwent 4 invasive surgical procedures without compliance despite an Order from the court after the first procedure.

In the court's Report and Recommendation issued in response to the defendant's Motion for Sanctions to Exclude Evidence on the basis of spoliation and disregard of the court's Order, the court discussed the duty to preserve evidence of the seaman's back condition and whether the seaman and/or his counsel acted in bad faith. The seaman testified that he never communicated with his counsel regarding his surgery date; however, the court found this testimony "totally unbelievable" given the fact that the attorneys guaranteed the cost of the procedure and scheduled and paid for the seaman's flight to Texas for the surgery. Based upon this evidence, the court found that the seaman and his attorneys acted in bad faith. The court ultimately sanctioned them a total of \$837,286.87, which was comprised of the cost of the surgery, the post-surgery procedures and the seaman's obesity surgery. The court further allowed an adverse inference presumption on the obesity surgery.

In *All Coast*, the court sanctioned both the seaman and his attorneys, but had the court only sanctioned the attorneys and found the seaman not culpable, would the Seaman have a cause of action against their attorney for malpractice if he is precluded from obtaining a full recovery of his

damages due to the non-compliance with the court's Order? Conversely, what if defense counsel fails to timely request an IME?

The defendants and any worker's compensation carriers, whether state or federal, are entitled to obtain an IME whenever an injured person's medical condition is placed at issue. Rule 35 of the Federal Rules of Civil Procedure governs physical and mental examinations:

(a) Order for an Examination.

(1) In General. The court where the action is pending may order a party whose mental or physical condition--including blood group--is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. The court has the same authority to order a party to produce for examination a person who is in its custody or under its legal control.

So, FRCP 35 allows one to obtain an IME, but does an injured person or their counsel have a duty in the absence of a request for an IME to tell a company or defense counsel that their client is going to have surgery to allow them the opportunity to obtain an IME? Would the defense have the same complaint for spoliation in the absence of a request for an IME and/or a court Order? This may go more toward the issue of whether cure is recoverable after the fact in a situation where no IME is obtained.

In *Dominguez v. Crosby Tugs, L.L.C.*, 704 Fed. Appx. 364 (5 Cir. Aug. 1, 2017), the district court was reversed when it dismissed a seaman's claim for failure to respond to discovery requests and to appear at an IME. The seaman failed to appear for an agreed upon IME allegedly due to car trouble. It was rescheduled and the seaman allegedly had a serious car accident. The court granted a continuance but then ordered an IME which the seaman subsequently failed to appear for due to being incarcerated. The employer Crosby moved for involuntary dismissal and the district court granted the motion. The Court of Appeals found that the first two IME were voluntary and that the third one, which was Court ordered, was not attended but was not considered "contumacious

conduct” as he was not at liberty to attend. The Court of Appeals also found that even if the failure to attend was sanctionable, a lesser sanction of striking the seaman’s own doctor’s report and opinion would have been a “logical lesser remedy.”

11. More Future Trends and Observations

A. The Impact of Modern Medicine

Medical advances such as regenerative medicine are creating challenges in the context of maintenance and cure—a doctrine developed centuries ago:

Spinal Injuries:

Disc herniations, degenerative disc disease, and facet joint pathology are ubiquitous in maritime workers exposed to vibration, heavy lifting, and awkward postures on vessels and platforms.

Intradiscal Biologics is a rapidly advancing area. Several clinical trials are evaluating injections of culture-expanded mesenchymal stem/stromal cell therapies (MSCs) or bone marrow aspirate concentrate (BMAC) directly into degenerating discs. The concept is not necessarily to "regrow" the disc but to modulate the inflammatory cascade within the nucleus pulposus and slow further degradation. Mesoblast's phase 3 trial of allogeneic MSCs for chronic low back pain due to disc degeneration has shown durable pain reduction at 3 years in some cohorts. This matters enormously in maintenance and cure analysis — if a biologic injection can delay or eliminate the need for fusion surgery, the long-term cost calculus and the worker's functional trajectory change dramatically.

PRP for Facet and SI Joint Pain is gaining traction as an alternative to radio frequency ablation (which raises the palliative vs. curative classification question). Emerging evidence suggests intra-articular PRP in facet joints may provide longer-lasting relief than corticosteroid

injections with actual tissue-modifying effects. This creates an interesting legal argument: If PRP is potentially curative rather than merely palliative, does the vessel owner's maintenance and cure obligation extend to covering it?

Knee, Shoulder & Rotator Cuff Injuries:

Knee Osteoarthritis and Meniscal Injuries:

- Single-injection, high-concentration leukocyte-poor PRP protocols are showing the most consistent evidence for mild-to-moderate knee OA, with effects lasting 12-18 months.
- For focal cartilage defects (common after acute trauma), matrix-assisted autologous chondrocyte implantation (MACI) is FDA-approved and represents true cartilage regeneration — not just symptom management. It involves harvesting a small cartilage biopsy, expanding the chondrocytes on a collagen scaffold, and surgically implanting it. This is a game-changer for younger workers with traumatic cartilage lesions who would otherwise face early joint replacement.
- Autologous protein solution (APS), marketed as nSTRIDE, concentrates both anti-inflammatory cytokines and growth factors from the patient's own blood. It received FDA clearance and is positioned as a step beyond standard PRP for inflammatory joint conditions.

Rotator Cuff:

- Biologic augmentation of surgical rotator cuff repair with PRP or BMAC at the tendon-bone interface is showing improved healing rates, particularly in large tears.

Dermal allograft patches:

- (e.g., ArthroFlex, GraftJacket) seeded or combined with biologics are being used as scaffolds for irreparable rotator cuff tears as an alternative to reverse total shoulder arthroplasty.

B. Economic Pressures

Maintenance and cure costs are rising:

- Medical inflation outpaces general inflation
- New treatments (like GLP-1 drugs) are extraordinarily expensive
- Longer life expectancy means longer cure periods for older seamen
- Drug costs vary wildly based on formulary and pharmacy benefit managers

These pressures may encourage parties toward:

- Earlier settlements to avoid long-tail exposure
- More aggressive investigation of pre-existing conditions
- Greater reliance on IME physicians to declare maximum cure
- More litigation over what constitutes "reasonable" and "necessary" care

Key takeaways:

1. **Investigation Timeline:** There's no bright-line rule, but 60-90 days should be the outer limit for most claims. When in doubt, pay under protest.
2. **Maintenance Rates:** Expect continued rising due to inflation. Will the traditional food and lodging be expanded to include, for example, cell phones and computers?
3. **Obesity Treatment:** This is a relatively new issue in maintenance and cure litigation. Document, document, document—and prepare for uncertainty.
4. **SCSs and IDDS:** Courts will likely require the initial costs and some future costs.
5. **RFA Classification:** Courts will likely split on this issue. The functional approach (can the seaman work with periodic RFA?) may become the prevailing standard.

For all parties, the watchwords are **documentation** and **good faith**. Vessel owners who act reasonably, investigate diligently, and document decisions will fare better than those who arbitrarily deny claims. Seamen's counsel, who build detailed medical records and show genuine causation will prevail over those making aggressive claims unsupported by medicine.

THE DOCTOR'S PANEL: WHAT ARE THE "TRICKS OF THE TRADE" IN THE INDEPENDENT MEDICAL EXAMINATION (IME), THE PROBLEMS CREATED BY THE COMPANY DOCTOR, AND WHY USE A NEUROSURGEON?

- How do doctors view pre and post offer physical questionnaires, and what do they recommend for protecting the employer? What is the importance of and the "credibility" created by the "Post Offer Employment Questionnaire"?
- When the doctor's nurse offers a patient by way of an electronic machine pertaining to authorization to the doctor and says "Sign Here" (often several times – is never read or only scantily explained to the Patient what it is – is that considered accepted by the Patient simply by him or her checking the box?
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GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert

Brian Bourgeois, M.D.
Occupational Medicine
West Jefferson Medical Center

The Independent Medical Exam

Independent Medical Exams (IME) are conducted by an M.D., D.O., or Chiropractors. These exams are intended to be an independent assessment of a pre-existing medical condition or complaint. Although these situations are often work-related, they are not solely used in that area. IMEs can be requested by other medical providers, attorneys, employers, or insurers. Individuals performing IMEs should be trained and certified under a supervising agency not only to perform the actual exam but also to determine a level of disability in accordance with SSA and Federal Disability Rating Guide. IMEs are often a second or third opinion but may also function as a tie breaker. IMEs are best used as an independent assessment when parties may not agree.

Many physicians and providers may be asked and may be willing to give an expert opinion regarding a question or discrepancy but may not be 'certified' as an IME. There is no requirement for certification in these cases but opposing parties may seek out an IME to either support or refute the determinations of other providers.

Independent Medical Examiners are not treating physicians. They are educated and familiar with legal standards, Disability Determination Ratings, and expected outcomes for different disease processes. An IME should not insert themselves into the treatment or long-term care role. This may cloud or create doubt in the 'independent' component of their role. Treatment may continue after an IME and may incorporate components of the IME's findings.

Employers, attorneys, insurers, and treating providers may seek out other medical opinions or treatment options for their party. These providers' assessments and opinions are not any more or less correct than the IME. Nor is the IME any more or less correct or honest than the treating providers. These are all simply different aspects of a case. They should be weighed individually and as part of a more complex system. The assessment and treatment of any individual person is by nature a complex and multifaceted process. There are components of physicality, psychology, behavior, family, work, peers, and all the other components of any life. It is with consideration of all of these that a provider should form and execute a plan for any individual. IMEs may simply provide a picture in time and set objective expectations.

THE DOCTOR'S PANEL: WHAT ARE THE "TRICKS OF THE TRADE" IN THE INDEPENDENT MEDICAL EXAMINATION (IME), THE PROBLEMS CREATED BY THE COMPANY DOCTOR, AND WHY USE A NEUROSURGEON?

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Moderator:

Marc C. Hebert

Najeeb Thomas, M.D.

Neurosurgeon
Southern Brain and Spine

Name: [REDACTED]
 DOB: [REDACTED]
 Chart: [REDACTED]
 Age: [REDACTED]
 Date: [REDACTED]



Southern Brain & Spine, LLC.
 NECK, BACK, and other SPINAL PROBLEMS
 MCGILL PAIN QUESTIONNAIRE, PAIN
 DRAWING, and PROLO SCORE
 (Functional Self-Assessment)

Name: [REDACTED]
 Patient #: [REDACTED]

PLEASE COMPLETE
 THIS FORM AT EACH VISIT:

Date: [REDACTED]

IN ORDER TO HELP US UNDERSTAND YOUR PAIN, PLEASE
 CHECK A BOX FOR EACH WORD LISTED BELOW

	NONE	MILD	MODERATE	SEVERE
THROBBING			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/> upper thoracic
SHOOTING				
STABBING			<input checked="" type="checkbox"/>	
SHARP			<input checked="" type="checkbox"/>	
CRAMPING			<input checked="" type="checkbox"/>	
GNAWING				<input checked="" type="checkbox"/> legs - killed
HOT - BURNING		<input checked="" type="checkbox"/>		feet can be freezing to burning, & tingling
ACHING				legs
HEAVY			<input checked="" type="checkbox"/>	
TENDER				have knots in leg
SPLITTING	<input checked="" type="checkbox"/>	- unless headache comes on		
TIRING - EXHAUSTING			<input checked="" type="checkbox"/>	
SICKENING				Tired of PAIN - only worse
FEARFUL	<input checked="" type="checkbox"/>			
PUNISHING - CRUEL		NOT NICE - but I'm aware others have it worse		

But I'm at my worst 10

0 No Pain	1	2	3	4	5	6	<u>7</u>	8	9	Pain as Bad as you can imagine
--------------	---	---	---	---	---	---	----------	---	---	--------------------------------

PLEASE CIRCLE THE NUMBER THAT BEST DESCRIBES HOW BAD YOUR PAIN IS ON AVERAGE FOR YOUR SPINE PAIN (NECK, MID-BACK, or LOW-BACK PAIN)

0 No Pain	1	2	3	4	5	6	<u>7</u>	8	9	Pain as Bad as you can imagine
--------------	---	---	---	---	---	---	----------	---	---	--------------------------------

PLEASE CIRCLE THE NUMBER THAT BEST DESCRIBES HOW BAD YOUR PAIN IS ON AVERAGE FOR YOUR EXTREMITY (ARM and HAND, and/or LEG and FOOT)

coccyx area - sacro-tuberous ligament
 Severe pain. Spasm on (R) side back for 3 weeks
 Rand M Voorhies, MD
 9/06/06
 Now just trying to do a little

Name: [REDACTED]
 DOB: [REDACTED]
 Chart: [REDACTED]
 Age: [REDACTED]
 Date: [REDACTED]



PLEASE MARK THE AREAS OF YOUR BODY WHERE YOU ARE FEELING PAIN, NUMBNESS, BURNING, THROBING, OR STABBING

Please Use These Symbols:
 PAIN XXXX
 NUMBNESS 0000
 BURNING IIII
 THROBING #####
 STABBING >>>>

Check the box that most closely describes your ACTIVITY

Check the box that most closely describes your PAIN

- COMPLETE INVALID (confined to the home) *CAN'T do most ADL'S - son shops son cooks*
- NO GAINFUL OCCUPATION (including no housework and no retirement or leisure activities)
- ABLE TO WORK BUT NOT AT YOUR PREVIOUS JOB (nor do the same types of housework or take part in all of your previous recreational activities or pastimes)
- WORKING AT PREVIOUS JOB BUT ON A PART-TIME OR LIGHT DUTY STATUS (same kind of housework or retirement activities as before, but reduced in the amount of time and effort)
- ABLE TO WORK AT PREVIOUS JOB (or do other things) WITH NO RESTRICTIONS OF ANY KIND

- SEVERE PAIN (cannot do anything somebody has to help you day to day)
- MODERATE LEVEL OF PAIN (able to take care of yourself without help, but can't do anything else) *embarrassing to have my son help w ADL'S*
- LOW LEVEL OF PAIN (able to do everything except sports, physically demanding leisure activities, or heavy housework)
- NO PAIN NOW, BUT YOU HAVE HAD ONE OR MORE SPELLS OF PAIN RECENTLY
- COMPLETE RECOVERY, NO PAIN, ABLE TO PERFORM PREVIOUS SPORTS ACTIVITIES *I WISH ↑*

Patient Signature [REDACTED]

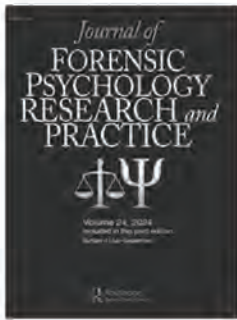
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Lauren Rasmussen, PsyD, ABN
Neuropsychologist
Jefferson Neurobehavioral Group



M is For Performance Validity: The IOP-M Provides a Cost-Effective Measure of the Credibility of Memory Deficits during Neuropsychological Evaluations

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M is For Performance Validity: The IOP-M Provides a Cost-Effective Measure of the Credibility of Memory Deficits during Neuropsychological Evaluations

Laszlo Erdodi ^a, Matthew Calamia ^b, Matthew Holcomb^c, Anthony Robinson ^d, Lauren Rasmussen^c, and Kevin Bianchini^c

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ABSTRACT



This study was designed to evaluate the classification accuracy of the Memory module for the Inventory of Problems (IOP-M) in a sample of real-world patients. Archival data were collected from a mixed clinical sample of 90 adults clinically referred for neuropsychological testing. The classification accuracy of the IOP-M was computed against psychometrically defined invalid performance. IOP-M ≤ 30 produced a good combination of sensitivity (.46-.75) and specificity (.86-.95). Lowering the cutoff to ≤ 29 improved specificity (.94-1.00) at the expense of sensitivity (.29-.63). The IOP-M correctly classified between 73% and 91% of the sample. Given its low cost, ease of administration/scoring in combination with robust classification accuracy, the IOP-M has the potential to expand the existing toolkit for the evaluation of performance validity during neuropsychological assessments.

KEYWORDS

Performance validity;
inventory of problems; IOP-M

Introduction

The assessment of response validity is a “medically necessary” part of neuropsychological evaluations ordered to inform diagnosis or treatment (Bush et al., 2005, p. 425) given the significant minority of clinical cases with non-credible presentation. Although the base rate varies across settings (e.g., referral question, presence of external incentives), clinical neuropsychologists report a median estimate of 15% of adult patients providing invalid testing in clinical assessments (Martin & Schroeder, 2020; Young, 2015). The most effective method for evaluating the credibility of a given cognitive profile is through the use of free-standing performance validity tests (PVTs) specifically designed for this purpose or embedded indicators with demonstrated utility in identifying noncredible responding (Sweet

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Relevant ethical guidelines were followed throughout the project. All data collection, storage and processing was done with the approval of relevant institutional authorities regulating research involving human participants, in compliance with the 1964 Helsinki Declaration and its subsequent amendments or comparable ethical standards.

et al., 2021). Similarly, the veracity of self-reported symptoms should be evaluated using symptom validity tests (Giromini et al., 2022; Sabelli et al., 2021).

The inclusion of free-standing PVTs in clinical assessments comes with increasingly prohibitive costs in terms of clinician time and test material. In addition, popular forced-choice PVTs are vulnerable to coaching, as examinees can be easily trained to recognize and beat them. Worse yet, much of the information is accessible on the internet (Bauer & McCaffrey, 2006), or may be provided to patients by their lawyers, which poses a direct threat to test security. The development of novel, briefer PVTs is critical to counteract the slow decay in the utility of old instruments.

An example of a novel PVT is the IOP-M (Giromini et al., 2020) which is unique in that its unannounced “learning trial” is a brief symptom inventory, the Inventory of Problems (IOP-29; Viglione & Giromini, 2020; Viglione et al., 2017). The IOP-M is presented to the examinee immediately after the completion of the IOP-29 and contains 34 pairs of words and phrases from its item content. Words and phrases were specifically chosen such that targets were high in imageability which reduces difficulty level (Davis, 2014). The IOP-M score is the number of correct responses. Together, the IOP-29 and IOP-M provide clinicians with a brief, 10–15-minute assessment of both symptom and performance validity, two equally important aspects of the credibility of the overall clinical presentation (Ales & Erdodi, 2022; Ben-Porath et al., 2010; Bianchini et al., 2001, 2005, 2008, 2018; Greve et al., 2009; Greve et al., 2013; A. S. Ord et al., 2021; Sabelli et al., 2021).

The IOP-29 (Giromini & Viglione, 2022) has been studied in a number of different countries and has shown incremental validity above existing measures in predicting simulated feigning (Giromini & Viglione, 2022). The IOP-M has been less researched, but initial studies have supported its incremental validity above the IOP-29 for assessing simulated feigning of psychiatric conditions, mild traumatic brain injury (mTBI), and neuropsychological problems (i.e., Banovic et al., 2022; Bosi et al., 2022; De Carvalho et al., 2021; Gegner et al., 2022; Giromini et al., 2020; Šömen et al., 2021). Those studies have found high specificity with varying sensitivity which could be related to how simulators perceive cognitive deficits as related to condition they are feigning (e.g., higher sensitivity for schizophrenia and mTBI as compared to depression and posttraumatic stress disorder). Aligned with this interpretation, studies directly comparing those asked to feign mTBI or neuropsychological problems with those asked to feign depression or different psychiatric conditions found higher effect sizes for the former conditions (Bosi et al., 2022; Giromini et al., 2020). Despite these promising results for the IOP-M, the use of only experimental malingering designs in these studies is a limitation as these designs can produce larger effect sizes compared to known-groups comparisons (Crişan et al., 2021; Rai et al., 2019). However, of note, IOP-29 and IOP-M research has largely focused on community-based samples that may more closely approximate the demographics of patients compared to experimental malingering

studies based on undergraduate students as participants. Nonetheless, there is a clear need for data on real-world patient samples.

The present study was designed to evaluate the classification accuracy of the IOP-M in a sample of real-world patients against well-established criterion PVTs. Given that research designs based on the experimental malingering paradigm tend to overestimate the instrument's signal detection power, we hypothesized a modest attenuation in classification accuracy. In line with the typical outcome of PVT research, we predicted that the classification accuracy of the IOP-M would hover around the *Larrabee limit* (.50 sensitivity at .90 specificity; Crişan et al., 2021).

Method

Participants

Data were collected from a consecutive case sequence of 90 adults clinically referred for neuropsychological assessment in a metropolitan area in the Southeastern USA. All patients were native speakers of English. The majority were Caucasian (85.6%), female (56.7%), and right-handed (91.1%). Mean age was 50.4 ($SD = 15.7$); mean level of education was 14.7 ($SD = 2.2$). Estimated premorbid cognitive functioning was in the average range based on a single-word reading test ($M_{WRAT-4} = 101.1$, $SD = 15.1$). Overall intellectual functioning was in the average range ($M_{WAIS-IV} = 93.5$, $SD = 14.0$). Inclusion criteria were a valid administration of at least two free-standing and at least seven embedded PVTs in addition to the IOP-M as well as age <70 . Exclusion criteria were a diagnosis of dementia or intellectual disability, as these conditions are known to be associated with elevated false positive rates on many PVTs when traditional cutoff scores are used (Messa et al., 2021; Schroeder & Martin, 2022). The sample represents a subset of cases from a recent publication on the IOP-29 (M. Holcomb et al., 2022).

Materials

A core battery of standard neuropsychological tests was administered to all participants. The main free-standing PVTs were the first trial of the Test of Memory Malingering (TOMM-1; Tombaugh, 1996), the Word Memory Test (WMT; Green, 2003) and the Word Choice Test (WCT; Pearson, 2009). To provide a multivariate criterion measure, these three PVTs were combined into a single indicator (PVT-3^a), and invalid performance was operationalized as failing at least two of the three PVTs. Failure on the TOMM-1 was defined as ≤ 43 (Denning, 2012; Erdodi, 2022; Jones, 2013; Kulas et al., 2014; Rai & Erdodi, 2021; Schroeder et al., 2013), whereas failure on the WCT was defined as ≤ 45

Table 1. Components of the EI-7 and base rates of failure at given cutoffs.

EI-7		EI-7 Values			
		0	1	2	3
Components	Scale	Pass	Fail	FAIL	FAIL
Animals	T	>33	32–33	25–31	≤24
Base Rate		84.9	5.8	4.7	4.7
BNT	T	>35	32–35	29–31	≤28
Base Rate		86.4	9.1	4.4	4.5
CIM _{BDAE}	T	>29	21–29	11–20	≤10
Base Rate		75.6	13.9	5.8	4.7
DS _{WAIS-IV}	ACSS	>6	6	5	≤4
Base Rate		83.9	11.5	1.7	3.4
GPB-DH	T	>31	26–31	18–25	≤17
Base Rate		73.3	15.1	6.9	4.7
LM _{Recog}	Raw	>20	19–20	16–19	≤15
Base Rate		78.8	10.6	5.9	4.7
TMT-B	T	>33	25–33	16–24	≤15
Base Rate		70.6	20.0	4.7	4.7

Note. Shading, capitalization and bold face provide a visual representation of the change in confidence in correctly classifying a given score as *invalid* (darker background, capital letters and bold mean increased likelihood of non-credible performance); EI-7: Erdodi Index Seven; All T-scores are based on demographically adjusted norms by (Heaton et al., 2004); ACSS: Age-corrected scaled score; Animals: Category fluency (C. A. Abeare et al., 2021; Deloria et al., 2021; Hurtubise et al., 2020); BNT: Boston Naming Test (L. A. Erdodi et al., 2018; Deloria et al., 2021; Nussbaum et al., 2022; Whiteside et al., 2015); CIM_{BDAE}: Complex Ideational Material subtest of the Boston Diagnostic Aphasia Examination (An et al., 2019; Erdodi, 2019; Erdodi & Lichtenstein, 2017; Erdodi, Tyson, et al., 2016); DS_{WAIS-IV}: Digit Span subtest of the Wechsler Adult Intelligence Scale – Fourth Edition (Babikian et al., 2006; Erdodi & Abeare, 2020; Greve et al., 2007; Heinly et al., 2005; Iverson & Tulsky, 2003; Shura et al., 2020; Young et al., 2012; Whitney et al., 2009); GPB-DH: Grooved Pegboard Test dominant hand (Erdodi et al., 2018; Erdodi et al., 2017; Link et al., 2021); LM_{Recog}: Logical Memory recognition trial (Bortnik et al., 2010; Dunn et al., 2021; Langeluddecke & Lucas, 2003; Pearson, 2009; J. S. Ord et al., 2008); TMT-B: Part B of the Trail Making Test (C. Abeare et al., 2019; Ashendorf et al., 2017; Erdodi, Hurtubise, et al., 2021; Erdodi & Lichtenstein, 2021).

(Cutler et al., 2022; Davis, 2014; Erdodi, 2021; Erdodi et al., 2014; M. J. Holcomb et al., 2022; Tyson et al., 2022). Standard cutoffs were applied for the WMT.

To complement the free-standing PVTs, seven embedded validity indicators were aggregated into a single measure of performance validity, the EI-7. First, each component was recorded onto a four-point ordinal scale where 0 was defined by a score that passed the most liberal cutoff available and 3 was defined by failing the most conservative cutoff or the bottom 5% of the PVT distribution (Erdodi, 2021). Level 1 failure was defined by only failing the most liberal cutoff; Level 2 failure was defined by failing the next most conservative cutoff or the bottom 10% of the PVT distribution (Table 1). Second, the recorded components were summed to obtain the value of the EI-7, which represents a cumulative measure of both the *number* and *extent* of PVT failures (Erdodi, 2022). The distribution of EI-7 scores is provided in Table 2.

Procedure

Tests were administered and scored by trained psychometrists under the supervision of fellowship-trained clinical neuropsychologists. Irreversibly de-identified psychometric data were collected for research purposes from the

Table 2. Frequency distribution and classification range of EI-7 values.

EI-7	EI-7			Clinical Classification	
	<i>f</i>	%	Cumulative %	By Row	Overall
0	33	36.7	36.7	PASS	PASS
1	15	16.7	53.3	Pass	
2	9	10.0	63.3	Borderline	
3	9	10.0	73.3	Borderline	
4	10	11.1	84.4	Borderline	
5	3	3.3	87.8	Fail	FAIL
6	1	1.1	88.9	FAIL	
7	2	2.2	91.1	FAIL	
8	2	2.2	93.3	FAIL	
≥9	6	6.7	100.0	FAIL	

Note: Shading, capitalization and bold face provide a visual representation of the change in confidence in correctly classifying a given score as *invalid* (darker background, capital letters and bold mean increased likelihood of non-credible performance); EI-7: Erdodi Index Seven; Capitalization, bold face and shading represent increased confidence in the clinical classification.

clinical archives of the second author. The study was approved by the local research ethics board. APA guidelines regulating research involving human participants were observed throughout the study.

Data analysis

Descriptive statistics [M , SD , skew, kurtosis, base rate of failure (BR_{Fail})] were reported as relevant. The main inferential statistics were area under the curve (AUC) with corresponding 95% confidence intervals, computed using SPSS version 25.0. Sensitivity, specificity, overall correct classification (OCC; the sum of true positives and true negatives divided by sample size), positive and negative likelihood ratios (+LR and -LR) were calculated using standard formulas (Grimes & Schultz, 2005). The minimum acceptable specificity is .84 (Larrabee, 2003), although .90 is becoming the emerging normative threshold. +LR indicates how much *more* likely an examinee with non-credible responding is to fail a given PVT compared to someone with valid performance (i.e., higher values provide stronger evidence of clinical utility). In contrast, -LR indicates how much *less* likely an examinee with non-credible responding is to pass a given PVT compared to someone with valid performance (i.e., lower values provide stronger evidence of clinical utility).

Results

Calibrating the EI-7

Despite growing empirical evidence, the EI model is still a relatively new aggregation method. Therefore, its classification accuracy was evaluated within the present sample. The EI-7 was a significant predictor of the PVT-3 (AUC = .83, 95% CI: .72-.94). The standard cutoff (≥ 4) failed to clear the .90

specificity standard. However, the next cutoff (≥ 5) produced a good combination of sensitivity (.67) and specificity (.93), at an OCC of .868 and thus, it was used to define non-credible responding on the EI-7. Scores in the *Borderline* range (2–4) were excluded from analysis that used the EI-7 as a criterion PVT, following methodological recommendations (Bigler, 2014; Greve & Bianchini, 2004; Guilmette et al., 2020) and established practice (Ashendorf, 2019; Cutler et al., 2022; Schroeder et al., 2019; Sugarman et al., 2016; Whiteside et al., 2019, 2015).

Distributional properties of the IOP-M

The mean score on the IOP-M was 31.4 ($SD = 3.5$; range: 13–34). The modal value was a perfect score (34). As shown in Figure 1, the IOP-M distribution was J-shaped: the majority of patients performed near the ceiling; scores < 31 were less and less frequent. IOP-M scores were negatively skewed (-2.91) and had a pronounced positive kurtosis (10.6).

Classification accuracy of the IOP-M

The IOP-M was a significant predictor of all criterion PVTs (AUCs: .74-.91). The liberal cutoff (≤ 30 ; $BR_{Fail} = 23.3\%$) cleared the specificity threshold (.86-.92), at .46-.63 sensitivity and .744-.826 OCC. +LR ranged from 3.28 to 6.38; -LR ranged from 0.42 to 0.63. Applying the conservative cutoff (≤ 29 ; $BR_{Fail} = 14.4\%$) resulted in the predictable trade-off of increased specificity (.94-.96) and diminished sensitivity (.29-.47) at comparable OCC (.731-.837). +LR ranged from 4.57 to 11.0; -LR ranged from 0.56 to 0.76. Lowering the cutoff to ≤ 28 ($BR_{Fail} = 10.0\%$) had a negative overall net effect on OCC (.718-.814),

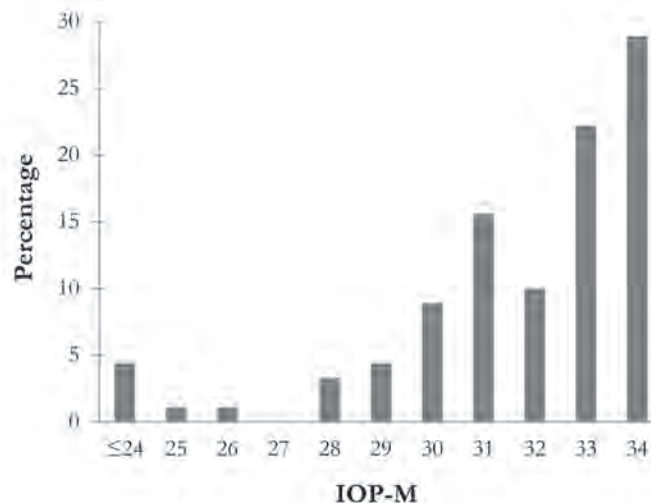


Figure 1. The distribution of inventory of problems – memory module (IOP-M) raw scores.

due to the combination of stagnant specificity (.94-.98) and declining sensitivity (.14-.32). Making the cutoff even more conservative (≤ 27 ; $BR_{Fail} = 6.7\%$) exacerbated the trend of trivial gains in specificity (.96-.98) but collapsing sensitivity (.07-.23). Finally, the cutoff defining the upper limit of *chance level responding* (i.e., the 95% CI around the mean of the binomial distribution; Larrabee, 1992), ≤ 23 ($BR_{Fail} = 4.4\%$) achieved perfect specificity against all criterion PVTs except the WCT (.97), but uniformly low sensitivity (.07-.18) and diminished OCC (.692-.790).

To improve the purity of the criterion groups following methodological recommendations (Erdodi, 2022; Greve & Bianchini, 2004; Rogers, 2008), two alternative approaches to operationalizing invalid performance were developed, and labeled the PVT-3^b and MIX. On PVT-3^b *valid* profiles were redefined as *passing all* three free-standing PVTs (TOMM-1 >43, WCT >45 and the three main WMT indices >82.5%) and *invalid* profiles were redefined as *failing all* three free-standing PVTs given recent developments suggesting that three PVT failures is the optimal multivariate cutoff (Larrabee et al., 2019). The MIX represents the joint classification of the EI-7 and the PVT-3^b, where a *Pass* is defined as an EI-7 ≤ 1 and at most one failure on the PVT-3^a, whereas a *Fail* is defined as an EI-7 ≥ 5 and a failure on at least two of the components of the PVT-3^a. Indeterminate cases (i.e., patients who fell between an incontrovertible *Pass* and an incontrovertible *Fail*) were excluded from the analyses using the PVT-3^b and MIX as criterion measures. The IOP-M achieved high AUC values (.87-.88) using the two alternative criterion grouping methods. The liberal cutoff (≤ 30) had high specificity (.95) and sensitivity (.75), at .893-.913 OCC. Notably, negative LRs were about half of the values observed against the other PVTs, indicating a decline in false negative rate. Perfect specificity was reached at ≤ 29 against the PVT-3^b and at ≤ 23 against the MIX (Table 3).

IOP-M and demographic characteristics

There was no difference in BR_{Fail} at either cutoff as a function of gender or race ($p: .163 - .960$). Likewise, there was no difference in age ($p: .143-.268$) or level of education ($p: .544-.927$) as a function of passing or failing either cutoff. Similarly, there was no difference in single-word reading scores between patients who passed and those who failed the IOP-M ($p: .642-.833$).

Discussion

This study was designed to evaluate the classification accuracy of the IOP-M in a sample of real-world patients clinically referred for neuropsychological assessment. It was predicted that the classification accuracy of the IOP-M would hover around the *Larrabee limit* (.50 sensitivity at .90 specificity; Crişan

Table 3. Classification accuracy of the IOP-M against various criterion PVTs.

AUC 95% CI	Cutoff	Criterion PVTs								
		TOMM	WCT	WMT	El-7	PVT-3 ^a	PVT-3 ^b	MIX		
.87 .69–1.00	BR _{fail}	≤43	≤45	STN	≥5	≥2	3	≥2/≥5		
		28.9	22.1	35.9	22.6	28.9	28.6	17.4		
		.74	.76	.77	.74	.81	.88	.87		
		.63–.86	.62–.90	.65–.88	.57–.91	.70–.93	.69–1.00	.69–1.00		
		.46	.63	.50	.50	.59	.75	.75		
		SENS	.88	.92	.92	.91	.95	.95		
	23.3	SENS	SPEC	.826	.769	.823	.816	.893	.913	
			OCC	3.28	5.29	6.25	6.00	6.38	15.0	14.3
			+LR	0.63	0.42	0.54	0.55	0.45	0.26	0.26
			-LR	.35	.47	.32	.29	.41	.63	.50
			SPEC	.94	.94	.96	.94	.96	1.00	.97
			OCC	.767	.837	.731	.790	.803	.893	.891
14.4	SENS	+LR	5.54	7.93	8.04	4.57	11.0	NA	19.0	
		-LR	0.70	0.56	0.71	0.76	0.61	0.38	0.51	
		SENS	.27	.32	.25	.14	.27	-	.25	
		SPEC	.97	.96	.98	.94	.96	-	.97	
		OCC	.767	.814	.718	.758	.763	-	.846	
		+LR	8.62	7.05	12.5	2.29	7.36	-	9.50	
6.7	SENS	-LR	0.75	0.72	0.77	0.91	0.76	-	0.77	
		SENS	.19	.21	.19	.07	.23	-	.13	
		SPEC	.98	.97	.98	.96	.98	-	.97	
		OCC	.756	.802	.692	.758	.763	-	.826	
		+LR	12.3	7.05	8.92	1.71	12.3	-	4.75	
		-LR	0.82	0.81	0.84	0.97	0.79	-	0.77	
4.4	SENS	SPEC	.15	.11	.14	.07	.18	-	.13	
		SPEC	1.00	.97	1.00	1.00	1.00	-	1.00	
		OCC	.756	.779	.692	.790	.763	-	.848	
		+LR	NA	3.53	NA	NA	NA	-	NA	
		-LR	0.85	0.92	0.86	0.93	0.82	-	0.88	
		-LR	0.85	0.92	0.86	0.93	0.82	-	0.88	

Note. IOP-M: Memory module of the Inventory of Problems; BR_{fail}: Base rate of failure (% of the sample that failed a give cutoff); SENS: Sensitivity; SPEC: Specificity; OCC: Overall correct classification (sum of true negatives and true positives divided by sample size); +LR: Positive likelihood ratio; -LR: Negative likelihood ratio; PVT: Performance validity test; TOMM: First trial of the Test of Memory Malingering (Denning, 2012; Erdodi, 2022; Etherton et al., 2005; Greve et al., 2009; Jones, 2013; Kulas et al., 2014; Rai & Erdodi, 2021; Schroeder et al., 2013); WCT: Word Choice Test (Cutler et al., 2022; Davis, 2014; Erdodi, 2021; Erdodi et al., 2014; M. J. Holcomb et al., 2009; Zuccato et al., 2018); WMT: Green's Word Memory Test (Green, 2003); STN: Standard cutoffs; El-7: Erdodi Index Seven (Erdodi, 2019, 2022; Erdodi & Lichtenstein, 2021); PVT-3^a: Sum of failures on TOMM (≤43), WCT (≤45) and WMT (STN); Pass defined as ≤1 failures; Fail defined as ≥2 failures; PVT-3^b: Sum of failures on TOMM (≤43), WCT (≤43) and WMT (STN); Pass defined as failing all three PVTs; MIX: Joint classification of the PVT-3 and El-7, Pass defined as El-7 ≤1 and PVT-3 ≤1, Fail defined as El-7 ≥5 and PVT-3 ≥2; NA: +LR could not be computed due to perfect specificity.

et al., 2021). Results are consistent with that hypothesis: the liberal cutoff (≤ 30) was specific (.91-.92) to psychometrically defined non-credible responding on multi-trial free-standing PVTs or multivariate models of performance validity, at .50-.59 sensitivity, correctly classifying 82% of the overall sample. Making the cutoff more conservative (≤ 29) produced a uniformly high specificity (.94-.96), but at a notable cost to sensitivity (.29-.47), correctly classifying 73–84% of the overall sample. Lowering the cutoff any further reached the point of diminishing returns: trivial gains in specificity and gradual loss in sensitivity and OCC.

Even the liberal cutoff (≤ 30) tended to underestimate BR_{Fail} (23.3%) compared to the criterion PVTs (22.1–35.9%). Although failing this cutoff was associated with a 3-to-6-fold increase in the risk of also failing criterion PVTs, patients with non-credible responding were about half as likely to pass this cutoff relative to patients with credible responding. LRs shifted in the predictable direction at ≤ 29 : failing the conservative cutoff was associated with a 5-to-11-fold increase in the risk of also failing criterion PVTs; however, patients with non-credible responding were only about 0.56–0.76 less likely to pass this cutoff relative to patients with credible responding. Values closer to 1.00 indicate diminished discriminant power.

The signal detection profile of the IOP-M improved once the criterion groups were purified by eliminating indeterminate cases following methodological guidelines proposed by Rogers (2008), Rogers et al. (2020), Giromini et al. (2022), and Erdodi (2022). Notably, the liberal cutoff (≤ 30) produced high specificity (.95), correctly classifying 89.3–91.3% of the sample. Equally important, negative LRs decreased substantially, signaling a markedly diminished chance of patients with non-credible presentation passing the IOP-M. The effect of a stricter criterion grouping provides a reminder that a binary cutoff (*Pass/Fail*) along a single score inevitably forces ambiguous cases (near-*Pass* or near-*Fail*; Bigler, 2012; Erdodi & Lichtenstein, 2017) into a false dichotomy, attenuating the purity of both groups (Erdodi, 2019).

Essentially, borderline cases are typically assigned to either the *valid* or *invalid* group based on insufficient psychometric evidence to support either classification. Given the primacy of specificity in PVT research, the majority of profiles in the indeterminate range are designated as *valid*. Combined with the high threshold for *invalid* status, this methodological artifact produces stable estimates of specificity, but sensitivity is prone to sample- and criterion-specific fluctuations. Although indeterminate profiles are part of clinical reality (Bigler, 2014; Erdodi, 2021) and excluding them could be construed as artificially sanitizing the sample, forcing them into dichotomies that lack strong empirical support in turn results in criterion contamination and ultimately, error-prone estimates of a given PVT's classification accuracy. Calculating sensitivity and specificity using both approaches seems a reasonable methodological compromise. Producing two sets of classification

accuracy data also provides an empirical estimate of the *borderline artifact* and ultimately, of the generalizability of results.

