The Old Seaman and the Sea: *Sanchez and the Ever-Evolving Test for Seaman Status*

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The U.S. Fifth Circuit Court of Appeals will soon issue an en banc decision in *Gilbert Sanchez v. Smart Fabricators of Texas, LLC* to decide whether over the past 20 plus years, the circuit has strayed too far from the test for determining seaman status established by the U.S. Supreme Court, and if so, how to bring its jurisprudence more in line with Supreme Court precedent. The court's decision could potentially limit the universe of maritime workers that qualify as seamen.

Looking Back…

After courts struggled for over half a century in determining seaman status, the Supreme Court issued three decisions from 1991 to 1997 that helped establish the current test for seaman status. In *McDermott International, Inc., v. Wilander*,[1] a paint foreman working on a boat chartered by McDermott, filed suit under the Jones Act for injuries he suffered on an offshore platform when a pipe bolt blew out striking him in the head. The jury found that Wilander was a seaman because he was either permanently assigned to, or performed a substantial amount of work on the vessel, and his duties contributed to the function of the vessel or accomplishment of its mission. The Fifth Circuit affirmed, and the Supreme Court granted certiorari and revised the test for seaman status by requiring that the individual have an "***employment related connection to a vessel in navigation***." However, the Court declined to provide guidance concerning what constituted such a connection.

Four years later in *Chandris v. Latsis*,[2] the Supreme Court was called upon to clarify what is an employment related connection to a vessel in navigation. In *Chandris*, a supervising engineer responsible for electronic communications equipment on a fleet of vessels begin developing eye problems on the *S.S. Galileo* the day it left Baltimore for Bermuda. He underwent surgery in Bermuda, recuperated for six weeks and sailed with the *Galileo* to Germany, where it was drydocked for a refurbishment. Latsis sailed back with the vessel to the U.S. and continued to work for Chandris until he was terminated. He then filed suit in the Southern District of New York under the Jones Act for negligence of the ship's doctor that resulted in his loss of sight. At trial, the court instructed the jury to consider whether Latsis was permanently assigned to the vessel or performed a substantial amount of work on the vessel and not to consider the drydock time because during that time the vessel was out of navigation. The jury returned a verdict for Chandris on seaman status, but the Second Circuit vacated the judgment and remanded the case.

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The Supreme Court affirmed, holding that a seaman must have a connection to a vessel in navigation that is substantial in both duration and nature and instructed the lower court to charge the jury consistent with its holding. The Court reasoned that the fundamental purpose of such a requirement is to give full effect to the remedial scheme created by Congress and to separate sea- based maritime employees who are entitled to Jones Act protection from those land-based workers who only have a transitory or sporadic connection to a vessel in navigation, and therefore, are not regularly exposed to the perils of the sea.

The issue of seaman status made its way back to the Supreme Court in 1997 in *Harbor Tug and Barge Co. v. Papai*.[3] In that case, Papai was injured when he fell from a ladder on a tugboat while painting the housing structure. The job was expected to take one day, there was no captain, and Papai was not going to sail with the vessel after he finished painting. Papai worked for Harbor Tug and Barge on 12 occasions in the two and a half months before his injury, received his jobs through a union and provided maintenance, longshoring and deckhand work on land and on vessels. Papai filed suit in the Northern District of California claiming negligence under the Jones Act and unseaworthiness under the general maritime law. The district court granted summary judgment for Harbor Tug and Barge, concluding Papai was not a seaman, but the Ninth Circuit reversed and remanded for trial.

The Supreme Court reversed, focusing on whether Papai had a connection to a vessel in navigation that was substantial in terms of its duration and nature. In resolving the issue, the Court articulated that for the connection requirement to serve its purpose the inquiry must concentrate on whether the employee's duties take him to sea, which distinguishes land-based and sea-based employees. In concluding that Papai was not a seaman, the Court reasoned that his employment in question did not include seagoing activity. He was hired for one day to paint a dockside vessel and was not going to sail with the vessel when finished. The Court emphasized that Jones Act coverage is confined to seamen, those workers who face regular exposure to the perils of the sea.

