BETWEEN A ROCK AND A HARD PLACE: MAINTENANCE AND CURE IN THE WAKE OF *ATLANTIC SOUNDING*

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I. INTRODUCTION

Imagine that there is a maritime employer, and one of its employees is injured on the job. Although the injury is common for the task that the employee was assigned, the employer diligently investigates the claim and the employee's medical history to determine if the injury was caused by some other event. The employer does so, though, mindful that any delay may increase the likelihood of a claim for punitive damages against it for failure to pay maintenance and cure. The employer checks to see how the employee responded to medical questions on his employment application. It questions the employee about his medical history and any similar injuries in the past. After the employer exhausts all available resources to ensure that the injury was the genuine result of his employment and compensation is due, it begins making maintenance and cure payments.

Later, through further investigation, the employer discovers that the employee has had a very similar injury in the past. The employer again checks the employee's file for a record of this injury, but he failed to mention such an injury on his employment application. Had the employer discovered this before beginning maintenance and cure payments, it might have been able to mount a successful *McCorpen*[1] defense against the employee's claim for maintenance and cure. However, the employer began making payments quickly to avoid any potential claim for

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1. The elements of a successful *McCorpen* defense are: (1) the seaman intentionally misrepresented or concealed a pre-existing medical condition; (2) the non-disclosed condition was material to the employer's decision to hire the seaman; and (3) there was a causal connection between the pre-existing condition and the injury at issue. McCorpen v. Cent. Gulf S.S. Corp., 396 F.2d 547, 548-49 (5th Cir. 1968).

punitive damages under the United States Supreme Court's decision in *Atlantic Sounding Co. v. Townsend,*[2]. What does the employer do now?

An employer's near absolute obligation to pay maintenance and cure to employees and the Supreme Court's recent decision in *Atlantic Sounding*[3] affirming the availability of punitive damages for failure to pay maintenance and cure have placed employers in the precarious position of balancing two interests. Employers have an interest in not only properly investigating a claim for maintenance and cure but also in avoiding liability for punitive damages. Because of the conflicting nature of these two interests, courts should afford employers some protection against undue claims for maintenance and cure by employees.

Courts should allow employers to recover payments of undue maintenance and cure to employees where they can successfully prove the elements of a *McCorpen* defense. Precedent for this proposition is sparse. Some courts have disagreed on the availability of a cause of action for restitution, but other courts have already recognized an employer's right to restitution and have made awards to employers accordingly.[4] Although some courts have recognized the right of an employer to restitution, they have done little to explain from where this right is derived, even though there are legal justifications available to support restitution.[5] The general maritime law concepts of equitable estoppel and unjust enrichment support recovery by the employer. This position is also supported by common law principles of unjust enrichment and the punitive themes of the Longshore Harbor Workers' Compensation Act (hereinafter LHWCA) and state workers' compensation systems.

This comment proposes that courts should allow employers to recover maintenance and cure payments made to an employee where an employer can prove a *McCorpen* defense for these very reasons. Part II introduces the right of an employee to maintenance and cure, the corresponding obligations of his employer, and the defenses to a maintenance and cure claim available to an employer. Part II also addresses the Supreme

2. 129 S. Ct. 2561 (2009).
3. *Id.*
4. *See* discussion *infra*, Part III.
5. *Id.*

Court's recent holding in *Atlantic Sounding Co. v. Townsend*[6] and its effect on an employer's obligation to pay maintenance and cure. Part III evaluates the current precedent for the proposition of restitution, the general maritime law concepts supporting restitution, the common law principles and systems supporting restitution, and a contractual theory for guaranteeing restitution.

II. BACKGROUND

Maintenance and cure is an ancient right of seamen created under the general maritime law that was first noted in American courts in 1823.[7] "Maintenance" is a seaman's right to food and lodging should he become ill or injured while performing his duties to the ship.[8] "Cure" is the seaman's right to medical care for his illness or injury.[9] Seamen have traditionally been considered wards of the court, friendless and poor; therefore, their remedies will be broad and protected without any fault on the part of the owner or vessel.[10] Although the seaman has the burden of proving that his injury or illness was incurred in the service of the ship, there is a presumption in favor of his entitlement to benefits, and any doubts regarding entitlement, defenses, or necessity of treatment will be resolved in the seaman's favor.[11] An employer's duty to pay maintenance and cure arises at the onset of the seaman's injury or illness, and it must promptly investigate and pay any claims.[12]

The duty to pay maintenance and cure to an injured or ill seaman is near absolute, and few defenses are available to employers against claims for maintenance and cure. In an action for maintenance and cure, the defenses of contributory negligence, comparative negligence, and assumption of risk are

6. 129 S. Ct. 2561 (2009).