Indeed, the first cutoff to reach .90 specificity on a different version of the EI model was ≥ 4 against individual free-standing PVTs. However, when data from individual instruments were aggregated into a single composite (similar to the PVT-3^a in this study), a more liberal cutoff (≥ 3) was sufficiently specific (Erdodi, 2022). In contrast, a more conservative cutoff (≥ 5) was required in the present study. Such fluctuations in the classification accuracy as a function of samples, instruments and criterion grouping methods even within the same research group serve as a reminder for the need on ongoing replication efforts.

Overall, findings suggest that failing either the liberal or the conservative cutoff provides strong psychometric evidence of non-credible responding. However, passing the IOP-M provides little evidence of valid performance (Chafetz, 2022). Therefore, IOP-M scores >30 should not be interpreted as proof of credible responding. The IOP-M was robust to the effect of demographic variables (age, sex, race, and education). Although reading level was orthogonal to passing or failing the IOP-M in this sample, examinees with very limited reading skills (i.e., functional illiteracy) may experience genuine difficulty on the IOP-M, increasing the risk of false positive errors. Future research is needed on the effect on low reading levels on IOP-M outcomes. Re-analyzing data from a subset of a previously published sample (M. Holcomb et al., 2022) extended previous work on the IOP-29-M by focusing on its PVT component and examining classification statistics for multiple proposed clinical cutoffs relative to a broader range of criterion PVTs.

Results should be interpreted in the context of the study's limitations. The sample size was relatively small, predominantly White, and limited to a single region of the USA. Therefore, results may not generalize to racially diverse samples or patients from other regions of the country (M. J. Holcomb et al., 2022; Lichtenstein et al., 2019). Further research is clearly needed to establish the classification accuracy of the IOP-M across a broad range of demographic and clinical characteristics. For example, some initial data suggest that the IOP-M may maintain good specificity in older adults with normal cognition or mild cognitive impairment but not more severe neurocognitive impairment and cutoff score for healthy older adults may need to be aligned with the proposed conservative cutoff (Giromini et al., 2020). However, the available evidence suggests that the IOP-M is a cost-effective and psychometrically robust PVT.

Disclosure statement

No potential conflict of interest was reported by the authors.

**A PRACTICAL UPDATE ON CHANGES IN UNITED STATES COAST GUARD REGULATIONS
AND POLICY THAT IMPACT LEGAL LIABILITY AND OPERATIONAL COMPLIANCE FOR
VESSEL OWNERS**

- What recent changes in USCG policy impacts vessel compliance in operations, changes in liability, and modifications of insurance coverage.
- What are the new Cybersecurity regulations and how the USCG will apply and enforce the regulations? What impact will they have on Vessel Security Plans (FSP), Facility Security Plans (FSP), and the Towing Safety Management System (TSMS)?
- What changes may vessel owners and operators expect from The Coast Guard Reauthorization Act of 2026 and what legal impact will those changes have on brown water operations.
- How these new policies and regulations will impact marine legal liability and insurance coverage?

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert

RDML Richard V. Timme (Retd.)
USCG
Washington, DC



THURSDAY AGENDA

8:30 – 10:30

THE USE OF AI IN LITIGATION AND THE COURTROOM: WHAT ARE THE PROS, THE CONS AND THE DANGERS...?

Insight into Issues of Ethical and Professionalism when Using AI in Litigation and the Courtroom.

- What is AI and how does it work?
- What are the different AI programs and services that are available for use in litigation?
- What training is necessary for use of AI, and who provides that training?
- What is the perception of the judge, the defense and the plaintiff's lawyer in the use of AI?
- How do the insurers view their law firm's use of AI to prepare briefs and pleadings, and who pays for it?
- What if AI "screws up" leading to misleading or incorrect information, case citations, etc., and the lawyers or client is sanctioned? Who pays for the screw up, the lawyers malpractice carrier, the client's insurance?
- After a discussion of AI, how it works and the pros and cons, there will be a live demonstration of use of AI in the courtroom by the panelists.

Moderator:

The Honorable Kurt D. Engelhardt, Judge
US Court of Appeals for the Fifth Circuit

Panel Members:

Jefferson R. Tillery
Jones Walker LLP
Defense Attorney

Blake R. David, Sr.
Broussard David & Moroux
Lafayette, LA
Plaintiff Attorney

10:30 – 10:45 **BREAK**

HOW DOES THE OIL POLLUTION ACT (OPA) 90 APPLY AND WHEN MAY I RECOVER ECONOMIC LOSSES OR DAMAGES FROM THE "FUND"?

- What is the National Pollution Funds Center (The Fund) and how does it work?
- What is a COFR?
- Who is a Responsible Party (RP) under OPA 90?
- What is an OSRO and what does it do?

- What is the Oil Spill Liability Trust Fund (OSLTF) and when does it pay for uncompensated removal costs and damages? What types of claims may be filed with the NPFC and when should they be filed?
- How do I work with my insurer and what documentation is needed to submit a claim?
- How does the Fund respond if the discharge includes both hazardous substances and oil?

Moderator:

Marc C Hebert, Esq.

Panel Speakers:

Ryan A. Puttick
Water Quality Insurance Syndicate
Pollution claims manager
New York, New York

Ben Benson

BEST, Inc.
Pollution Adjuster/Surveyor
Slidell, Louisiana

12:00 – 1:30

LUNCH

1:30 – 3:15

THE ART OF MEDIATION IN TODAY'S LITIGIOUS WORLD

It is a necessity in today's maritime litigation – whether personal injury, contracts, property damage, etc. - to be involved in mediation –

Your understanding of what it takes to succeed depends on the company's immediate and prompt involvement with its attorney and insurer

The Panel Members will strongly recommend and suggest to you what it takes to use Mediation to your advantage, with comments on

- What Mediation really is and why mediate.
- How to prepare for Mediation considering the needs of the Mediator, you (the company,) your attorney, your insurer and the opposing party
- Selecting the right Mediator
- The reason the company's involvement is an absolute necessity to succeed – why and how? From start to finish?
- Making sure, without a doubt, as an absolute necessity, you and your client are present physically in the Mediation Hearing – yes, be there!!
- Your presence at the hearing is the right way to succeed and use the Mediation to your company's and insurer's advantage

- Otherwise, you may be opening your checkbook and “bumping up” your loss record for increases in premium
- Is there a difference in “private” versus “Magistrate” Mediations? Yes, there is and the differences are ***! Might one be better than the other?
- Instead of Mediation, what about the use of arbitration? Is there a difference in the two and what is the difference? Is one better than the other, and if so why?

Moderator/Mediator Representative

Maurice C. Hebert, Jr., Esq.

Panel Members:

Rhett King, Esq.

Strauss & King, APLC

Plaintiff Attorney

Harold Flanagan, Esq.

Flanagan Partners

Defense Attorney

Robert A. Milana, Esq.

Travelers – Ocean Marine Claims

Insurance Representative

The Honorable Andrew Edison

U.S. District Court

Magistrate Judge

3:15 – 3:30

BREAK

3:30 – 5:00

**CONTRACTS AND AGREEMENTS (C&A)
IN TODAY’S MARITIME WORLD!**

**Part I: A Catastrophe Has Occurred
Between/Among Multiple Parties – Deals And
Agreements Are Going Back And Forth “To
Solve The Issues” – So, You Might Want To
Be Guided By The Following:**

**What constitutes a binding “Contract” or
“Agreement?”**

- How do you draft a written C&A and reduce it to writing and make it binding between the Parties? Particularly in the maritime world!
- How might one modify the document in the future, if necessary?
- What clauses assure me that my attorney fees and costs would be recovered should I prevail if there is litigation over the document?

- Can it make a difference if a C&A is or is not “notarized?” “Why and when” must a C&A or any company document, for that matter, have to be notarized?
- How do I make sure any litigation takes place in the Court, State and Venue of my choice?
- Do all C&As (even Maritime Charters or Vessel Sales and Construction) have to be in writing and notarized? Is an “oral” Contract or Agreement (such as a Vessel Charter) valid? – If so, how does one prove there is or was an oral meeting of the minds?

**Part II: The “Infamous Internet Emails And
Cell Phone Texts” Used Every Day In The
Marine Industry – And, In The Real World
Of C&As And Litigation**

- Can they be Good, Bad or Ugly to either side?
- Are emails and cell phone text messages binding between or among Parties?
- Watch what you put in an “email” – because...
- As an example, can a “thumbs up” in a “text message” to the other side constitute acceptance of a binding C&A, Vessel Charter or whatever?
- Admissible in litigation?
- Can a captain, dispatcher, secretary or whomever, outside of Company high management, bind a company in an “email/text” Agreement?
- Can a company dispute an “email/text C&A?” How?
- Can a company dispute an “email/text Agreement” of a non-management employee? How?
- What is considered a “company record” and how might it be used for or against my company in litigation?
- The word “hearsay” in litigation is common. What does it mean – applicable in non-litigation disputes as well as lawsuits/trials?
- A witness may not be available in a trial, but, can an email or text message of the “missing witness” be used as evidence if it is considered a company business record and an exception to “hearsay” rule in a trial?
- A witness recorded a statement or executed a signed written statement – can it be used in litigation if the witness is not available or is deceased? What about a witness’s deposition?

- Can a company's lawyer bind, under the argument of C or A, the company he/she represents with an "email/text" to opposing counsel? How and why?
- Would all or any of these be considered an action on behalf of a company which would or could void the companies' insurance coverage?

Moderator:

Marc C. Hebert, Esq.

Panel Members:

Jennifer Khouri

Kiewit Corporation

In House Counsel

Bari Blanks

Fugro

Head of Legal, Americas

Houston, Texas

In House Counsel

THURSDAY SPEAKERS

C. A. “BEN” BENSON is President/Owner of BEST, Inc. and Senior Marine Pollution Surveyor & Adjuster for EPG, LLC. His response experience spans 40+ years which includes service in the U.S. Coast Guard serving expeditions to the Arctic and Antarctic regions, Atlantic & Pacific Ocean Patrols, Inland Construction Tenders, COTP/MIO New Orleans and Captain of the Port Honolulu as the Senior Pollution Investigator for the Hawaiian Islands. Assigned to the USCG National Strike Force-Gulf Strike Team as Chief Damage Controlmen, Diver and C-130 Loadmaster. Mr. Benson’s commercial experience includes senior level oil/hazardous material contractor management, Certified Response Manager for US EPA’s Region IV Emergency Response Contracting System, Superfund Program. Senior VP of Response Services for O’Brien’s Response Management a preeminent contract Incident Management Team serving Major Oil & Gas and Pipeline Industry. U.S. based Qualified Individual for Worldwide International Shipping Interests for tank and non-tank vessel clients trading in the United States. Deputy Incident Commander/ Adviser BP-Deepwater Horizon-Houma, LA. Command Center. Senior Marine Pollution Surveyor/Consultant for various U.S. based Pollution Insurance Providers and Lloyds of London Pollution Underwriters. Deployed to Gulf War I for Saudi Armaco Services & Gulf War II for U.S. Army Corp of Engineers as a subject matter expert. Education Background: USCG/FEMA Advanced Training Curriculum; UT(Austin)- Offshore Oil Exploration & Operations; ‘Red’ Adair-Well Control Technology, Vanderbilt University-Pyrotechnic Technology; LSU- Asbestos Science, University of Hawaii Leeward Campus for Business Administration. USAF-C-130 Load Master and USN ‘SeaBee’ Advanced Survival Training.

BARI BLANKS currently serves as Head of Legal-Americas for Fugro in Houston, Texas. As an Executive Corporate Counsel, she offers vast experience in providing strategic legal guidance to energy, chemicals, and manufacturing companies on a global level. Her expertise lies in managing and advising on complex domestic and international transactions including acquisitions, joint ventures, consortiums, and strategic alliances in the US, Middle East, Asia, Africa, Europe and other jurisdictions.

She also serves as an executive strategic legal advisor for risk mitigation and commercial and legal guidance to C-suite leadership on domestic and international legal matters including capital markets, intellectual property and R&D protections, laws pertaining to the formation of foreign operating entities, compliance and M&A opportunity identification and analysis.

She has been recognized for innovative collaboration with internal business leaders and executive teams in distressed circumstances to help drive commercial objectives, provide legal guidance to mitigate risks, and execute on commercial strategy. She takes immense pride in having dedicated herself to converting legal teams from being regarded as functional support to being considered a critical strategic lever for company global objectives.

BLAKE R. DAVID was raised in Lafayette and is a founding partner of Broussard, David & Moroux. Mr. David focuses on personal injury and wrongful death litigation with an emphasis on offshore/maritime, trucking accident, aviation, products liability, industrial accident, and automobile claims. Mr. David is board certified in civil trial law by the National Board of Trial Advocacy in Civil Trial Advocacy and a member of the American Board of Trial Advocates (ABOTA). Mr. David has been included in Louisiana Super Lawyers list of TOP 10 lawyers in the state of Louisiana (this exclusive list of 10 named individuals is selected by peers out of over 22,000 lawyers in Louisiana, and Mr. David is the only TOP10 lawyer outside of New Orleans and

THURSDAY SPEAKERS

the only TOP10 lawyer categorized as personal injury). For years, Mr. David has been listed by Louisiana Super Lawyers TOP50 and in the field of personal injury law.

Mr. David is an “AV” rated attorney by Martindale-Hubble (highest rating possible) and recognized by Million Dollar Advocates and Multi-Million Dollar Advocates Forums. Mr. David has been named to Top 1% of lawyers nationwide by National Association of Distinguished Counsel. He has also been recognized by The National Trial Lawyers as a Top 100 Trial Lawyers, an exclusive designation for trial lawyers who exemplify superior qualifications, trial results, and leadership.

Mr. David was lead counsel in a jury trial involving a leg amputation where the jury awarded \$38,052,544.92. Mr. David was lead counsel in a jury trial involving a local man paralyzed by an 18-wheeler that ran a stop sign. The jury awarded \$30,438,225.00 (the largest award in Lafayette Parish court history, recognized nationwide as one of the Top 100 Verdicts of 2016 by The National Law Journal and VerdictSearch). Mr. David was lead counsel in jury trial involving a drunk company driver in St. Charles Parish that resulted in a \$29,100,000.00 award (recognized nationwide as one of the Top 100 Verdicts of 2011 by The National Law Journal and VerdictSearch). Mr. David was also lead counsel in an 18-wheeler wrongful death case in Lake Charles (Calcasieu Parish) that resulted in a \$10,800,000.00 jury verdict. Mr. David was lead counsel in a successful wrongful death jury trial that resulted in a \$21,400,000.00 award in Lafayette Parish (then the largest award in Lafayette Parish court history, and recognized nationwide as one of the Top 100 Verdicts of 2007 by The National Law Journal and VerdictSearch).

Mr. David’s professional associations include the Louisiana Association for Justice (Past President, Executive Committee Member, Maritime Section Chair), Louisiana State Bar Association (past Board of Governors), Louisiana State Law Institute (Board Member, Code of Civil Procedure Committee), Lafayette Bar Association (Past President, Foundation Board Member), American Inn of Court of Acadiana (Past President), International Academy of Trial Lawyers, and International Society of Barristers. He also is a founding board member of the Lafayette-Acadiana Chapter of the Federal Bar Association (Past President), and American Association for Justice (past Council of Presidents, Board of Governors). Annually, Mr. David teaches Trial Advocacy to law students at the LSU Law Center. He also lectures on maritime law at the LSBA Admiralty Symposium and LAJ High Stakes on the High Seas.

In 2017 and again in 2023, Mr. David was appointed to the Louisiana Board of Regents by Governor John Bel Edwards and confirmed by the Louisiana Senate (the secondary education board that coordinates the efforts of all 33 degree granting institutions in the State of Louisiana). He currently serves as Finance Chair, Executive Committee, and is a Past Chair. Mr. David currently serves on several community organizations as well, including Lafayette Economic Development Authority (Chair, Executive Committee – appointed by city-parish council to the LEDA Board of Commissioners), First Horizon Bank (Advisory Board), Community Foundation of Acadiana (Board Member), The Committee of 100 for Economic Development, Downtown Development Authority (past Board Member and past Chair of DDA and DLU), Opus Christi Magnum Catholic Charities (Former Co-Chair, Captain); St. Thomas More High School (Board Member), Our Lady of Fatima Catholic Church (Eucharistic Minister, Foundation Board, Finance Board), ABC Art Fund (Vice-Chair), The Acadiana Tigers (Board Member, Past President), and a founding board member of “the705”, a young professionals organization focused on leadership and service in the community.

THURSDAY SPEAKERS

In 2009, Mr. David was honored as the “Outstanding Young Lawyer of Louisiana” award by the Louisiana State Bar Association. This award is presented annually at the Louisiana State Bar Association’s Annual Meeting in Florida to one attorney under 40 years of age who has made outstanding contributions to the legal profession and his or her community. In 2006, The Daily Advertiser recognized Mr. David as “20 Under 40”, an honor designating Mr. David as one of Acadiana’s 20 most successful business persons under 40 years of age.

Prior to litigating, Mr. David graduated from LSU (BA, JD) and worked as a registered lobbyist with Haynie & Associates in Baton Rouge. He and his wife, Amber, reside in Lafayette with their three children.

JUDGE ANDREW EDISON is a United States Magistrate Judge for the Southern District of Texas -- Galveston Division. He earned his undergraduate degree from Dartmouth College and his law degree from the University of Virginia School of Law. Prior to taking the bench in 2018, Judge Edison was a highly respected trial lawyer, appearing for the past 25 years in state courts, federal courts and arbitration panels across the country. He lectures frequently at various continuing legal education seminars and serves as an adjunct professor at the University of Houston Law Center, teaching Remedies and Trial Advocacy. Outside the law, Judge Edison is an avid sports fan and can often be found attending sports events all over the globe. Although he is not blessed with much athletic ability, Judge Edison has managed to run--and complete--five marathons, including the Boston Marathon.

JUDGE KURT D. ENGELHARDT was appointed by President Donald J. Trump to the United States Fifth Circuit Court of Appeals, based in New Orleans, on May 10, 2018. He was previously appointed by President George W. Bush to the United States District Court for the Eastern District of Louisiana on December 13, 2001, and became Chief Judge to that Court on October 1, 2015, serving until his appointment to the Fifth Circuit. He received a Bachelor of Arts in history in 1982 from Louisiana State University in Baton Rouge and received his law degree from LSU in 1985. Prior to his appointment to the federal bench, Judge Engelhardt was a partner with the Metairie, Louisiana law firm of Hailey, McNamara, Hall, Larmann & Papale, where his practice included all aspects of commercial transactions and commercial litigation, including real estate, bankruptcy, insurance defense and coverage issues, RICO, contract disputes, and construction litigation, along with some practice in the areas of personal injury litigation and white collar criminal defense work. In 1995, Judge Engelhardt was appointed by the Governor to serve a four-year term on the nine-member Louisiana Judiciary Commission; in 1998, he was elected by his fellow commission members to serve as Chairman. His work on the Judiciary Commission has been cited for its excellence by the Louisiana Supreme Court. In 2004, Judge Engelhardt was appointed by United States Supreme Court Chief Justice Rehnquist to serve on the Judicial Conference Committee on Federal-State Jurisdiction, where he served two terms. He also served on the U.S. Fifth Circuit’s Committee on Criminal Pattern Jury Instructions, charged with drafting and updating jury instructions for use throughout the Circuit. He is a member of several professional organizations including the Advisory Board of the New Orleans Chapter of The Federalist Society; The American Judicature Society; and previously the Board of Directors (and past president) of the New Orleans Chapter of the Federal Bar Association. On October 17, 2019, he was elected to membership in The American Law Institute. He is also a Board member and past president of the Cancer Association of Greater New Orleans.

THURSDAY SPEAKERS

HAROLD FLANAGAN is a partner at Flanagan Partners LLP. His practice includes both contracts and litigation in the areas of maritime law, oil and gas production, construction, and clean & renewable energy. He drafts and negotiates contracts for oil and gas producers, including drilling contracts, master service agreements, licensing agreements, and purchase orders. He and his team investigate casualties in the marine, oil and gas, construction, and industrial settings, and advise industrial clients on Health, Safety, and Environmental compliance. Mr. Flanagan is frequently associated by other law firms to assist in litigating the insurance aspects of large casualty claims. His team includes lawyers barred in Texas, Louisiana, Mississippi, Alabama, Colorado, and California. Mr. Flanagan graduated from Loyola University with a B.S. in Business Management in 1984, and from the Loyola School of Law in 1995, cum laude, where he was a member of the Loyola Law Review. In December 2023, he retired from Tulane Law School, where he taught the Insurance Law class for 23 years. Mr. Flanagan enlisted in the U.S. Marine Corps in 1985 and retired at the rank of colonel after 26 years of service, including overseas service in Operation Enduring Freedom.

RHETT E. KING was born and raised in New Orleans, graduating from Jesuit High School in 1988. He earned his undergraduate degree from Emory University in 1992 and his Juris Doctor from Louisiana State University (LSU) in 1995. A partner at Strauss & King since 1996, Rhett focuses his practice on representing injured seamen and workers. An experienced trial lawyer, he has litigated cases in both state and federal courts and during the past 30 years he has participated in mediations across the country. He is an active member of the Federal Bar Association, the Louisiana Association for Justice, and the New Orleans Bar Association.

JENNIFER DAVID KHOURI is an Assistant General Counsel with Kiewit Corporation, a construction and engineering organization with operations spanning throughout North America. In her role, she coordinates and assists outside defense counsel handling complex litigation and helps manage legal strategies on a wide range of matters for the company and its affiliates, including property damage, personal injury, contract disputes, and insurance issues. She also works with the company's insurers, risk management program, and safety department on claims and regulatory matters arising on construction, transportation, and maritime projects. Before joining Kiewit, Khouri developed a strong background in litigation, having practiced as both a plaintiff's attorney and as a civil defense lawyer with an emphasis in maritime law. Given her background, she is uniquely positioned to understand strategies on both sides of a case. Khouri holds a Juris Doctor degree from Tulane University School of Law and a Bachelor of Arts in History from the University of Kansas. At Kiewit, Khouri aims to help facilitate the legal strategy of the company and/or its affiliates in a collaborative, creative, and aggressive manner, while supporting the company's long-standing commitment to integrity, safety, and excellence.

ROBERT A. MILANA, ESQ. has been with Travelers Major Case Unit since 2015. He has extensive experience handling all types of marine disputes including, P&I, hull, liability, recreational marine, cargo and charter party. He is an expert in personal injury Jones Act matters. He is an SMA Arbitrator, mediation expert and frequent speaker on mediation topics and is the Chairman of the SMA Mediation Committee. He worked for AIG from 2004 to 2014 as Director of Marine Liability; as an attorney with Kirlin, Campbell & Keating (1985-1999, partner) and as an attorney with London Fischer, LLP (1999-2004, partner). He is a graduate of SUNY Maritime College at Fort Schuyler and sailed as Third Engineer with MSC.

THURSDAY SPEAKERS

RYAN A. PUTTICK is Senior Vice President & Chief Claims Officer at the Water Quality Insurance Syndicate (WQIS) and is based in New York, New York. He is a graduate of the United States Merchant Marine Academy, and is an attorney admitted in New York and New Jersey.

Ryan has over twenty five years of experience in the field of marine insurance and maritime law. Ryan joined the claims department of the Water Quality Insurance Syndicate in 2013 where he manages marine pollution claims throughout the entire claim life cycle from initial response to prompt and accurate resolution, and recovery when applicable. He also directs and manages relevant litigation involving the Syndicate, and its Assureds. WQIS' own surveyors and response team members attend discharge incidents and report to Ryan.

He has significant mediation and arbitration experience, as well as having participated in a vast number of court conferences and trials throughout the United States in both Federal and State Courts. Ryan's prior experience includes working at a leading New York maritime law firm and for an International Group P&I Club. Ryan is a Proctor member of the Maritime Law Association of the United States.

JEFFERSON R. TILLERY, ESQ. is a partner in Jones Walker's Maritime Practice Group and co-leader of the maritime litigation, arbitration, and dispute resolution team. He is recognized as an accomplished trial lawyer and is a Fellow of the American College of Trial Lawyers.

Drawing on his more than 35 years of experience, Jeff works closely with clients to identify the issues at the heart of any dispute and to adopt practical strategies to resolve the issues quickly and effectively. When negotiated settlements are not an option, clients rely on Jeff's significant trial experience to present their cases before judges and juries in federal and state courts.

Known for handling complex maritime litigation, Jeff has extensive trial experience that includes representing clients in maritime personal injury and vessel collision and allision matters, commercial litigation, longshore matters, marine insurance coverage disputes, contract and charter party disputes, and property and economic damage cases involving construction and repair of fixed offshore platforms, marine terminals, docks, ships, towboats, barges, and offshore service vessels. Jeff regularly represents clients in complex marine multiparty casualty cases, including many under the Oil Pollution Act. He also represents industrial plants and refineries in matters involving explosions and other major incidents.

Jeff is a frequent speaker at seminars and on podcasts around the country. His presentations cover a wide range of maritime topics, including collisions, offshore casualties, the ramifications of recent court decisions on the industry, and the application of a host of federal and state laws and regulations, including the Jones Act and the Longshore and Harbor Workers' Compensation Act.

**THE USE OF AI IN LITIGATION AND THE COURTROOM: WHAT ARE THE PROS, THE CONS
AND THE DANGERS...?**

Insight into Issues of Ethical and Professionalism when Using AI in Litigation and the Courtroom.

- What is AI and how does it work?
- What are the different AI programs and services that are available for use in litigation?
- What training is necessary for use of AI, and who provides that training?
- What is the perception of the judge, the defense and the plaintiff's lawyer in the use of AI?
- How do the insurers view their law firm's use of AI to prepare briefs and pleadings, and who pays for it?
- What if AI "screws up" leading to misleading or incorrect information, case citations, etc., and the lawyers or client is sanctioned? Who pays for the screw up, the lawyers malpractice carrier, the client's insurance?
- After a discussion of AI, how it works and the pros and cons, there will be a live demonstration of use of AI in the courtroom by the panelists.

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:

The Honorable Kurt D. Engelhardt, Judge
US Court of Appeals for the Fifth Circuit

Blake R. David, Sr.
Broussard David & Moroux
Lafayette, LA

Jefferson R. Tillery
Jones Walker LLP
New Orleans, LA

**THE FUTURE OF ARTIFICIAL INTELLIGENCE IN THE LEGAL
PROFESSION – INSIDE AND OUTSIDE THE COURT ROOM**

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Introduction

Imagine, just before dawn on an ordinary night along the Mississippi River, a chain of small decisions begins to unravel into a full-blown maritime crisis.

Grantham Barges, LLC (“Grantham”), the owner of Tank Barge 101 (“TB 101”), bareboat chartered the barge to Savoie Towing, LLC (“Savoie”). For weeks, TB 101 had been out on the river, quiet and uneventful. However, on one particular night, at 0200 hours, the tug M/V MO, owned and operated by Savoie, nudged the TB 101 into the Robin Fleet, a fleeting facility perched above the Burnside terminal. The crew secured TB 101 with the fleet’s lines, made a quick call to dispatch to report the “drop-off,” and then—like dozens of tows before them—slipped away into the dark current. No one from Savoie or Grantham mentioned any issues with the barge. The fleet’s “Tariff” requires advance notice from any towing vessel or barge of any leaking or problematic barge. And although Robin Fleet had personnel on duty, no one went down to inspect the new arrival. TB 101 was simply mixed into the river’s nightly shuffle, added to the fleet diagram and forgotten.

At around 0500 hours, the river was quiet except for the soft hum of industry waking up. A fleet worker—also a crew member of the fleet tug—was undertaking a routine inspection of the fleet. While inspecting the lines on another barge, the fleet worker/crew member heard a loud, startling snap. He spun around and saw the TB 101 list heavily to one side and break its ties. Within seconds the barge began slipping beneath the surface, and an oily sheen fanned out across the water. In a rush, the fleet worker/crew member turned, causing him to slip and fall on the deck of the adjacent barge. Falling hard, the fleet worker/crew member immediately felt pain stabbing through his back. Gritting his teeth, he grabbed his radio and reported everything at once: the fall, the spill, the sinking barge.

Robin Fleet’s manager immediately reached out to both Savoie and Grantham, delivering the blunt demand: to “come take care of” the sinking barge and spill. Out of caution, Robin Fleet contacted and activated its OSRO. The Coast Guard is also notified, and within minutes, river traffic—the lifeblood of countless businesses—was shut down. A single barge has brought the Mississippi to a standstill.

In the wake of a sinking barge, a polluted river, an injured worker, and a shutdown waterway, there is urgent and essential work to be done. But inevitably, the attorneys will be called in. As attorneys do, they will work the case from its earliest beginnings through trial. And now the question becomes: what does that process look like when the attorney is equipped with Artificial Intelligence (“AI”)? What does advocacy, strategy, and case management look like in a world where AI becomes a tool in the lawyer’s arsenal?

This paper examines the emerging and expanding role of AI in the practice of law. In Section One, we explore how AI has been used, and could be used, by attorneys *before* a case reaches trial, including predictive analytics, discovery assistance, pre-trial motions/briefs, and mediation assistance. In Section Two, we examine the emerging courtroom tug-of-war over artificial intelligence, highlighting how judges have alternately embraced and rejected AI technologies in ways that reveal a deepening doctrinal tension at the heart of modern litigation.

I. AI in Pre-Trial Litigation: A New Legal Battleground

Just as a single sinking barge can shut down the Mississippi River before sunrise, a single lawsuit can set into motion a cascade of decisions, deadlines, and strategic decisions long before a case ever reaches the courtroom. In those early, often frantic day and weeks of a developing legal matter, attorneys must quickly answer fundamental questions: *How strong is this case? What evidence matters? Which strategy leads to the best possible outcome?* In an era of expanding

technology, the attorney making these decisions is faced with a decision, whether to use AI or not. And while trial-court confrontations with AI grab the headlines, it is the pre-trial arena where AI's influence is rapidly accelerating

a. Predictive Analytics: Seeing into the Future

The first question any attorney must answer—sometimes within hours of receiving a case—is deceptively simple: *What is this case worth?* Traditionally, experience, intuition, and knowledge of a jurisdiction's tendencies guided these early valuations. Today, AI tools analyze vast databases of verdicts, settlements, judicial tendencies, expert-witness histories, jury pool data, and demographic factors to forecast outcomes with a level of speed impossible for any human team.¹

Used responsibly, predictive analytics can serve as a strategic compass for an attorney who must be onboarded and provide results to a worried client in a quick manner. This includes: (1) estimating likely verdict ranges; (2) identifying settlement windows; (3) flagging weak points in a theory of liability or damages; and (4) modeling how a particular judge or jury pool tends to rule in similar matters.²

Armed with this information, attorneys can make earlier, more informed decisions about resource allocation, litigation strategy, and whether settlement is wiser than trial. But these tools are not crystal balls. They depend entirely on the quality and completeness of the data beneath them—and data rarely captures the human elements of litigation: credibility, sympathy, or an unpredictable witness.³

¹ See THOMSON REUTERS, FUTURE OF PROFESSIONALS REPORT (2024).

² *The Siren's Song of Generative AI in Pleadings*, ESQUIRE (May 7, 2025), <https://www.esquiresolutions.com/the-sirens-song-of-generative-ai-in-pleadings/>.

³ See ESQUIRE, *supra* note 2, at 4, 10; THOMSON REUTERS, *supra* note 1.

For example, where a barge unexpectedly slips beneath the Mississippi before sunrise, injures a fleet worker, spills oil, and shuts down river traffic—an attorney can utilize AI to digest comparable spill cases, Jones Act injury awards, environmental-damage settlements, Coast Guard enforcement patterns, and even specific judges’ tendencies, delivering preliminary verdict ranges and likely settlement windows within hours of the incident. Faced with a scenario like TB 101—multiple parties (Grantham, Savoie, Robin Fleet), overlapping duties, a personal injury, environmental contamination, and massive economic impact—AI tools help flag weaknesses in theories of liability like a failure to inspect, failure to give notice, improper mooring, etc. Further, they can predict how a judge or jury might treat comparative fault and can map realistic outcomes before discovery begins. Used responsibly, these tools allow counsel to advise clients about whether to pursue early settlement, tender responsibility, or brace for litigation. But it not an infallible fortune-teller: datasets cannot fully capture a sympathetic injured worker, a poorly-prepared corporate witness, or the emotional weight of a sensitive issue in front of a jury, human variables that no algorithm can ever fully quantify.⁴

b. Discovery: When AI Meets the Document Deluge

If predictive analytics guide strategy, AI in discovery drives efficiency. Modern litigation generates terabytes of emails, texts, spreadsheets, drafts, photos, and more, forcing an attorney into days, if not weeks, of document review. However, with the help of AI, lawyers can dissect and review millions of documents in mere hours.⁵ AI has the ability to cluster documents by subject matter, flag anomalous or privileged materials, and surface connections invisible to an unaided

⁴ *See id.*

⁵ Seyhan Selcuk et al., *AI-driven civil litigation: Navigating the right to a fair trial*, 57 COMPUT. L. & SEC. REV. 1, 2 (2025).

eye. In theory, these tools reduce human error, expedite production, and lower overall litigation costs.⁶ In practice, they are only as reliable as the human oversight supervising them. Because AI identifies patterns rather than meaning, it remains vulnerable to nuance, tone, and ambiguity—things lawyers must still parse themselves.⁷

A properly trained AI machine can reduce human error and dramatically shrink review timelines.⁸ Traditional document review is often plagued by fatigue, inconsistency, and sheer volume; AI does not tire, rush, or overlook.⁹ But this speed comes with a fundamental caveat: AI identifies patterns—it does not *understand* them. A subtle nuance in language, sarcasm, or ambiguity may mislead an algorithm that lacks human context. The best results come from hybrid review: AI for the first cut, humans for the judgment calls.¹⁰

For example, in the TB 101 incident, there is likely to be a huge volume of resulting documents: emails between fleet personnel, maintenance logs, tow reports, inspection checklists, Coast Guard communications, OSRO activation records, insurance notices, and internal incident assessments. In such a case, AI-driven discovery tools can sift through millions of these materials in hours rather than weeks, clustering communications about the barge’s condition, flagging anomalous entries in fleet logs, and surfacing patterns—such as repeated failures to inspect or delayed reporting—that a human reviewer might miss. AI can even identify threads suggesting awareness of problems before the incident or highlight privileged materials that need attorney

⁶ See THOMSON REUTERS, *supra* note 1, at 6; Selcuk, *supra* note 5, at 4.

⁷ Selcuk, *supra* note 5, at 11 (“Unlike human[s] . . . who can adapt their assessments to the unique characteristics of a case, AI models lack the flexibility for nuanced evaluation.”).

⁸ Jonathan Ciottono et al., *The Economic Benefits of AI in Civil Defense Litigation*, NAT’L L. REV. (July 18, 2024), <https://natlawreview.com/article/economic-benefits-ai-civil-defense-litigation>.

⁹ See *id.*

¹⁰ Selcuk, *supra* note 5, at 11.

attention. Yet, much like the human factors that no predictive model can fully capture, AI-assisted discovery still depends heavily on attorney oversight. An algorithm might misread sarcasm in a crew email, overlook the significance of a short text message, or fail to grasp the nuance of a tense exchange with dispatch. Used properly, AI becomes the first cut—fast, tireless, and comprehensive—but the lawyer remains essential for interpreting tone, context, and meaning. In a high-stakes maritime case like TB 101, this hybrid approach allows counsel to move quickly, reduce costs, and avoid fatigue-based errors, while ensuring that no critical detail is lost in translation from data to strategy.

c. Pre-Trial Pleadings, Motions, and the Perilous Pitfalls of AI

A weapon in an attorney’s arsenal now includes AI-enhanced search tools that deliver synthesized summaries, case comparisons, and issue-based analyses in seconds. When used carefully, these tools streamline research. When used carelessly, they create professional disaster.

AI’s role in drafting pre-trial filings is perhaps the most controversial. Attorneys across the country have attempted to use generative AI to write briefs, craft arguments, or “summarize” legal precedent—sometimes with disastrous results.

Recent federal cases illustrate the danger:

In *Bevins v. Colgate Palmolive Co.*, an attorney submitted briefs to the court with case citations that were inaccurate and did not correspond to any real or identifiable judicial opinions.¹¹ The court determined that the citations appeared to come from AI-generated hallucinations, as the cases could not be located, nor could the court discern any plausible typographical or citation error explaining their inclusion.¹² The court rejected this explanation as unconvincing, and the attorney

¹¹ No. 25-576, 2025 U.S. Dist. LEXIS 68399, at *16-17 (E.D. Pa. Apr. 10, 2025).

¹² *Id.*

was sanctioned under Federal Rule of Civil Procedure 11 (“Rule 11”) and the court referred the matter to the State Bar.¹³

In *Wadsworth v. Walmart Inc.*, plaintiffs’ counsel submitted motions *in limine* containing nine case citations, eight of which were fabricated and could not be located in any legal database, prompting the court to conclude that the citations originated from AI-generated hallucinations.¹⁴ The fictitious cases—produced after an attorney uploaded the brief into an AI-assisted research tool—mirrored the emerging pattern of attorneys relying on AI without adequate verification.¹⁵ The court concluded that plaintiffs’ counsel violated Rule 11 because an attorney has a “nondelegable responsibility” to review any motion, brief, or pleading before filing to ensure that it is not based on a “fake opinion,” but is instead grounded in existing law.¹⁶ The court emphasized that despite advancements in research tools, lawyers remain responsible for confirming the accuracy of their citations and may face discipline for failing to do so.¹⁷

In *Mid Central Operating Eng’rs Health v. Hoosiervac LLC*, defense counsel repeatedly submitted briefs containing citations to non-existent cases, which the court determined were generated by AI tools that the attorney had used without verifying the accuracy of the resulting authorities.¹⁸ After discovering at least three filings with fictitious citations, the court found that

¹³ *Id.* at *17-18.

¹⁴ 348 F.R.D. 489, 493-94 (D. Wyo. 2025).

¹⁵ *Id.*

¹⁶ *Id.* at 495.

¹⁷ *Id.* at 496 (“The key takeaway for attorneys is simple: make a reasonable inquiry into the law before signing (or giving another permission to sign) a document, as required by Rule 11. If an attorney does not do so, then they should not sign the document. However, if the attorney decides to risk not making reasonable inquiry into the existing law and signs, then they may be subject to sanctions.”).

¹⁸ No. 2:24-cv-00326-JPH-MJD, 2025 U.S. Dist. LEXIS 100748, at *1-2 (S.D. Ind. May 28, 2025).

the attorney had violated his duty under Rule 11 by relying on AI-generated material without attempting to confirm that the cited cases actually existed.¹⁹ Although the attorney acknowledged the errors and attributed them to generative AI programs, the court rejected any argument that sanctions were moot and imposed a monetary penalty, concluding that a substantial sanction was necessary to deter similar misconduct and protect the integrity of judicial proceedings.²⁰

Finally, in *Benjamin v. Costco Wholesale Corp.*, plaintiff's counsel submitted a reply brief containing citations to non-existent cases, which the court later determined had been generated using an AI platform called "ChatOn."²¹ The court noted that the attorney had presented these fabricated authorities as if they were legitimate legal precedents, despite their being entirely fictitious, and emphasized that generative AI tools can "hallucinate" case law that appears valid but does not actually exist.²² After issuing an order to show cause, the court rejected counsel's explanations as insufficient and imposed sanctions, underscoring that attorneys remain fully responsible for verifying the accuracy of all citations submitted to the court, regardless of whether AI tools are used.²³

These cases provide a clear message: AI may draft, but the lawyer must verify. Failure to do so violates not only local rules and standing AI-usage orders but fundamental professional responsibility. Yet AI's potential remains significant. When used responsibly, AI can: build initial pleading drafts; outline arguments; summarize caselaw for attorney review; analyze opposing

¹⁹ *Id.*

²⁰ *Id.* at *2-3.

²¹ 779 F. Supp. 3d 341, 345 (E.D.N.Y. 2025).

²² *Id.* at 342-43.

²³ *See id.*

counsel's filings for omissions or weaknesses; and check citations (when paired with proper verification tools). AI accelerates the work—but cannot replace the lawyer's judgment.²⁴

d. AI in Mediation and Settlement: A New Neutral?

If trial is the tip of the litigation iceberg, mediation is the underwater mass where most cases resolve. Here, too, AI is emerging as a powerful—if imperfect—tool.