The Here and Now…

The Fifth Circuit is now tasked with deciding whether to allow a continuing expansion of the universe of those who qualify as seamen or to potentially overrule existing precedent in order to bring it in more in line with *Chandris*. In *Gilbert Sanchez v. Smart Fabricators of Texas, LLC,*[4] a welder, hired by Smart Fabricators was injured when he tripped on a pipe on the deck of a jack-up drilling rig owned and operated by Enterprise Offshore Drilling, LLC. He filed suit in state court under the Jones Act. After removal, the district court denied his motion to remand and granted summary

judgment for Smart Fabricators because it determined Sanchez was not a seaman. On appeal, the Fifth Circuit affirmed, distinguishing its previous decision in *Naquin v. Elevating Boats LLC*,[5] and finding that Sanchez's work on a stable, flat, above water deck and his welder duties did not expose him to the perils of the sea. However, on April 14, 2020, the Fifth Circuit withdrew its opinion.

On August 14, 2020, a different Fifth Circuit panel issued a new opinion reversing the district court's judgment and remanding the case to Texas state court. The panel relying on the circuit's previous decisions in *In re Endeavor Marine*,[6] and *Naquin*, in which the court found a that a brown water crane operator as well as a shipyard worker were exposed to the perils of the sea, determined that Sanchez was a seaman because the nature of his employment could not be distinguished from that of the plaintiffs in those cases. However, in a special concurrence of the panel authored by Judge Eugene Davis, the panel raised concerns that the court's precedent may have strayed too far from the Supreme Court's decision in *Chandris* and encouraged the court to rehear the case en banc. An en banc petition was later granted ordering a rehearing of the case, and oral argument occurred on January 20, 2021.

What Lies Ahead…

The panel's concurrence reflects a desire to see the court correctly apply the teachings of *Chandris* and *Papai* by determining whether an employee's duties "take him to sea" and expose him to the "perils of the sea" in distinguishing land and sea-based maritime workers. Despite the *In re Endeavor Marine* court characterizing those concepts as synonymous, one could argue they are not. More importantly, there is very little jurisprudential guidance on what is a peril of the sea. In marine insurance, perils of the sea broadly refer to forces of nature that maritime ventures might encounter, which include stranding, sinking, collision, heavy wave action, and high winds, all of which could potentially impact moored (or nearly moored) vessels like the ones at issue in *In re Endeavor Marine* and *Naquin*. Such a possibility as well as the language of the concurrence seems to encourage a further analysis and a determination of whether an employee's duties actually *take him to sea*. After all, the *Papai* court based on its decision largely on the fact that Papai's work did not include seagoing activity.

Regardless of how the court ultimately decides the issue, its decision will have significant consequences. An express or even implied overruling of *In re Endeavor Marine* and *Naquin* and a subsequent narrowing of the analysis of who qualifies as a seaman will impact both land-based and sea-based maritime workers as well as the risk exposures of their employers. For example, if the court decides that its

precedent has strayed too far and should be brought more in line with *Chandris*, plaintiffs such as those in the aforementioned cases as well as numerous types of maritime workers who are able to get off a vessel at the end of each day and go home every night will likely not qualify as seamen going forward in the Fifth Circuit; consequently, they will not be afforded the vast protection and numerous remedies provided by the Jones Act and would be limited to benefits under the Longshore Harbor & Worker's Compensation Act and a potential 905 (b) action against the vessel. However, an en banc affirmation of the panel's opinion would signal approval of what has been a gradual expansion of seaman status. This could ultimately garner the attention of the Supreme Court and open the door for the Court to again refine the test for determining who is a seaman.

Endnotes

1 McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991)

2 Chandris, Inc. v. Latsis, 515 U.S. 347, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995)

3 Harbor Tug & Barge Co. v. Papai, 520 U.S. 548, 117 S. Ct. 1535, 137 L. Ed. 2d 800 (1997)

4 Sanchez v. Smart Fabricators of Texas, L.L.C., 952 F.3d 620 (5th Cir.), opinion withdrawn (Apr. 14, 2020), superseded, 970 F.3d 550 (5th Cir. 2020), reh'g en banc granted, opinion vacated, 978 F.3d 976 (5th Cir. 2020)

5 Naquin v. Elevating Boats, L.L.C., 744 F.3d 927 (5th Cir. 2014)

6 In re Endeavor Marine Inc., 234 F.3d 287, 298 (5th Cir. 2000)