7. Harden v. Gordon, 11 F. Cas. 480, 483-85 (C.C.D. Me. 1823).

8. Calmar S.S. Corp. v. Taylor, 303 U.S. 525, 527 (1938).

9. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 4-28, 290 (2d ed. 1994); *see* Guevara v. Mar. Overseas Corp., 59 F.3d 1496, 1500 (5th Cir. 1994).

10. Vaughan v. Atkinson, 369 U.S. 527, 531 (1962); Calmar S.S. Corp. v. Taylor, 303 U.S. 525 (1938); Cortes v. Balt. Insular Line, 287 U.S. 367 (1932); Pac. S.S. Co. v. Peterson, 278 U.S. 130, 138 (1928).

11. Vella v. Ford Motor Co., 421 U.S. 1 (1975); Vaughan v. Atkinson, 369 U.S. 527 (1962).

12. Vaughan v. Atkinson, 369 U.S. 527 (1962); Morales v. Garijek, Inc., 829 F.2d 1355 (5th Cir. 1987).

not available.[13] Only "willful misconduct" by a seaman will bar recovery, but the Supreme Court has shown a high level of tolerance for outlandish behavior without depriving a seaman of maintenance and cure.[14]

Although employers have had some success in defending against maintenance and cure claims where a seaman has engaged in willful misconduct, courts have uniformly denied maintenance and cure benefits for a seaman's willful concealment of a material medical condition at the time of employment.[15] This defense, known as the "*McCorpen* defense," allows an employer to deny maintenance and cure benefits to a seaman who willfully conceals a material past injury or illness when questioned at the outset of employment.[16] To be successful, the employer must prove: (1) the seaman intentionally misrepresented or concealed a pre-existing medical condition; (2) the non-disclosed condition was material to the employer's decision to hire the seaman; and (3) there was a causal connection between the pre-existing condition and the injury at issue.[17] The *McCorpen* defense does not preclude recovery for a seaman who has a good faith belief that he is fit for duty and has not been asked about any prior injuries or illnesses.[18]

In *McCorpen v. Central Gulf S.S. Corp.*, a merchant seaman with a history of diabetes filled out a "Physical Examination

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13. Aguilar v. Standard Oil Co. of N.J., 318 U.S. 724, 730-31 (1943); Boudreaux v. United States, 280 F.3d 461, 468 (5th Cir. 2002).

14. Warren v. United States, 340 U.S. 523, 528 (1951) (holding that seaman's conduct must be "positively vicious" and allowing recovery of maintenance and cure for a seaman's broken leg when he fell from a second story dance hall window); Farrell v. United States, 336 U.S. 511, 516-17 (1949) (awarding maintenance and cure to a seaman injured while in disobedience of orders); *but cf.* Dailey v. Alcoa S.S. Co., 337 F.2d 611 (5th Cir. 1964) (denying maintenance and cure for injuries resulting from sailor's intoxication); Watson v. Joshua Hendy Corp., 245 F.2d 463 (2d Cir. 1957) (denying maintenance and cure to seaman for injuries sustained in fight in which he was the aggressor).

15. West v. Midland Enter., Inc., 227 F.3d 613, 617 (6th Cir. 2000); Deisler v. McCormack Aggregates, Co., 54 F.3d 1074, 1080-81 (3d Cir. 1995); Wactor v. Spartan Transp. Corp., 27 F.3d 347, 352-53 (8th Cir. 1994); McCorpen v. Cent. Gulf S.S. Corp., 396 F.2d 547, 548-49 (5th Cir. 1968); Burkert v. Weyerhaeuser S.S. Co., 350 F.2d 826, 829-30 (9th Cir. 1965); Tawada v. United States, 162 F.2d 615, 617 (9th Cir. 1947).

16. McCorpen v. Central Gulf S.S. Corp., 396 F.2d 547, 548-49 (5th Cir. 1968).

17. Johnson v. Cenac Towing, Inc., 544 F.3d 296, 301 (5th Cir. 2008) (citing Brown v. Parker Drilling Offshore Corp., 410 F.3d 166, 171 (5th Cir. 2005)..

18. Sammon v. Central Gulf S.S. Corp., 442 F.2d 1028, 1029 (2d Cir. 1971) (citing Ahmed v. United States, 177 F.2d 898, 900 (2d Cir. 1949)).