AI's value in mediation includes: analyzing massive data sets to propose fair settlement ranges; offering neutral, unbiased recommendations; eliminating gamesmanship in negotiation by evaluating parties' confidential bids; and reducing court congestion through faster dispute resolution.²⁵ One of the most striking examples occurred in Canada, where an AI-driven “robot mediator” was used to resolve a three-month dispute in under an hour through the Smartsettle ONE platform.²⁶ After the parties in a £2,000 fee dispute failed to settle through the UK's online civil money claims system and a court-run telephone mediation, mediator Graham Ross introduced them to Smartsettle ONE, which uses algorithms, open and secret bids, and pattern-learning to nudge parties toward agreement while protecting their negotiation strategies.²⁷ Developed by ICan Systems in British Columbia, the tool can encourage earlier, more efficient settlements—particularly appealing for insurers and routine cases—and is complemented by a more advanced version, Smartsettle Infinity, designed for complex disputes with conditional terms.²⁸

²⁴ Ciottone, *supra* note 8.

²⁵ Nick Hilborne, *Robot mediator settles first ever court case*, ADR INST. OF CAN. (Feb. 19, 2019), <https://adric.ca/robot-mediator-settles-first-ever-court-case/>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

However, mediation can be as much emotional as analytical. AI falters as it cannot detect emotional cues, sincerity, or tension. Further, mediation depends on trust—human trust. And trust is not easily delegated to a machine. While the Canadian “robot mediator” demonstrates the remarkable potential of AI to streamline negotiations by analyzing confidential bids and incentivizing good-faith bargaining, mediation remains a fundamentally human process. The very strengths of AI—speed, pattern recognition, and analytical precision—cannot compensate for its inability to perceive emotional nuance, gauge sincerity, or sense tension between parties. Mediation depends not only on logic but on empathy, rapport, and trust, and those elements cannot be delegated to an algorithm. Ultimately, AI may serve as a powerful tool to enhance dispute resolution, but it cannot replace the human judgment, emotional intelligence, and interpersonal dynamics at the heart of effective mediation.²⁹

In such a high-stakes case like the TB 101, AI tools could analyze thousands of comparable maritime settlements, model likely resolution ranges, and even evaluate confidential settlement positions submitted by the parties to propose neutral, data-driven numbers—much like the Canadian “robot mediator” that resolved a dispute by analyzing secret bids and rewarding good-faith negotiation. In a TB 101-type mediation, this capability could reduce gamesmanship, identify where the parties’ risk assessments genuinely overlap, and speed up negotiations that might otherwise take months. But the very moment the mediator sits across from a fleet worker—still stiff from his fall—or from a tug captain worried about his licensure, the limits of AI become clear. A machine cannot read the tremor in a voice, detect defensiveness or sincerity, or sense when a proposal lands poorly. It cannot build rapport with a frustrated terminal manager or defuse tension between corporate representatives blaming each other for the sinking. Thus, while AI may

²⁹ *Id.*

accelerate the analytical side of evaluating settlement ranges and narrowing bargaining gaps, mediation in a case like TB 101 still depends on human empathy, credibility assessments, and trust—qualities no algorithm can replicate.

II. A Courtroom Tug-of-War

An examination of AI's use in the pre-trial context reveals a landscape marked by doctrinal uncertainty and uneven experimentation. Now we arrive at trial, where that uncertainty is amplified. The use of AI in the courtroom is largely *terra incognita*, or unexplored territory, where judges must confront, in real time, what role artificial intelligence may play at the very core of adjudication. The results to this point in AI's short history can be described as consistently inconsistent: Courts across the United States are simultaneously welcoming experimentation with artificial intelligence while firmly resisting it in others. Judges have permitted AI-assisted presentations, immersive simulations, and AI-generated victim impact statements. Conversely, courts have rejected AI-enhanced evidence and attempts to introduce AI-led testimony.

This dissonance has painted a picture, albeit ill-defined, of an emerging doctrinal tension over the role artificial intelligence may properly occupy in adjudication. What will follow herein is thus an analysis of that tension through concrete, real-world examples of AI being both permitted and rejected in American courtrooms, opining on what each episode signals about the future jurisprudence and persuasive authority of artificial intelligence.

a. *Permitted Uses of Artificial Intelligence in Open Court*

- *Albisu v. State* - Florida Judge Wears VR Headset to View Crime Simulation

In December 2024, a criminal case in Broward County, Florida – *Albisu v. State* – saw one of the earliest and most prominent examples of artificial intelligence–adjacent technology being

used inside an American courtroom.³⁰ The case itself involved the trial of, Miguel Rodriguez Albisu, a 59-year-old owner of a private wedding venue in Southwest Ranches, Florida. In 2023, Albisu was charged with nine counts of aggravated assault with a firearm for allegedly brandishing a pistol at guests during a wedding reception on his property. Prosecutors contended that Albisu threatened celebrants with his weapon over a dispute concerning “last call” at the wedding venue. Albisu consistently maintained that he acted in self-defense amid what he described as a chaotic encounter involving intoxicated and aggressive guests.³¹

At a December 2024 evidentiary hearing addressing Albisu’s “stand your ground” defense, Broward County Circuit Court Judge Andrew Siegel not only oversaw, but participated in what has been widely reported as a historic first in the judiciary’s engagement with immersive technology. At the request of the defendant, Judge Siegel personally donned an Oculus Quest 2 virtual reality headset as a means of experiencing a computer-generated 3D simulation of the alleged incident from the defendant’s point of view. The simulation was designed by an artist retained by defendants to render an immersive scene intended to recreate Albisu’s perceived first-person perspective during the escalation. The demonstration was supplemented with testimony from an expert witness, who walked the court through key moments of the simulation and correlating those visuals to the incident’s timeline, including the point at which Albisu allegedly drew the firearm.

³⁰ See Florida Judge Wears VR Headset to View Crime Evidence Simulation in Legal First Courtroom, PETAPIXEL (Jan. 3, 2025), <https://petapixel.com/2025/01/03/florida-judge-wears-vr-headset-to-view-crime-evidence-simulation-in-legal-first-courtroom/>; Broward Judge Dons Virtual Reality Headset in What’s Thought to Be a Courtroom First, LOCAL 10 NEWS (Dec. 17, 2024), <https://www.local10.com/news/local/2024/12/17/broward-judge-dons-virtual-reality-headset-in-whats-thought-to-be-a-courtroom-first/>

³¹ See Local 10 News, *supra* note 1.

The defense narrative, guided by attorney Ken Padowitz, emphasized that the generated computer simulation offered a more intuitive understanding of how Albisu perceived his surroundings and the perceived threat he faced. Speaking on the demonstration, Padowitz offered:

*“We put headsets on the judge, the prosecutors and the witness and the judge was able to see from my client’s own eyes, from his own perspective, what he faced when he was surrounded by intoxicated partygoers ... and he felt at that point in time he needed to pull out his weapon to defend his own life and his property.”*³²

Judge Siegel’s admission of the virtual simulation into evidence was limited to use in the stand-your-ground hearing where he, as the factfinder, could evaluate the defense’s self-defense claim. Siegel made no determination regarding the simulation’s broader admissibility, including whether it could ultimately be presented to a jury. Nonetheless, the judge’s willingness to personally experience the simulation reflects a judicial openness to new sensory modes of understanding factual narratives, particularly where credibility and perspective are contested.³³

This episode serves as a novel example of courts treating immersive technologies as a modern extension of traditional demonstratives, perhaps akin to diagrams, animations, or scene reconstructions. Although the VR simulation was not offered as a scientifically precise recreation, it was presented as an illustrative tool designed to aid the court’s conceptualization of spatial relationships, movement, and perspective. In that sense, the new technology functioned less as evidence purporting to establish historical truth and more as a visualization of the defendant’s narrative.

The lasting visual of the courtroom-first has quickly become emblematic of the judiciary’s entry into the AI era:

³² See Petapixel, *supra* note 1

³³ See Local 10 News, *supra* note 1.



Pictured: A judge uses a virtual-reality headset to view an immersive presentation³⁴

- *State of Arizona v. Gabriel Paul Horcasitas* - Arizona Sentencing Court Allows AI Avatar of Murder Victim

Although *Albisu v. State* stands as a landmark in trial courts' willingness to engage with immersive courtroom technology, its embrace of 'AI' is arguably limited by the fact that the demonstration did not rely on generative artificial intelligence. The simulation was not self-generating but instead rendered by an artist. Those concerned by this absence of generative AI need only look to 2025's *State of Arizona v. Gabriel Paul Horcasitas*.

During a May 2025 sentencing proceeding, an Arizona state court permitted the family of homicide victim Chris Pelkey to present a video of the victim offering sentiments of forgiveness to his killer. "It is a shame we encountered each other that day in those circumstances," Pelkey's AI-generated avatar said in the presented video, "in another life, we probably could have been

³⁴ Local 10 News, *supra* note 1.

friends.” Pelkey’s avatar furthered offered that he “believe[s] in forgiveness, and a God who forgives,” ultimately forgiving his killer.³⁵



*Pictured: An AI recreation of Chris Pelkey addresses his killer.*³⁶

Needless to say, the video did not contain a statement from the tragically deceased Pelkey himself. His image and voice were entirely AI-generated. Using photographs, videos, and voice recordings taken during Pelkey’s life, his family created the AI representation and scripted what they believed he would have said. Pelkey’s sister explained that “everyone who knew Pelkey agreed this capture was a true representation of the spirit and soul of how Chris would have thought about his own sentencing as a murder victim,” and that the family’s goal was “to humanize Chris, to reach the judge, and let him know his impact on this world and that he existed.”³⁷

Presiding Judge Todd Lang responded favorably to the presentation, directly stating, “I loved that AI. Thank you for that.” Interestingly, Judge Lang proceeded to sentence Pelkey’s killer,

³⁵ See *After an Arizona Man Was Shot, an AI Video of Him Addresses His Killer in Court*, NPR (May 7, 2025), <https://www.npr.org/2025/05/07/g-s1-64640/ai-impact-statement-murder-victim>.

³⁶ *AI Used to Create Victim Impact Statement for Dead Man*, BBC NEWS (May 2025), <https://www.bbc.com/news/articles/cq808px90wxo>.

³⁷ NPR, *supra* note 6.

Gabriel Horcasitas, to the Arizona state maximum 10.5 years in prison on manslaughter charges – one year more than the 9.5 years requested by the prosecution.³⁸

Following the sentencing, Horcasitas’s attorney, Jason Lamm, noted that an appeal would be sought, and that the AI video would likely be a highlighted point of contention in said appeal. Speaking to the media, Lamm noted the potential for the case to become “a bellwether case not just for Arizona but also courts around the country to rule on the use of AI in victim impact statements[.]”³⁹

Regardless of the appellate outcome of the sentencing, the courtroom proceedings in *State of Arizona v. Gabriel Paul Horcasitas* represent a seminal moment in the judiciary’s encounter with generative artificial intelligence. The case stands as an early and powerful example of a court permitting AI to be used not merely as a visual or demonstrative aid, but as a simulated human speaker – one that effectively occupied a symbolic role within the sentencing process traditionally reserved for living victims or surviving family members. In doing so, the court implicitly sanctioned AI as a vehicle for conveying moral narrative and emotional perspective.

Yet, the procedural posture matters. Victim impact statements at sentencing hearings are of course not subject to the same evidentiary rules governing trial proof. They are intended to inform the court’s moral and human understanding of harm, not to establish disputed facts. As such, this is not an example of an AI-generated witness being used to establish historical facts or reconstruct physical events. Instead, this serves as an example of AI being implemented as an

³⁸ *Family Uses AI Video to Give Road Rage Victim Voice at His Killer’s Sentencing*, WWNYTV (May 10, 2025), <https://www.wnyvtv.com/2025/05/10/family-uses-ai-video-give-road-rage-victim-voice-his-killers-sentencing/>; *An AI “Ghost” Speaks to the Man Who Killed Him at Sentencing*, FINDLAW (Practice of Law Blog) (May 2025), <https://www.findlaw.com/legalblogs/practice-of-law/an-ai-ghost-speaks-to-the-man-who-killed-him-at-sentencing/>.

³⁹ Findlaw, *supra* note 9.

expressive surrogate, communicating values, forgiveness, and perceived intent. Still, the court's willingness to accept such a presentation underscores a broader judicial comfort with AI when it operates in the realm of narrative and human meaning. This case undoubtedly signals a willingness for courts to integrate artificial intelligence into the expressive core of judicial proceedings, even while stopping short of treating AI as a source of factual proof – for now.

b. Rejected Uses of Artificial Intelligence in the Courtroom

If the foregoing examples illustrate courts' growing willingness to tolerate AI as an expressive or illustrative tool, an equally important line of cases demonstrates that such tolerance has its limits. Courts have been far more resistant when AI is offered as a mechanism for altering, enhancing, or generating evidentiary content itself. In these contexts, judges have largely declined to admit AI-driven outputs, citing concerns about reliability, transparency, and the risk of misleading factfinders. The following examples reflect a consistent judicial impulse: while AI may assist in presentation, it may not yet serve as an authoritative source of evidentiary truth.

- *State v. Puloka* – Rejected Use of AI Enhanced Evidence

State v. Puloka arises from a criminal prosecution in King County, Washington in which the defendant, Joshua Puloka, sought to introduce an AI-enhanced version of a civilian's smartphone video depicting a shooting at the heart of the case.⁴⁰ The original recording - approximately ten seconds long - was captured on an iPhone and streamed to Snapchat. A copy of the video was extracted directly from the witness's phone was admitted into evidence in its original, unaltered form as the "source video" of the incident. Despite its evidentiary significance, the video was hindered by severely low-quality visuals, appearing blurry and grainy.⁴¹

⁴⁰ *State v. Puloka*, No. 23-1-01234-7 SEA, 2024 Wash. Super. LEXIS 1467 (King Cnty. Super. Ct. Mar. 29, 2024).

⁴¹ *Id.*

In hopes of addressing said low-quality, and obtaining a clearer image of the video's contents, the defense retained a videographer, who utilized the well-regarded AI capabilities of Topaz Labs AI and Adobe Premiere Pro to create an enhanced version of the footage. The State moved to exclude the AI-enhanced videos, prompting the trial court to conduct a novel hearing to determine whether the enhanced video passed the age-old evidentiary test established in 1923's *Frye v. United States*. The court thus analyzed 1) whether AI-based video enhancement constitutes a novel scientific technique and, 2) if so, whether it is generally accepted within the relevant scientific community.⁴²

Following the *Frye* hearing, the court found that “the use of artificial intelligence (AI) tools to enhance video introduced in a criminal trial is a novel technique.” The court subsequently concluded that the defense failed to make that showing this AI-enhanced video met the *Frye* test, explaining that the pertinent community is the forensic video analysis community, not the general video-production or filmmaking community.⁴³

The court credited testimony from the State's forensic video expert that the AI tools at issue added approximately sixteen times the number of pixels to each frame using an algorithm “unknown to and unreviewed by any forensic video expert,” and that the process “created false image detail.” The expert further demonstrated that the AI enhancement “removed information that was in the original images and... added information that was not in the original images,” altered shapes and colors, and eliminated the ability to conduct proper forensic analysis. As the court summarized, “the AI-enhancement tools made proper, accepted forensic analysis of the video impossible.”⁴⁴

⁴² *Puloka*, 2024 Wash. Super. LEXIS 1467.

⁴³ *Id.*

⁴⁴ *Id.*

The court also emphasized the cloudiness of the technology itself. The defense expert could not explain what data the AI models were trained on, did not know whether the models employed generative AI, and acknowledged that the algorithms were “opaque and proprietary.” By contrast, the forensic video analysis community has issued warnings regarding machine-learning interpolation methods, noting that “it can be challenging to identify what process were applied to the imagery and replicate those steps with accuracy.”⁴⁵

On these facts, the court held that AI enhancement tools “have not been peer-reviewed by the forensic video analysis community, [and therefore] are – at the present time – not reproducible by that community, and are not accepted generally in that community.” The court further concluded that the AI-enhanced video “[did] not show with integrity what actually happened but uses opaque methods to represent what the AI model *thinks* should be shown,” meaning it essentially reflected the software’s guess about reality rather than reality itself, and thus risked misleading the jury.⁴⁶

Puloka stands in sharp contrast to instances in which courts have permitted VR demonstrations or AI avatars as illustrative courtroom tools. Of note, those permitted technologies are typically framed as aids to perception or narrative understanding. AI-based enhancement, by contrast, purports to improve the technical condition of the evidence itself. Courts have shown little comfort with that concept. The skepticism reflected in *Puloka* tracks a core evidentiary commitment: that evidence must rest on methods that are reliable, knowable, and capable of independent verification. In that posture, AI enhancement ceases to function as a demonstrative

⁴⁵ *Id.*

⁴⁶ *Id.*

aid and instead becomes an unaccountable evidentiary intermediary – one the system is seemingly not yet prepared to trust.

- *Dewald v. MassMutual Metro New York, et al.* – An AI Litigant Addresses the Court

Among the more novel and unconventional examples of attempted AI use in courtrooms to date, few are as striking as the episode that arose in *Dewald v. MassMutual Insurance Co.* In 2025, a New York appellate court confronted an unprecedented, and somewhat humorous, attempt to deploy generative artificial intelligence not merely as a background tool, but as a speaking surrogate for a litigant.⁴⁷

The episode arose when Jerome Dewald, a self-represented litigant appealing a civil employment dispute, sought permission to use a prerecorded video presentation in lieu of traditional oral argument. The court granted that limited request.⁴⁸

When the video began to play, however, it was not Dewald delivering the remarks. Instead, the screen showed a youthful, well-dressed, *fully computer-generated figure* standing before a virtual background and delivering what appeared to be the opening of a legal argument. Within seconds, a confused judge on the panel interrupted to ask whether the individual onscreen was Dewald’s attorney. Dewald responded candidly: **“I generated that. That is not a real person.”**⁴⁹

⁴⁷ *An AI avatar tried to argue a case before a New York court. The judges weren’t having it*, AP NEWS (2025) <https://apnews.com/article/artificial-intelligence-ai-courts-nyc-5c97cba3f3757d9ab3c2e5840127f765>; *Man Employs A.I. Avatar in Legal Appeal, and Judge Isn’t Amused*, THE NEW YORK TIMES (2025) <https://www.nytimes.com/2025/04/04/nyregion/ai-lawyer-replica-new-york.html>.

⁴⁸ AP News, *supra* note 25.

⁴⁹ *Id.*



Pictured: An AI generated man testifies before a New York appellate panel.⁵⁰

The presiding justice, Sallie Manzanet-Daniels, immediately brought the presentation to a halt. She admonished Dewald, informing him that she found his failure to note his intent to rely on AI in his application for prerecorded argument was entirely deceitful, further stating: **“I don’t appreciate being misled.”** The court directed that the video be shut off, bringing a prompt end to the AI avatar’s day in court.⁵¹

Dewald later explained that he had turned to artificial-intelligence software after struggling with oral presentation in earlier proceedings. Speaking to the media about the incident, Dewald explained that he believed a prerecorded avatar might ease the pressure of speaking before the court. He acknowledged that he had not disclosed the artificial nature of the video in advance and subsequently sent a letter apologizing to the court, expressing his regret for having “inadvertently misled” the judges. Speaking to the media since the courtroom incident, Dewald has clarified that he had originally attempted to create a digital version of himself but encountered technical difficulties and instead used a generic computer-generated avatar.⁵²

⁵⁰ The New York Times, *supra* note 25.

⁵¹ *Id.*

⁵² *Id.*



*Pictured: Jerome Dewald alongside his AI Litigant.*⁵³

It is important to emphasize the fact that the court did not object to the use of prerecorded videos generally. Rather, it objected specifically to the substitution of a synthetic human figure for the litigant himself. After the avatar was barred, Dewald proceeded to argue personally, speaking haphazardly from prepared notes on his cellphone.⁵⁴

The significance of this episode lies not in evidentiary reliability, but in institutional role definition. Dewald was not attempting to introduce AI-generated evidence, nor to present a demonstrative exhibit. Instead, the AI avatar was positioned as a functional courtroom participant, performing one of the most central acts in adjudication: addressing the court as an advocate. In rejecting this use of AI, the New York state court drew one of the clearest boundaries yet as it relates to AI's place in the courtroom: while the permissible ability to incorporate AI into a proceeding remains unclear, it is certain that AI will not, at least for now, serve as a physical stand-in for a litigant.

⁵³ *Bizarre! Man uses AI lawyer to argue in court, leaves judges shocked*, MINT (2025) <https://www.livemint.com/news/bizarre-man-uses-ai-lawyer-to-argue-in-court-leaves-judges-shocked-watch-video-11744215091112.html>.

⁵⁴ AP News, *supra* note 25.

c. *Observations*

These early courtroom encounters with AI, albeit a limited sample size, reveal a provocative pattern. Courts have seemingly shown a willingness to tolerate, and at times fully embrace AI when it is deployed to evoke the *human experience*: to simulate perspective, to convey emotion, or to situate a decision-maker inside a party's narrative. The virtual-reality demonstration in *Albisu v. State* was permitted because it offered a sensory approximation of how a defendant claimed to perceive a volatile encounter – it appealed to human logic. The AI-generated avatar of Chris Pelkey was allowed because it functioned as an expressive surrogate, conveying forgiveness and human sentiment at sentencing – it appealed to human emotion. In both instances, AI was framed not as a source of objective truth, but as a vehicle for storytelling.

By contrast, when artificial intelligence purports to improve reality itself, courts have foreclosed its use. The rejection of AI-enhanced video in *State v. Puloka* reflects skepticism toward artificial alteration of evidence that cannot be independently verified or transparently explained. The New York appellate court's response in *Dewald v. MassMutual Insurance Co.* similarly exemplifies a stark resistance to AI as a means of perfecting the delivery of oral argument and therefore occupying an institutional role traditionally reserved for human advocates.

Taken together, these examples can perhaps be used to hint at or fully expose an emerging judicial logic. Courts appear far more comfortable with AI when it **openly acknowledge its artificiality** and operates as an aid to human understanding, emotion, or perspective. They appear far less comfortable when AI asserts epistemic authority - when it claims to make evidence more accurate, to determine truth, or to replace human speech, delivery, and participation. One might expect courts to privilege AI used for technical precision over human narrative. Instead, however,

judges have proven more receptive to emotionally resonant AI outputs used to invoke emotion, perspective, and logic.

What the legal system is observing at the advent of AI is not a simple story of courts being pro-AI or anti-AI, but a more nuanced accommodation. Courts are tentatively permitting AI at the edges of persuasion, while resisting its migration into the core of adjudication. AI may help tell a story, it may help visualize a perspective, it may even help express grief or forgiveness. But it may not, at least for now, attempt to tell a judge what actually happened, or attempt to determine what is true. That boundary – uneasy, evolving, and imperfect – may ultimately define artificial intelligence’s place in the modern courtroom.

III. Conclusion

As the TB 101 incident illustrates, a single moment on a dark riverbank can trigger an avalanche of legal, logistical, and human consequences—and artificial intelligence now stands poised to shape how attorneys navigate every stage of that cascade. From predictive analytics that forecast early case trajectories, to discovery tools capable of parsing millions of documents, to AI-assisted drafting and even algorithmic mediation, AI offers unprecedented speed, scale, and strategic insight. Yet the courtroom reveals the limits of that promise. Judges have welcomed AI when it illuminates human experience—when it helps them see, feel, or understand a narrative—but have rejected it when it attempts to supplant human judgment, reshape evidence, or stand in for a litigant. What emerges is a legal landscape both energized and unsettled, one in which AI functions as a powerful assistant but not a surrogate for human credibility, advocacy, or truth-finding. As the profession stands at this technological inflection point, the path forward will depend not on resisting AI nor embracing it wholesale, but on learning to deploy it with precision,

restraint, and responsibility. The tools may evolve, but the core duties of judgment, integrity, and human discernment remain firmly—and necessarily—in the hands of the lawyer.

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR

HOW DOES THE OIL POLLUTION ACT (OPA) 90 APPLY AND WHEN MAY I RECOVER ECONOMIC LOSSES OR DAMAGES FROM THE “FUND”?

- What is the National Pollution Funds Center (The Fund) and how does it work?
- What is a COFR?
- Who is a Responsible Party (RP) under OPA 90?
- What is an OSRO and what does it do?
- What is the Oil Spill Liability Trust Fund (OSLTF) and when does it pay for uncompensated removal costs and damages? What types of claims may be filed with the NPFC and when should they be filed?
- How do I work with my insurer and what documentation is needed to submit a claim?
- How does the Fund respond if the discharge includes both hazardous substances and oil?

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BEST, Inc.
Slidell, Louisiana

Ryan A. Puttick
Water Quality Insurance Syndicate
New York, New York

**GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
RIVER & MARINE INDUSTRY SEMINAR
2026**

**OIL POLLUTION ACT OF 1990
&
THE OIL SPILL LIABILITY TRUST FUND**

23 April 2026

By: Lars Perkins

ENVIRONMENTAL POLLUTION GROUP, LLC

Danbury, CT

and

C.A. “Ben” Benson, President

BEST, Inc.

Slidell, Louisiana

Senior Pollution Response Surveyor/Claims Adjuster for Environmental Pollution Group

Nationwide Professional Spill Response Consultant Network

Environmental Pollution Group, LLC

Formed in 1989, EPG is a Lloyd's Coverholder underwriting vessel pollution insurance on behalf of Certain Syndicates at Lloyd's, NorthStandard, and Convex Insurance UK Limited. EPG has binding authority to underwrite primary vessel pollution policies with limits of up to \$10,000,000, and fully subscribed excess marine liability slips offering \$500,000,000 in total capacity which can sit over all marine lines, including pollution.

After practicing admiralty law in New Orleans for six years at Burke & Mayer, Lars Perkins joined EPG in 1998 and became an owner in 2006. He has been responsible for day-to-day operations and overall management of EPG since that time.

Benson Environmental Services & Technology, Inc. (BEST)

BEST is the exclusive Spill Response Manager for all vessel pollution policies underwritten by Environmental Pollution Group, LLC. Overseeing a nationwide spill response network, Ben Benson has been providing marine spill response surveying and adjusting services to EPG assureds for more than two decades. BEST also offers vessel owners insured by EPG value added pollution spill response and training services not available from competitors.

Ben Benson began his career in spill response management with the U.S. Coast Guard Strike Force, during the 1976 grounding of the Argo Merchant off Massachusetts. With over four decades in the U.S. Coast Guard, including captain-of-the-port assignments in New Orleans and Honolulu, he transitioned to the private sector upon retirement. His leadership and operational experience spans major incidents from Exxon Valdez (1989) to Deepwater Horizon (2010), making him one of the most seasoned professionals in industry-wide spill response management.

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OPA Liabilities

In response to the grounding of the Exxon Valdez in 1989 and resulting oil spill, Congress passed the Oil Pollution Act of 1990 (OPA 90). *33 U.S.C. § 2701 et seq.* OPA 90 imposes strict liability upon the **responsible party**¹ (RP) for a vessel for **removal costs**² and **damages**³ resulting from oil spills or substantial threats thereof into navigable waters, adjoining shorelines, or the exclusive economic zone of the United States. *33 U.S.C. § 2702(a).*

Congress designed OPA 90 to incentivize immediate RP-led response to oil spills from their vessels. To ensure financial ability to respond, operators of all vessels over 300 gross tons (excluding non-self-propelled vessels without fuel or oil aboard), vessels transshipping/lightering oil, and tank vessels over 100 gross tons must obtain a Certificate of Financial Responsibility (**COFR**) to legally operate in U.S. waters. *33 U.S.C. § 2716(a); 33 C.F.R. Part 138.* COFR insurance guarantors may be sued directly by the government for OPA claims without policy defenses, enhancing the Federal On-Scene Coordinator's (**FOSC's**) leverage over RPs as compared to non-COFR vessels.

RPs may limit their liability to statutory amounts under 33 U.S.C. § 2704(a), except where the incident results from gross negligence, willful misconduct, or violation of federal safety, construction, or operating regulations. *33 U.S.C. § 2704(c)(1)(A-B).* Limitation is also unavailable if the RP fails to report the incident, provide cooperation, or comply with orders. *33 U.S.C. §*

¹ OPA defines the **responsible party** as the owner, operator or demise charterer of a vessel. *33 U.S.C. § 2701(32).*

² OPA defines **removal costs** as costs of removal incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident. *33 U.S.C. § 2701(32).*

³ Damages specified under 33 U.S.C. § 2702(b)(2) of OPA. *33 U.S.C. § 2701(5).* This means damages to (A) Natural Resources; (B) Real or Personal Property; (C) Subsistence Use; (D) Revenues; (E) Profits and Earning Capacity; and (F) Public Services. *33 U.S.C. § 2702(b)(2)(A-F).*

2704(c)(2)(A-C). Complete defenses are narrow: acts of God, war, or unrelated third-party actions.
33 U.S.C. § 2703.

Purpose & Administration of the OSLTF

The Oil Spill Liability Trust Fund (**OSLTF**) provides dedicated funding for oil spill removal costs and damages when the RP is unknown, unable, or unwilling to respond. Administered by the Coast Guard's National Pollution Funds Center (**NPFC**), the OSLTF supports direct federal response as directed by the FOSC as well as claims for uncompensated costs and damages. All OSLTF expenditures are recoverable from the RP post-response. *33 U.S.C. § 2712(f).*

In evaluating response adequacy by the RP, FOSCs may consider the existence of a COFR in deciding whether to federalize the response. Federalization necessitates opening the OSLTF and the existence of a COFR is relevant as the insurance guarantor cannot raise policy defenses. While recovery from the Fund by the RP is possible post-payment if defenses or limitations apply, immediate RP response remains paramount. *33 U.S.C. § 2708.*

OSLTF Coverage Limits

The OSLTF covers uncompensated OPA removal costs and damages—including natural resource damages, property damage, subsistence losses, government revenue losses, lost profits/earnings, and public service costs, subject to per-incident caps. The maximum amount for any single incident is limited to \$1.5 billion, with natural resource damages subjected to a sub-limit of \$750,000,000.
26 USC § 9509(c)(2)(A)(i-ii).

The OSLTF is available only to pay removal costs and damages associated with oil discharges. 33 U.S.C. § 2702(a). OPA's definition of oil excludes any substance listed as being hazardous under CERCLA. 33 U.S.C. § 2701(23). In instances in which oil is mixed with hazardous substances, funding is confined to CERCLA/Superfund as rights of recovery under each statute differ. *Munoz v. Intercontinental Terminals Co., L.L.C.*, 85 F.4th 343 (5th Cir. 2023).

Claims Procedure

For legal practitioners, the rules and procedures for submitting a claim to the OSLTF are set forth in 33 C.F.R. Part 136. Consistent with the premise that the polluter pays, claimants (any "person," including Oil Spill Response Organizations (**OSROs**)) must first present their claim to the RP and await denial or partial payment before submitting a claim to the Fund. 33 C.F.R. § 136.103. Claims require proof of causation, reasonableness, and attestation of no prior compensation. 33 C.F.R. § 136.105.

For non-legal practitioners, the NPFC's Claimants Guide (2003) in the Appendix also details how to submit a claim to the OSLTF and includes a sample claim form. Even if the sample claims form is not used, it can serve as a valuable checklist when submitting a claim. Claims deadlines: six years for removal costs post-completion; three years for damages from discoverability.

The NPFC aims for 90-day decisions and claimants have 60 days to accept. Supplemental submissions restart this period. While pollution insurance is elective, subrogated insurers may file claims and COFR payments trigger similar dynamics. Preparation costs are non-recoverable from the Fund but may qualify as costs of defense under the RP's policy of insurance.

Insurance Considerations

As the OSLTF prohibits double recovery, claimants must disclose/offset all insurance payments and provide policy details and allocations. *33 C.F.R. §§ 136.105 & 136.111* Fund payments require assignment of all claimant subrogation rights to the United States against the RP. *33 U.S.C. § 2712(e)*. Insurers and COFR guarantors paying claimants may file subrogated claims but must meet RP presentment unless waived.

While costs of preparing a claim are not recoverable from the OSLTF, insurers and COFR insurance guarantors are often willing to absorb such costs in the hopes of recovering amounts expended.

Denial & Appeal Process

Common reasons for denial of an OSLTF claim include ineligibility, procedural lapses (e.g., untimely RP presentment), causation gaps, inadequate proof, and prohibitions against double recovery. The existence of a contractual relationship of the RP with the party at fault for causing a spill is another basis upon which the NPFC may deny your claim.

Prejudicing the OSLTF's rights of recovery against the RP or other potentially liable parties can serve as the basis of denial of a claim. Therefore, participating in litigation after an incident but before presenting a claim to the Fund must be carefully considered from a strategic standpoint.

Claimants may request NPFC Director reconsideration within 60 days of mailing (or 30 days of receipt), limited to one request with supporting evidence. *33 C.F.R. § 136.115*. No decision by the NPFC within six months constitutes constructive denial. After a final denial (reconsideration

outcome or deemed), a claimant may seek Administrative Procedures Act review in federal court. Courts generally defer to the NPFC decision if record-supported and the law was properly applied.

Conclusion

The OSLTF was funded by OPA to afford the FOSC guaranteed funding to respond to a pollution incident in the event the RP is unable, unwilling to respond or cannot be identified. Aside from funding the federal government response, it can be accessed by state and local governments, as well as private claimants, to pay uncompensated removal costs and damages. Potential claimants include RPs who either have the right limit liability or a complete defense under OPA.

Claims against the fund for removal costs must be brought within six years while claims for damages must be brought within three years. Each claimant must establish the right to recover from the fund by including information outlining the basis of the claim as well as extensive documentary support establishing the reasonableness of the claim. OPA prioritizes RP/COFR recovery before OSLTF access. 33 C.F.F. § 136.103(a). Presenting a claim to the RP is a necessary prerequisite to making a claim to the OSLTF.

Unlike CERCLA, OPA allows claims by individuals beyond removal costs for financial losses caused by an oil spill. This includes damages to real and personal property, subsistence use, as well as losses of profits and earning capacity. **NRDA** claims, loss of government revenues and increased costs of government services may only be brought by trustees or other government representatives. Insurers and COFR guarantors who pay on behalf of the responsible party will be subrogated to the rights of the responsible party and may be entitled to make a claim against the fund.

Costs of preparing a claim are not recoverable from the fund. This makes insuring pollution risks by vessel owners important as OPA is a strict liability statute. Regardless of fault, the RP must pay first and only then are they entitled to seek reimbursement from either the fund or through litigation.

Key Terms & Abbreviations

COFR – Certificate Of Financial Responsibility

Damages – In the context of OPA, damages means damages to or loss of:

- (A) Natural Resources, including costs of assessing those damages.
- (B) Real of Personal Property
- (C) Subsistence Use
- (D) Revenues
- (E) Profits and Earning Capacity
- (F) Increased Costs Of Public Services

FOSC – Federal On Scene Coordinator

NPFC – National Pollution Funds Center

NRDA – Natural Resource Damage Assessment

OSLTF – Oil Spill Liability Trust Fund

OSRO – Oil Spill Response Organization

Removal Costs – As defined by OPA are:

- (A) all removal costs incurred by the United States, a State, or an Indian Tribe under OPA, the Clean Water Act of the Intervention on the High Seas Act, or under State law; and
- (B) any removal costs incurred by any person for acts taken by the person which are consistent with the National Contingency Plan.

RP – The Responsible Party in the context of vessels under OPA are the owner, operator and demise charterer of the vessel.

Appendix

Claimants Guide (NPFC, 2003)

Optional OSLTF Claim Form

Claimant's Guide

A Compliance Guide for Submitting Claims Under the Oil Pollution Act of 1990

**CG National Pollution Funds Center Claims
US Coast Guard Stop 7605
2703 Martin Luther King Jr Ave SE
Washington DC 20593-7605**

April 2003

Updated December 2020



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PART I - INTRODUCTION

How to Use This Guide

If you believe you have uncompensated removal costs or damages resulting from an oil spill to the navigable waters or the threat of an oil spill to the navigable waters, you may be entitled to compensation from the Oil Spill Liability Trust Fund (OSLTF). The National Pollution Funds Center (NPFC) created this guide to assist you in determining whether you have damages that may be covered and, if so, how to properly submit a claim.

This guide is intended to assist individuals and small entities (e.g., small businesses, not-for-profit organizations, and small governmental jurisdictions) with submitting a claim or claims to the NPFC. This guide also provides assistance to states and larger entities. This guide is divided into four parts: "Introduction," "General Information," "General Claim Requirements," and "Specific Claim Requirements."

To help determine whether you are eligible, Part II (pages 2-3) provides background information on the NPFC, OSLTF, the Oil Pollution Act (OPA), the types of claims that can be submitted, and who is eligible to submit claims.

To help you learn about the submission process, deadlines, etc., Part III (pages 4-6) addresses information that is applicable to submission of all claims, regardless of claim type. Format, time limits, and the adjudication process are discussed in this section.

To learn about specific proof and supporting information for different claim types, Part IV (pages 7-16) addresses the specific requirements for each claim type and lists additional information that may be required to process your claim. General Claim Requirements also apply.

Key Definitions and an Acronym List can be found on pages 17 and 18, respectively. A Privacy Act Statement and instructions for the optional claim form can be found on page 19. A copy of the Optional OSLTF Claim Form is inserted with the guide.

Additional information may be obtained from the NPFC Web site: www.uscg.mil/npfc

This guide is intended to help claimants submit a claim against the OSLTF. **IT IS NOT A LEGAL REFERENCE.** The Oil Pollution Act of 1990 (OPA) (33 U.S.C. 2701 et. seq.) is the law that established the OSLTF and covers incidents involving oil spills. Claimants should consult the claims regulations in 33 CFR Part 136 to address legal and regulatory issues. If there is a conflict between this guide and OPA or the regulations at 33 CFR Part 136 the statute and regulations prevail.

If any claims-related questions are not answered by this guide or if you do not have internet access, you may contact the NPFC in writing, by phone, fax, or email:

CG National Pollution Funds Center: Claims
US Coast Guard Stop 7605
2703 Martin Luther King Jr Ave SE
Washington DC 20593-7605

Telephone: (800) 280-7118
Fax: (202) 372-8397

Claims-related email questions can be sent to the NPFC: hqs-smb-npfc-claimsinfo@uscg.mil

Normal business hours are weekdays from 7:30 a.m. to 4:00 p.m. eastern time.



PART II - GENERAL INFORMATION

Background

OPA dictates that the spiller (responsible party or RP) pay compensation for certain removal costs or damages suffered as a result of an oil spill. The types of costs or damages covered under OPA are listed on page 2, under "What Claims may be submitted?"

The OSLTF was established to provide—

- Funds for Federal cleanup
- Funds to assess and restore damaged natural resources
- Compensation to claimants for certain removal costs and damages resulting from an oil spill incident
- Cost recovery from responsible parties for costs and damages paid from the OSLTF

The USCG, through the NPFC, manages the OSLTF by—

- Disbursing funds for Federal cleanup
- Monitoring the sources and uses of funds
- Adjudicating claims submitted to the OSLTF for payment
- Pursuing reimbursement from the RP for costs and damages paid by the OSLTF

After the NPFC evaluates your claim, a determination is made to accept or deny all or part of your claim. You will have 60 days to accept or reject the claim determination. If you accept the claim determination, then the NPFC will process the payment of the amount offered. If you reject the claim determination, you can request reconsideration of your claim and provide additional information. On reconsideration, the NPFC may re-evaluate your entire claim, based on the new information/documentation that you provide.

What Claims may be submitted?

OPA incidents involve a discharge or substantial threat of a discharge of oil from a vessel or facility into or on the navigable waters of the U.S., adjoining shoreline, or the exclusive economic zone. Claim types allowed under OPA include—

- Removal Costs (see page 8)
- Real or Personal Property Damage (see page 9)
- Loss of Profits and Earning Capacity (see page 10)
- Loss of Government Revenue (see page 12)
- Cost of Increased Public Services (see page 13)
- Subsistence Loss (see page 14)
- Natural Resource Damage (see page 15)

Under certain conditions, OPA also allows an RP to submit a claim to the NPFC for removal costs and damages paid by the RP (see page 16).



Who is Eligible to Submit a Claim?

A claimant can be—

- An individual
- A corporation, partnership, or association
- The United States government
- Federal, state, foreign or Indian tribe trustee
- States, the District of Columbia, municipalities, and political subdivisions of States
- The Commonwealth of Puerto Rico, Guam, American Samoa, the U.S. Virgin Islands, the Commonwealth of the Northern Marianas Islands, and any other territory or possession of the United States
- Certain foreign claimants, in accordance with Section 1007 of OPA (33 U.S.C. 2707)
- An RP who establishes entitlement to a defense to liability or limitation of liability in accordance with Section 1008 of OPA (33 U.S.C. 2708)

Lawsuits

The NPFC cannot evaluate, decide, or pay any claim that is part of a court case, including a class action suit, to recover the costs or damages in your claim.

Insurance

Claimants are not required to have insurance for OPA removal costs or damages. If you do have insurance that may cover the removal cost or damage, you are not required to use it, but you must report that you have it.

Double Payments

If a removal cost or damage claim has already been paid, no other claim for the same removal costs or damages can be paid from the OSLTF. For example, if a removal contractor accepts payment from the OSLTF for his removal costs, but then fails to pay his subcontractor, the subcontractor cannot be paid from the OSLTF for the same removal activity.

Mitigation

The Coast Guard considers that each claimant has a responsibility to make reasonable efforts to mitigate—that is, to avoid or minimize—the losses from an oil spill incident. Additional expenses related to avoiding or minimizing losses by a claimant can be included in the claim as additional expenses. The claimed amount of a direct loss will be adjusted for extra expenses and/or income related to avoidance/minimization efforts.

False Claims

If you submit a false claim you can be subject to civil and criminal prosecution under Federal law (18 U.S.C. 287 and 1001; 31 U.S.C. 3729).



PART III - GENERAL CLAIM REQUIREMENTS

Do You Qualify?

To qualify as an OPA claim, the following must be true:

- The incident (events surrounding the spill or threat of a spill) must have occurred on or after August 18, 1990.
- The incident involved the discharge, or substantial threat of discharge, of oil. (OPA expressly exempts discharges from public vessels, such as a U.S. Naval vessel; from an onshore facility subject to the Trans-Alaska Pipeline Authorization Act; and from discharges permitted by Federal, state or local permit.)
- The discharge or substantial threat of a discharge was into or upon the navigable waters of the U.S., their adjoining shorelines, or the Exclusive Economic Zone of the United States. A spill that impacts or potentially impacts ground water but not the navigable waters of the U.S. is not an OPA spill.
- The cost or damage is a type covered by OPA (see listing of claim types on page 2).

Where Do I Submit a Claim?

You must first submit the claim to the RP—

- Unless you fall under one of the exceptions noted in the following text, you must always first submit your claim to the RP or its insurer. (This guide does not address procedures for submitting claims to the RP. The RP must establish and advertise those procedures.)
- Your submission to the RP should state that you are filing a claim under Section 2713(a) of the Oil Pollution Act. Simply submitting an invoice or a bill to the RP is not sufficient unless the bill or invoice clearly states that it is a claim under OPA.

The exceptions for sending your claim directly to the NPFC rather than submitting it first to the RP are—

- The NPFC advertises or notifies claimants to submit claims directly to the NPFC.
- An RP asserting a claim under Section 1008 of OPA (33 U.S.C. 2708).
- A Governor of a State submitting for removal costs incurred by the State.
- A U.S. claimant suffers removal costs or damages from oil pollution from a foreign off-shore unit.

After submitting your claim to the RP can you submit the claim to the NPFC?

- Yes. If the RP or its insurer denies your claim or does not pay within 90 days of the date you presented your claim to them or the RP's advertising began (whichever is later), you can submit your claim to the NPFC.

What You Need to Submit to the NPFC

- You must provide the NPFC with the information, documentation, and evidence needed to support your claim. If more information is needed, the NPFC will ask you for it. To make the process as quick as possible on your behalf, submit complete and detailed supporting information with your claim. *Receipt of incomplete information is the most common cause for delay in processing claims!*



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- You will be reimbursed for reasonable removal costs and damages covered under OPA, including the reasonable cost of assessing your damage. For example, you can be reimbursed the costs of an accountant's assessing your business losses, but you will not be reimbursed for the accountant's costs of assisting you in preparing the claim.
 - Businesses should identify, when appropriate, any "Confidential Business Information" included with your claim and provide the reason(s) you consider the information to be confidential. Under Federal law the government may be required to release documents to the general public.

(NOTE: Detailed information needed for each claim category is included in Part IV.)

Claim Format

There is no required format for OSLTF claims. You must, however, support your claim with evidence, information, and documentation; an optional claim form and instructions are included with this guide and may be used as an aid.

You do not need a lawyer to file a claim. You will not be compensated for any attorney's fees if you use a lawyer to assist in preparing or filing a claim.

Claims must be made in writing; we cannot accept verbal claims. Claims must follow the requirements for a claim (33 CFR 136.105), including the following information:

- Type and amount of damages for each type of claim
- Total amount claimed
- Your full name, street and mailing address(es), and telephone numbers for your home and business
- Time, date, and geographic location of the oil spill; identification of the navigable water impacted; and an explanation of how the oil impacted the water
- Identify the vessel, facility, or person causing or suspected of causing the spill, if possible, and include an explanation of why you suspect the vessel, facility, or person to have caused the spill
- A general description of the impact of the spill, including the removal costs or damages claimed by category
- Explanation of how the damage happened, the location, and the date and time (this may/may not be the same as the location, date, or time of the spill)
- Descriptions of actions taken to minimize or avoid damages
- Costs of assessing the damage (do not include attorney's fees or other costs for claim preparation or filing)
- Name, street and mailing address(es), and telephone numbers of any witnesses and a brief description of what the witness knows
- Copies of any written communications and content of any verbal communications with the RP, including any claims submitted to the RP
- Information on any attempts to submit claims to the person or company responsible for the oil pollution
- Information on any insurance claim made for removal costs or damages
- Any compensation you have received for removal costs or damages from the spill



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- Statement that no action has been taken in court or, if action has been taken, the status of the pending court case
 - Certification statement of the accuracy of the claim to the best of your knowledge and belief
 - Your signature and, if applicable, your legal representative's signature

If necessary, the NPFC may ask you for additional information.

Time Limits

Claims for Damages: Damage claims must be made within three (3) years after the date on which the damage and its connection with the spill was reasonably discoverable with the exercise of due care. The only exception is for natural resource damage claims – see the Natural Resource Damage Funding Guidelines link in Section G of Part IV.

Claims for Removal Costs: A removal cost claim must be made within six (6) years after the date of completion of all removal actions for the incident.

NPFC considers the claim as "presented" on the day it is received.

The Adjudication Process

The NPFC processes claims in the order received.

The NPFC reviews the claim to see if all the information is included. If additional information is needed, the NPFC will request that you forward the information. If the information requested is not received within 90 days, NPFC will complete adjudication of the claim with the information it has. This may result in a reduction of possible compensation or denial of the claim.

Once the NPFC sends you a claim determination, you must accept or reject the offer within 60 days—

- If you accept, you must sign a release.
- If you take no action within 60 days, the offer to pay will be voided and the claim closed.
- If you reject the offer, you may provide additional information and ask NPFC to reconsider your claim. This may start an entirely new review process. Another claim determination will be made as a result of reconsideration and this determination on reconsideration becomes final agency action. “Reconsideration” is not “negotiation.”

Claims are paid in the order that they are approved. Payment normally takes 30 days after the NPFC receives your signed release.



PART IV - SPECIFIC CLAIM REQUIREMENTS

Sections A through H address the specific requirements for each category of claim and lists additional information above that listed in the General Claims Requirements that may be required to process your claim.

If any claims-related questions are not answered by this guide or if you do not have internet access, you may contact the NPFC in writing, by phone, fax, or e-mail:

CG National Pollution Funds Center: Claims
US Coast Guard Stop 7605
2703 Martin Luther King Jr Ave. SE
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A. Removal Costs

Removal Costs: “Removal Costs” means the costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.

Example of a Typical Claim: You own waterfront property where a boat and dock were oiled from an OPA incident. You notified the National Response Center of the incident, discussed it with the FOSC, and hired a local contractor to remove the oil. You may have a claim for the cost of the contractor used to remove the oil from your property.

Eligible Claimant: Anyone incurring removal costs.

What you Must Prove: In addition to the information required in Part III, you must provide information that is specific to removal cost claims to prove that—

- Necessary actions were taken to prevent or reduce the effects of the spill.
- Removal costs resulted from these actions.
- Actions taken were reasonable and consistent with the National Contingency Plan.

Examples of Supporting Information:

Evidence of Spill:

- FOSC report
- Information on EPA or USCG notification
- Newspaper reports describing the spill
- Witness(es) statement(s)

General Information:

- Detailed description of actions
- Dates on which work was performed
- Analysis of spill substance
- Map of area
- Pictures of area, damage, and spill

Costs:

- Receipts, invoices, or similar records with description of work
- How rates were determined and any comparison of rates
- Daily records of personnel costs including details on labor rates, hours, travel, and transportation
- Daily records of equipment costs including description and use
- Signed disposal manifests and proof of payment for disposal
- Payroll verification of hourly rate at the time of spill
- Verification of standard equipment rates for equipment used
- Proof of payment for all third-party vendor and subcontractor costs and/or services you are claiming



B. Real or Personal Property Damages

Real or Personal Property Damages: “Real or Personal Property Damages” means damages for injury to, or economic losses resulting from destruction of, real or personal property.

(NOTE: Injury to real or personal property does not include personal injury!)

Example of a Typical Claim: You own a recreational boat or waterfront property that was oiled by an OPA incident. You may have a claim for the cost of restoring your property to its pre-spill condition.

Eligible Claimant: Person or entity who owns or leases the property.

You Must Provide Information Showing:

- Your ownership or leasehold interest in the property
- That property was injured or destroyed
- Value of property both before and after injury
- Cost of repair or replacement of the property

If you lost money, show:

- The property was not usable because of the oil spill
- The value of your property before and after the spill
- Whether or not substitute property was available, and, if you did use substitute property, what the costs were
- How you lost money from the damage to the property

Examples of Documentation to Support Claim:

Evidence of Spill:

- FOSC report
- Information on EPA or USCG notification
- Newspaper reports describing the spill
- Witness(es) statement(s)

General Information:

- Copy of title, deed, lease, or license to property in your name
- Pictures or videotape of property and/or damage
- Maps or legal documents showing the location of the property within the spill area
- If you sold the property, professional property appraisals for the value of the property prior to and after the spill, actual selling price of the property, and evidence connecting the depressed selling price to the oil spill rather than to other economic or real property factors
- Copies of bills paid for repair of damage or two estimates showing activities and costs to repair the damage
- Any expenses or money lost while the property was unavailable because of spill damage
- Lease or rental agreement of any substitute property used



C. Loss of Profits and Earning Capacity

Loss of Profits and Earning Capacity: “Loss of profits and earning capacity” means damages equal to the loss of profits or impairment of earning capacity due to the injury, destruction, or loss of real property, personal property, or natural resources.

You do not have to own the damaged property or resources to submit a claim under this category.

Example of a Typical Claim: You lease a commercial charter boat that was trapped in port when the Coast Guard closed the river to remove oil. You may have a claim for lost profits or earnings during the time the river was officially closed. The recreational fishermen whose trip was cancelled would not have a loss of profits or earnings.

Eligible Claimant: Anyone with loss of profits or income.

You Must Provide Information Showing:

- Property or natural resources that were damaged, destroyed or lost, resulting in your loss
- Your income was reduced due to the damage or loss of the property or natural resources and how much it was reduced
- Amount of profits and earnings in similar time periods
- If alternative employment or business was available, what, if any, income was received from it
- Savings to overhead and other normal expenses not paid as a result of the spill (e.g., commuting costs, utility fees)

Examples of Documentation to Support Claim:

Evidence of Spill:

- FOSC report
- Information on EPA or USCG notification
- Newspaper reports describing the spill
- Photos of damaged property (before and after the spill)

General Information for Employee Claims:

- Statement on how the spill caused a loss in income
- Affidavit from your employer on the impact on your work or income due to the spill and if the company will be filing a claim for lost profits
- Copies of pay stubs, receipts, etc., from before, during, and after the spill
- Personnel records from your employer before, during, and after the spill, showing employment
- Description of efforts to reduce your loss, including job search
- Copies of any job-hunting expenses (e.g., travel costs)
- Signed copies of income tax returns and schedules for at least two years prior to spill
- Details of employment expenses not paid during period being claimed (e.g., commuting costs)
- Copies of pay stubs, etc., from alternative employment during time of spill



General Information for Claims by Businesses:

- Description and documentation of business losses due to spill
- Copies of letters of business cancellations caused by the spill damage
- Maps or descriptions of the area showing the business location and the spill impact area
- Financial statements for at least two years prior to spill and from the year of the spill
- Signed copies of income tax returns and schedules for at least three years prior to spill
- Details on efforts to mitigate losses or why no efforts were taken
- Statement from you or witnesses on how the spill led to loss of income or earning capacity; explain any earnings anomalies
- For hotels, daily and monthly occupancy information for two years prior to spill and the year of the spill

General Information on Claims by Fishing or Marine Charters:

- Description of business losses caused by the spill
- Evidence that vessel(s) were in the area impacted by the spill and were unable to carry on their business due to the spill
- Maps or descriptions of the area showing business location within spill area
- Statement from you or witnesses on how the spill caused the loss of income; explain any earnings anomalies
- Signed copies of income tax returns and schedules for at least three years prior to spill
- Details on expenses not paid out during period being claimed (e.g., wages)
- Booking records for three years prior to spill and year of spill
- List of charter rates, including any services the business specializes in (e.g., sport fishing)
- Copies of any logs relating to boating activities for the year prior to and the year of the spill
- Registration documents for the vessel(s), copies of business license, vessel license, fishing license, captain's license



D. Loss of Government Revenue

Loss of Government Revenue: Damages equal to the net loss of taxes, royalties, rents, fees, or net profit shares due to the injury, destruction, or loss of real property, personal property, or natural resources.

Example of a Typical Claim: A city charges fees for parking at a lot near a public beach. The beach is closed while an oil spill is being cleaned. The city may have a claim for loss of revenue during the beach closure.

Eligible Claimant: Federal government, a State, or a political subdivision of a State.

You Must Provide Information Showing:

- That the loss of revenue was caused by the injury to, destruction of, or loss of real or personal property or natural resources caused by the discharge
- The amount, identity, and description of the revenue loss for which compensation is claimed, including the applicable authority for collecting the revenue, method of assessment, applicable rate, and dates of collection or periods of loss
- Expenditures saved because revenue was not collected
- The total assessment or revenue collected and related expenditures for comparable revenue periods, typically covering two years

Examples of Documentation to Support Claim:

Evidence of Spill:

- FOSC report
- Information on EPA or USCG notification
- Newspaper reports describing the spill
- Witness(es) statement(s)

General Information:

- Description of what revenues were impacted and how the spill caused a loss of revenues
- Copies of statutes, regulations, ordinances, etc., outlining applicable authority to raise such revenues, property affected, method of assessment, rate of assessment, and method and dates of collection of assessment
- Government financial reports showing total assessment or revenue collected for comparable periods, typically covering two years
- Details of any expenses not paid out by government during the period being claimed
- Details and explanation of net loss of revenue



E. Cost of Increased Public Services

Cost of Increased Public Services: “Cost of Increased Public Services” are damages for net costs of providing increased or additional public services during or after removal activities, including protection from fire, safety, or health hazards, caused by a discharge of oil or directly attributable to response to the oil spill incident.

Example of a Typical Claim: You are the manager of a coastal town that must provide emergency traffic control in the vicinity of an OPA incident. The town may have a claim for the costs of providing those emergency services.

Eligible Claimant: State or political subdivision of a State.

You Must Provide Information Showing:

- Justification for the public services provided, including documentation of what specific services were provided and showing their relationship to the spill
- When services were provided (during or after the removal activities)
- Services were in addition to services normally provided
- Net cost for the services and the methods used to compute those costs

Examples of Documentation to Support Claim:

Evidence of Spill:

- FOSC report
- Information on EPA or USCG notification
- Newspaper reports describing the spill
- Witness(es) statement(s)

General Information:

- Reports showing the increased public services were required and if the services were due to fire, health, or safety hazards
- Detailed description of what increased services were necessary and why, including a distinction between removal activities, safety acts, and law enforcement acts, and if the increase was actually incurred or if normal resources were diverted for use
- Daily reports on the activities of the government personnel and equipment involved

Government Labor and Equipment Rates:

- Payroll verification of the government hourly rate at the time
- Verification of the standard government equipment rates for any equipment claimed
- Signed and dated records of the spill including hourly rates for labor and equipment
- Explanation as to whether rates are fully loaded or not and formulas used; states should provide rates under OMB Circular A-87
- Certification that rates used reflected actual costs incurred and did not include punitive damages or fees



F. Loss of Subsistence Use of Natural Resources

Damages for Loss of Subsistence Use of Natural Resources: As determined by NPFC in claims adjudications, damages for loss of subsistence use of natural resources means damages resulting from the injury, destruction, or loss of natural resources used by the claimant to obtain food, shelter, clothing, medicine, or other minimum necessities of life.

Example of a Typical Claim: Federal and/or state natural resource managers close fishing areas following an OPA oil spill, restricting your ability to harvest fish that you depend upon for food. You may have an OPA claim for the cost to you of replacing the fish that you were unable to harvest because of the closures if, during the period of time for which the loss of subsistence use is claimed, there were no alternative sources or means of subsistence available to you.

The compensation allowable will be based on the reasonable replacement cost to you of the fish you needed during the loss period for your subsistence, less all compensation made available to you for your subsistence loss, all income you received by using the time you otherwise would have spent harvesting the fish for your subsistence, and all overhead or other normal expenses of your subsistence use that you avoided as a result of the incident. (See, 33 CFR 136.223.).

Eligible Claimant: Anyone who uses natural resources which have been injured, destroyed or lost as a result of an OPA oil spill incident, for their survival (e.g, for water, food, shelter, clothing, medicine, transportation or other subsistence purposes). It does not matter who owns or manages the affected natural resources. (See, 33 U.S.C. 2702(b)(2)(C) and 33 CFR 136.219).

You Must Provide Information Showing: In addition to the proof required by subparts A and B of the regulations at 33 CFR part 136, you will need to provide the information described in 33 CFR 136.221 to support your claim. This requires that you:

- Identify each specific natural resource for which compensation for loss of subsistence use is being claimed;
- Describe the actual subsistence use you make of each specific natural resource you identify;
- Describe how and to what extent your subsistence use of the natural resource was affected by the injury to, destruction of, or loss of, each specific natural resource;
- Describe each effort you made to mitigate your subsistence use loss; and
- Describe each alternative source or means of subsistence available to you during the period of time for which you claim a loss of subsistence; and
- Describe any compensation available to you for the subsistence loss you suffered.

(NOTE: If you also want to claim for loss of profits or impairment of earning capacity due to loss of subsistence use of natural resources, you must include the proof required under 33 CFR 136.233.)

Examples of Documentation to Support Claim: Examples of documentation that may support your claim include, but are not limited to, the following:

Evidence of spill and reason to change subsistence use behavior -

- FOSC, natural resource trustee and newspaper reports describing the oil spill and response, and the resulting injury, destruction or loss of natural resources;
- Information in EPA or USCG notifications, and claims advertising;
- Witness(es) statement(s);



- Beach closures or fishing advisories;

Supporting information to demonstrate your subsistence use and damages -

- Photographs and videos;
- Published accounts, witness statements and other written records documenting your use of natural resources for subsistence purposes before, during, and after the spill and oil spill response;
- Maps;
- Store and barter receipts showing the replacement costs you claim;
- Copies of pay stubs and other documentation showing income you received before, during, and after the spill and oil spill response;
- Witness statements and documents showing the alternative sources of subsistence available to you, and your efforts to reduce the damages resulting from your loss of subsistence use, including receipts from job-hunting expenses (e.g., travel costs);
- Records showing the expenses you avoided during the time you were not able to carry out your subsistence use of the affected natural resource; and
- Records showing compensation you received for your loss.



G. Natural Resource Damages

Natural Resource Damages: Damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing the damage.

Example of a Typical Claim: You are the designated trustee agency for a state wildlife refuge that is oiled from an OPA incident. As trustee, you may have a claim for natural resource damages to cover the costs of assessing injuries and restoring the refuge to its pre-spill condition.

Eligible Claimant: Federal, state, foreign and Indian tribal trustees.

NRD Guidelines: Natural Resource Damage claims are often unique. A separate Natural Resource Damage Funding Guidelines publication is available on the NPFC Web page:

www.uscg.mil/npfc/NRD/

You may also call the NPFC's toll-free number with claims questions: (800) 280-7118



H. Claims by a Responsible Party (RP)

Claims by a Responsible Party: OPA Section 1008 (33 U.S.C. 2708) provides that an RP may assert a claim for removal costs and damages only if the RP demonstrates that the RP is entitled to a defense to liability under Section 1003 or to a limitation of liability under Section 1004.

Example of a Typical Claim: You are the owner of a recreational boat that sank after being hit by another vessel. Your vessel caused a gasoline and motor oil spill. If you can prove that the incident was caused solely by the other vessel, you may have a claim for amounts you paid for oil removal costs and damages.

RP Claims Must Show the Following:

- Documentation addressing each element of the complete defense to liability (33 U.S.C. 2703) or limitation of liability (33 U.S.C. 2704), as applicable
- That other claimants paid by the RP had presented their claims within OPA's time limits
- That the RP presented its claim to the NPFC within three years of the date the paid claims were presented to the RP
- Removal costs and damages for which compensation is requested are included under OPA (33 U.S.C. 2708)
- That individual claims paid meet the applicable regulatory requirements for claims against the OSLTF
- If the claim is for costs in excess of your limit of liability you must disclose—
 - > All costs and paid claims (not just those exceeding the limit of liability) and
 - > How those costs and paid claims meet OPA requirements

The NPFC will first evaluate your entitlement to the defense to liability or limitation of liability claimed before taking further action. You will be notified of this determination.

If your entitlement to the limitation of liability or complete defense to liability is upheld, the NPFC will measure the uncompensated removal costs and damages in accordance with the claims regulations for each claim type.

If the claim is for costs in excess of your limit of liability, the NPFC will measure the total acceptable costs for the incident and will deduct the limit of liability amount from the measurement.



KEY DEFINITIONS

Damages. OPA damages means damages to natural resources, to real or personal property, for loss of subsistence use of natural resources, for loss of governmental revenues, for loss of profits or earning capacity, and for increased or additional public services. These damages are specified in Section 1002(b) of OPA and are amplified in Section IV of this guide.

Discharge. Any emission (other than natural seepage), intentional or unintentional, and includes, but is not limited to spilling, leaking, pumping, pouring, emitting, or dumping.

Guarantor. Any person who provides evidence of financial responsibility for an RP under OPA.

Natural Resources. Land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other such resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States (including the resources of the exclusive economic zone), any State or local government or Indian tribe, or any foreign government.

Oil. Oil of any kind or in any form, including petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil, but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of Section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601) and which is subject to the provisions of that Act [42 U.S.C. §9601 et seq.].

Oil Spill. An occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil into or upon navigable waters of the United States, adjoining shorelines, or the exclusive economic zone (e.g., oil spill in coastal waters from a tanker). A spill that impacts ground water, but not the navigable waters of the U.S., is not an OPA spill.

Removal Costs. The costs of removal that are incurred after a discharge of oil has occurred or, in any case in which there is a substantial threat of a discharge of oil, the costs to prevent, minimize, or mitigate oil pollution from such an incident.

Responsible Party.

In the case of a vessel, any person owning, operating, or demise chartering the vessel;

In the case of an onshore facility (other than a pipeline), any person owning or operating the facility, except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as the owner transfers possession and right to use the property to another person by lease, assignment, or permit;

In the case of an offshore facility (other than a pipeline or a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501 et seq.)), the lessee or permittee of the area in which the facility is located or the holder of a right of use and easement granted under applicable State law or the Outer Continental Shelf Lands Act (43 U.S.C. 1301-1356) for the area in which the facility is located (if the holder is a different person than the lessee or permittee), except a Federal agency, State, municipality, commission, or political subdivision of a State, or any interstate body, that as owner transfers possession and right to use the property to another person by lease, assignment, or permit;

In the case of a deepwater port licensed under the Deepwater Port Act of 1974 (33 U.S.C. 1501-1524), the licensee;

In the case of a pipeline, any person owning or operating the pipeline; and,

In the case of an abandoned vessel, onshore facility, deepwater port, pipeline, or offshore facility, the persons who would have been responsible parties immediately prior to the abandonment of the vessel or facility.



ACRONYM LIST

CFR	Code of Federal Regulations
EPA	Environmental Protection Agency
FOSC	Federal On-Scene Coordinator (either U.S. Coast Guard or EPA)
NPFC	National Pollution Funds Center
OPA	Oil Pollution Act of 1990 (also known as 33 U.S.C. 2701 et. seq.)
OSLTF	Oil Spill Liability Trust Fund
RP	Responsible Party
U.S.C.	United States Code
USCG	United States Coast Guard



PRIVACY ACT STATEMENT

AUTHORITY: 33 U.S.C. 2713. **PRINCIPAL PURPOSE:** To aid the Coast Guard in adjudicating claims for reimbursement of removal costs and damages from oil spills when the Responsible Party has not paid.

ROUTINE USES: Information on reimbursements may be provided to the Internal Revenue Service for tax purposes and may be provided to the Department of Justice for litigation against the Responsible Party.

DISCLOSURE: Decision to submit a claim is voluntary; but, if proper information is not furnished by the claimant, the Government may be unable to evaluate or pay a claim.

This information applies to all claims against the Oil Spill Liability Trust Fund, whether or not the Optional OSLTF Claim Form is used.

OPTIONAL OSLTF CLAIM FORM — INSTRUCTIONS

Please provide all information, evidence, and documentation that supports the removal costs and/or damage(s) claimed. **Use additional sheets or pages, as necessary,** to provide information, evidence, and documentation. The following numbered paragraphs correspond to the numbers on the optional claim form:

1. Complete name, street, city, state, ZIP and phone number of the claimant (party that incurred damage and is seeking reimbursement).
2. If known, provide the following incident information on the oil spill or threat of oil spill causing or suspected of causing the removal costs and/or damage(s) claimed:
 - The identity of the vessel, facility or entity causing or suspected of causing the incident.
 - Describe the geographic area and waterway directly affected by the oil spill or threat of oil spill.
 - Briefly describe any known information regarding the occurrence of the oil spill or threat of oil spill.
3. Indicate the amounts by the type of claim(s) being submitted. Provide the total amount claimed.
4. Indicate if claimant has had any communication (written or verbal) with the entity causing or suspected of causing the damage(s) claimed.
5. Has the claimant or the claimant's legal representative submitted the claim(s) to the entity causing or suspected of causing the damage claimed? If yes, include the date submitted.
6. If claim was submitted to the responsible party, indicate any response (written or verbal) or any payment you have received. Provide the date the claim was submitted.
7. Indicate if the claimant is pursuing a claim(s) against the responsible party by legal representation in a court of law. If yes, provide all information that will enable us to contact your legal representative and identify your case.

* * **At the bottom of the first page of the form, please initial and date the page.** * *



8. Indicate if claimant is pursuing payment from an insurance carrier for costs that are included in the claim. If yes, provide all information that will enable us to contact the insurer and identify the claimant's policy.
9. Provide detailed information, evidence, and documentation that describes the extent of the damage(s) claimed. Attach copies, if necessary, of all pertinent information.
10. Provide any information, evidence, and documentation that will help describe how the oil spill, or threat of oil spill, caused the removal costs and/or damage(s) claimed.
11. Provide any information, evidence, and documentation that describe the actions of the claimant or any other person on the claimant's behalf to reduce or avoid the damage(s) claimed.
12. Provide the name, address and telephone number (if known) of any witness to the damage(s) claimed. On a separate page provide a summary of each witness's knowledge of the damage(s) claimed or the incident causing or suspected of causing the damage(s) claimed.
13. If you provide additional documents, please list them here or on a separate piece of paper.
14. If the claimant is an individual, that person must sign the claim. If the claimant is a corporation, an officer of the company must sign the claim. All signatures must be in ink to be valid.
15. If the claim is presented by a legal representative, that legal representative must also sign the claim. Provide the complete address and phone number of that legal representative.

Submit your claim, with any necessary information, evidence, and documentation to:

CG National Pollution Funds Center: Claims
US Coast Guard Stop 7605
2703 Martin Luther King Jr Ave SE
Washington DC 20593-7605

Claims for Natural Resource Damages or for Loss of Subsistence Use of Natural Resources may use the same address.

We recommend that you keep the Privacy Act Statement and a copy of the claim for your files.

Department of Homeland Security

CG NATIONAL POLLUTION FUNDS CENTER (CA)
US COAST GUARD STOP 7605
2703 MARTIN LUTHER KING JR AVE SE
WASHINGTON DC 20593-7605

Optional OSLTF Claim Form

CG NPFC-CA1
(Rev. AUG 19)

PURPOSE: This form may be used for submitting claims to the U.S. Coast Guard, National Pollution Funds Center, for potential compensation from the Oil Spill Liability Trust Fund for uncompensated removal costs or damages resulting from an incident under the Oil Pollution Act of 1990 (OPA). You may use your own version of this form. PLEASE PRINT OR TYPE:

1. Claimant Information: Name: _____
 Address: _____

 Home Tel. #: _____ Work Tel. #: _____
 Fax Number: _____ E-mail: _____

2. Incident Information: Date: _____ Time: _____ NRC Report #: _____
 Name of vessel or facility causing damage: _____
 Geographic location of incident: _____
 Brief description of the incident: _____

3. Type(s) of claim(s) and total amount for costs and damage(s) claimed:

\$ _____	Removal Costs
\$ _____ Subsistence Use	\$ _____ Profits & Earning Capacity
\$ _____ Natural Resources	\$ _____ Government Revenues
	\$ _____ Public Services
	\$ _____ Real or Personal Property

\$ _____ *Total Amount Claimed*

4. Has claimant communicated with the responsible party? No Yes

5. Has the claim been submitted to the responsible party? No Yes Date Submitted: _____

6. If the claim has been submitted to the responsible party, what action has the responsible party taken?

No Action Denied Other – Explain: _____

7. Has claimant commenced an action in court to recover costs which are the subject of the claim?

No Yes If yes, provide the name, address, phone number of your attorney, the court in which action is pending and the civil action number: _____

Optional OSLTF Claim Form

CG NPFC-CA1

8. Has claimant submitted or planned to submit the loss to an insurer? No Yes Please provide the name, address, and phone number of your insurer, the policy number, and explain any compensation received:

9. Description of the nature and extent of damages claimed (Attach additional information as necessary): _____

10. Description of how the incident caused the damage: _____

11. Description of actions taken by claimant/representative to avoid or minimize damages: _____

12. Witnesses:

Name: _____ Tel. No.: _____

Address: _____

Name: _____ Tel. No.: _____

Address: _____

13. List Documents or Attachments (Attach additional information as necessary):

- a. _____
- b. _____
- c. _____
- d. _____
- e. _____

I, the undersigned, agree that upon acceptance of any compensation from the Fund, I will cooperate fully with the United States in any claim or action by the United States to recover the compensation. The cooperation shall include, but is not limited to, immediately reimbursing to the Fund any compensation received from any other source for the same costs and/or damages and, providing any documentation, evidence, testimony, and other support, as may be necessary for the Fund to recover such compensation.

I, the undersigned, certify that, to the best of my knowledge and belief, the information contained in this claim represents all material facts and is true. I understand that misrepresentation of facts is subject to prosecution under Federal law (including but not limited to 18 U.S.C. 287 & 1001 and 31 U.S.C. 3729).

14. _____
Claimant's Signature Date
Printed Name of Signer: _____

15. _____
Legal Representative Date
Title/Legal Capacity: _____

**HOW DOES THE OIL POLLUTION ACT (OPA) 90 APPLY AND WHEN MAY I RECOVER
ECONOMIC LOSSES OR DAMAGES FROM THE “FUND”?**

- What is the National Pollution Funds Center (The Fund) and how does it work?
- What is a COFR?
- Who is a Responsible Party (RP) under OPA 90?
- What is an OSRO and what does it do?
- What is the Oil Spill Liability Trust Fund (OSLTF) and when does it pay for uncompensated removal costs and damages? What types of claims may be filed with the NPFC and when should they be filed?
- How do I work with my insurer and what documentation is needed to submit a claim?
- How does the Fund respond if the discharge includes both hazardous substances and oil?

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C Hebert, Esq.

Ryan A. Puttick
Water Quality Insurance Syndicate
New York, New York

Limits of Liability under OPA

If the vessel is a . . .		The limits of liability are the greater of:
Tank Ship	With a single hull, double sides only, or double bottom only	Greater than 3,000 gross tons: \$4,000 per gross ton or \$29,591,300 Less than or equal to 3,000 gross tons: \$4,000 per gross ton or \$8,070,400
	With a double hull	Greater than 3,000 gross tons: \$2,500 per gross ton or \$21,521,000 Less than or equal to 3,000 gross tons: \$2,500 per gross ton or \$5,380,300
Tank Barge	With a single hull, double sides only, or double bottom only	Greater than 3,000 gross tons: \$4,000 per gross ton or \$29,591,300 Less than or equal to 3,000 gross tons: \$4,000 per gross ton or \$8,070,400
	With a double hull	Greater than 3,000 gross tons: \$2,500 per gross ton or \$21,521,000 Less than or equal to 3,000 gross tons: \$2,500 per gross ton or \$5,380,300
Non-Tank Vessel	Greater than 300 gross tons	\$1,300 per gross ton or \$1,076,000
	Less than or equal to 300 gross tons	\$1,300 per gross ton or \$1,076,000

In 1990, Congress passed the Oil Pollution Act (OPA) which developed a comprehensive prevention, response, liability, and compensation regime to address vessel and facility discharges of oil pollution into navigable waters. Title 1 of OPA established oil spill liability and compensation requirements, including the Oil Spill Liability Trust Fund (OSLTF) to help facilitate cleanup activities and compensate for damages from oil spills. In 1991, the United States Coast Guard created the National Pollution Funds Center (NPFC) to implement Title 1 of OPA, administer the OSLTF, and ensure effective response and recovery.

The NPFC has four main objectives:

1. The issuing of Certificates of Financial Responsibility
2. Funding Oil Spill Response
3. Adjudicating Claims
4. Recovering costs from the Responsible Party

Certificates of Financial Responsibility (COFRs)

A COFR is a vessel Certificate of Financial Responsibility issued by the NPFC to a vessel applicant (Owner / Operator) that has provided evidence of financial responsibility, in accordance with the Oil Pollution act of 1990 (OPA 90) and CERCLA. This evidence is in the form of a guaranty by a third party or the applicant itself (in the case of self-insurance). It assures potential claimants, including the Federal Government, that a Responsible Party can pay its legal liability up to the prescribed limits, in the event of an oil spill incident or substantial threat thereof.

With limited exceptions, vessels greater than 300 gross tons and vessels of any size that are transshipping / transferring oil within the EEZ are required to comply with the COFR regulations in order to operate in U.S. waters.

There are four main methods of establishing evidence of financial responsibility, insurance, surety bond, financial guaranty, and self-insurance. Roughly 90% of COFR's are secured via Insurance Guaranty. COFR guarantors are subject to direct action and have limited defenses to liability when compared to insurance policies issued. The Guarantor has all rights and defenses available to the Responsible Party under OPA, and also has the complete defense of willful misconduct.

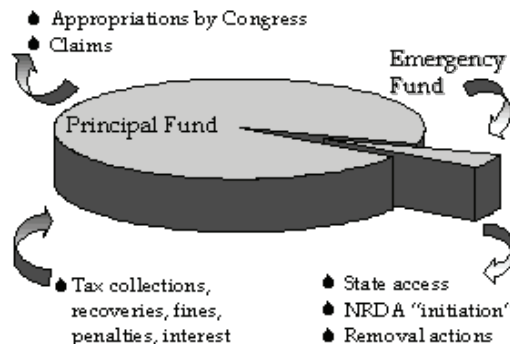
Oil Spill Liability Trust Fund

The OSLTF was created in 1986, however legislation was not passed authorizing the use of existing funds or to collect new revenue. Once the fund was activated a tax was imposed (various

cents over the years per barrel of oil), and the fund was/is used to provide a quick and effective response and to compensate injured parties.

The OSLTF has two major components.

1. **The Emergency Fund** is available for Federal On-Scene Coordinators (FOSCs) to respond to discharges and for federal trustees to initiate natural resource damage assessments. The Emergency Fund is a recurring \$50 million available to the President annually.
2. **The remaining Principal Fund** balance is used to pay claims and to fund appropriations by Congress to Federal agencies to administer the provisions of OPA and support research and development.



The Principal Fund of the OSLTF has several recurring and nonrecurring sources of revenue.

- **Barrel Tax.** The largest source of revenue has been a per-barrel excise tax, collected from the oil industry on petroleum produced in or imported to the United States. The original 5-cent-per-barrel tax expired at the end of 1994 because of the sunset provision in the law. The 2005 Energy Policy Act again reinstated the tax (effective April 2006). The Energy Improvement and Extension Act of 2008 extended the per-barrel excise tax through December 2017 and increased the per-barrel excise tax from 5 cents to 8 cents from 2009-2016 and to 9 cents in 2017.

- **Transfers.** A second major source of revenue had been transfers from other existing pollution funds. Total transfers into the Fund since 1990 have exceeded \$550 million. No additional funds remain to be transferred to the OSLTF.
- **Interest.** A recurring source of OSLTF revenue is the interest on the Fund principal from U.S. Treasury investments. As a result of historically low interest rates, interest income declined in 2003 and 2004, but has rebounded in recent years as Treasury rates have risen with the economic recovery. The Department of the Treasury serves as the OSLTF's investment manager.
- **Cost Recoveries.** Another source is cost recoveries from Responsible Parties (RPs); those responsible for oil incidents are liable for costs and damages. NPFC bills RPs to recover costs expended by the Fund. As these monies are recovered, they are deposited into the Fund.
- **Penalties.** In addition to paying for clean-up costs, RPs may incur fines and civil penalties under OPA, the Federal Water Pollution Control Act, the Deepwater Port Act, and the Trans-Alaska Pipeline Authorization Act. Penalty deposits into the OSLTF are generally between \$4 million and \$7 million per year.

https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/OSLTF/

“Two additional points must be made regarding the OSLTF. First, there was much discussion during the OPA 90 negotiations, and even today, about the role cargo owners play in the oil-spill-liability-funding scheme. While at first glance it appears to many that cargo owners avoided liability for the costs of oil spills, this view is not entirely correct. The OSLTF is funded almost entirely by taxes on the oil industry.....Consequently, the oil industry is in fact the safety net for oil spill liability and response costs.

Second, while the current funding levels of the OSLTF may be inadequate for spills of national significance such as the Deepwater Horizon spill, the system for allocating the costs of oil spills between the responsible party and the oil industry remains valid.”

David H. Sump, *The Oil Pollution Act of 1990: A Glance in the Rearview Mirror*, 85 TUL. L. REV. 1101, 1103-04 (2011).

Adjudicating Claims

Should the Responsible Party not pay for response, claimants who responded or were impacted by a discharge may submit their claims to the NPFC. The types of claims allowable include removal

costs, damages to natural resources, damages to property, loss of profit and earnings, subsistence use, revenues, and damages to Public services. Additionally, Responsible Parties may seek reimbursement of costs and expenses above the applicable limitation amount in certain circumstances.

Recovering Costs

The NPFC takes action to recover response costs from the Responsible Party.

Limitation of Liability Not Available

33 U.S.C. section 2704 (c) (2)

The Responsible Party **will lose the right to limit liability** if the discharge was caused by gross negligence or willful misconduct, or if there was a violation of Federal safety, construction, or operating regulation by the Responsible Party or person / agent etc. with whom the Responsible Party has a contractual relationship

Limited liability will also **not apply** when the Responsible Party fails:

1. To report the incident when the R.P. knows or has reason to know of the incident
2. To provide all reasonable cooperation and assistance with removal actions
3. To comply with orders from the Authorities

As gross negligence and willful misconduct are not defined under OPA, when adjudicating claims the NPFC uses their own definition of gross negligence / willful misconduct. However, congress did not grant the NPFC the authority to create its own definition. see – *Water Quality Ins. Syndicate v. United States*, 225 F. Supp. 3d 41 (D.D.C. 2016)

Here, the court reviewed similar environmental and natural resource statutes to define gross negligence. The court finally relied on the CERCLA, which requires conduct that is “reckless, willful, or wanton” for gross negligence. **The Court concluded that Congress intended OPA 90**

to provide for limited liability absent misconduct by a Responsible Party. The NPFC did not articulate how its definitions applied the appropriate standards. The Court further cited precedent in prior NPFC decisions that involved the most egregious of circumstances yet did not find gross negligence, showing various inconsistencies. The NPFC was arbitrary and capricious in its adjudication.