Report & Record" prior to joining the crew of the employer's vessel.[19] In this report, he answered "no" to an inquiry of whether he had any illnesses.[20] Subsequently, he was treated twice during the course of his service aboard the defendant's vessel and once at the conclusion of the ship's voyage for diabetes control.[21] The appellate court affirmed the trial court's finding that the employee's failure to divulge his diabetic condition was a concealment of the type that precluded recovery.[22] Consequently, the court upheld the denial of maintenance and cure benefits to McCorpen because he willfully concealed a material fact of consequence that had a causal connection to the injuries he suffered while in service of the employer's vessel.[23]

The duty of employers to promptly pay maintenance and cure claims has been made even more stringent by the Supreme Court's recent decision in *Atlantic Sounding Co. v. Townsend*.[24] Prior to *Atlantic Sounding*, there was uncertainty about the availability of punitive damages for an employer's failure to pay a maintenance and cure claim.[25] In *Atlantic Sounding*, the Supreme Court, the court distinguished between the availability of punitive damages under statutory schemes from availability under the general maritime law and held punitive damages were available under general maritime law for "willful and wanton disregard of the maintenance and cure obligation."[26]

As a result of the Court's holding in *Atlantic Sounding*, employers are placed in a precarious position when faced with a

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19. *McCorpen*, 396 F.2d at 548.
20. *Id.*
21. *Id.*
22. *Id.* at 550.
23. *Id.* at 550-52.
24. 129 S. Ct. 2561 (2009).
25. Punitive damages were commonly available in maritime cases since first recognized by the Supreme Court in 1818. The Amiable Nancy, 16 U.S. 546, 558 (1818). But, the steady course changed suddenly in 1990 with Miles v. Apex Marine Corp., 498 U.S. 19 (1990). Although *Miles* did not discuss punitive damages, *Miles* was interpreted by some lower courts to alter the availability of punitive damages in some cases. David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. MAR. L. & COM. 73, 140 n.376 & 379 (1997) (collecting cases interpreting *Miles* to have varying effects on punitive damages). Some circuits interpreted *Miles* to specifically deny punitive damages in an action for failure to pay maintenance and cure. Guevara v. Mar. Overseas Corp., 59 F.3d 1496 (5th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1046 (1996); Glynn v. Roy Al Boat Mgmt. Corp., 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996).
26. Atl. Sounding Co. v. Townsend, 129 S. Ct. 2561, 2575 (2009).

maintenance and cure claim. The employer has a duty to promptly investigate and pay a claim for maintenance and cure.[27] But, the employer may pursue the *McCorpen* defense if it discovers that the employee has concealed a relevant preexisting medical condition. However, presently, when an employer fails to discover the employee's medical condition until after it has made payments to the employee, it has no legal recourse to recover those payments made. The availability of punitive damages to employees discourages employers from withholding payment until a thorough investigation is conducted. Further, employers have no relief if it is discovered that, by virtue of *McCorpen*, there was no legal obligation to pay the employee. This situation presents an employer with two competing interests: an interest in properly investigating a maintenance and cure claim and an interest in avoiding punitive damages by promptly paying maintenance and cure.

III. POSSIBLE SOLUTIONS

As a result of the Supreme Court's ruling in *Atlantic Sounding*, an employer's obligation to investigate maintenance and cure claims becomes much more urgent. Employers have a duty to promptly investigate and pay maintenance and cure claims, but they are also entitled to investigate and seek corroboration of the claim.[28] However, to avoid the possibility of a punitive damages award, an employer may be forced into an abbreviated investigation of employee's prior medical history. The difficulty for an employer arises when it later discovers, after having made possibly substantial maintenance and cure payments, the employee did in fact conceal pertinent medical information from the employer.

The most sensible solution would be to allow an employer who has paid maintenance and cure benefits to an undeserving employee to recover those undue benefits. Although there is very little jurisprudence regarding this proposition, the underlying principles of equity are well developed not only in general maritime law but also in state and federal statutory systems and

27. Vaughan v. Atkinson, 369 U.S. 527, 538 (1962); Morales v. Garijek, Inc., 829 F.2d 1355 (5th Cir. 1987).

28. *Vaughan*, 369 U.S. at 538; McWilliams v. Texaco, Inc., 781 F.2d 514, 518-20 (5th Cir. 1986); Hunt v. R & R Marine Holdings, L.L.C., No. 09-6055, 2011 WL 3606951, at *1 (E.D. La. Aug. 15, 2011) (citing Morales v. Garijak, Inc., 829 F.2d 1355, 1358 (5th Cir. 1987)).

common law. Despite the lack of jurisprudence, some courts have rectified willful concealment by a seaman.