OPA 90 “RESPONSIBLE PARTY”

Strict Liability – One who discharges is strictly liable, jointly and severally

33 U.S.C. section 2702: Elements of Liability

(a) In general

Notwithstanding any other provision or rule of law, and subject to the provisions of this Act, each responsible party for a vessel or a facility from which oil is discharged, or which poses the substantial threat of a discharge of oil, into or upon the navigable waters or adjoining shorelines or the EEZ is liable for the removal costs and damages specified in subsection (b) of this section that result from such incident.

33 U.S.C. section 2701:

(14) “incident” means any occurrence or series of occurrences having the same origin, including one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.

(32) “Responsible Party” means the following:

(A) Vessels – In the case of a vessel, any person owning, operating, or demise chartering the vessel

(26) “owner or operator”-

(A) Means- (i) in the case of a vessel, any person owning, operating, or chartering by

demise, the vessel;

United States v. Nature'sWay Marine, L.L.C., 904 F.3d 416 (5th Cir. 2018) – “Operator”

“It follows from that analysis that the ordinary and natural meaning of an “operator” of a vessel under the OPA would include someone who directs, manages, or conducts the affairs of the vessel. Furthermore, it follows that the ordinary and natural meaning of “operating” a vessel under the OPA would thereby include the act of piloting or moving the vessel.”

A. Exclusive navigational control (dumb barges)

Other examples of potential relevant factors and considerations that need to be evaluated when determining an OPA operator :

B. Exclusive possession and control

C. Employer of Master / Crew

D. Charterer’s mere instructions selecting cargo and routes (time / voyage charterer)

E. Contractors in control and and performing major work on vessel

F. Vessel itself carried as cargo or being transported by ship/barge

Covered Removal Costs and Damages

Before reimbursement can be authorized for uncompensated removal costs, the claimant must demonstrate:

- (a) That the actions taken were necessary to prevent, minimize, or mitigate the effects of the incident;
- (b) That the removal costs were incurred as a result of these actions
- (c) That the actions taken were directed by the FOOSC or determined by the FOOSC to be consistent with the NCP;
- (d) That the removal costs were uncompensated and reasonable

33 U.S.C. Section 2702:

(b) Covered Removal Costs and damages

(1) Removal costs

(2) Damages

(a) Natural resources

(b) Real or Personal Property

(c) Subsistence use

(d) Revenues

(e) Profits and earning capacity

(f) Public services

Time to File:

After submitting your claim to the Responsible Party you can submit the claim to the NPFC if the Responsible Party or its insurer denies your claim or does not pay within 90 days of the date you presented your claim.

Time Limit- Claims for Damages: Damage claims must be made within three (3) years after the date on which the damage and its connection with the spill was reasonably discoverable with the exercise of due care. The only exception is for natural resource damage claims.

Claims for Removal Costs: A removal cost claim must be made within six (6) years after the date of completion of all removal actions for the incident. NPFC considers the claim as "presented" on the day it is received.

Natural Resource Damage Claims:

The NPFC's Natural Resource Damage (NRD) Claims Division adjudicates claims for natural resource damages arising out of oil spills (or the substantial threat of a spill) to the navigable waters of the United States. Those damages may include:

1. The cost to restore, rehabilitate, replace or acquire the equivalent of the injured resource.
2. Any interim lost use or diminution in value of the injured resource pending restoration.
3. The reasonable cost of assessing those damages.

Time to file: within 3 years of discovery or **within 3 years of the completion of the NRDA.**

Comingled Product

OPA's legislative history clearly highlights the intent of Congress that OPA liability and, by extension OPA claim compensation, only applies to discharges of OIL and not oil mixed with hazardous substances.

An "incident" under OPA is defined as "any occurrence or series of occurrences having the same origin, involving one or more vessels, facilities, or any combination thereof, resulting in the discharge or substantial threat of discharge of oil.

OPA defines "oil" as "oil of any kind or in any form.....- but does not include any substance which is specifically listed or designated as a hazardous substance under subparagraphs (A) through (F) of section 101 (14) of CERCLA. The CERCLA definition of Hazardous substance specifically excludes petroleum, including crude oil or any fraction thereof... Natural and synthetic gas liquefied or not are also excluded.

While the NPFC has for years adjudicated claims involving a discharge of product that includes oil and other / hazardous substances, and has declined the claims, the Fifth Circuit Court of Appeals has also addressed this.

See - *Munoz v. Intercontinental Terminals Co., L.L.C.*, 85 F.4th 343 (5th Cir. 2023)

- Fire at Intercontinental Terminals chemical storage facility
- Confirmed discharge of Oil and Hazardous substances
- Claimants sued the terminal under OPA 90 for economic losses due to closure of Ship Channel
- ITC's summary judgment was granted – OPA does not apply
- Appeal – comingled oil and hazardous substances was not “specifically listed” under CERCLA, therefore OPA 90 exclusions did not include mixed discharges
- The Court rejected the main appellate argument and recognized several circuits and the EPA have already interpreted CERCLA definition of hazardous substances to include comingled discharges.

Economic Damages are available under the Oil Pollution Act. Are they available under the Comprehensive Environmental Response, Compensation, and Liability Act?

No Claim Reimbursement

1. Arbitration – Claimant must retain all rights of recovery against a Responsible Party permitting the NPFC to acquire them by subrogation. 33 U.S.C. 2715(a) NPFC cannot be forced to enforce its subrogation rights against a Responsible Party in an arbitration proceeding as opposed to a federal court as contemplated by OPA.
2. Litigation – The NPFC cannot evaluate, decide, or pay any claim that is part of a court case, including a class action suit, to recover the costs or damages in the claim.

Burden of Proof when Challenging NPFC determination

Over two decades of case law of insurers or other claimants challenging a determination of the NPFC in federal court, indicates that the matter would be adjudicated under the Administrative

Procedures Act, "APA" 5 U.S.C. section 551 et seq. Under the APA, a reviewing Court must set aside a challenged agency action that is found to be, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The scope of review under the "arbitrary and capricious standard is highly deferential to the agency.

At least two very recent cases have significantly eased the burden a claimant will now have when challenging any governmental agency determination. While the APA, for now, may still apply in most jurisdictions, principles and doctrines that bolster the highly deferential standard have been completely removed and in one instance severely limited in one particular circuit.

A. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 144 S. Ct. 2244, 219 L. Ed. 2d 832 (2024)

Chevron Doctrine overturned. Chevron deference - refers to the doctrine under which courts historically deferred to a federal agency's interpretation of an ambiguous statute that the agency administers. The Supreme Court expressly overruled the long-standing *Chevron* doctrine on the basis that:

“[the] Administrative Procedure Act requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts may not defer to an agency interpretation of the law simply because a statute is ambiguous.”

B. *United States v. Ernst Jacob GmbH & Co. KG*, 158 F.4th 232 (1st Cir. 2025)

The Court held that the government must prove by a preponderance of the evidence, not solely by deferring to the FOOSC's determination – that the vessel posed a substantial threat to pollute. The ordinary standard of proof in civil cases applies. Stated another way, the NPFC's determination that the vessel posed a "substantial threat of a discharge of oil" was subject to review under the preponderance of evidence standard.

What is a Substantial Threat?

Starr Indem. & Liab. Co. v. Water Quality Ins. Syndicate, 320 F. Supp. 3d 549 (S.D.N.Y. 2018), aff'd, 775 F. App'x 4 (2d Cir. 2019).

Amongst several meaningful determinations, the court analyzes “Substantial Threat of Discharge”, a term found in the Act:

“the word “substantial” qualifies the word “threat” and the word “significant” qualifies the word “risk” These adjectives do not modify the words “discharge” or “oil.” Thus, the risk or threat must be substantial or significant; the definition is not met by a trifling threat or risk of a discharge of a body of oil, even if, in quantity, the body of such oil is large. To count as “substantial threat of discharge”there must have been a substantial – that is, a considerable, significantly great, noticeably or measurably large- threat of discharge. It is that threat (or risk) that must be significant.”

What is critical is whether the likelihood of a discharge is significant, not whether there is only a hypothetical but unlikely possibility of a large spill even after a marine incident such as a collision, grounding, sinking, allision, etc.

Funding

Trafigura Trading LLC v. United States, 29 F.4th 286 (5th Cir. 2022).

Litigation ensued regarding the tax on domestic crude oil used in or exported from the United States. The Appellate court confirmed that it is a tax and therefore it violates the Export clause, Article I, section 9, clause 5, of the United States Constitution, and could not be enforced. IRS declined to appeal.

References:

33. U.S.C. Sections 2701-2761

<https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/>

<https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/Claims/NPFC-Claimant-Guide/>

David H. Sump, The Oil Pollution Act of 1990: A Glance in the Rearview Mirror, 85 TUL. L. REV. 1101, 1103-04 (2011).

THE ART OF *MEDIATION* IN TODAY'S LITIGIOUS WORLD

It is a necessity in today's maritime litigation – whether personal injury, contracts, property damage, etc. - to be involved in mediation –

Your understanding of what it takes to succeed depends on the company's immediate and prompt involvement with its attorney and insurer

The panel members will strongly recommend and suggest to you what it takes to use mediation to your advantage, with comments on

- What Mediation really is and why mediate.
- How to prepare for Mediation considering the needs of the Mediator, you (the company,) your attorney, your insurer and the opposing party
- Selecting the right Mediator
- The reason the company's involvement is an absolute necessity to succeed – why and how? From start to finish?
- Making sure, without a doubt, as an absolute necessity, you and your client are present physically in the Mediation Hearing – yes, be there!!
- Your presence at the hearing is the right way to succeed and use the Mediation to your company's and insurer's advantage
- Otherwise, you may be opening your checkbook and “bumping up” your loss record for increases in premium
- Is there a difference in “private” versus “Magistrate” Mediations? Yes, there is and the differences are ***! Might one be better than the other?
- Instead of Mediation, what about the use of arbitration? Is there a difference in the two and what is the difference? Is one better than the other, and if so why?

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2026 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:

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MEDIATION - THE PLAINTIFF LAWYER'S PERSPECTIVE

By: Rhett E. King
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Mediation is a “process” that came about many years ago and I am sure mediation will be used for many years into the future - well past my legal career. Mediation will persist because it provides litigants with an effective resolution of claims. As a personal injury attorney and especially with my marine claims, more and more of my cases are mediated (and with a very high rate of resolution). Understanding how to utilize the mediation process to your client’s advantage, is essential to success in the litigation field today. Although there is no “one size fits all” formula, over the years I have formed strong opinions about why to mediate, when to mediate, and how to mediate.

While each case may have a different secret sauce depending on the client, the facts, the law, as well as the opponent representing the defendant in the case, two basic concerns are always present - risk and reward. Mediation will be a desirable option if (1) the case warrants the time and effort, i.e., the expense of mediation, (2) the case has been properly prepared, (3) the parties are in good faith, and (4) the parties select a seasoned mediator.

In the maritime personal injury context, the injured seaman or maritime worker is often a high wage earner and the injury is arguably career ending, so the cost and necessary effort involved with mediation are easily justified. Normally, but not always, there may be reasonable disputes surrounding liability and the plaintiff’s damages that create enough uncertainty for each side that mediation becomes a worthwhile undertaking.

As the plaintiff’s attorney, my priority is to make sure my case is ready for mediation.

Sufficient discovery has to have been accomplished so that the parties understand the strengths and weakness of the claim. The respective clients have to be educated regarding those strengths and weaknesses *prior* to the mediation. Of all the participants at mediation, my client is only one who will have had no experience with the mediation process. It is crucial that my client feels comfortable with the concept and dynamic of the mediation. My job is to create reasonable expectations so that at the time of the mediation, my client has a realistic appreciation of what we are trying to achieve and how the mediation should unfold through the day. By the same token, I believe it is of critical importance that the defense has its representative / decision maker present at the mediation. On a basic human level, the physical presence of the defense representative creates an atmosphere of respect from my client's perspective signaling that the defendant is committed to this process with a personal interest in working with my client to reach a fair resolution during the mediation. The Covid pandemic has made "in person participation" less common. Our response to the challenges presented by Covid spurred widespread adoption of participation over Zoom and similar tech. What started as a common sense work around due to the pandemic has persisted as a desired convenience and cost saving technique for the defense. But, I still adhere to my view that there is no substitute for the decision maker being physically present at mediation.

The parties mutually have to select their mediator. Everyone must be comfortable with the chosen mediator for there to be any chance of success. Although I don't apply a litmus test, I actually prefer a mediator with a defense background. I want the defendant to feel at ease with the mediator because at some point that mediator will probably have to challenge the prevailing mind set in the defense room and I want that mediator to have credibility and rapport with both

the defense counsel and his client. Of course, I also want a mediator that I am familiar with and with whom I have mediated before as this will bolster my client's ability to trust the mediator and to have confidence in the mediation process as a whole. If the client trusts me, and I trust the mediator, then the client trusts the mediator.

Just like the parties have to know the strengths and weaknesses of the case, I also want the mediator to be prepared with knowledge of the facts and issues of the case prior to mediation. This enables the mediator to *appropriately* challenge the positions of each side rather than simply acting like a robot ferrying numbers back and forth. The appearance of mediator neutrality is key. I don't want either a "yes" man or an overly aggressive skill for the defendant. Many of my clients are suspicious and distrustful of the legal process. Skepticism is often at play in my client's brain. A mediator that knows pertinent facts about my client and his case creates credibility for the mediator and the mediation process. Conversely, a mediator who doesn't care enough to remember my client's name or the basic facts of his case will doom the mediation. On one particular occasion, the mediator referred to himself and the defense jointly as "we" and "us" as in "we need you to help us out here." Needless to say, that mediation ended abruptly (and unsuccessfully) as my client had zero confidence in that mediator. Trust lost with the process is not going to be regained.

Once the parties decide upon a mediator, my job of educating the mediator begins. I want to provide the mediator with the good, the bad, and the ugly on my case and my client. Of course, I must have total certainty that what I have submitted remains in strict confidence until and unless the mediator is instructed to share specific information with the other side.

Additionally, I prefer to also speak with the mediator in advance of the mediation date, usually a

few days before, to clarify the plaintiff's position and reasoning as well as to hear the mediator's thoughts on my submission (and whether additional information would be useful). While this has the added benefit of helping me in my preparation, what is more important, it ensures that the mediator is thoroughly educated about the case and is in the best position to successfully mediate our case.

The old saw "it's not where you start, it's where you finish" holds true but in my experience, the start of the mediation remains critical to how you will finish. I am a proponent of the mediator hosting a joint meeting between the parties with substantive opening presentations. This is my opportunity for the defendant representative / decision maker to meet and observe my client but also to see and hear our presentation. My presentation is geared toward the decision maker more than anyone else. I am attempting to challenge the view of the case that the defense representative has in his mind. Conversely, I make sure that my client is prepared to hear what the defense attorney will say, some of which may be not so nice. I acknowledge that joint sessions and especially substantive opening remarks from each side are currently disfavored by plaintiff and defense counsel alike. I assume that is because (1) the fear of "educating" the other side about a claim or defense that perhaps the other side was missing, and / or (2) the fear that advocacy will devolve into arguing which might lead to hard feelings which then unnecessarily sabotage the chances of a successful mediation. Every case and client is different but by and large I believe the benefits of an honest, good faith but thorough opening outweighs the risks of overeducation or alienation. I accept that I am in the distinct minority in my view.

Mediation, even if successful, is usually a long day for my client. They experience a

gamut of emotions. It can be cathartic. It is not exactly their “day in court” but it does provide an experience in which the client sees his advocate, the defendant’s advocate, the defense representative, and the mediator all focused and working hard to resolve his case which in my experience is very appreciated by the client, even if the case is unresolved at the end of the day. A private mediation affords the plaintiff the time and space to make an informed decision about settling his case which is often one of the most important decisions in that person’s life. If a settlement is reached, I think it is best practice to have the terms of the settlement written up and signed by all those present at the mediation.

Conclusion

From the plaintiff’s perspective, proceeding with private mediation is almost always in my client’s best interest, so long as the parties are well prepared, the parties have chosen a seasoned mediator with maritime experience, and the parties are engaging in good faith. If the case settles at mediation, our goal has been achieved and the process has been successful. But, even when the parties cannot reach a settlement on the day of mediation, the mediation often is the catalyst for a later settlement. In those instances where the process is unsuccessful, I have rarely regretted having engaged in mediation because you always learn something useful through mediation - even if it simply that this case will have to be tried.

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It is a necessity in today's maritime litigation – whether personal injury, contracts, property damage, etc. - to be involved in mediation –

Your understanding of what it takes to succeed depends on the company's immediate and prompt involvement with its attorney and insurer

The panel members will strongly recommend and suggest to you what it takes to use mediation to your advantage, with comments on

- What Mediation really is and why mediate.
- How to prepare for Mediation considering the needs of the Mediator, you (the company,) your attorney, your insurer and the opposing party
- Selecting the right Mediator
- The reason the company's involvement is an absolute necessity to succeed – why and how? From start to finish?
- Making sure, without a doubt, as an absolute necessity, you and your client are present physically in the Mediation Hearing – yes, be there!!
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OBSERVATIONS ON MEDIATION

23 April 2026

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Observations on Mediation

I have 29 years of litigation experience. That's more than some and less than others. My experience is no more valuable than anyone else's. But, having participated in numerous mediations (most successful, and a healthy minority not), I've been asked to present my observations on the subject. I provide below my recommended best practices, pointers, and cautions regarding mediation. I am instructed that (unusually) war stories are welcomed in this context.

Mediation is becoming more and more important.

It's been documented that compared to 20-25 years ago, mediation (that is, formal mediation with a trained mediator or a federal magistrate judge) has gone from a casual opportunity that might be explored before trial to a strong expectation (and in some places, a firm requirement). There is nothing wrong with that. And some would say that to the extent mediation delivers prompt resolution of claims, it results in better client service, less cost and disruption, and the more efficient use of judicial resources. Consequently, one should plan for the near certainty that there will be a mediation, and that certain preparations must be made for it (including accounting for some of the issues raised below).

Early mediations.

Every now and then someone proposes an "early" mediation. What "early" means in this context isn't entirely clear, but it almost always means before any depositions are taken or discovery battles commence. I have nothing against early mediation per se, although it raises challenges to frankness and fears of leaving money on the table (or paying too much), and the potential for lawyer embarrassment/client disappointment afterwards. I can't recall any "early" mediations in my career that were successful. That does not mean a mediation has to be 30 days before trial to be effective. But, in my experience, for there to be a meaningful chance at successful mediation the parties must *at least* take the major depositions and exchange important documents. I have a regular opponent (more of a colleague) who won't recommend mediation to his clients until experts are deposed. Fair enough. So, if someone does propose an early mediation, my advice would be to first come up with a plan that calls for major classes of documents to be produced and at least one deposition on either side to be taken.

Short mediations.

There is an increasing trend of half-day mediations. The driving factor is the idea that 6 to 7 hours of a full day mediation is typically wasted while the parties posture, making tiny incremental movements toward a midpoint. If there isn't too much ground to cover factually, why not create a sense of urgency with a 9 a.m. to 1 p.m. mediation, creating a new paradigm for the so-called "witching hour" and the obligatory "call to New York" to get the last \$250,000 necessary to close out a deal? And a half-day mediation, especially one starting in the morning, works better for east coast insurance company reps who want to close shop at 5 p.m. Eastern time. The half-day approach is often cheaper and more efficient. But it probably won't work in cases where the issues are complicated or multiple parties are involved.

Picking the right mediator for your case.

In my opinion, there's far too much angst over picking the right mediator for a case. Some dyed in the wool defense lawyers will insist on defense-oriented mediators; some plaintiff's lawyers will reciprocate. I don't care what the mediator's former practice was (defense or plaintiff, policyholder or insurance company) *provided* that they (i) don't act as an advocate for one side¹ over the other and (ii) have mediation skills. In my mind, the most important question is whether the mediator has the particular skills/qualities to help bring the parties together to settle the kind of dispute at hand. What is in their "bag of mediator tricks" that will help *this case* settle? Does this person have the right knowledge and temperament for *this case*, with *these parties*, *these lawyers*? Consequently – like some of my opponents – I will often let the other side pick the mediator, provided I think the person has the right tools and qualities for the job.

What's in the mediation position paper?

No doubt, the mediation position paper is an opportunity to convince the mediator that you are likely to prevail. And you want the mediator to spend more time warning/scaring your opponent about the potential results of trial, such that your opponent will be motivated to pay more (or take less) and move on. To do that, the position paper should be constructed to read like a brief, *attaching* important documents or evidence, and confronting the other side's position. The evidentiary part is important, inasmuch as the mediator probably knew absolutely nothing about your case until he or she picked up the paper (and might not know anything about you, your ability, or your integrity). Attaching and quoting the evidence that you will present to the court will show the mediator that the "boasts" you make in your paper can be backed up with evidence and will provide credibility that you have the stronger case (and consequently, you should not be the one to back down). One thing that should be left on the cutting room floor is hyperbole (or as I like to call it, "loudmouthery"). Everybody already knows that you are a tough guy, you will take this case to trial, that the other side is evil, etc. Just show the mediator how you intend to win the case at trial, and the mediator – if competent – can do most of the other work.

Surprise kills the mediation.

Surprise ruins the chance of a settlement at mediation. That's because, particularly with corporate clients (and even more so with insurance companies), there is a staged process to get appropriate authority to pay/accept a certain amount of money. And that process – particularly with insurance companies – often takes weeks to play out. Consequently, when we save our "smoking gun" evidence for the 4:00 p.m. witching hour, all we've done is guarantee to shut down any progress. Plus, you will have shown them your "supersecret" evidence but gotten no movement out of the other side because they don't have time to run through the multiple level of authority to adjust their settlement position. Subject to "keeping powder dry" concerns, if you plan on presenting certain evidence at the mediation, consider sending it to the other side ahead of time.

Relatedly, in recent years there has been a slight uptick in sharing mediation position papers with the other side. Some lawyers think this is a great idea because, if the other client or lawyer seems to misunderstand the case or has unrealistic expectations, the position paper might steer them into

¹ I'm not talking about the usual mediator tactic of presenting you with the other side's argument is to make sure you see the potential weaknesses in case.

reasonableness. Other people think it's silly to provide information to your opponent. So, who's right here? It depends.

If the other side hasn't seen the ball since kick off regarding liability and damages, or has a very stubborn and unrealistic client, putting together a supporting brief style position paper – with the expectation that it will be ultimately sent to the opposing client – might be what's needed to soften up a recalcitrant litigant. This approach should *only* be taken when the other side with a lawyer is significantly ignorant about multiple issues in the case. Those who are tempted to provide their position paper to the other side should do so on a case-by-case basis, i.e., only when it's absolutely necessary to ensure that the opponent needs to better understand the case.

Is this practice potentially dangerous? Sure. Once in my career opposing counsel improperly attempted to introduce an attachment to my position paper at a summary judgment hearing (the attempt was appropriately rebuffed). But that sort of misbehavior is rare. And while the paper cannot be introduced as evidence, it should be clearly marked as “Confidential Position Paper - Not To Be Used For Any Other Purpose” to reinforce that point and mitigate any potential misuse.

Others are vehemently opposed to sharing mediation position papers because it educates the opponent too much before the mediation and provides an advantage. Well, I would suggest that might be the point after all. Besides, what are you putting in your mediation paper that a decently educated and intelligent opponent doesn't expect or already know? Any potential dangers should be mitigated by not revealing anything too confidential in the paper (see “keeping my powder dry” section below).

What are the pros and cons of having clients attend mediation?

It's rare that I don't have my client attend mediation with me. After all, the client is the decision-maker and sometimes has the best handle on the facts. Moreover, having the client in the mediation to hear the inevitable warnings from the mediator about risk and cost can be useful to sober up an overly optimistic client. Finally, a client's attendance at mediation provides an opportunity for the client to have a firsthand look at the quality of the opposing party's arguments and your responses.

Why not have a client attend the mediation? In rare circumstances it may be disadvantageous for the client to attend mediation, for example, where there is the risk of a strong emotional reaction, the two parties hate each other, or one is practically unavailable (i.e., sick or overseas). Sometimes, however, I will step out of the mediation and speak only with opposing counsel. This is especially so when I have a long-standing relationship with the other lawyer. I do this to foster “extreme frankness” with the other lawyer. I've settled many cases in the hallway (and without the client or mediator).

What are the pros and cons of having the mediation with the magistrate judge?

I am a big proponent of having mediations with federal magistrate judges. Much more so than private arbitrators, federal magistrate judges tend to cut to the chase and dispense valuable frankness more liberally. That approach saves both parties time and money. Because they speak with the authority of their office, federal magistrate judges can intimidate some lawyers. A party

with a strong case and an unreasonable opponent will seek mediation with the magistrate judge. Conversely, lawyers with weak cases and unreasonable clients will avoid them like the plague. Why? Because a magistrate judge will almost always firmly call out a weak case or an unreasonable position. And there's always the fear that the word will get back to the district judge just how silly or unreasonable the opposing party's case is.

For specialty matters, like maritime litigation, a strong judicial bench (such as in the U.S. District Court for the Eastern District of Louisiana) will provide authoritative subject matter experts (who know the district judges very well) and who can give useful guidance about which arguments are likely to fly and which aren't. Moreover, although in a big case it wouldn't matter, magistrate judges are cost-free and (at least in this district) have a strong customer service attitude. A party can often get a half-day mediation (particularly if it's on the phone or Zoom) scheduled within a week of request, and often times faster.

Authority

Lawyers should counsel their clients to be frank about settlement expectations and authority at the mediation. I've represented clients who would not even tell me what my authority was in the mediation. I found it not only off-putting, but also handicapping my ability to properly negotiate at the mediation. After all, aren't we on the same team? My experience also teaches that clients' expectations need to be carefully controlled and any estimate provided to the client of the mediation process outcome should be extremely conservative, all to avoid client dissatisfaction (or the failure of a mediation on the 5-yard line).

Who is in charge?

I've had mediators say outright (or at least directly imply) that *they* are in charge of the mediation. That's certainly not my attitude/view. In my mind, I am exclusively in charge of the entire mediation; no one else is going to set the agenda or tell me whether I can make an opening statement, when I can offer a bracket, when I get to leave, etc. That is not to say that I don't let well-trained mediators dig into their bag of tricks and offer ideas, send messages, and give advice. Ultimately the *mediator is providing a service* to me and my client; they're not there to boss me (or my client) around.

Keeping my powder dry.

We all know it's true. We are worried we're going to go to the end of our authority at the mediation with no room to move. Consequently, we don't want to put up our best number as a guard against the other side saying, "Ha ha, he says his bottom line is \$12 million, I think that's a signal that he is really at \$15 million and that's where I'm going to push." It's a legitimate concern, and one that I'm not immune to. I think the only thing we can do about this point is accept that the other side probably has the same concern. Here, trust between usual opponents helps, because we can have frank conversations in the hallway such as "Okay, I will lean on my client to take \$15 million but don't you dare come back with anything less."

Being the master of the facts and the law.

Because mediation serves as an opportunity for the other party to evaluate you, your client, and your case, and because it is an opportunity to persuade, you must be the master of the facts and the law. Every time the mediator walks into the room with a question, you must have the answer. That requires significant preparation. Imagine the credibility you build when the other side snidely tells the mediator that they have you beaten on issues X, Y, or Z, then the mediator walks back into the other room and says, “They had a good answer for every single point you raised - maybe you need to reevaluate your position.”

On the other hand, it’s not useful (and is mildly irritating) for one party to insist on either infinite detail on damages numbers when the experts have not calculated them yet or every scrap of “backup” for costs reimbursement. In such situations, I might say “I thought we were mediating now so that we didn’t have to spend the tens of thousands of dollars to get the finite detail you’re looking for. Accept our responsible estimates/documentation for settlement purposes now, and if the case doesn’t settle, then you’ll get your precise figures.”

Always do an opening statement.

I’ve heard this dozens of times: This is a commercial case, not a bodily injury case, so we don’t need an opening statement. I respectfully (and strongly) disagree. Why on earth would I miss an ethical opportunity to speak directly to the other client about our view of the case and what we are willing to do about settlement? Of course, the opening statement is not to browbeat or insult anyone; that would be counterproductive. If the opening statement is respectful and frank, it goes a long way toward establishing a good rapport with the other client who, ultimately, is the one who’s going to be making settlement decisions. There are many (misguided!) lawyers who disagree with me, and sometimes I’m the only one delivering the opening statement. That’s fine.

Brackets.

I love brackets as a settlement tool. I’m occasionally told by mediators that it’s too early for brackets. *First*, remember that *I’m* in charge and you’re not. *Second*, brackets work. Anyone who’s done even a few dozen mediations recognizes that one of the major advantages of a formal mediation is the ability to send “messages” to the other side as opposed to demands. Brackets enable us to send messages through the mediator. They are often met with counter brackets. That’s fine, that’s how the process works. Many, many times I’ve cut through an impasse at mediation by offering a bracket. I don’t wait for the impasse, however. My brackets might come as early as 10:30 a.m. If the other side refuses to engage, oh well, I will turn to the mediator and say: “Open up your bag of mediator tricks and pull something else out.”

Emotional commitment.

I suspect it’s not always obvious, but *even in non-bodily injury cases*, there can be a strong emotional reason for a party’s settlement position. While 99% of the time it’s all about the money, that 1% can nudge a difficult case into settlement if the non-economic aspect is specifically addressed. Twenty-five years ago, I settled a commercial litigation matter with then *non-mediator* John Perry, whose general counsel client was incensed about one line written in a brief that I had signed. That one line – and his personal offense at the (true) assertion in it – became a much more important point of the

settlement process than the amount of money we were demanding. I've seen demands for apologies along with monetary demands. And I've seen hard cases settled for less than the full demand where there was some accountability taken for the incident giving rise to the lawsuit. The bottom line here is that it's not useful to ignore the emotional component of the lawsuit and the impact accounting for that component.

The case doesn't have to settle today.

A good mediator doesn't pick sides; their only goal is to have the case settled. Most of us recognize that the mediator does not have a vested interest in one side prevailing; their "victory" is in settlement itself. And some mediators – attempting to do their jobs – can get a little insistent that the case "must" settle today. But here's the thing: it doesn't. If, for example, the parties don't understand the relative risks and rewards of litigation, not enough discovery has been taken, or one party needs to stew in fear for a little while, there's nothing wrong with adjourning the mediation and letting the mediator come back later to see if either of the parties have thought it over or someone has a new idea. Now, I've heard people say, "This offer is good today and after that my number is going up." I'm often skeptical of such statements. If \$30 million is good today, it will be good at 11 a.m. tomorrow.

Relatedly, I attended a mediation where (at least in my opinion) liability was clear and a certain minimum amount of money was owed. In my opening statement I said that I expected the first offer out of the defense room to be \$1 million, and absent that number, we were going to leave. Of course, the first offer came back at \$10,000. I told my client, "Pack your bag, we're leaving." The mediator literally begged me to stay. I said "Fine, one more chance." The next offer was for \$50,000. I walked into the defense room, shook everybody's hand, thanked them, and started to walk out. One of my opponents (now a friend and colleague) asked, "Hey, where are you going?" And I responded, "What did I tell you? \$1 million as an opening offer or I was leaving. You offered \$50,000, and now I'm leaving." And my client and I left (as promised). The case settled the next day for policy limits. There are two lessons here. *First*, you must keep your word to maintain your credibility. Because I said I needed \$1 million as a first offer or I was leaving, *I had to leave*; otherwise, I was guilty of being a loudmouth and nothing else. *Second*, the case does not have to settle today. Sometimes people need a chance to evaluate you and your client, test your mettle, and weigh their chances. The case can always settle tomorrow.

Conclusion.

Much like the rest of a litigator's practice, the approach to mediation must be nuanced, fact-specific and (especially) personality dependent. One must understand that mediating a case is more akin to art than science. There aren't many strict rules that must be followed to guarantee "success" (however that may be defined by each lawyer). But I hope the above guidance and pointers prove helpful to litigators and increases the ability to meet a common goal, which is a fair (or at least acceptable) outcome for the client.

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Travelers – Ocean Marine Claims
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MEDIATION 2026

STAYING RELEVANT IN THE 21st CENTURY

- I. INTRODUCTION
- II. NAVIGATING THE MEDIATION
- III. MEDIATION STRATEGY and TACTICS
- IV. CONCLUSION

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MEDIATION 2026

STAYING RELEVANT IN THE 21st CENTURY

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I. INTRODUCTION

Evolve and advance or stagnate and perish. Either one keeps up with the fluid nature of dispute resolution or grow like moss on the proverbial tree.

Mediation post-Covid evolution has assisted the claimants and confounded the defense. Most court mediation orders require the parties and usually the insurance representative to attend. Attorneys should facilitate the attendance and participation of the insured and/or even the insurance representative. Insured and Insurers must attend. Adjusters need to see the conduct of the plaintiff(s) and the attorney(s) in person (or by Zoom if that is the order) to better analyze the temperature of the settlement situation.

Insurers want their representatives to attend mediations. The list of items insurers hope to accomplish is long: 1) hopefully the case will settle, if not, insurers/insureds will see why first hand, 2) get free discovery, 3) check out the attorneys, 4) check out the plaintiff(s) in personal injury cases, 5) get a preview of the evidence, 6) get the mediator's take on the case ("unbiased"), and 7) re-analyze the strengths and weaknesses of the case after you hear how the case sounds during openings and in private discussions with the mediator.

Being available by phone is penny wise and pound foolish if personal attendance is required or possible. You will not observe the attorney(s) and plaintiff(s) in person, and you will not get firsthand information on the case but continue to get secondhand information filtered thru your attorney. This is not a criticism of defense counsel. They see things thru the eyes of a lawyer and you as the owner and/or insurance representative may see things differently for any number of commercial reasons. Providing lump sum authority or being available to be called and updated as needed is not beneficial.

This paper will explore the benefits of insurer and insured participation in the mediation process and specifically attendance at the mediation itself as well as mediation tactics and strategy and pitfalls to avoid. Defense of claims and litigation is a team effort between defense counsel, the insurer, and the insured. Successful mediation requires that the members of the team work together to achieve the desired result. Each must bring to the “party” his/her respective talents and perspective.

II. NAVIGATING THE MEDIATION

Preparing for Mediation:

As Bill Belichick used to say, channeling his inner Sun Tzu: “The only sign we have in the locker room is from *The Art of War*: Every battle is won before it is fought.” Thus, one of my favorite mediation sayings is: “The Mediation starts before the Mediation starts.” It is important to pave the way for a successful mediation before you show up and that goes for the attorneys, the insurers, and the insured. Just showing up is not a plan.

Insurers and insureds should make sure their lawyers are communicating with the mediator to cement how the proceeding should unfold. Do not attend a mediation without a

current demand. The emphasis being “current.” Not a demand that pre-dated discovery or expert report disclosures and/or a summary judgment motion. While plaintiffs may not alter their demand, it provides the mediator the opportunity to obtain a more appropriate number, that reflects the status of the case prior to the mediation and not the status at some prehistoric time. It also signals to the mediator that he/she cannot just adopt the old demand at the first private conference with the plaintiffs. Moreover, the demand may be a window into the possibility of settlement. If the demand is well out of the ballpark, not even in the parking lot, it may signal a disconnect between plaintiff’s analysis and reality as reflected by the facts and law.

Opening statements are increasingly being waived. Pre-Covid opening statements were the norm. Now mediators want to avoid verbal battles and lengthy openings. However, in personal injury cases they are especially important for the defense side, since counsel can look the plaintiff(s) in the eye (across a table or in Zoom) and present the defense side of the case, unfiltered by any other source of information. In personal injury mediations, it is important for the defense to “burst the bubble of false expectations” that the plaintiff(s) may have about the case. This is best performed from across the table. If it needs to be by Zoom, make sure the plaintiff(s) have a “front row seat” and are not way back in the office chair. Think field level boxes not upper deck cheap seats.

Mediators who seek to rush the parties to separate rooms do a disservice to the mediation process. A little “hand to hand” combat among the parties might be beneficial; that’s what the lawyers get paid to do: argue their respective cases. Mediators can use the openings and joint session to determine if the parties can agree on any issues: fact and/or law. The prospect of an instant and credible rebuttal can only occur during the joint session, which might be reason for a party to soften its position on some key issue and agree to a fact or legal principle. Mediators

should also remember that the parties know their cases much better than the mediator and that he/she may not be as effective an advocate for a certain position. Mediators want to rush the parties to separate rooms since demands and the resistance thereto have become wider apart than ever. It is common for the first half or more of mediations to be occupied by intransigent positions. Mediators believe they need more time, to move the parties off their out-of-settlement range positions and they are right. However, neutering the openings should not be the favored methodology to get there.

Insurers and insureds should also prepare for the mediation. Insurance adjusters should avoid just being a “checkbook.” They can and should display some knowledge about the case and make points direct to the mediator. Don’t present yourself as an “easy mark” who is letting the defense lawyer do all the heavy lifting. You are not there to just watch. Moreover, mediators perceive the insurance adjuster as the most reasonable person in both respective rooms. Do not be that person all the time, pick your reasonable spots.

Defense Team:

Working together is paramount to a successful defense. The more insureds view the insurer and the lawyers as a part of a “team,” their team, the better the ability of the team to execute on successful defense strategies.

Successful mediations require that the team be pulling the matter and by extension the potential settlement in the same direction and to accomplish this goal the attendance of the insured is paramount so that they obtain first-hand knowledge of the information being both conveyed and received at the mediation. Attendance enables on the scene decisions by the team based on the same information in real-time. Moreover, the insured is a valuable member of that

team. In rebutting some plaintiff invented theory either from the attorneys or the alleged experts, it is important to hear the insured state to the parties at opening or to the mediator in private sessions for example: that the company has been in existence for a hundred years (hyperbole), has been doing it this way since man invented the wheel, every other owner does it this way, the USCG would never permit it to be done any other way and certainly not the way plaintiffs are suggesting: just absurd or words to that affect.

These types of rebuttals can only be credibly delivered by the owner and they not only let the other side know that the defense team is not going to be persuaded by anything other than credible theories but also sets a tone that the insured is involved and invested in the case and would be a formidable witness at trial on this and any other issues. Only the insured owner can deliver these types of credible commercial rebuttals stopping the plaintiff(s) dead in their tracks. Insureds: your presence does matter.

Tactical Contributions:

The owner must not under-estimate his ability to convey and provide value technical information during the opening and discussion phases of a mediation. The other participants at mediation from the attorneys, the employee/plaintiff and insurers collectively may not have the same commercial knowledge about the fundamentals of tug/barge operation or any other aspect of the river business. There is nothing more important than a forceful and strident denial by the owner insured of some plaintiff attorney theory that was invented just for this case as to what the maritime standards are for an issue or custom and practice in the river industry. Custom and practice is usually admissible and is a powerful tool at trial, especially if experts can opine on the same, and thus can be persuasive at mediation.

The insured knows the vessel(s), knows the operation and if needed can call the office for information to rebut the false narrative put forward by the plaintiff attorney on an issue.

Insurer Adjuster:

Cases are assigned at insurance companies using multiple approaches, some of which may not be clear to the insured owner. Some insurers assign cases based on office location, some on the type of claim (Cargo, Hull, MGL and P&I, etc.), some by computer (whoever is next and/or has the fewest cases), some based on experience and the nature of the claim, and/or combinations of these criteria.

Usually, the insured does not know the adjuster or his/her settlement/negotiating abilities. Mediation attendance provides the owner an opportunity to meet the adjuster in person and directly learn about his/her case thought process and opinions. Moreover, meeting with insurer adjusters at mediations can make further dealings with the insurer easier during the conclusion of the matter, if the case does not settle, or during future matters.

Corporate Dating for Attorneys:

Think match dot com. Are these attorneys right for you? Attending the mediation in person provides a sound opportunity for you as the client to “check-out” not only defense counsel but plaintiff’s counsel as well.

There are many reasons why you may not be familiar with the lawyers representing you: nominated by the insurer, suggested by a fellow owner, etc. Moreover, even if the attorney is someone you are familiar with and did in fact nominate, have you done so based on any lawyering activity you witnessed firsthand or is it based on your many lunches with counsel, golf outing invitations or GNOBFA parties thrown by the firm? While watching an attorney “in

action” at a mediation does not resemble a trial, it at least may provide a window into what type of defense will be put forward by the attorney at trial. In other words, before you bet your loss record on how he will play in the golf tournament at least you get to see him on the range.

Furthermore, you will be introduced to the plaintiff’s attorney(s) and may witness their opening statement. Did they make a compelling case for their client? Are they great whites swimming around looking to take a big bite out of the insurer’s pocket and indirectly your loss record? Or do they come across as colorful and flamboyant but mostly harmless, not the type of attorney which should strike fear into the hearts of the defense team? No one will provide you, the owner insured, with this information, you must witness it yourself. One way to accomplish this goal is to attend the mediation.

Sympathetic Plaintiff:

Many cases irrationally revolve around sympathy for the plaintiff(s). This phenomenon is best viewed in person. The mediation is the ideal place to see and hear from the plaintiff and the mediator on this very subjective issue. One could observe the plaintiff at his deposition, however, insurers and insureds do not usually attend this event. Sympathy is a concept an attorney will use to justify evaluating the matter at higher levels than the case facts and law would dictate. Insurers and insureds sometimes express frustration at this situation. Rather than accept secondhand information from defense counsel, it behooves both the insurer and insured to view the plaintiff(s) and/or his family member claimants firsthand, up close, and in person so that they are comfortable “overpaying,” if necessary. At minimum, they get to form their own opinion as to whether the plaintiff(s) will generate excess sympathy (beyond normal sympathy for an injured person), so that this excess sympathy becomes a “damage component” in and of itself. Educate yourself.

Curve of Gratitude:

Insureds often wonder after the settlement: “why did you (insurer) pay so much” in that case? It hurts my loss record. Too often insurers and the lawyers are caught in the “client curve of gratitude.” After hearing the settlement number is achieved the insured is overjoyed as the insurers and attorneys settled for a favorable number, rejected punitive damages, eliminated the uninsured exposure, and saved the company from financial ruin. Then time passes, and the insured owner begins to think plaintiff(s) were never getting punitive damages, the damage numbers were inflated to begin with, and the settlement was just OK. Then more time passes and it’s “I can’t believe those guys (insurer and lawyers) made such a big deal out of the case”: the facts and law were all on my side and we would have maintained the limitation amount. Finally, it’s are these underwriters serious, they want me to pay the deductible and want a big premium increase because of my lost record; we should have gone to trial, and we would have won easily.

Being engaged in the case, which includes attending and participating in the mediation process, goes a long way to hopefully preventing insured owners from going down the curve of gratitude path. You get to hear from the plaintiff’s attorney, you observe the injured plaintiff firsthand (it’s one thing to hear about someone’s severe injury and another to see it, like a jury or judge will see it, up close and personal). You usually will get to hear from the mediator on case value, what the parties can expect at trial, and not only what the law is but also how far it can be pushed to accommodate an injured mariner. Personal involvement may not get you off the curve at the first stop, but you will not get to the bottom either.

Challenging Counsel:

Insurers and insureds heavily rely on the opinion of counsel concerning the case settlement value. Counsel's opinion should be just one of the factors that the insurer and insured use to arrive at what they would be willing to pay to settle the case. Insurers and insureds should be comfortable arriving at their own settlement number. This comment is not to suggest that defense counsel will not offer a very sound case settlement value. However, in the end, it is the insurer and the insured who should decide the ultimate settlement limit.

Disclosing Authority:

The author's humble opinion: "Don't." This is not a Joe Biden "don't," but a real what is the upside to doing it so "don't." There is no upside to disclosing the number to anyone: defense attorneys, the mediator, etc. You want to keep counsel aggressive to get the best possible number. Same with the mediator. You do not want them just backing the case into your authority. Most defense counsel will understand, and the mediator may try to get a window into your authority with questions like: "where do you want to end up" or comparable questions. Create a scenario so they will not pursue this issue beyond: "getting the best possible deal at the lowest possible number..."

III. MEDIATORS AND FAVORITE MEDIATOR TACTICS

Mediator Styles:

Different mediators will employ unique styles, personal to them, and different tactics to try to facilitate settlement. Some styles are more effective than others. Some styles are preferred, others disliked, but the goal is the same: settle the case.

The “Saint Bernard mediator” wants to exchange numbers without getting too involved in the facts or the law. This mediator tends to believe that the parties and the attorneys already know this information and therefore, can forego getting bogged down in arguments about these issues. Insurers tend to want to discuss the case issues, especially if they have paid for years of litigation. Sometimes talking about the facts and law is cathartic in that those involved need to have their say and then they can move on and negotiate more freely.

The “Closer mediator” likes to push the parties from the outset. He is determined to drag the parties to settlement, even if they will not go willingly. Some mediation participants like the “closer” approach; an aggressive pursuit of the perceived goal: settlement. Less so when the pressure is being brought to bear on them.

The “Compressor mediator” likes to offer his/her subjective opinion early in the process to move parties off hardened, and in his/her mind, unreasonable positions. This is a favorite tactic of magistrates and retired judges: “compress” the case. Instead of listening to each party, sifting thru the facts and law, and trying to make an objective analysis, the mediator will tout his/her judicial or legal experience and then offer an opinion as to where the case should be

resolved. Neither party is likely to agree, and the parties can be stuck with an “uneducated” number.

Moreover, a good mediator needs to do more than just perform a quick read thru the papers before the mediation. Listening to the parties during opening statements and then again during shuttle-diplomacy may function as second-hand cross-examination and can often bring the true facts and value of the case to light. Trying to force a number on the parties for the sake of expediency is flawed.

Mediator Tactics:

Mediators will engage in multiple tactics which are designed to move the parties off their pre-determined positions. These allegedly tried and proven tactics are used because they tend to work. However, their application may not be in the best interest of the insurer and/or the insured. Do not hesitate to resist them being used against your side.

Ask for the Moon...Wait for 3PM:

This tactic has become the norm post-Covid. Mediation dates to ancient Greek and Roman civilizations. Indeed, historians believe the origins of mediation date to ancient Mesopotamia 5,000 years ago and include the well-known Biblical tale of King Soloman and the custody dispute. It took 5,000 years to get to this...

Post Covid as we move forward thru this decade, plaintiffs have increasingly started their demands at astronomical numbers that have no relationship to reality or the facts, law, venue, etc. of the case. This forces the defense to put up money even if exceedingly small and create floors for future negotiations at realistic numbers. The mediator unwittingly becomes part of this “negotiation fraud” by persuading the defense to put up money because the plaintiffs do not want

to negotiate against themselves. Plaintiffs demand one ridiculous number after another, even numbers outside the collective policies, while defense starts numerically climbing with real money, a floor from which there is no retreat. The author has no sound solutions other than stay the course and do not be persuaded to make: “the first big move.” Discretion is the better part of valor. Furthermore, the defense should freely point out that they are not going to wait until 3PM to receive a rational demand and the earlier the better.

Brackets:

Brackets do not favor the defendant owner and/or insurers. A proposed bracket tends to produce a reply counter-bracket. The mediator will be tempted to look at the average of the two brackets and think that the “average of the average” is a suitable number to settle the case. Since the plaintiff’s bracket tends to be wider, this creates a higher average for the plaintiff’s bracket and the average of the average will tend to be higher than insurers and insureds assigned value to case. Numbers in the abstract are plaintiff’s friend not defendant’s ally.

Moreover, and this point is lost during negotiations, the parties, usually the plaintiffs, can backtrack if defense rejects their brackets at any time to the last single number even if it is outside the bracket scope. DO NOT MAKE THIS MISTAKE. Do not think that because plaintiffs have offered a bracket that the next single number must be inside or at minimum at the top end of the bracket. It does not have to be...

Example: Demand of \$5.0M...offer is \$100,000. New demand is \$4.5M and new offer is \$250,000. Plaintiff offers a bracket of \$3.0M vs \$1.0M. Defense reject bracket and offers counter bracket for \$2.0M vs \$500,000. Next demand is \$4.25M. Defense objects: you should be at \$3.0M. Plaintiff: “No” since you rejected my brackets, we are free to return to any single number

up to \$4.5M. Plaintiff is right. This is why brackets are not a sound way for defense to proceed, in the humble opinion of the author. If you do engage in “bracket swapping” address the return to single numbers upfront with mediator. Emphasize that a single number return outside the bracket will signal the end of the mediation.

“You have no idea...”

And I do not want to... How many times have you heard a mediator come into your room and lament that “you have no idea what’s going on in the other room...”? Most insurers and insured are thinking: “why is this my problem;” but let the mediator off the hook by not squashing the concept that the defense should pay more to satisfy the unreasonable conduct or thought process of the plaintiff(s) and his/her allies. This is the mediator’s problem, not yours, and make sure it stays that way.

Split the difference...looking at the middle.

The proverbial mediation quest for mediators is to find the “middle” as if it’s the “Holy Grail” of the mediation. This rarely helps the defense. Mediators and lawyers tend to look at the middle far too early. Indeed, why look at the middle at all? What does the middle of two arbitrary numbers have to do with the facts and the law or the settlement value of the case? This is a lazy party negotiating concept, but a strategy the mediator will often employ. Try to have the numbers correspond to the case value as dictated by the facts and law, which admittedly is subjective, but far more objective than some arbitrary middle between two already arbitrary figures (demand and offer). Leave your calculators at home.

Mediator's Proposal:

One of the more challenging issues confronting the parties and the mediator towards the end of the mediation is whether to ask for a mediator's proposal in the case of the parties or whether to make a proposal in the case of the mediator. For the parties be careful what you wish for as in "remember you asked for it" to quote Jack Reacher. Usually, one will try to obtain a sense of what the number may look like before making this request. For the mediator: should he/she ask the parties if they want one first? If not, should the mediator offer one anyway? Will the risk of offending both parties outweigh the potential reward of moving intransigent parties off their respective numbers? There are no easy answers.

In the author's humble opinion, a mediator should not make a proposal unless all parties want one. This is especially true since the negotiating tactics of plaintiffs' attorneys have tended to abandon reasonableness. Plaintiffs may stay unreasonably high for most of the mediation, unreasonably being subjective. However, since Covid, plaintiffs' attorneys know that the demands are silly but that remains a tactic to bring the case to the point where time is running out, the clock is ticking, the end of the day is near, and they look to weaponize the lack of progress into a favorable mediator's proposal. Mediators need to understand, and if not defense counsel needs to remind them, that confronted with very high demands the proposal still needs to reflect the facts of the case and the applicable law and not be governed by proposing settlement numbers that the mediator perceives that the plaintiff(s) is looking for or would accept. What the plaintiff is looking for should be irrelevant. What is relevant is what do the facts and law dictate he/she may be entitled to as recovery.

More mediators appear prone to “bailing out” the failed negotiations and rewarding the delaying tactics of the plaintiffs. The mediator should not perceive the need to rescue a mediation from a course which was doomed from the start. Let the plaintiff correct course.

“Make the Call...”

Mediators often think of themselves as having the power of a Terry Benedict (Andy Garcia character) in the movie *Ocean 11* when they say: “Make the call...”. It is tempting to say you should never make a call, but it will be suggested here that you think long and hard before doing so. Why am I making this call: to get more authority? The adjuster, and defense counsel have been working on the case for years before mediation, they have reviewed the evidence in detail, have authored reports, have had strategy sessions, have evaluated the case with insurer senior management and after all of that have produced an authority level or number. The mediator has looked at the case for only a few seconds; so why is his opinion that you should get more authority, under the gun, no chance to re-evaluate, no chance to reflect on the mediation events, worthy of a call?

The author will acknowledge this is a complex issue. The defense may learn information at the mediation either directly from plaintiff’s attorney in openings, if there are any, or thru the mediator during the mediation or even added information from the insured, which is why the insured should attend, that will cause the defense to re-evaluate to the negative. If that occurs do not wait to be “instructed” by the mediator to “make a call” do it early on and get additional authority. Once you accept the mediator’s request to make a call you have explicitly stated, either to the mediator or possibly to plaintiff(s) that you are willing to pay more than you were willing to do when you showed up for the mediation. That is not a good look.

IV. CONCLUSION

Insurers and insureds must attend the mediation in person to co-pilot and steer the case to a successful result.

Be wary of mediator tactics as well as mediation pitfalls as discussed, as you navigate the mediation itself.

THE ART OF *MEDIATION* IN TODAY'S LITIGIOUS WORLD

It is a necessity in today's maritime litigation – whether personal injury, contracts, property damage, etc. - to be involved in mediation –

Your understanding of what it takes to succeed depends on the company's immediate and prompt involvement with its attorney and insurer

The panel members will strongly recommend and suggest to you what it takes to use mediation to your advantage, with comments on

- What Mediation really is and why mediate.
- How to prepare for Mediation considering the needs of the Mediator, you (the company,) your attorney, your insurer and the opposing party
- Selecting the right Mediator
- The reason the company's involvement is an absolute necessity to succeed – why and how? From start to finish?
- Making sure, without a doubt, as an absolute necessity, you and your client are present physically in the Mediation Hearing – yes, be there!!
- Your presence at the hearing is the right way to succeed and use the Mediation to your company's and insurer's advantage
- Otherwise, you may be opening your checkbook and “bumping up” your loss record for increases in premium
- Is there a difference in “private” versus “Magistrate” Mediations? Yes, there is and the differences are ***! Might one be better than the other?
- Instead of Mediation, what about the use of arbitration? Is there a difference in the two and what is the difference? Is one better than the other, and if so why?

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:

Maurice C. Hebert, Jr., Esq.

Maurice C. Hebert, Jr., Esq.

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River Ridge, LA

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- I Mediators “Notice of Mediation” with particulars of who, what, where and when – plus how much it will cost.
- II. “Request for Position Paper” – i.e., what is the “Mediator” asking to attorneys for – to educate the Mediator well ahead of the day of the mediation.
- III. An Overview of the Maritime “Mediation and Arbitration” – how it works!

**AN OVERVIEW OF THE MARITIME MEDIATION
AND ARBITRATION AND HOW THEY WORK**

- Do they effectively serve the claimants, employers, insurers, attorneys or the courts?
- Why mediate or arbitrate? When and how do they work effectively?
- The difference between mediation and arbitration
- The role of the company and insurer representatives – how important are they? As important as the mediator? No question they make a difference!

**PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR**

By:

**MAURICE C. HEBERT, JR., ESQ.
MAURICE C. HEBERT, JR. LLC
RIVER RIDGE, LOUISIANA**

**EFFECTIVE ADVOCACY AND PARTY PARTICIPATION AT MARITIME MEDIATIONS
AND ARBITRATIONS**

I. WHAT IS MEDIATION?

One of the principle characteristics of Mediation is the decision making process -- with the decision making retained by the parties in dispute, not the third party mediator.

Alternative Dispute Resolution is basically a substitute to litigation for the continuing dispute. It has been said that statistics reflect that 95% of all lawsuits are settled. Mediation is an alternative to further litigation and helps the parties, for whatever reason, reach a settlement of a dispute.

Mediation is defined with the simple word "process" -- that "process" being an independent, neutral third party (*the mediator*) assisting the parties to a dispute to resolve that dispute.

Mediation has been further defined as the means by which the parties themselves are talked to, talked with, and encouraged to evaluate their position, both weaknesses and strengths, to make a decision to settle or not settle.

The mediator is generally referred to as the negotiator who helps and assists the parties to negotiate their own settlement and make their own decisions.

Those parties who do not negotiate, or mediate or just sit around in an attempt to resolve a dispute, will generally go 6 months, 1 year, or 2 years, continuing to "fight," incur costs and legal fees, and end up at the court house with their "guns loaded" to win or lose.

The real people, or parties who have a "dispute," the plaintiff and defendant, should want to resolve their differences as promptly as possible. Once the "dispute" results in a lawsuit being filed, there are three (3) basic avenues that can be taken, namely, (1) mediation, (2) arbitration; or (3) litigation. All three (3) of these means or methods have a third party involved to help and

resolve the dispute. In a maritime case, it is generally always a mediator if the parties chose that route to take to settle their differences.

II. REASONS TO MEDIATE

The reason for use of a mediator and reasons to mediate may be as follows:

- A. The parties are not sure, who is right or wrong
- B. Either party could win or lose
- C. There is the amount in dispute and that amount cannot be agreed upon.
- D. A mediator or third party is needed to bring out and convey the strength and weaknesses of either party's side of the case.
- E. The mediator provides a neutral guidance so as to allow the parties to evaluate their position, reach a decision, and settle their dispute.

It has been said that 80% of the expenses in litigation are incurred between the filing of a lawsuit and before trial. Therefore, sometime during the course of this timeframe (between the filing of the lawsuit and the trial) is the optimum time to have mediation -- i.e. conducting just enough discovery to have a meaningful and productive mediation. Mediation can save both sides time, money, and expenses, before a trial, eliminating the possibility of numerous depositions, medical and expert evaluation reports, and the retaining of some of these certain experts, general litigation expenses, etc.

III. HOW TO MEDIATE

It is suggested that there are several guidelines that might be considered so as to proceed with a meaningful and productive mediation:

- A. There should be some discovery done so that the position of either side can be intelligently discussed with the mediator during the process.
- B. The parties should meet with their client before mediation and discuss the mediation process with the client, so that the client can be prepared and participate in the mediation. Again, the parties, or clients, are the ultimate decision makers and they should have some idea of the mediation process before engaging in it.

- C. The attorney should prepare his or her client to engage in a “positive” mediation by having them properly evaluate their case, and not be unreasonable in any particular position, or any unreasonable settlement figure.

There may be a difference as to how one would proceed with mediation in an automobile case, airplane crash, contract dispute, or maritime case. At this particular time, I will attempt to set out what I think are some of the basic necessities to consider in preparing to mediate a maritime case. However, mediation in any general litigation is really no different. You rely on the facts, law, evidence and witnesses to evaluate your case. ***BE PREPARED FOR ANY MEDIATION BEFORE THE DAY OF THE MEDIATION!***

IV. THE MARITIME MEDIATION

Maritime cases are generally regarded as high profile and involving a lot of money or substantial settlements. However, the maritime law is unique within itself, and is much different than a straight automobile case, as an example, and is not simply based upon the laws of any one particular state. With maritime cases being filed, be it property or personal injury, or even contract, in state and federal courts, the laws may be somewhat different even though the maritime law is considered somewhat uniform in its application. As an example, Louisiana Direct Action law or the Louisiana Anti-indemnity laws may greatly affect the liability or value of a case. It would be my suggestion, in a maritime case, that the following steps be seriously considered prior to the day of the mediation:

- A. The plaintiff's deposition be taken as well as one or two key defense witnesses so as to enable the parties to have a better understanding of the strengths and weaknesses of their cases.
- B. If there are any experts involved, and the case justifies same, it might be considered to have the experts attend the mediation. This would be particularly more susceptible to occurring in substantial property damage, toxic tort, or contractual disputes- experts such as engineers, marine surveyors, financial consultants, etc.

- C. The parties should provide a “Position Paper” setting out what they would consider to be the applicable law and what they would consider to be the “strength” and “weaknesses” of their particular side of the case, and acknowledge the “strength” and the “weaknesses” of the other side. This would educate the mediator prior to the mediation.
- D. Be extremely careful of any family member or friend or representative who may be brought to the mediation so as to not have a very forceful person substitute his or her opinion for the decision making process granted to the party.
- E. Request that position papers be kept in confidence and not disclosed to either side. With rare exceptions, the mediation is held confidential. Therefore, both sides should let their clients know that they should be open, opinionated, and talk freely so as to help the mediator analyze their side of the case. A good mediator will give all of his or her time and effort to resolve the “dispute” and the question of when to stop or continue to proceed should be left as a decision to the mediator and not the parties. The reason I make this comment is perhaps the mediator will know something, told to him in confidence, and not to be divulged to one side or the other, and the mediator needs to continue forward with that information in mind and hopefully reach a resolution to the dispute.
- F. Be sure to provide the mediator effective documents that might help your case, such as vessel logs, accident reports, contracts, safety manuals, medical reports (personal injury cases), expert reports, etc. Get these documents to the mediator prior to the mediation.

The attorneys for the parties should not hesitate to call the mediator or the mediator contact the attorney for the parties prior to the mediation to determine issues that might be considered at the mediation. In other words, the mediator may want to know who will be attending the mediation on behalf of the parties, and it is strongly suggested that both sides know who will be attending for the other side. This is to eliminate any surprise when the parties meet at the mediation, and hopefully not have one side think that the other side has an “upper hand” because of someone he or she brings to the mediation. Both parties should know before the mediation who will be attending on both sides and this should be disclosed.

The attorney for either side should not hesitate, if necessary, to request that the mediator step out of the room so that a private discussion can be had between the attorney and his or her

client. Likewise, the attorney should advise his or her client that there may be times when the mediator will meet with just one or both of the attorneys, if the mediator feels it is necessary, to discuss a point that would help in resolving the dispute. This should not be taken by the attorney for either side or the client as a showing of favoritism by the mediator to one side or the other, but is simply a method the mediator might have to use to further advance the case and resolve the dispute.

Certain factors that make mediation work well in a maritime case may be considered to be the following:

- A. Confidentiality
- B. Direct involvement of the litigants themselves, and, from the defendant's side, have the client or insurer representative at the mediation;
- C. Give the necessary time and effort to resolve the dispute;
- D. Saving of money on both sides;
- E. Not having to be ultimately concerned whether one will win or lose.

You could find that some mediators may refer to a five-question technique as follows:

- 1. The strengths of either side's case
- 2. Weaknesses of either side's case
- 3. The reasonable value or settlement range of either side
- 4. What do you think the other side will do?
- 5. What will you do?

V. REASONS FOR THE SUCCESS OR FAILURE OF MARITIME MEDIATIONS

In a maritime case, there may be various reasons why mediation would fail. Perhaps the following might give you some idea what might cause the mediation to fail:

- A. Lack of authority on the part of either side can be an obstacle;

- B. Under or over evaluating the maritime case;
- C. Failure to “open” up to the mediator, or not coming out the with the “smoking gun” to allow the mediator in the general sessions or caucuses to have a meaningful discussion with one side or the other;
- D. Being unreasonable, too slow, etc. trying to negotiate or arrive at a final figure for settlement;
- E. Recognizing or wanting to recognize the weaknesses in the law or the facts of your case;
- F. And, using the mediation as a means of trying to “see” where the other side is going in the case – rather than settle the case. In other words, go on a “fishing mediation” rather than trying to settle the case.

In the maritime personal injury case, the medical issues, the issue of contributory negligence, burden of proof, credibility, etc. are always factors that are highly contested. Credibility of the medical position of either side can be argued, taken into account the particular physicians retained by either side, or the interpretation of the credibility of the plaintiff or defendant or any witness of either side. Parties must recognize the strengths and weaknesses of their case and act accordingly during the mediation.

VI. CONCLUSION

The above comments simply are a few factors to be considered in maritime mediation, in preparing for the mediation, and in preparing the mediator so as to achieve a successful resolution and settlement of the dispute. Know your client, know your case, know the facts, the law, and proceed with a positive attitude so that the mediation can be a success.

While mediation practices and procedures may vary and differ depending upon the case, such as facts, law, personalities, and other factors, the contents of this paper are meant to simply give basic general guidelines of what you might consider in the mediation of a maritime case. These suggestions are not meant to suggest that mediations are always handled only in line with

what is suggested for consideration. You should know your case, the law, and facts, your client, the opposing side and you should act and proceed in a manner that is best for you and your client.

VII. WHAT IS ARBITRATION?

Arbitration and mediation are words that are basically used interchangeably in the professional field. However, there is a very big difference between the two, in both procedure and costs, to the point where parties agreeing to one or the other must fully understand how each is carried out. Generally, the arbitration process begins with parties voluntarily entering into an agreement to arbitrate a dispute and follow certain procedures that are common in the field of arbitration. It is not unusual, in negotiating contracts, master service agreements, etc., for there to be a clause dictating that, in the event of a dispute, the parties agree to arbitrate and usually agree to “binding arbitration.”¹ Both parties, in an arbitration procedure, are entitled to be represented by their attorney and present their case. While it is very similar, an arbitration procedure, to being in court, it is not the same. Binding arbitration is a substitute for the right to present your case in a court of law. Sometimes this is good., and sometimes it is bad.

You might ask the question of where does an arbitrator or arbitrators come from? There are various arbitration panels of individuals deemed to be qualified to sit as an arbitrator, be it an arbitrator on a commercial matter, real estate dispute, etc. Usually individuals are invited to become a member of an arbitration panel depending upon their expertise, abilities, background, etc.

When the parties are ready to proceed with arbitration, they are provided a list of possible arbitrators to select from or some other arrangement that might be agreed upon. Ultimately this is

¹ It could be specified that the arbitration will take place in a specific location, city, state or country; under specific rules; etc. This will be discussed in a little more detail further in this paper.

done. There are certain rules and procedures that are followed in arbitration, but it should be kept in mind that the rigid and regimented rules and laws of the court are generally not the same as that you would find in an arbitration proceeding. While an arbitrator may have the power to issue subpoenas for the presentation of documents and witnesses, you will find that discovery is sometimes very limited or maybe even non-existent. The arbitrator does not necessarily have to follow the rules of evidence that would apply in a courtroom, and some view this as a potential problem.

While a mediator thinks primarily of compromise, you would generally find an arbitrator considering compromise on a different scale — since the arbitrator is dealing in the presentation of facts and the law. That is not to say that a mediator does not consider the same but it is simply presented in an altogether different type of procedure.

VIII. THERE ARE CONSIDERATIONS IN ARBITRATION THAT MIGHT BE CONSIDERED AN ADVANTAGE AND A DISADVANTAGE.

The Advantages for Arbitration that are Usually Claimed Include:

- A. Speed in arriving at a hearing and finding;
- B. Reduced costs;
- C. The ability of the parties to choose the arbitrators and the time and place where the arbitration will take place — adhering to their convenience; however, the inability of a party to choose the time and place can be a real disadvantage to a party;
- D. Privacy and informality of the proceedings;
- E. A finding that is not subject to appeal.

The Disadvantages of Arbitration are Generally Considered to be:

- A. The lack of having “your day in court” before a single judge or a jury of peers;
- B. A possible tendency of arbitrators to make awards that basically compromise a “split the difference” between the parties;

- C. A lack of strict rules of evidence that you find in a courtroom and sometimes causing unreliable and less-than-credible evidence to be presented;
- D. A basic lack of review of the arbitrators, decisions and how they proceeded in the hearing;
- E. Increased costs that might occur due to the lax approach of an arbitration panel, for whatever reason, resulting in increased attorney's fees and costs, including the fees of those arbitrators on the panel;
- F. Enforcement of an award in your favor.

While there are considered forms of “non-binding arbitration,” you will normally find arbitration to be binding. Non-binding arbitration means that the award is not binding and simply aids the parties to enter into their own settlement. Ultimately, one may well find that “non-binding arbitration” is simply a different form of mediation and is seldom found to be conducted in trying to reach the settlement of a dispute.

Quite often the parties will, under certain arrangements, be it in a written contract or otherwise, agree to an Arbitration Procedure which more or less sets in motion an agreed-upon dispute-resolution procedure. One of these often used procedures that has been around for many years is through the American Arbitration Association (AAA). This association has a customary set of rules and procedures that are usually agreed upon and followed. Arbitrators with this Association generally apply to become a member of a panel of qualified arbitrators for various types of disputes, including, maritime, real estate, securities, etc. Arbitrators with this Association are generally accepted after consideration by the Association and are often chosen for their experience and expertise in the industry or in certain types of disputes that that Association may be involved in.

Assuming that the parties agreed to arbitration under the AAA rules, you would expect this to be in the written contractual agreement between the parties – be it an MSA; Contract of Towage; Charter Hire Agreement; etc. Normal approach under AAA rules is where the parties are sent a

list of possible arbitrators from the AAA-approved panels and ultimately the parties get to select the arbitrators. The AAA then arranges for the time and place for the arbitration to be held and begin. Maybe or maybe not there would be some pre-hearing discovery, subpoenas issued for the presentation of documents and witnesses, etc. All parties are entitled to be represented by counsel. AAA is paid a fee and the arbitrators are likewise paid a fee, and the award can be converted to a judgment, if necessary.

You may be ultimately faced, in negotiating a contract, with the issue of whether or not your written contract should contain a clause for the settling of a dispute by way of “arbitration” or “mediation.” This is a choice to be made by the parties. There are pros and cons on both sides and it would be suggested that all parties discuss with their attorney what is best should a dispute arise in any contractual arrangement.

IX. CONCLUSION

This paper is meant to simply inform the audience of the “barebones” basics of mediation and arbitration. It is not meant to explain both processes in full and complete detail, for me to do so, would require pages and pages and become very technically explained. It is simply suggested that the above will give you some idea of what happens if you end up in either mediation or arbitration. It is also the objective of this paper and the panel presenting the topic to you today to advise you that, before you agree to or engage in either of the proceedings, you have it fully explained to you by your attorney as to the objective and procedure of each process so that you can fully understand what affect the process may have on your contract or your case.

The likelihood is that you may almost always find that mediation is the answer what process would be necessary in the settlement of your dispute, but you should also understand that, in certain circumstances, due to contractual agreements or otherwise, you could be facing

arbitration and it is suggested that, if such is the case, you become fully aware of this process and how it is carried out.

CONTRACTS AND AGREEMENTS (C&A) IN TODAY'S MARITIME WORLD!

Part I: A Catastrophe Occurs Between/Among Multiple Parties – Deals And Agreements Are Going Back And Forth “To Solve The Issues” – So, You Might Want To Be Guided By The Following:

What constitutes a binding “Contract” or “Agreement?”

- How do you draft a written C&A and reduce it to writing and make it binding between the Parties? Particularly in the maritime world!
- How might one modify the document in the future, if necessary?
- What clauses assure me that my attorney fees and costs would be recovered should I prevail if there is litigation over the document?
- Can it make a difference if a C&A is or is not “notarized?” “Why and when” must a C&A or any company document, for that matter, have to be notarized?
- How do I make sure any litigation takes place in the Court, State and Venue of my choice?
- Do all C&As (even Maritime Charters or Vessel Sales and Construction) have to be in writing and notarized? Is an “oral” Contract or Agreement (such as a Vessel Charter) valid? – If so, how does one prove there is or was an oral meeting of the minds?

Part II: The “Infamous Internet Emails And Cell Phone Texts” Used Every Day In The Marine Industry – And, In The Real World Of C&As And Litigation

- Can they be Good, Bad or Ugly to either side?
- Are emails and cell phone text messages binding between or among Parties?
- Watch what you put in an “email” – because...
- As an example, can a “thumbs up” in a “text message” to the other side constitute acceptance of a binding C&A, Vessel Charter or whatever?
- Admissible in litigation?
- Can a captain, dispatcher, secretary or whomever, outside of Company high management, bind a company in an “email/text” Agreement?
- Can a company dispute an “email/text C&A?” How?
- Can a company dispute an “email/text Agreement” of a non-management employee? How?
- What is considered a “company record” and how might it be used for or against my company in litigation?
- The word “hearsay” in litigation is common. What does it mean – applicable in non-litigation disputes as well as lawsuits/trials?
- A witness may not be available in a trial, but, can an email or text message of the “missing witness” be used as evidence if it is considered a company business record and an exception to “hearsay” rule in a trial?
- A witness recorded a statement or executed a signed written statement – can it be used in litigation if the witness is not available or is deceased? What about a witness’s deposition?
- Can a company’s lawyer bind, under the argument of C or A, the company he/she represents with an “email/text” to opposing counsel? How and why?
- Would all or any of these be considered an action on behalf of a company which would or could void the companies’ insurance coverage?

PRESENTED AT THE
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CONTRACTS AND AGREEMENTS IN TODAY'S MARITIME WORLD

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I. Introduction

Maritime contracts form the backbone of international trade and offshore operations in the United States, as well as operations on the nation's waterways, ports, and terminals. These contracts encompass a broad spectrum of agreements, from traditional cargo transportation and vessel chartering to specialized service contracts that support oil and gas production, energy, shipping, barge movement, dredging, and development of critical infrastructure.

Maritime contracts differ from ordinary commercial contracts in several fundamental ways. They are subject to federal admiralty jurisdiction, which applies specialized rules of interpretation and enforcement. Additionally, maritime contracts often involve unique risks, including seaman rights, indemnity and risk transfers, and sometimes complex multi-jurisdictional issues.

This article provides a comprehensive overview of maritime contracts and addresses certain issues that can arise in drafting, negotiating, and enforcing maritime contracts. It introduces the various types of contracts used in the industry, explores essential contractual provisions and interpretation principles, and discusses practical considerations for drafting and negotiating these agreements. Finally, the paper presents a case study inspired by real events which reinforces the need to have a clear and valid contract prior to undertaking work in the maritime sphere or engaging maritime subcontractors and vendors.

Understanding maritime contracts requires not only legal knowledge but also familiarity with industry practices, technical operations, and commercial realities. This paper aims to provide practical guidance for attorneys, business professionals, and industry participants who work with maritime contracts. By examining these contracts through both legal and commercial lenses, we can better appreciate the sophisticated mechanisms that enable safe, efficient, and profitable operations and ensure the company is protected if an incident occurs.

II. What Qualifies as a Maritime Contract?

To determine whether a contract qualifies as a maritime contract governed by federal maritime law, courts will employ a multi-factor test. First, the court will ask whether the contract provides for services to facilitate activity on navigable waters. Second, if the answer to the first question is "yes", does the contract provide – or do the parties expect – that a vessel will play a substantial role in the completion of the contract? If yes, then the contract is maritime in nature. In sum, if the contract is primarily focused on the use of a vessel—or services performed from a vessel—it is typically a maritime contract and will be governed by federal maritime law.

III. Common Types of Maritime Contracts

Maritime commerce involves many types of contractual relationships, each serving distinct purposes within the broader industry.

A. Offshore Service Contracts

Offshore operations require specialized service contracts to allocate risks among the parties and establish governing standards for the work, including contracts such as surveying contracts, drilling contracts for mobile offshore units, marine construction contracts for platform and pipeline installation, diving and subsea service contracts for underwater operations, and marine logistics contracts for shore base and supply chain management. These complex agreements address traditional maritime concerns

such as vessel operations and weather delays as well as technical requirements including equipment specifications, performance standards, safety procedures, and regulatory compliance.

B. Master Service Agreements and Purchase Orders

Master Service Agreements and related Purchase Orders are common contracting mechanisms for maritime operations. A Master Service Agreement (MSA) provides maritime companies—whether towing operators, dredging companies, terminal services, barges, or other service vendors—with a standardized contractual foundation that governs all future projects and purchase orders between the parties. Its purpose is to establish clear expectations up front: defining the party's responsibilities, allocating risk through indemnity and insurance provisions, setting safety and compliance requirements, and streamlining commercial terms such as pricing, invoicing, and dispute resolution. MSAs ensure the terms between the parties are already in place, so that work with certain vessels or subcontractors can begin quickly and seamlessly on a project.

Where an MSA does not exist between the parties, a company may wish to simply issue an individual purchase order or work order for the subcontractor's or vendor's services. As discussed in this paper, the purchase order or work order should contain sufficient and detailed terms and conditions that are clearly accepted and agreed by both parties. This will help ensure the company is fully protected in the event of an incident or dispute.

C. Charter Parties

Charter parties are contracts for the use of vessels and represent one of the most fundamental forms of maritime contracts. Master Charter Parties – like the Master Service Agreements discussed above – can be created for regular use of subcontractor vessels or towing companies. In the offshore space, charter parties often address specialized concerns such as dynamic positioning requirements, deck space configurations, crane capacities, fuel efficiency in rough weather, and compatibility with platform loading systems.

Below are the types of charter parties that may be used for operations:

1. Time charters provide the charterer with use of a fully-crewed vessel for a specified period, with the vessel owner retaining operational control through the master and crew. The charterer directs where the vessel goes and what cargo or equipment it carries, but the owner remains responsible for navigation, vessel maintenance, and crew management. The widely accepted industry standard form for time charters worldwide is the BIMCO SUPPLYTIME 2017.
2. Bareboat charters, also known as demise charters, transfer complete possession and control of the vessel to the charterer, who is considered the "owner pro hac vice" (owner for this occasion) for certain legal purposes. The charterer essentially becomes the vessel operator, assuming responsibility for crew, maintenance, insurance, compliance with regulations, and liability for vessel operations. The widely accepted industry standard form for bareboat charters worldwide is the BIMCO BARECON 2017.
3. Voyage charters cover a single voyage or series of voyages, with payment typically based on cargo quantity or a lump sum. Voyage charters may be used for transporting large equipment items, moving drilling rigs between locations, or delivering supplies for specific projects. The voyage charterer's responsibility is typically limited to providing and loading the cargo, while the shipowner handles all aspects of the voyage itself. The widely accepted industry standard form for voyage charters worldwide is the BIMCO GENCON 2022, though specialized forms exist for things like tankers and coal carrying vessels.

D. Ship Sale and Purchase Agreements

The sale and purchase of vessels involve substantial investments and complex documentation. These transactions must address vessel specifications, delivery conditions, sea trials, financing arrangements,

warranties regarding the vessel's condition and capabilities, and regulatory compliance including classification society certifications and flag state requirements, among other issues.

E. Towage Contracts

Towage contracts govern the movement of barges, drilling rigs, production platforms, and other large assets or structures between locations. Towage contracts carefully allocate responsibilities between the towing vessel owner and the asset owner, addressing issues such as seaworthiness of both towing vessel and tow, weather routing, insurance, and liability for damage or loss during transit.

F. Marine Insurance Contracts

Marine insurance is essential for maritime operations. Hull and machinery insurance covers physical damage to vessels and drilling units. Protection and indemnity (P&I) insurance covers third-party liabilities including pollution, cargo damage, and personal injury. Operators also maintain specialized insurance for drilling or construction operations and production facilities.

IV. Common Maritime Disputes

Maritime operations generate several recurring types of disputes:

- A. Warranty & Performance Disputes.** These disputes involve allegations that services do not meet specified standards, that equipment fails to meet warranted specifications, or that work is defective. These disputes require careful documentation of specifications, performance data, and industry standards, and care must be given in drafting relevant contracts to specify the remedies of the client and limitation on liability of the contracted service provider.
- B. Delay.** Claims frequently arise over schedule delays, including who will bear the associated costs and who is to blame for the delays. Delays due to weather and sea conditions are very common in marine sector and, as discussed more thoroughly below, allocation of the risk of project delays should be addressed during contract negotiation to reduce or eliminate protracted claims during project execution.
- C. Payment.** Disputes over invoices, timing of payments, and change orders and additional charges, are common. These disputes may involve questions about whether services were properly authorized, whether invoices comply with contract requirements, and whether offsets for performance deficiencies are justified.
- D. Casualties.** Claims arising from vessel collisions, personal injuries, equipment damage, well control incidents, and the like commonly arise. In addition to contractual risk allocation, maritime law and other applicable laws and regulations provide specialized procedures for some types of casualty investigations. Casualty claims may involve multiple parties and insurers with complex causation and damages issues.

V. Key Contractual Provisions in Maritime Contracts

Effective maritime contracts require careful attention to essential provisions that allocate risks, define obligations, and provide mechanisms for resolving disputes.

A. Indemnity and Hold Harmless Clauses

Indemnity provisions allocate liability for injuries, damages, and losses among the parties. In maritime contracts, these clauses are among the most heavily negotiated provisions.

Maritime contracts typically employ "knock-for-knock" indemnity structures, where each party assumes liability for injuries to its own personnel and damage to its own property, regardless of fault. This structure promotes operational efficiency by eliminating disputes over fault allocation for many incidents. For example, a drilling contract might provide that the operator indemnifies the drilling contractor for injuries to

the operator's personnel, while the drilling contractor indemnifies the operator for injuries to the contractor's personnel. Likewise, a tug owner might provide that the barge owner indemnifies the tug for injuries to the barge's personnel, and vice versa. However, knock-for-knock provisions may not apply to all losses. Liability for pollution, damage to third-party property, and damage to an offshore well itself typically require separate indemnity provisions that reflect the parties' relative ability to control these risks.

Under federal maritime law, an indemnity agreement can require one party to indemnify another even for that party's own negligence, so long as the requirement for a party to be indemnified for its own negligence is "clear and unequivocally expressed." Seal Offshore, Inc. v. American Standard, Inc., 736 F.2d 1078, 1081 (5th Cir. 1984). In other words, the contract must "clearly and unequivocally" state that the marine subcontractor/vendor must indemnify the company for injuries to a subcontractor employee, even when such injuries are caused (at least in part) by the company's own negligence. If this language requiring indemnity even for a party's own negligence is missing, courts will not infer it—even if both parties intended broad indemnity at the time of contracting. Therefore, clear drafting of the maritime contract's indemnity provision is essential, if the goal is to shift responsibility for one's own negligence.

Some states have enacted anti-indemnity statutes limiting or voiding indemnity provisions, especially when the agreement requires indemnity to a company for its own negligence. The company must establish that the contract at issue is governed by maritime law in order to avoid application of a state's anti-indemnity statute. Otherwise, the indemnity provision may be voided under state law or limited to preclude indemnity for a party's own negligence.

Further, under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(b), indemnity agreements requiring an employer to indemnify a third-party vessel for its own negligence are generally void.

B. Insurance Requirements

Together with a well-drafted indemnity provision, a maritime contract should also include detailed and clear insurance requirements. Maritime contracts typically require several categories of insurance coverage.

Hull and machinery (H&M) insurance covers physical damage to vessels and offshore units. H&M policies address marine casualties (collisions, groundings, fires, sinking), weather damage, and machinery breakdowns, with coverage extending to the vessel itself, machinery, equipment, and often spare parts.

Protection and Indemnity (P&I) insurance covers third-party liabilities not addressed by H&M policies, including bodily injury, environmental pollution, wreck removal, cargo damage, collision liability, damage to fixed and floating platforms, fines and penalties, and legal defense costs.

Additional frequently required coverages include workers' compensation, employer's liability, general liability, and specialized policies depending on the operations at issue.

Well-drafted insurance clauses specify: (1) types and amounts of required coverage for each policy category; (2) acceptable insurers; (3) additional insured designations for contract counterparties and potentially for parent companies, affiliates, and lenders; (4) primary and non-contributory coverage specifications preventing contribution from additional insureds' own policies; (5) certificates of insurance evidencing coverage before operations commence, showing all required terms including additional insureds and subrogation waivers; (6) 30-day notice requirements before cancellation or material changes; and (7) self-insurance provisions addressing when parties may self-insure based on financial strength criteria.

Requiring additional insured coverage is essential to ensure the company has an added layer of protection if a casualty occurs, especially if the indemnity provision is voided or limited. When requiring additional insured coverage under the subcontractor's or vendor's policy, consider requiring coverage up to the full limits of available coverage (as opposed to a certain sum amount). Also, the additional insured

provision should require removal of any 'as owner' limitation. To clarify, even when a maritime subcontractor names the company as an 'additional insured,' coverage may still fail if the P&I policy restricts additional insured status to liability 'as owner' of the vessel. That phrase—common in P&I policies—means the policy provides coverage only for liabilities arising from the company's ownership of the vessel. If operating, towing, or interacting with the subcontractor's vessel, you are not acting 'as owner,' and the P&I carrier may deny coverage.

Mutual waivers of subrogation are also essential to marine risk management, preventing insurers from pursuing subrogation claims against contract parties and thereby preserving knock-for-knock indemnity structures. Without such waivers, insurers who paid claims could pursue recovery from responsible third parties in the insured's name, undermining the parties' intended risk allocation. Effective subrogation waivers extend to all relevant policies—H&M, P&I, cargo, liability, and workers' compensation coverage—and survive contract termination for incidents occurring during the contract term. These provisions ensure that each party's insurers bear losses allocated to that party by contract, regardless of fault, making mutual subrogation waivers a cornerstone of marine contracting.

C. Waiver of Consequential Damages

Exclusions of consequential damages have become ubiquitous in maritime contracts, appearing in virtually every service agreement, charter party, and construction contract in the industry. These provisions eliminate liability for lost profits, business interruption, loss of production, and other indirect damages, fundamentally shaping risk allocation between parties. By limiting recovery to direct damages actually incurred—repair costs, replacement expenses, and reasonable mitigation costs—these provisions create predictable risk frameworks. The exclusions protect service providers from catastrophic exposure while preserving clients' remedies for actual losses directly caused by performance failures.

D. Limitation of Liability Clauses

Maritime contracts routinely incorporate contractual provisions limiting liability, reflecting the unique risk profile and economic realities of maritime operations. These limitations must be carefully drafted to ensure enforceability under maritime law, which applies specific rules governing liability caps and exclusions.

One of the most common limitation mechanisms is a cap on total liability, typically expressed as a multiple of the contract price or annual contract value, and which protects service providers from catastrophic exposure while preserving meaningful remedies for customers.

While contractual limitations are generally enforceable in maritime contracts between sophisticated commercial parties, courts scrutinize such provisions to ensure they are not unconscionable. Limitations for intentional breaches or gross negligence will not be enforced unless the contract clearly and unambiguously covers such conduct. Proper drafting therefore requires explicit language addressing the scope of excluded damages and the types of conduct to which limitations apply.

E. Liquidated Damages Provisions

Liquidated damages (LDs) provisions establish predetermined compensation amounts for specific breaches, most commonly delays in achieving contractual milestones. These clauses generate divergent perspectives among contract parties. Critics argue that LDs impose rigid penalties that may not reflect actual damages and can create adversarial relationships during project execution. Proponents, however, value the certainty and finality LDs provide, eliminating protracted disputes over damage quantification and enabling parties to assess financial exposure with precision.

When parties elect to include liquidated damages provisions, careful drafting is essential to achieve balanced risk allocation. Contractors should insist that LDs constitute the client's sole and exclusive remedy for delays, with express language precluding additional claims for consequential damages, lost profits, or

other delay-related losses. Without such protective language, contractors face potential exposure to both liquidated damages and common law damage claims, defeating the certainty rationale underlying LD provisions.

Contractors should also negotiate protections against cascading or "knock-on" liquidated damages that compound across project phases. Early delays in one contract phase should not automatically trigger LD obligations for subsequent phases, particularly where the contractor has opportunity to recover schedule through acceleration or other means. Well-drafted provisions limit LD exposure to delays directly attributable to the contractor's performance within defined contract phases.

Finally, contractors should seek provisions voiding or crediting liquidated damages when final project milestones are achieved, recognizing that interim delays may not ultimately impact project completion or client operations. Such provisions acknowledge that the purpose of LDs is to compensate for actual harm from delays, and where no ultimate delay occurs, interim LD assessments should be reversed or credited. This approach balances the client's interest in schedule adherence with the contractor's interest in avoiding penalties for delays that prove inconsequential to final project delivery.

F. Choice of Law Clauses

Choice of law provisions determine which jurisdiction's substantive law governs the interpretation and enforcement of the contract. In maritime contracts, these clauses are critical because different jurisdictions may have vastly different rules regarding liability, remedies, and damages.

For domestic contracts, parties often select the General Maritime Law of the United States (federal maritime law) as the governing law, potentially supplemented by the law of a particular state for non-maritime issues. While federal maritime law generally preempts state anti-indemnity statutes for maritime contracts, parties can unintentionally reintroduce state restrictions through a broad or alternative choice-of-law clause. A clause selecting a state's law can override maritime protections, even when the contract is plainly maritime. Therefore, company's should ensure the choice-of-law clause aligns with the intended purpose of the contract and its protections. As previously discussed, application of federal maritime law will help ensure application of the indemnity provisions and help prevent such provisions from limitation by state anti-indemnity statutes.

That said, for offshore contracts, the Outer Continental Shelf Lands Act complicates this analysis by making adjacent state law applicable as surrogate federal law in certain circumstances. Well-drafted choice of law clauses in offshore contracts specifically address which state's law will apply in absence of applicable federal law.

International maritime contracts frequently select either U.S. or English law as the governing law, as both provide sophisticated maritime legal frameworks and predictable enforcement mechanisms. Parties should consider carefully whether they want the protections (and limitations) of U.S. maritime statutes like the Jones Act and COGSA, or prefer a different legal framework. The choice of law should be coordinated with the jurisdiction and arbitration clauses to ensure a coherent dispute resolution framework.

Courts generally enforce choice of law clauses in maritime contracts, provided they do not violate public policy. However, certain U.S. maritime law provisions, such as COGSA's minimum liability standards, cannot be contracted around even with a choice of law clause selecting foreign law.

G. Standby, Force Majeure & Weather

Although negotiated by the commercial teams at project outset, the issue of who bears the costs of project delays—particularly those due to weather and force majeure—remains one of the most frequent sources of conflict between clients and contractors.

Contractors typically build standby rates into their rates structure. Standby rate provisions address compensation for periods when service providers remain available and ready to perform but cannot execute

contracted services due to circumstances beyond their control. These provisions are essential in maritime contracts given the frequency of operational interruptions from weather conditions, client delays, equipment unavailability, regulatory suspensions, and third-party dependencies that characterize offshore operations.

Disputes frequently arise over whether circumstances justify standby rates or constitute force majeure events potentially triggering different contractual consequences, whether the service provider could have mitigated by relocating to alternative work, and whether client-caused delays warrant full operating rates rather than reduced standby compensation.

Well-drafted standby provisions clearly define triggering events that justify standby rates rather than full operating rates or demobilization. Common triggers include weather conditions preventing safe operations, waiting on client-furnished equipment or personnel or client suspensions, suspension due to third-party operations, and regulatory holds. Contracts should specify the maximum standby duration before alternative arrangements such as termination or demobilization become available to the contractor. The contractor should also seek to include language entitling it to an equitable adjustment to the schedule as well as payment for any additional port calls necessitated by the delay.

Force majeure clauses excuse performance when extraordinary events beyond the parties' control make performance impossible or impracticable. Traditional maritime law does not necessarily recognize force majeure as a defense to non-performance unless the contract explicitly provides for it. Therefore, maritime contracts typically include detailed force majeure clauses listing specific events that will excuse performance, such as acts of God, war, terrorism, strikes, government actions, and severe weather. Force majeure provisions should specify the consequences of a force majeure event, including whether it suspends performance, extends contract duration, or entitles parties to terminate.

The parties should carefully consider at the outset of negotiations whether the contract price is inclusive of weather or not—*i.e.*, whether the possibility of delays due to potential weather events has been built into the price and schedule proposed to the client by the contractor, or whether delays during weather events are to be compensated at the standby rate. It is critical that the parties be clear on expectations and that the contract clearly reflect their agreement. Conflict can arise where the parties intend for weather delay time to be paid at the standby rate, but where a force majeure clause includes default language excusing the client from performance during certain types of storms. To remedy this potential contractual gap, the contractor can endeavor to include “weather events of any severity” and/or “force majeure” as triggering events for the payment of standby.

H. Warranty Provisions

Warranty provisions establish service providers' commitments regarding quality and performance of services and equipment. These provisions balance clients' expectations for professional performance against maritime operational realities. Offshore service contracts typically include workmanship warranties (professional performance consistent with industry standards), equipment warranties (freedom from defects and regulatory compliance), and compliance warranties (adherence to laws and specifications). Contractors often resist broad fitness for purpose warranties given the numerous variables affecting offshore performance beyond their control. Warranties typically exclude failures caused by client-furnished equipment, client instructions, abnormal operating conditions, improper maintenance, third-party actions, force majeure events, and the changing marine environment.

Offshore projects involve numerous contractors, complex interfaces, and client-controlled variables; without proper limitations, warranty provisions could expose service providers to liability for project outcomes far beyond their contracted responsibilities or control. Contractors must ensure warranties are confined to their specific deliverables, explicitly excluding responsibility for overall project success, production targets, or outcomes dependent on other contractors' work or client decisions. For example, a subsea installation contractor should warrant proper installation according to specifications, not the equipment's ultimate production performance, which depends on reservoir characteristics, equipment design by others, and operational decisions beyond the contractor's control.

Warranty periods typically range from 30 days to one year following service completion, varying by service type. Warranty remedies prioritize repair or re-performance over monetary damages, with contractors obligated to correct defective work within reasonable timeframes or reimburse the client for deficient work which cannot be rectified. Warranty provisions often state that repair or replacement constitutes the client's sole and exclusive remedy for warranty breaches, precluding claims for damages, and limit a client's right to force reperformance after demobilization.

I. Payment Terms and Security

Payment provisions in maritime and offshore service contracts establish the financial framework governing compensation for services rendered, addressing payment structures, timing, conditions, and dispute resolution mechanisms. These provisions require careful drafting to balance service providers' need for predictable cash flow against clients' interest in ensuring satisfactory performance before payment.

Standard payment terms typically require payment within 30 to 60 days following invoice submission, though some clients seek to impose periods as long as 90 or even 120 days. Contractors should scrutinize provisions that extend payment timelines through invoice approval periods, where clients receive time—sometimes as much as 30 days—to approve invoices before payment terms commence, effectively extending terms by 30 or more days.

Contractors should also resist "paid if paid" and "paid when paid" provisions that make payment contingent on client receipt of upstream payments. These clauses improperly transfer client credit risk to service providers and can leave contractors unpaid indefinitely despite satisfactory performance. Where clients insist on such language, contractors should negotiate strict time limits (*e.g.*, payment due within 90 days regardless of upstream payment) converting open-ended contingencies into limited deferrals.

Contractors should secure explicit rights to payment of all undisputed invoice amounts within standard payment terms, regardless of disputed amounts. Disputes over specific line items should not delay payment of undisputed portions, maintaining contractor cash flow during disagreements. Contractors should further negotiate express rights to suspend performance or terminate contracts for nonpayment of undisputed sums due. Suspension rights typically activate after undisputed amounts remain unpaid for a fixed period days beyond the due date, following written notice. Termination rights for persistent nonpayment allow contractors to exit relationships with financially distressed clients, with provisions addressing payment for work performed and demobilization costs.

J. Dispute Resolution

Maritime contracts employ various dispute resolution mechanisms designed to provide efficient, expert, and enforceable resolutions while minimizing disruptions to ongoing operations.

1. Arbitration. Maritime and offshore contracts frequently include arbitration clauses, recognizing that arbitrators with industry knowledge can better understand technical disputes and appreciate the commercial realities of offshore operations. Increasingly, maritime and offshore energy contracts specify institutional arbitration under ICC, AAA, or other rules rather than ad hoc arbitration, providing administrative support and established procedures. Society of Maritime Arbitrators (SMA) arbitration is widely used for U.S.-based maritime disputes while LMAA arbitration clauses incorporating London Maritime Arbitrators Association procedures are also common, particularly in international offshore energy contracts.

Arbitration clauses should address several key issues:

- Number of arbitrators (commonly three for substantial disputes, one for smaller claims)
- Method of selecting arbitrators (each party selects one, who jointly select the third)
- Seat of arbitration (New York, London, Houston, etc.)
- Governing arbitration rules

- Applicable substantive law
- Language of proceedings
- Confidentiality requirements
- Allocation of costs and fees

Well-drafted arbitration clauses also address emergency arbitration procedures for urgent matters, consolidation of related disputes, and joinder of additional parties—issues that frequently arise in multi-party offshore projects. Enforcement of arbitration awards benefits from the New York Convention, which provides for recognition and enforcement of arbitration awards in over 160 countries. This makes arbitration particularly attractive for international offshore contracts, as awards can typically be enforced more easily than foreign court judgments.

Parties should recognize that arbitration is not always faster or cheaper than litigation, particularly for complex offshore disputes involving extensive technical evidence and multiple parties. Arbitration clauses should be drafted with realistic expectations about costs and timelines.

2. Litigation. Despite arbitration's popularity, many maritime contracts provide for litigation in federal courts under admiralty jurisdiction. Depending on the jurisdiction, courts may offer several advantages: established procedural rules, publicly available precedents, appellate review, and broad discovery procedures.

Forum selection clauses specifying federal courts in particular districts are generally enforceable in maritime cases.

Advantages of federal court litigation include:

- Established procedural rules
- Judges with maritime law expertise in major maritime districts
- Appellate review providing guidance on unsettled legal issues
- Public proceedings that may establish precedents for future disputes
- Broad discovery, including depositions and document production
- Jury trials available for certain claims

Disadvantages include:

- Public proceedings exposing proprietary information and inviting public scrutiny
- Potentially longer timelines than arbitration
- Judges may lack specialized offshore industry knowledge depending on the jurisdiction
- Limited ability to consolidate cases with pending arbitrations

3. Alternative Dispute Resolution Methods. Beyond arbitration and litigation, offshore contracts increasingly incorporate alternative dispute resolution (ADR) mechanisms designed to resolve disputes collaboratively while preserving business relationships. Mediation involves a neutral third party who facilitates negotiations between disputing parties without imposing a resolution. Mediation is particularly effective where ongoing relationships are important, such as between operators and long-term service contractors. Many contracts require mediation before arbitration or litigation, creating an opportunity to resolve disputes without the expense and adversarial nature of formal proceedings and the possibility of creative solutions unavailable in arbitration or litigation. Parties may agree to compromise positions, modify ongoing contracts, or structure future relationships in ways that address root causes of disputes. However, mediation requires both

parties' good faith participation and willingness to compromise—it cannot resolve disputes where parties' positions are irreconcilable.

4. Multi-Tier Dispute Resolution Procedures combining these methods are increasingly common. A typical structure might require:
 - i. Direct negotiation between designated representatives, *followed by*
 - ii. Escalation to senior executives, *followed by*
 - iii. Mediation with a neutral facilitator, *followed by*
 - iv. Arbitration or litigation if earlier steps fail.

These procedures encourage early resolution while preserving formal dispute resolution options if collaboration fails.

VI. Conclusion

Maritime contracts represent sophisticated legal instruments that balance complex technical requirements, substantial financial risks, and intricate regulatory frameworks. While this article has focused on core contractual provisions including indemnity, limitation of liability, insurance, payment terms, and dispute resolution mechanisms, the list of critical terms discussed herein is not exhaustive. Successful maritime contracts must also address numerous additional considerations that are equally vital to comprehensive risk management and operational success, including intellectual property, confidentiality, compliance, and sanctions. The maritime industry operates in an environment of continuous evolution—technological advancement, regulatory development, market volatility, and geopolitical change constantly reshape the landscape in which these contracts function. Successful contracting requires not only mastery of established legal principles but also adaptability to emerging challenges and opportunities.

VII. Case Study: The Perils of Informal Arrangements and Uncontrolled Signatory Authority

This case study, inspired by real events giving rise to two separate lawsuits, highlights the importance of having a valid contract in place before undertaking maritime work. It is also a cautionary tale against poorly-trained field workers signing documents in the field.

A marine services provider ("**Service Provider**") was hired by a client ("**Client**") to perform offshore surveying services. The Client owned and operated the vessel upon which the Service Provider's work was to take place. Service Provider and Client had a long and amiable history of working together on various projects. Throughout their long history, each party believed that a Master Services Agreement existed.

During the course of the work, an employee of Service Provider (the "**Employee**") allegedly sustained alleged neck and back injuries during a personnel basket transfer on Client's barge. The Client's employees were also operating the crane from which the personnel basket was carried.

The Employee filed a Jones Act lawsuit against both the Service Provider and the Client in state court. Co-defendants Service Provider and Client successfully removed the case to federal court, but in exchange for the right to have the case remanded, the Employee's attorney agreed to dismiss non-diverse Service Provider from the lawsuit with prejudice at no cost. This left Client alone in state court in Harris County, Texas.

At the same time, Client tendered defense and indemnity to the Service Provider, assuming that traditional knock-for-knock indemnities existed between the parties. However, when the parties searched their files for the Master Services Agreement, there was none to be found. Knowing that without a contract requiring that Service Provider indemnify Client, Service Provider's underwriters would not cover the claim, Service Provider rejected this tender on two grounds:

1. No master service agreement or job-specific contract existed between the parties establishing contractual indemnity obligations; and

2. No basis for tort indemnity existed, as the Service Provider did not own or operate any of the equipment involved in the incident.

Despite the parties' expectations, the absence of a contractual relationship between the parties proved decisive in allowing the Service Provider to avoid assuming defense and indemnity obligations that would typically flow from knock-for-knock provisions common in maritime services agreements. The lack of contractual provisions led to protracted litigation over whether any agreement existed and what its scope might be.

Lesson 1: This case demonstrates the significant consequences that can flow from performing maritime services without a formal contractual framework. Maritime service providers should ensure that comprehensive written agreements are in place before commencing work, clearly defining the scope of services, risk allocation, indemnity obligations, insurance requirements, and other critical terms.

Client was displeased with this result and following the Service Provider's dismissal from the state court action, Client filed a separate lawsuit in federal court again seeking defense and indemnity from Service Provider. The basis for this claim was a Vessel Boarding Agreement ("VBA") dated 2014 that Client located deep within its files at some time after Service Provider's dismissal by Employee. While the VBA did contain indemnity language purporting to require Service Provider to indemnify Client for personal injury to Service Provider's employees, the VBA was unrelated to the incident. The VBA was signed eight years prior to the incident by a field-level Party Chief working on an entirely different project. In fact, at the time of signing, both Service Provider and Client were subcontractors working for a separate third-party client. The Party Chief signed the VBA to facilitate boarding the Vessel Owner's vessel for that specific 2014 project.

The circumstances surrounding this VBA revealed a critical lesson about establishing clear guidelines related to signatory authority and ensuring that field personnel are appropriately trained on those guidelines. This VBA was never intended to create ongoing, indefinite indemnity obligations for all future interactions between the parties. In fact, the Party Chief swore to having signed dozens or hundreds of similar boarding agreements throughout his career with intent only to bind Service Provider for the limited vessel visit at issue. However, it did not contain any temporal or project-related limiting language.

Lesson 2: Here, what appeared to be a routine administrative document (an old vessel boarding agreement) contained indemnity language creating potentially significant long-term liability. Documents signed in the field often lack clear limitations on scope, duration, and applicability, leading to creative disputes about their intended effect to leverage settlement. To avoid this issue, organizations should implement and enforce clear policies regarding signatory authority, including (1) limiting authority to sign contractual documents to designated legal or senior management personnel, and deliberately training all employees on that standard; (2) training field personnel to decline requests to sign any documents and to refer such requests to appropriate management; (3) implementing systems for tracking and retaining copies of any documents signed in the field; and (4) ensuring that any vessel boarding agreements or similar documents contain explicit limitations on scope, duration, and applicability.



FRIDAY AGENDA

FRIDAY, APRIL 24, 2026

7:00 – 8:30 Breakfast Buffet

8:30 – 11:45 **THE SUNKEN BARGE SCENARIO**

This scenario is simple and opens the door for hours and hours of discussion and advice regarding legal obligations of each party involved. This is a common scenario that can occur any time and day and at any fleet.

“Savoie Towing, LLC is the tower and operator of the Tank Barge 101, pursuant to a written Bareboat Charter Agreement it has with the owner of the barge, Grantham Barges, LLC. At 0200 Hours the tug M/V MO, owned by Savoie Towing LLC, places the Tank Barge 101, owned by Grantham Barges, LLC, in the Robin Fleet, LLC which is located on the Mississippi River above Burnside terminal. The crew of the M/V MO tied the TB 101 off with gear from the fleet and called Robin Fleet dispatch to advise of “drop off” and location of the TB 101 in the fleet. The tug then immediately departs the area. The fleet places the barge on its fleet “picture” and proceeds with business as usual. Neither the tug or barge owner notified the fleet of any problems with the TB 101. The TB 101 was not inspected by any fleet personnel when brought into the fleet, even though Robin Fleet had personnel on duty at the time. The fleet “Tariff” obligates any towing vessel or barge owner to notify the fleet of any leakage or problem with any barge prior to placement in the fleet. One of the fleet personnel was undertaking a routine inspection of the fleet at around 0500 Hours. He was inspecting the lines of another barge adjacent to the TB 101 when he heard a loud snap, he turned and saw the TB 101 list heavily to one side, break its ties and quickly appeared to begin to sink. There was an immediate sheen as oil discharged into the river. Unfortunately, for the fleet personnel who happened to be a member of the crew of the fleet tugboat, when he turned he also slipped and fell on the deck of the adjacent barge, throwing out his back. He immediately called in the incident to dispatch and called for personal assistance, also advising dispatch of the situation involving the discharge of the oil and the possible sinking of the barge. The tug operator, Savoie Towing, and barge owner, Grantham Barges, are notified by Robin Fleet’s manager, and a demand is made to “come take care of” the sinking barge and the spill. Out of precaution, the fleet contacts and activates its OSRO. The US Coast Guard also is immediately notified and closes river traffic as a result of oil being discharged into the river.”

Who will be “Running the Show” and Responsible for:

- | | |
|--|--|
| <ul style="list-style-type: none">• Preservation of evidence from the sinking;• Pollution response and cleanup;• Salvage of the barge;• Determining the cause of the sinking and whether any negligent acts occurred; | <ul style="list-style-type: none">• Insurance coverage issues;• Loss of profits due to river closure;• Environmental damage and subsequent claims;• Identifying which experts are needed and engaging the experts;• Etc., etc. |
|--|--|

Moderator:

Marc C. Hebert, Esq.

Panel Members: What action should be taken by the following parties based on either Legal Requirements or Industry Custom and Practice:

- The Defense Lawyer: Kent Morrison, Phelps Dunbar
- The Pollution Lawyer: John Nicoletti, Nicoletti Hornig Namazi Eckert & Sheehan
- The United States Coast Guard: COTP Greg Callaghan
- The Marine Surveyor/OSRO: Rob Keister, Sabine Surveyors
- The Metallurgist: Bob Bartlett, Bartlett Engineering

Panel Members Seated in the Audience:

Terrence Gomez, MG Transport Services
Lee Nelson, Upper River Services
Lee LeBoeuf, L & L Marine Transportation

11:45 – 12:00 Closing Remarks

FRIDAY SPEAKERS

ROBERT D. BARTLETT, P.E. is an experienced metallurgical and mechanical engineer with over 30 years of expertise in the marine, petrochemical, and power industries. He holds a Master's degree in Metallurgical Engineering from The Ohio State University and a Bachelor's degree in Mechanical Engineering from Tulane University. Robert is a registered Professional Metallurgical and Mechanical Engineer in both Louisiana and Florida.

As the principal engineer at Bartlett Engineering, Robert has specialized in failure analysis, emphasizing the evaluation of entire systems to understand failure mechanisms. His extensive background in metallurgical engineering and equipment design allows him to take a comprehensive approach to solving complex engineering problems. Prior to founding his firm, Robert co-owned a welding and machine shop, where he gained significant experience in the design and fabrication of ASME Code process equipment and boilers. His diverse experience makes him a trusted expert in the field of equipment design and failure analysis.

CAPTAIN GREGORY A. CALLAGHAN assumed the duties as Commander, Sector New Orleans in June 2024 where he served as Deputy Sector Commander since 2022. In this capacity, he oversees over 1,000 active duty, reserve, civilian, and auxiliary Coast Guard personnel who serve over 300 miles of the Lower Mississippi River, 230 miles of the Intracoastal Waterway, and almost 4,000 miles of coastline in an area of responsibility totaling over 100,000 square nautical miles.

His previous operational assignments include Commanding Officer of Marine Safety Unit Texas City from 2016-2018 and Executive Officer from 2014-2016. There, his responsibilities included carrying out the Coast Guard's Homeland Security, Marine Safety, and Marine Environmental Protection missions in the Ports of Galveston, Texas City and Freeport, in over 120-miles of the Gulf Intracoastal Waterway, a 4,000 square-mile region of the Outer Continental Shelf, and the entrance to the nation's largest petrochemical complex. His time there included the preparation and response to Hurricane Harvey. From 2004-2008, Captain Callaghan was assigned to Sector Boston, MA, where he served as Chief of Port State Control, Assistant Chief of Waterways Management, Aids to Navigation Officer, and Senior Investigating Officer. From 2000-2004, he served at Marine Safety Office Miami, FL as Port State Control and Domestic Marine Inspector and Licensing Examiner at Regional Exam Center Miami.

Captain Callaghan's staff assignments include his most recent assignment as Chief of Prevention for the Eleventh Coast Guard District from 2019-2022 where he led staff, two Coast Guard Buoy Tenders, and more than 2,500 Auxiliarist in management of the prevention mission in an area of responsibility covering California, Nevada, Utah, and Arizona and responsible for \$500 Billion in international trade. From 2010-2014 he was assigned in the Office of Port and Facility Compliance at Coast Guard Headquarters where he served as the Coast Guard's program manager for the Transportation Worker Identification Credential enforcement and Chief of the Port and Facility Security Standards Branch leading research, development, and implementation of top priority maritime security regulations. Additionally, he was the Coast Guard representative to the U.S. and Canada Bi-National Maritime Security Working Group.

In 2020, Captain Callaghan was appointed by the Coast Guard Deputy Commandant for Operations as Chairman of the Marine Board of Investigation to investigate the causal factors in the loss

FRIDAY SPEAKERS

of the commercial fishing vessel SCANDIES ROSE and five crew members which occurred on December 31, 2019.

Captain Callaghan served in the Coast Guard Reserves from 1996-2000 as part of the Maritime Academy Reserve Training Program and was assigned to Activities New York.

Captain Callaghan is a graduate of the State University of New York Maritime College where he received a Bachelor of Science degree and an Unlimited Third Mates License in the Merchant Marine. He has Master's in Public Administration and Certification in Port and Maritime Administration from Old Dominion University, and a Master's in National Security and Resource Strategy from the National Defense University's Eisenhower School.

ROBERT KEISTER, CDR, USCG (RET) is Sabine Surveyor's vice president. He has more than 30 years of experience in the United States Coast Guard and the marine industry. While in the Coast Guard, he completed more than 400 marine inspections on barges, small vessels, supply vessels, and tankers, and he supervised and trained more than 60 Coast Guard marine inspectors. Keister retired as the commanding officer of Marine Safety Unit Houma, Louisiana, which is responsible for the largest fleet of inspected vessels in the United States. He is currently responsible for all Subchapter M and third-party Organization (TPO) activities, as well as general vessel surveys for Sabine Surveyors, managing all towing vessel surveys and audits, management audits, and pre-Coast Guard inspection consulting. Keister is an ISM, AWO/RCP, and Subchapter M lead auditor, and he is an active NAMSGlobal-CMS.

THOMAS KENT MORRISON, ESQ. is a partner with Phelps Dunbar, LLP having joined the firm in 1998 after obtaining his J.D. from Tulane University's School of Law. He holds an AV rating, is admitted to practice in all of the courts in Louisiana and regularly represents clients in jurisdictions throughout the Gulf South. Mr. Morrison previously served on the Board of Directors for the New Orleans Chapter of the Federal Bar Association and is a member of the FBA, the Maritime Law Association and the Southeastern Admiralty Law Institute. He practices in the areas of transportation, energy, maritime law, and general litigation handling cases involving commercial disputes, casualties, torts, cargo claims, collisions, personal injuries, property damage, and contractual defense and indemnity demands for maritime employers, vessel owners, longshore employers, energy companies, dock and terminal owners and their various underwriters. He also provides representation with respect to coverage issues involving a broad range of energy, marine, general liability, excess and umbrella insurance policies. He further assists marine and energy companies with their corporate structure, regulatory issues and internal and external contractual relationships.

Kent currently serves as the firm's Regional Practice Coordinator for the marine and energy practice group.

JOHN A.V. NICOLETTI is the managing partner of the firm with more than 46 years of domestic and international insurance coverage litigation experience. John represents the interests of major international and domestic underwriters in federal and state courts throughout the United States. He advises clients on a full range of insurance and reinsurance matters, with a focus on marine, inland marine, commercial property & casualty and energy insurance. John also counsels clients following pollution incidents on how to respond to the incident in compliance with federal and

FRIDAY SPEAKERS

state law (e.g., Oil Pollution Act of 1990, Clean Water Act, CERCLA and state equivalents), on coordinating with governmental agencies responding to the incident, and on how to manage third-party claims arising out of the incident. In addition, John regularly represents a variety of interests in the shipping and transportation industries in federal and state courts, as well as in arbitration, throughout the United States in connection with lawsuits arising out of maritime casualties, pollution incidents, cargo damage, charter party disputes, maritime liens, salvage, personal injury and commercial disputes.

John has also authored or reviewed and supplemented many open cargo policy forms for multiple domestic underwriters and upon request reviewed and at underwriters' request prepared risk assessment reports on cargo policy forms offered by the major brokers.

Further, John has been, and is, lead counsel for multiple insurers on COVID claims and litigations, riot/vandalism, weather-related and terrorism catastrophes, flood/wind/named storm/deductible/hurricane and sublimit controversies, home owners' policy litigation defense, corrosion analysis, fire losses, cyber risk, allocation, exhaustion and occurrence analysis, all-risk and builder's risk policies, policy and reinsurance wording and forms analysis, building and crane collapses, transportation accidents, boiler and machinery, utility and power generation loss, contamination, arson and fraud, defense of insurers against public transportation agency first-party lawsuits, reinsurance arbitration, federal multi-district disaster litigation, chemical plant loss, oil company claims, refinery loss and related energy loss, on shore and off shore energy loss, coal and gold mining loss, satellite loss, defense of officers and directors, whistle blower defense, defamation defense, products liability defense, commercial marine coverage disputes, warehouse liability, marine cargo, bills of lading disputes, construction accidents, construction project sequence analysis, defense of serious personal injury, litigation of commercial and real estate disputes, bankruptcy, employee-related issues, land use, financial guaranty, retrospective premium, advertising liability, and product recall.

John Nicoletti argues motions and appeals in various federal and state courts. He has litigated as U.S. counsel in international commercial, insurance and reinsurance disputes, applying U.K., Bermudian, French and Spanish law, represented U.S. clients in foreign insurance and commercial disputes, and assisted foreign clients seeking discovery in the U.S. regarding foreign litigations. John has represented foreign clients in commercial disputes.

John has litigated cases in federal and state courts throughout the United States, including New York, New Jersey, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Illinois, Iowa, Louisiana, Maine, Massachusetts, Michigan, Missouri, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia, Washington, Hawaii, the U.S. Virgin Islands and West Virginia.

John has authored articles, made presentations as part of industry panels, and lectured on multi-layer approaches to ambiguity questions, weather related catastrophes, ensuing loss, punitive damages, business interruption, occurrence issues, cyber and CGL insurance trends, and claims leadership.

THE SUNKEN BARGE SCENARIO

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PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert, Esq.

Kent Morrison
Phelps Dunbar

**GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
RIVER & MARINE INDUSTRY SEMINAR
2026**

THE SUNKEN BARGE SCENARIO

April 24, 2026

Thomas Kent Morrison
Partner
Phelps Dunbar LLP
504-584-9306
kent.morrison@phelps.com

The incident involving the sinking and discharge of oil from Tank Barge 101 presents a layered allocation-of-risk problem under the Oil Pollution Act of 1990 (“OPA”), general maritime law, the Jones Act, and the governing contractual instruments between the parties. At the center of the dispute is Savoie Towing, LLC (“Savoie”), which operated the barge pursuant to a written bareboat charter from its titled owner, Grantham Barges, LLC (“Grantham”). Savoie delivered the barge into the fleeting facility operated by Robin Fleet, LLC (“Robin Fleet”) using its tug, the M/V MO. The barge appeared to be properly dropped in the fleet at approximately 0200 hours, no issues were reported to the fleet, and fleet personnel did not conduct an inspection upon arrival. Approximately three hours later, the barge suddenly listed, broke its moorings, and began to sink, discharging oil into the Mississippi River and prompting Coast Guard intervention and a river closure. During the immediate response, a fleet employee—apparently a crew member of the fleet tug—slipped and sustained a back injury.

From a statutory standpoint, the starting point for the environmental liability analysis is OPA, which imposes strict liability for removal costs and specified damages upon the “responsible party” for a vessel from which oil is discharged into navigable waters. For a tank barge, the responsible party is defined as the owner and operator. Here, there are arguments that Savoie, Grantham, or Robin Fleet could be the “operator”.

In the context of a true bareboat (demise) charter, operational control and possession of the vessel are transferred to the charterer, rendering the charterer the owner pro hac vice. Thus, if the bareboat charter between Grantham and Savoie validly transferred complete control to Savoie, it could be deemed both operator and functional owner for OPA purposes – at least between it and Grantham. Courts addressing similar arrangements routinely place primary OPA liability on the demise charterer rather than the titled owner, particularly where the charterer supplies crew, directs navigation, and assumes maintenance responsibilities. Consequently, Savoie could face substantial initial exposure for removal costs, which are not subject to statutory limitation, as well as potential civil penalties and private claims for economic loss resulting from the spill and the temporary river closure. To be clear, the fact that Savoie might be the “responsible party” initially responsible for the foregoing does not foreclose potential recovery actions against either Grantham or Robin Fleet to the extent they caused or contributed to the loss (or vice versa if those other parties were found to be the operator).

Although Grantham is the titled owner of the barge, its liability under OPA depends largely on whether it retained any operational control or responsibility for the barge at the time of loss. If the bareboat charter truly divested Grantham of control, it may argue that it is not the “operator” and therefore should not bear primary statutory liability pursuant to OPA. Nevertheless, title ownership alone may suffice to bring Grantham within the statutory definition of responsible party in some enforcement contexts, leaving allocation to be sorted out contractually between owner and charterer.

Finally, there also is an argument, although admittedly somewhat less certain given the temporal aspects in play of the delivery of the barge, that Robin Fleet was the “operator” for purposes of OPA. Under the fact pattern at issue, total and complete control was passed from Savoie to Robin Fleet over the barge. At the same time, only 3 hours passed between the delivery of the barge and the sinking. There are viable arguments running in each direction as to whether or not

under such circumstances Robin Fleet should be considered the “responsible party” for purposes of OPA.

It is worth remembering that the purpose of OPA is to expedite the response and clean up following a pollution event. It does not foreclose the putative “responsible party” from subsequently pursuing a recovery from others that the “responsible party” maintains caused or contributed to the loss. Here, each of the parties faces potential liability even if not deemed to be the initial “responsible party”.

Separate from OPA, Grantham could face liability under general maritime law if the sinking resulted from a pre-existing structural defect that rendered the vessel unseaworthy at the time it was delivered under the charter. A bareboat charter carries with it an implied warranty that the vessel is seaworthy at delivery. If the failure that caused the sudden listing and sinking stemmed from latent structural deterioration existing before Savoie assumed possession, or from some other defect about which Grantham was either aware or should have been aware, Grantham could be exposed for breach of that warranty.

By contrast, if the defect arose during Savoie’s possession of the barge, ultimate responsibility could rest with it. That exposure would potentially exist whether Savoie caused the defect in its operation and possession of the barge, or knew or should have known of the defect when it arose after the barge came into its possession. It should be self-evident that exposure exists if Savoie actively caused the defect that resulted in the sinking of the barge. But it arguably also is the case if the defect arose during Savoie’s possession of the barge and it was a defect that either was known to exist or should have been known to have existed through prudent possession, maintenance, and inspection of the barge.

Robin Fleet’s potential liability, meanwhile, would center on its role as the bailee for the barge as a fleet operator. While fleeters are not insurers of vessels placed in their custody, they do owe a duty of reasonable care under the circumstances for vessels in their possession. The fact that fleet personnel did not inspect the barge upon delivery, despite being on duty, raises a potential for liability exposure. It certainly could be argued that Robin Fleet’s failure to inspect the barge upon entry constituted a breach of reasonable care, although undoubtedly Robin Fleet will counter that the sinking of the barge only three hours after its admission into the fleet did not give it enough time to inspect the barge and suggests a defect about which little could have been done in any event. Depending upon the facts, there could be arguments with respect to whether or not Robin Fleet’s response once the barge was noted to be listing was adequate. In sum, regardless of who would be deemed to be the responsible party, each of the parties could ultimately face liability for the loss and any attendant costs, fines, penalties, and damages

The personal injury sustained by the fleet employee introduces an additional layer of liability. Because the injured individual appears to have been a crew member of the fleet tug, he likely qualifies as a Jones Act seaman. As such, he may assert claims against Robin Fleet, his employer, for negligence under the Jones Act. Once again, the cause of the oil discharging from the sinking barge creating a slippery condition on the adjacent deck could implicate liability for each of the parties involved.

Finally, Grantham and/or Savoie could consider invoking the Limitation of Liability Act in an effort to cap its/their liability with respect to the potential personal injury/Jones Act claim at the post-casualty value of the M/V MO and the pending freight ***assuming the potential exposure with respect to the personal injury/Jones Act claim warranted as much.*** To be clear, such limitation would not shield or limit the responsible party from OPA removal costs, which are expressly exempt from limitation. However, as is well known, limitation is unavailable where the casualty occurred with the privity or knowledge of the vessel owner. If the sinking resulted from conditions that that Grantham or Savoie knew or should have known about, or as a consequence of lax policies that played a part in the loss, it could be quite difficult to establish entitlement to Limitation of Liability with respect to any potential personal injury/Jones Act action.

In sum, the fact pattern presents a byzantine maze of potential OPA responsibility and liability exposure for each of the identified parties that, ironically, would likely only get more opaque and uncertain as the granular details of each parties involvement with the vessel, adherence or non-adherence to its policies and protocols, and the actual cause of the loss revealed themselves.

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- Etc., etc.

PRESENTED AT THE
GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
2026 RIVER AND MARINE INDUSTRY SEMINAR

Moderator:
Marc C. Hebert, Esq.

John A. V. Nicoletti
Nicoletti Hornig Namazi Eckert & Sheehan

**GREATER NEW ORLEANS BARGE FLEETING ASSOCIATION
RIVER & MARINE INDUSTRY SEMINAR
2026**

THE SUNKEN BARGE SCENARIO

April 24, 2026

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The sinking of the Tank Barge 101 and the release of oil from the sunken hull triggers the immediate involvement and response from the United States Coast Guard ("USCG") who, for want of a better term, is the enforcement agency under the Oil Pollution Act of 1990 ("OPA") designated for controlling and directing the response to a petroleum spill (or substantial threat of discharge or release of the same) in or on navigable waters. Per OPA, the party designated as the Responsible Party ("RP") is held strictly liable in the first instance for all OPA charges as identified below.

The USCG first role is to designate the RP who is defined by OPA as the owner of the oil and/or operator of the vessel from which the oil is leaking into the seaway. Upon receiving the USCG's letter designating the cargo owner or vessel operator as the RP and assuming there are no grounds to challenge the designation, it is imperative for the RP to act immediately to notify its pollution and separate liability insurers and secure the insurers' consent to assemble a professional response team, which consists of legal counsel, an oil spill response manager or team who works with the USCG to set up the response plan, an environmental impact team for eventual environmental claims posed by the state and/or federal governmental agencies, a forensic accountant to vet all invoices related to the clean-up, particularly invoices submitted by one or more Oil Service Response Organizations ("OSROs") and a third party administrator to process claims submitted by third-parties, including fishermen, allegedly impacted and damaged by the spill.

The RP will be responsible for the following costs and/or damages:

1. The cost of the clean-up
2. The cost of tracking and paying for all potential environmental impacts/damages, including any associated environmental fines and penalties
3. The receipt, vetting and settlement of all valid third-party claims for direct damage from being oiled and related business interruption losses, lost profits and impaired earning capacity, including fishermen claims.

The Cost of Clean-Up

As noted above, the USCG controls the manner and extent of the clean-up operation. No spill is ever fully remediated and the USCG determines when a designated area has reached a reasonable end point. The spill manager, if respected by the USCG, influences when an area meets maximum remediation. If left to its own discretion, the USCG always calls for a maximum clean-up effort even if not warranted. These costs can be constrained by the appointment of the correct oil spill response manager who has worked with the USCG on prior spills and in whom the USCG has confidence in assisting with overseeing the clean-up process. The efforts to manage and control the cleanup process is discussed and set at meetings held by the Unified Command. The RP's representatives are part of and attend these daily meetings. With the USCG's consent, the oil spill response manager will reduce the clean-up response by reducing unnecessary or redundant manpower and equipment and negotiate reasonable rate terms for labor and equipment as the number of OSROs responding to a spill are reduced. The manager will work with a forensic accountant to vet the invoices submitted by all involved with the clean-up. It is not uncommon for invoices to charge for manpower or equipment actually deployed by the vendors. In addition, the USCG will submit invoices for its cost which also require review by the oil spill response manager and the accountants,

The Environmental Costs

In the first instance, the federal and state environmental agencies will deploy representatives and monitoring equipment to gauge the impact of the spill on the environment, such as air and water pollution, ground contamination, fish and bird kills and the like (a Natural Resource Damage Assessment). To illustrate the complexity of assessing environmental damages, the damages associated with bird kills is not set by the actual number of birds killed or oiled by the spill. Even if some birds are only partially contacted by oil, the government will estimate the number of partially oiled birds will perish from the limited contact with the oil. The government uses a formula going out some three or more years to count lost bird lives, which are the number of theoretical offsprings which each dead bird could have produced if not killed by the oil. It is extremely important to retain your environmental team at the inception of the spill. The RP's experts will accompany the government's people on the inspections when they inspect the affected areas to assess the environmental damages including counting/calculating the dead wildlife.

The Third-Party Claims

OPA is set up to require the submission of third-party claims directly to the RP without any government involvement in the first instance.

When the party receives the USCG's letter that it has been designated as the RP, that sometimes requires (depending on the scale of the pollution incident) the RP to negotiate with the USCG the content of a publication, the media sources, and geographic area for notifying the public where to submit individual claims to the RP for consideration and potential payment of the claim. The publication must include the name, address and other contact information to whom the claim should be submitted. Although the RP could choose to handle these claim submissions in-house, we do not recommend this course of claims handling. There are third party administrators who specialize in this type of claim review. The claim presentation must meet/contain certain specific information to allow the RP to adequately assess the validity of the claim and damages owed. This process is called the "Presentation". The professional TPA will know what constitutes an adequate Presentation or if it is inadequate, the TPA will know what info is missing and request an update from the claimant. At this stage, it is also recommended that your legal team be brought into the evaluation to advise the TPA if the type of damages and/or dollar values are payable under OPA. The Act does not allow for the submission of bodily/personal injury claims and does not permit class actions. Once the Presentation is adequately supported, the RP with the assistance of the TPA and legal team has 90 days to accept the claim. If no response is made by the RP within the 90-day time frame, the claim is deemed denied.

Once a claim has been expressly denied or by the passage of the 90 days, the claimant and only the claimant has the right to either submit the claim to the National Pollution Fund Center ("NPFC") or institute a civil action against the RP. Unpaid OSRO invoices for pollution clean-up expenses are handled in the same manner. If the claim is submitted to the NPFC and is paid by the government, the Federal Government is subrogated to the rights of the claimant, who in turn makes claim against the RP which may eventually find its way into Federal Court.

Limitation of Liability

The RP may limit their liability for damages and removal costs. The limit is determined by the type of vessel and/or its gross tonnage and is adjusted periodically by the USCG to account for inflation. Double Hull Tank Vessels in excess of 3,000 gross tons currently have a limit of the greater of \$2,500 per gross ton or \$21,521,300; Single Hull Tank Vessels in excess of 3,000 gross tons currently have a limit of the greater of \$4,000 per gross ton or \$29,591,300; and all other vessels have a limit of the greater of \$1,300 per gross ton or \$1,076,000. An RP that is required to pay damages or removal costs in excess of those limits can seek reimbursement for the overage from the NPFC. However, there are exceptions to the limit of liability available under OPA. Specifically, an RP has unlimited liability where (1) the spill incident was caused by gross negligence or willful misconduct; (2) the spill incident was caused by a violation of a federal safety statute or regulation; or (3) the RP failed to report the incident, provide reasonable assistance or comply with an order.

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Bartlett Engineering

Engineering Failure Analysis for the Marine Industry

by Bartlett Engineering LLC

Julia Bates, Patrick Adams, Bob Bartlett

The purpose of the engineering failure analyst is to bring additional information to the trier of fact. We have learned that there are many areas where engineering methods can gain information from marine events. Some of these areas are listed below with brief descriptions.

Welded Structure Failure Evaluation:

Welding by its nature requires melting of the base metal. The base metal immediately adjacent to the metal that is welded gets hot enough to be affected. When the weld is cut in cross section and washed with an acid, the heat affected zone will etch dark. An example of how this can be used is when a fracture is observed in a structure, but corrosion has caused the loss of the fracture features. When a “matched fracture” cross section is created by assembling cross sections of the steel on both sides of the fracture, the original weld joint can often be visualized. This is useful when trying to answer the question, “Was the weld on this item originally full penetration?”

Fracture Mode Determination:

Steel fractures are primarily either ductile, brittle, or fatigue. To discuss ductile vs brittle, we need to understand that “plastic” deformation is the type of deformation that does not spring back. Modeling clay is referred to as plastic because almost all of the deformation of clay does not spring back. When you bend a wire and it stays bent, that is plastic deformation. When a material is capable of plastic deformation, we say that it has “toughness.”

We also need to understand that a piece of steel consists of many microscopic crystals which are orderly stacks of iron, carbon, manganese and other alloying elements.

Brittle Fracture:

A material is “brittle” when it is not capable of being plastically deformed prior to fracture. Glass and ceramics are the usual examples of brittle materials. When steel fails in a brittle manner, the iron atoms in its crystals separate along an atomic stacking plane in each crystal in a failure mode referred to as “cleavage.” As a result, the fracture surface has a “rock candy” appearance, and the fracture facets of each plane form a reflective flat surface so the surface has a specular appearance.

(Figure 1).

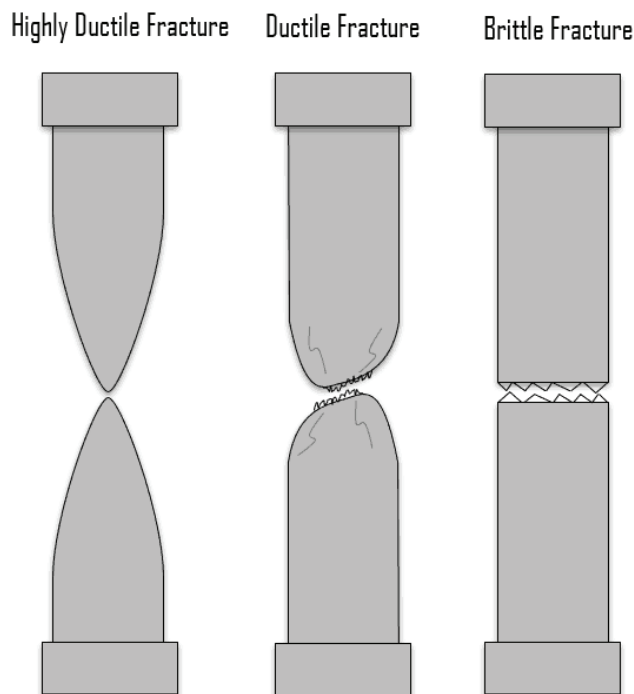


Figure 1

It is possible for steel to become brittle due to improper heat treatment. Because welding heats metal, it “heat treats” the metal adjacent to the weld metal. There are certain rare cases where welding can cause steel to become brittle. In order for welding to embrittle steel, the steel typically needs to be able to be hardened by heat treatment. Heat treatable steels are typically high strength steels (i.e. - greater than 90 ksi tensile strength).

The easiest way for steel to behave in a brittle manner is to make it very cold (e.g. negative 20 F or colder). Some steel is manufactured to tolerate low temperatures. Because welding is a form of localized heat treatment, welding methods to maintain the low temperature toughness of steel must be used for items that must operate at low temperatures.

As a note, the ductile behavior of steel depends on the movement of imperfections (known as “dislocations”) in the stack of atoms that are the crystal of steel. When the rate of stretching of steel is rapid (due to either shock load or a fast-moving fracture), the fracture surface will exhibit “quasi cleavage” which, in my opinion, is the result of the dislocations not being able to move quickly enough to exhibit fully ductile behavior.

Ductile Fracture:

A material is said to be “ductile” if it plastically stretches before breaking. A rule of thumb is that steel that stretches more than 5 percent before breaking is ductile. Toughness is the measure of

how ductile a steel is. Toughness is determined by the amount a steel stretches before breaking, and this stretch is referred to as the steel’s “elongation.”

We see the ductile behavior of steel in coat hangers and nails which can bend completely in half before breaking. The steel of pipelines, buildings, ships and most steel structures is ductile. Just bending that steel once doesn’t make it crack. It can be “torn” though, such as when a hull is severely dented during a collision. If a ductile steel part fails, the first suspect is just that it was overloaded. Without magnification, the fracture surface of a ductile failure is rough and non-reflective. This is because as steel is stretched its dislocations move around and form microscopic voids. With additional loads those microscopic voids coalesce (Figure 2).

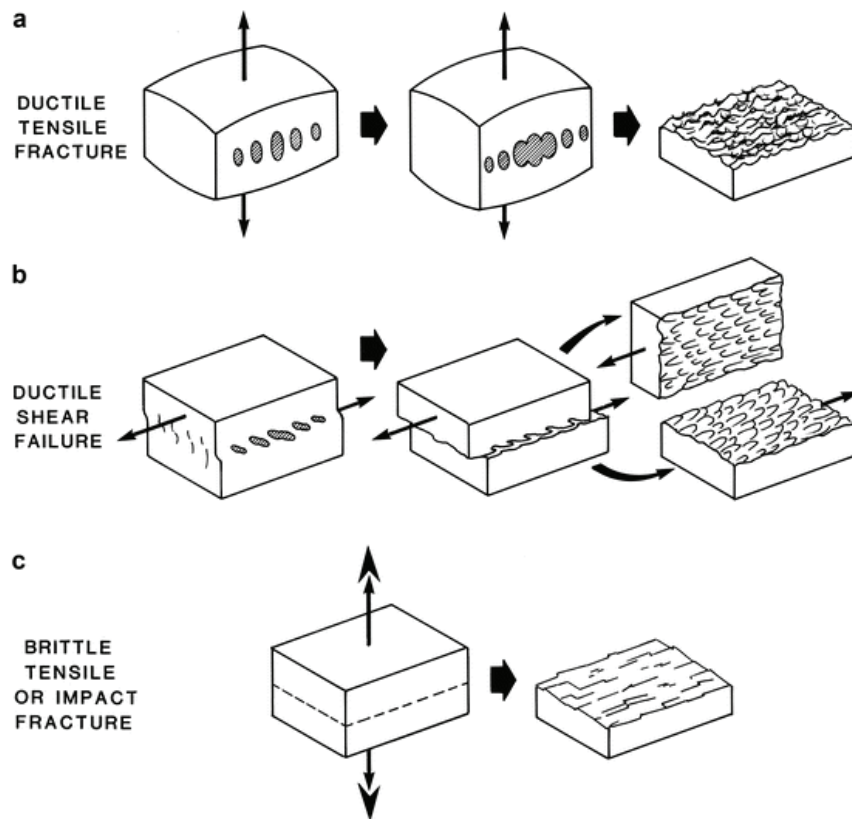


Figure 2

When a slow speed ductile overload fracture is observed using a scanning electron microscope (SEM), the fracture surface consists of the opposing halves of these ruptured voids.

Because steel is ductile, when it is overloaded, it plastically stretches before breaking. Plastic stretching is an observable feature adjacent to a fracture. This plastic stretching can be in the form of local bending or “necking.” Necking describes the narrowing that occurs in an item when it is stretched (visualize stretching chewing gum). Necking is a macroscopic feature so that even if significant corrosion has occurred, this local deformation is often still visible (Figure 3).



Figure 3

One other indication that the fractured material was ductile, which is observed in thin tensile fractures, is that the fracture is at a 45-degree angle to the direction of pull. This is called a “shear lip,” and it occurs because thin ductile materials fail in shear, and the plane of greatest shear stress is 45 degrees to the line of pull (Figure 4).



Figure 4

As a curious note, engineers have only been able to be successful in the design of structures in the last century because of the ductility of steel. Now that we have computer finite element stress

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analysis (FEA), we see that those structures have had local high stress areas (See Computer Stress Analysis, below). The stress in those areas often exceeded the yield stress (the stress that causes permanent deformation). The only reason that this was “OK” was because when the structure was put into use, these small areas of high stress simply stretched and the load that was going through those spots was then carried by the adjacent areas.

This phenomenon of stretching the areas of high stress is so well understood that, in the lattice crane boom industry and the pressure vessel industry, the standard practice is to fully load the item before it is put into commercial use. This first full loading stretches the tight spots and is referred to as a “shake out.”

Fatigue Fracture:

These small high stress areas become a problem if an item is repeatedly loaded then unloaded and in that case fatigue cracks can form. The term “fatigue” came from the early belief that metal got “tired” from repeated loading. We now know that fatigue of metal proceeds in three steps: initiation of the first tiny crack which is not visible to the naked eye, growth of that crack to the point where the part is dramatically weakened, and then the final fracture when the last load cycle causes the part to fail. Fatigue crack formation has been extensively studied in a field called “fracture mechanics.”

The area of metallurgy that studies crack growth is called fracture mechanics. Fracture mechanics has matured considerably and is now at the point where it can be easily applied in engineering

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applications. One of the things that fracture mechanics quantified is the speed of crack growth during cyclical loading, so not only do we know that small cracks grow slowly, but we can calculate their rate of growth based on their size and the amplitude of cyclical stress. This is useful when evaluating “what if” scenarios to determine what could have caused a particular crack to form and grow.

Fracture mechanics also allows us to determine how large a crack must be before the part experiences “final fracture.”

Fracture mechanics also tells us that fatigue cracks are more likely to form (initiate) at high stress amplitudes, but that at low stress amplitudes fatigue cracks only initiate after many tens of millions of cycles. From this we know that if we see a fatigue crack with more than one initiation point, the initiation point is experiencing high amplitude stress cycles.

This inability of fatigue cracks to form at low stress amplitudes is why engines can be built that will withstand 10’s of millions of cycles.

Fatigue in welded structures typically manifest at the toe of a weld (Figure 5).

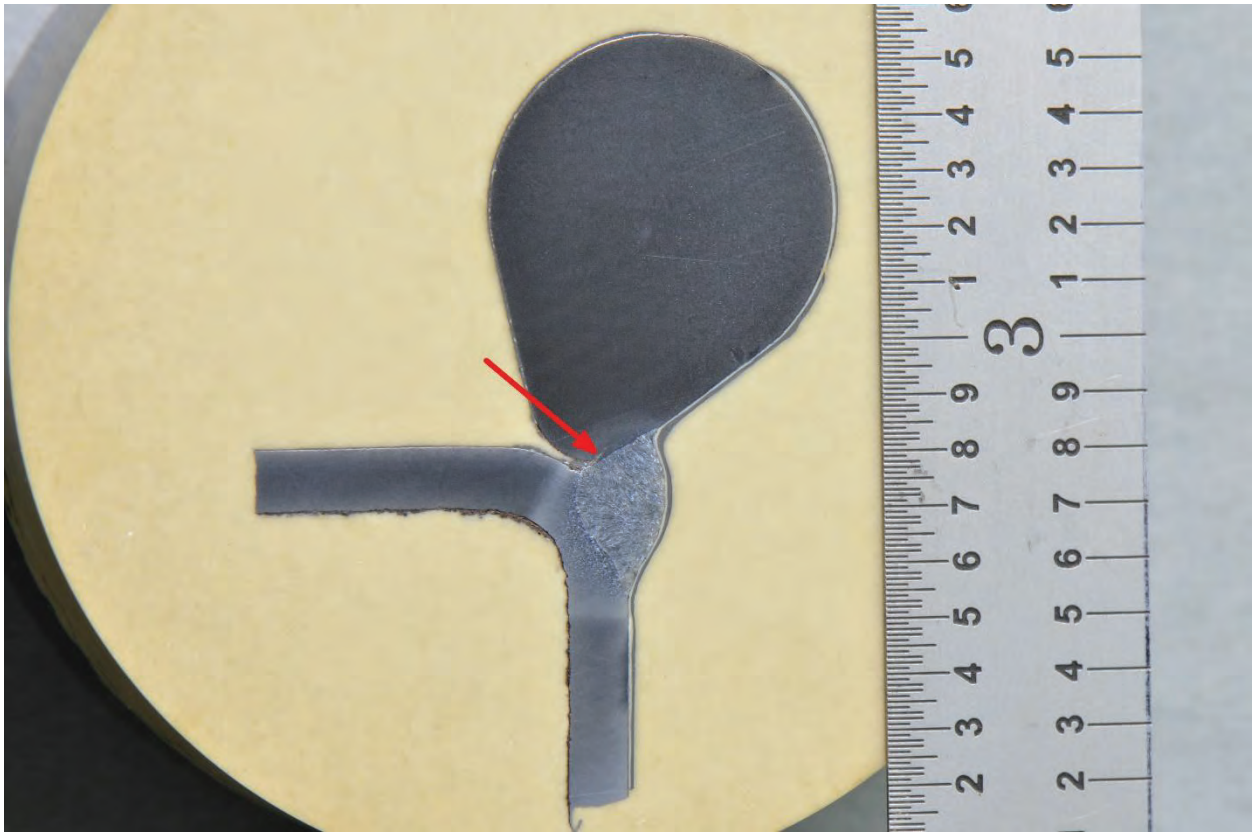


Figure 5

Computer Models and Photogrammetry:

An accurate computer model allows the accident scene to be virtually visited by the failure analysis engineer for uses such as taking measurements or establishing sight lines. Possibly most important is the ability of the trier of fact to virtually visit an accident scene on a ship or offshore that would be otherwise impossible.

The challenge is that the accident scene is often changed by the time observations can be made. If you are so fortunate as to have any photographs or surveillance video they can be used to validate

a 3D computer model. The first step is to get the available dimensions of the items that are in the photo and create 3D models of those items. When the known items are placed in proximity to each other in the 3D modeling software, then the software can take virtual photographs. These virtual photographs mimic the distortion of a camera. After many efforts of cut-and-try, the correct relationship of the items in the photo can be established because the virtual photo will suddenly match the actual photo. That “match” of the virtual and real photos demonstrates the validity of the model.

Computer Stress Analysis:

The digital 3D model of the item in question can be used to evaluate the stresses produced by selected loads using computer finite element stress analysis (FEA). The FEA computer program presents the results of an FEA by coloring the model (Figure 6). Areas that are blue have low stress and high stress areas are red. When the high stress areas are at localized areas such as at a hole or notch that causes the stress to concentrate, we refer to those high stress areas as “hot spots” because of the red color.

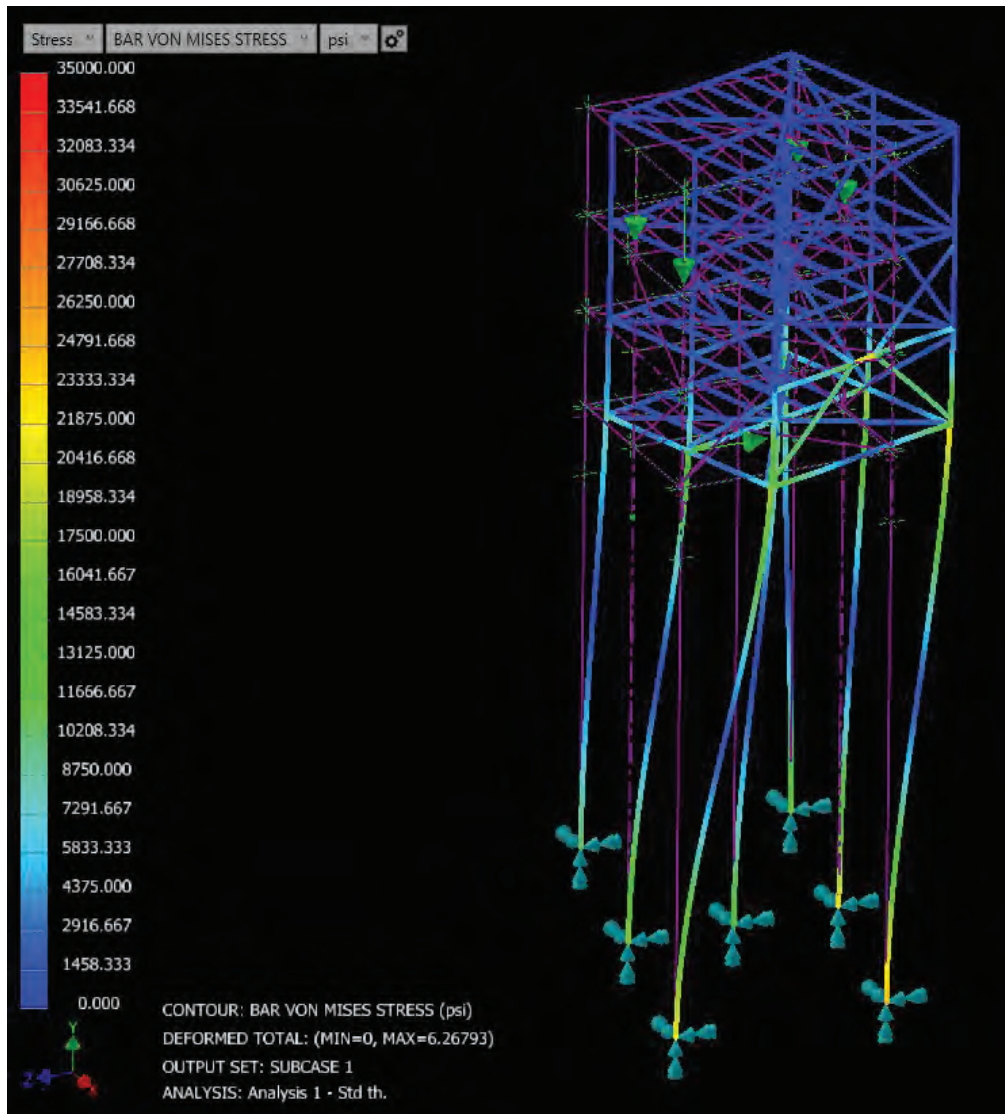


Figure 6

Accident Reconstruction:

The laws of physics can be very helpful in assessing valid hypotheses of collisions and allisions. Moving items like ships have momentum and kinetic energy. To stop or slow a moving object requires that the energy be removed from the moving object by doing deceleration “work” on the

item. The numerical value of the deceleration work is exactly equal to the numerical change in the kinetic energy. The physics term “work” is defined as the force applied times the distance over which it is applied. As an example, the change in the kinetic energy of a car is equal to the deceleration work done by the brakes which convert the kinetic energy to heat. With a vessel collision, the energy is absorbed by the deformation of the striking objects. Because the amount that the moving object is slowed is due to this deceleration force and the distance at which it is applied, computer models that can calculate the force vs deformation can be helpful in estimating hypothetical scenarios.

The path of a vessel sometimes can be helpful in understanding what led up to an event. Vessel information such as speed over ground, heading, course over ground and position can often be obtained from either recorded data from the vessel’s data recorder connected to its electronic chart display and information system (ECDIS) or from companies that collect and store historical vessel automatic identification system (AIS) data such as Vessel Tracker or Mississippi River Traffic Information Service (MRTIS). GPS is an integral part of a vessel’s AIS system, but GPS has inherent imprecision due to several factors including such things as cloud cover and the specific positions of the participating satellites. No system is perfect, but if the limitations are known then they can be of value in recreating vessel path, speed over ground, and heading in the time around the time of an event. Figure 7 is an example of how historical AIS data was used to reconstruct the paths, speeds, headings and positions of two vessels that passed each other in the Mississippi River.

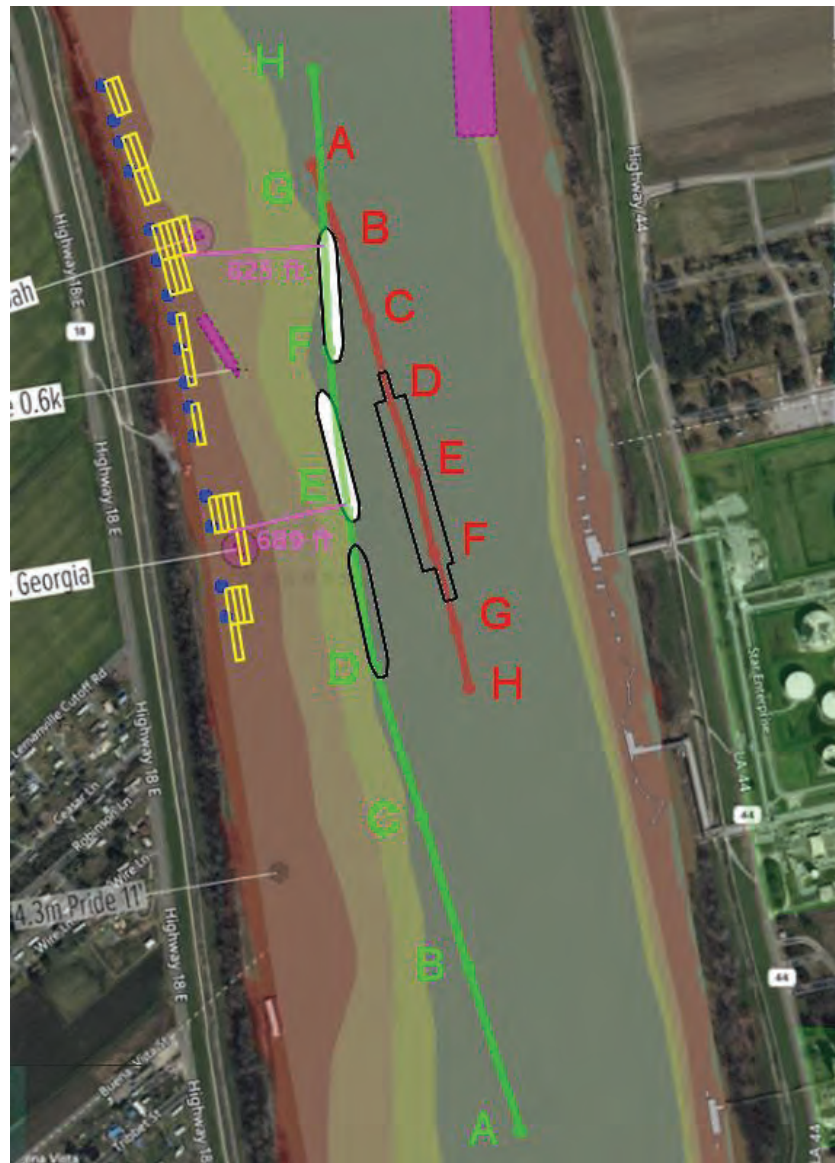


Figure 7

Another tool used for accident reconstruction is the use of “witness marks.” A witness mark is any mark, dent or change in an object which was caused by it contacting another object. Things like the shape of a dent or material transferred between the two objects can help establish that nature of the contact.

Dock and Piling Damage:

When docks and dolphins are damaged after they are contacted by a vessel the question often is, “Was the dock suitable for its intended purpose?” The process begins with the nature of the damage. In some cases, the damage is in the form of a leaning pile dolphin. You would be correct in saying that the statement above about plastic deformation producing permanent deformation means that the pile was plastically deformed. Although that can be correct, the river bottom clay is part of the “structure,” and it is almost certainly plastically deformed. The pile could have a residual lean only because the clay was plastically deformed and that is now holding the pile at an angle. We notice that dock owners are very quick to have piles cut off at the mud line rather than pull the pile. Very often a pulled pile will still be straight. The advice here is to quickly demand that the information contained by the pile not be destroyed, but rather that the pile be pulled. As a note, our conversations with the U.S. Army Corps revealed that they don’t have a prohibition against pulling piles. The Corps. told me that they only answer the request by the salvage company. The company removing the pile can request to pull the pile or request to cut the pile at the mud line. Especially in this era where many of the dock structures in the lower Mississippi River have so much corrosion metal loss that they are past the point where they can perform their intended function, dock owners seem to be very quick to remove and discard their damaged dock before its dilapidated condition can be documented. My advice is to be persistent, and have a marine surveyor go out immediately and have them also confirm that the evidence will be preserved.

Dock damage can be above the mud line also. Older docks can have pre-existing damage other than just corrosion thinning. Steel in a corrosive environment develops fatigue cracks at lower stress than steel in non-corrosive environments. There is a way to determine if a crack pre-existed a docking event. A coupon cut from the crack of the dock structure which contains both sides of the crack can be used to create a “matched fracture” cross section (Figure 8).

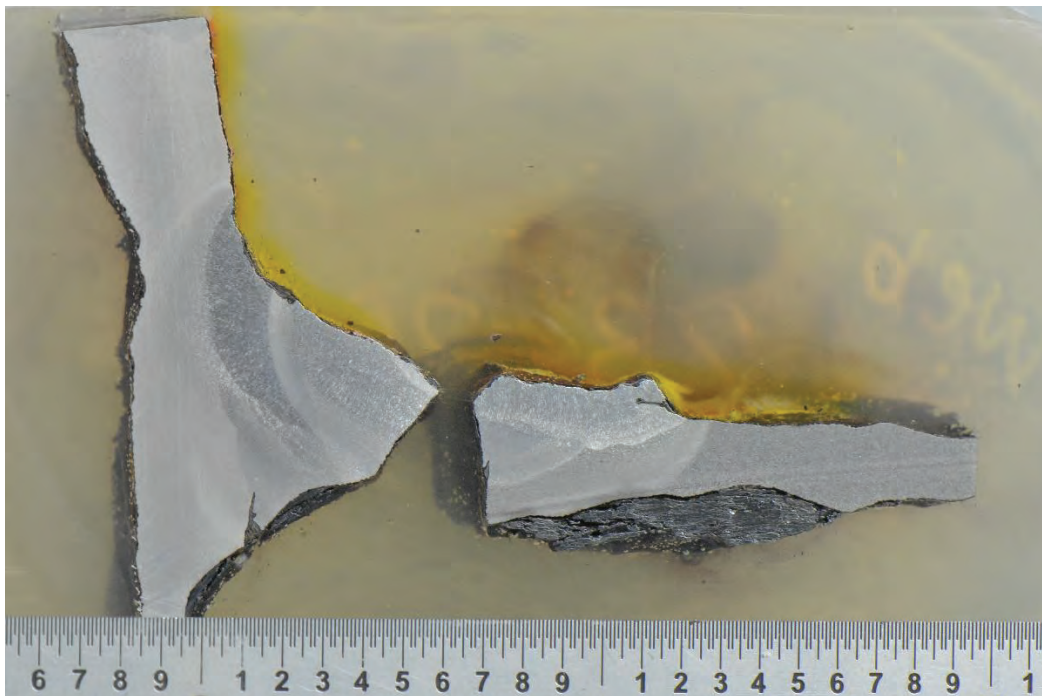


Figure 8

Because steel has a corrosion rate in fresh water of approximately 0.01 inches per year, a matched fracture which has pronounced rounded edges is not weeks or months old. Figure 9 is an example of a “new” fracture because its edges are sharp.

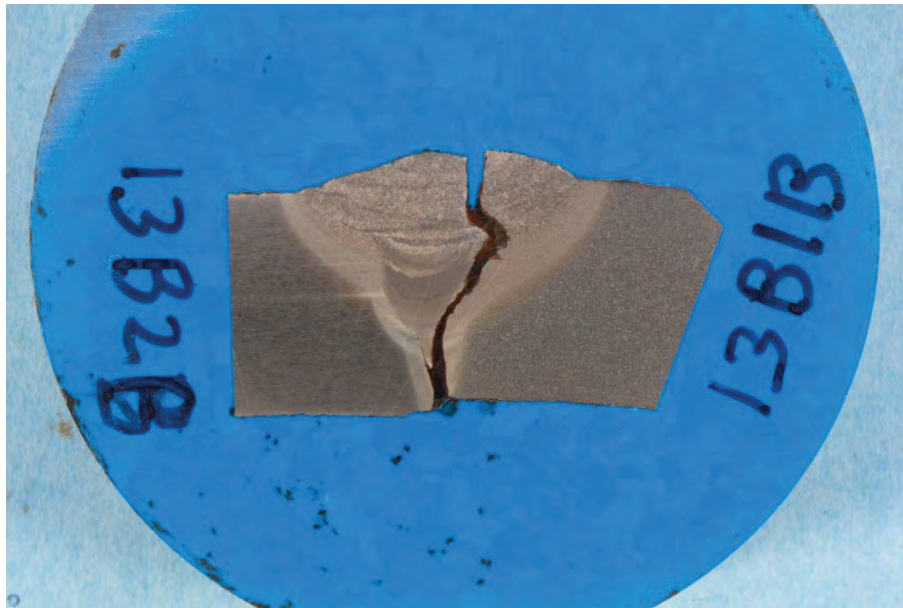


Figure 9

Figure 10 is an old fracture because it has had significant corrosion rounding of its corners.

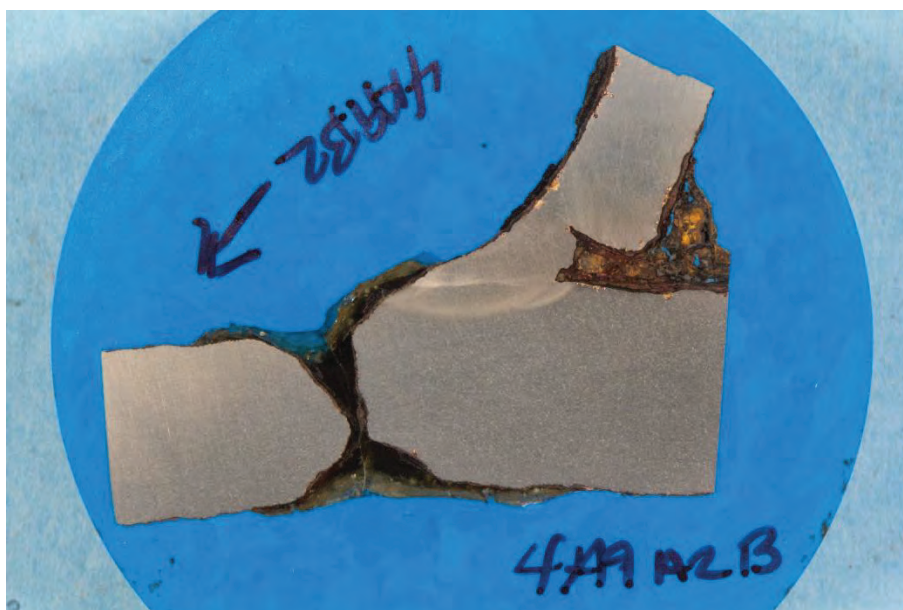


Figure 10

As another caution, we have noticed that the owner claiming that their vessel was damaged will often delay the collection of the specimens in an attempt to make this determination less obvious. Our thought is that if there is a crack then that area is not providing any support, so removing the required sample(s) will not weaken the dock. Samples can be removed with the dock in place using a diver with an underwater torch. The cost to do this when the speed of the river is diveable can be less than \$10,000.

When a dock develops a lean or other structural change after a docking event, the dock owner seems to instinctively blame the ship. The World Association for Waterborne Transport Infrastructure (known as PIANC, www.pianc.org) has multiple standards that address such things as the requirement for “protective structures” to protect docks and pipe bridges, and the approach velocity for which a dock should be designed. The point is that docks are required to have a mechanism to absorb the inevitable energy of a docking ship. Many modern docks use large rubber bumpers. Some docks were designed to have wale timbers on their face. The absence of these wale timbers causes the dock to be out of conformance with their original design.

ASIDE: It would make defense of the ship easier if, prior to arrival, the ship made the dock owner affirm that the dock is in “good repair” and is in compliance with the relevant PIANC Working Group guide (e.g. WG 153 for Marine Oil, Gas & Petrochemical Terminals or WG213 for Marine Multipurpose Terminals).

Wind, Water, and Mooring Line Loads

Using drawings and draft readings of vessels, we can perform calculations to estimate the wind and water forces applied to a vessel; and, therefore, applied to mooring lines and structures. We have completed calculations like these in our evaluation of breakaways during hurricanes and other events.

We utilize the information regarding wind loading from the American Society of Civil Engineers (ASCE). ASCE 7 provides data on wind pressure at differing elevations and wind speeds, which we then use in conjunction with our computer models to perform calculations. The other aspects of these calculations are the fundamentals of fluid mechanics.

Using the loads applied to vessels from wind and water, we can use the geometric layout of docks and the moored vessel to resolve forces in specific mooring lines. Calculations can be performed in both 2D and 3D vectorization of the mooring lines. The forces can then be calculated in synthetic ropes and steel wire ropes. The ropes themselves have differing amounts of stretch depending on their loading, construction and material. All of these properties are taken into account when performing these calculations.

Corrosion Rate in Soft and Seawater:

The corrosion rate of steel in various natural waters has been extensively studied and quantified. Uhlig's Corrosion Handbook by R. Winston Revie provides the following information regarding the corrosion rate of steel in soft water:

The average corrosion rate of steel in stagnant air-saturated soft waters at ordinary temperatures is roughly 0.1 mm/year. [0.004 inches per year]

This reference also states the following regarding the corrosion rate of steel in seawater:

Overall corrosion rates of steel continuously immersed in quiescent seawater at many locations throughout the world for periods from <1 year to 40 years collected from various literature [4-14] are plotted in Figure 1. The corrosion rates range from 0.02 to 0.37 mm/year (0.8-14.6 mpy), the average rate being ~0.1 mm/year (4mpy)

The metal wastage observed on the interior and exterior of steel marine vessels can, therefore, be determined to be recent corrosion or having occurred over a long period of time.

Closing

These topics are just a few of the many areas that a marine failure analyst has the ability to address. The earlier you get a failure analyst involved in your case, the best chance you have at succeeding in gaining all of the necessary information you need to provide to the trier of fact.