A. CURRENT CASE LAW SUPPORTING AND REFUTING THE RIGHT OF AN EMPLOYER TO RESTITUTION

Admiralty courts are allowing, or at least considering, recovery of maintenance and cure previously paid when an employer successfully proves a *McCorpen* defense. The deficiency in most of these cases is that courts have not provided clear justifications for their rulings or the source for the right beyond *McCorpen* itself. The result is a body of jurisprudence of dubious value because later courts are hesitant to rely on opinions recognizing an employer's right to recovery without further legal support for the right. Moreover, this collection of inconclusive jurisprudence has caused conflicting positions on the availability of restitution for an employer.

In the most recently decided case on this issue, *Boudreaux v. Transocean Deepwater, Inc.*, an injured seaman, filed an action against his employer for damages, including maintenance and cure, as a result of a back injury sustained in the course of employment.[29] Subsequently, it was discovered that the employee intentionally concealed significant back injuries from his employer during his post-hire medical interview.[30] Prior to trial, the employer won a motion for summary judgment on the employee's maintenance and cure claim in light of *McCorpen*.[31] The employer then filed a counterclaim against the employee seeking to recover maintenance and cure payments previously disbursed.[32] The court noted the lack of jurisprudence on this issue,[33] but it ordered restitution to the employer in the amount of undue maintenance and cure paid to the employee.[34] The court stated:

> This seaman has deprived himself of protection through his own willful and deliberate misconduct and consequences should be considered. An opposite result would lead to a travesty of justice, encouraging mockery of

29. No. 08-1686, 2011 WL 5025268, at *1 (E.D. La. Oct. 20, 2011).
30. *Id.*
31. *Id.*
32. *Id.* at *2.
33. *Id.*
34. *Boudreaux*, 2011 WL 5025268, at *6.

> the judicial process and denigration of the founding principles of admiralty based schemes that seek to promote the "combined objective of encouraging marine commerce and assuring the well-being of seamen."[35]

Currently, only the Ninth Circuit allows restitution of maintenance and cure payments to an employer that has successfully proved the elements of a *McCorpen* defense.[36] In *Vitcovich v. Ocean Rover O.N.*, the Ninth Circuit affirmed the district court's grant of summary judgment on the employer's claim for repayment of maintenance and cure benefits.[37] The court found that the undisputed facts demonstrated (1) the employee intentionally concealed a pre-existing shoulder condition; (2) the undisclosed shoulder condition was material to his employer's hiring decision; and (3) there was a causal connection between the pre-existing condition and the injury at issue.[38]

In *Patterson v. Allseas USA*, the Fifth Circuit recognized, but declined to decide, the "difficult *res nova* issue" of whether a recovery of maintenance and cure payments was appropriate where a plaintiff failed to disclose a pre-existing medical condition.[39] In *Patterson*, an injured seaman sued his employer for injuries sustained while working aboard one of his employer's vessels.[40] The employer began making maintenance and cure payments shortly after the injury, but during discovery, the employer learned that the employee had pre-existing back problems, which likely caused his injury.[41] The employer, relying on *McCorpen*, counterclaimed for recovery of the maintenance and cure it had already paid.[42] Although the Fifth Circuit affirmed the district court's denial of the employer's counterclaim for recovery of maintenance and cure payments, it did so on the factual finding that it failed to establish the elements of the *McCorpen* defense.[43]

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35. *Id.* (quoting Aguilar v. Standard Oil Co., 318 U.S. 724, 727 (1943)).

36. Vitcovich v. Ocean Rover O.N., 106 F.3d 411 (9th Cir. 1997) (unpublished opinion).

37. *Id.* at 4.

38. *Id.* at 3-4.

39. Patterson v. Allseas USA, 145 F. App'x 969, 971 (5th Cir. 2005) (per curiam) (unpublished opinion).

40. *Id.* at 970.

41. *Id.*

42. *Id.*

43. *Id.* at 971.

There are a handful of additional district court cases that have addressed the issue of restitution of maintenance and cure payments.[44] In surveying these cases, a common theme can be seen throughout. In each case, the court evaluated the facts to determine whether the employer successfully proved a *McCorpen* defense, and if so, the court awarded restitution in favor of the employer.[45] One conclusion to be drawn from these decisions is that each implicitly accepted the premise that *McCorpen* authorizes, or should authorize, the restitution of maintenance and cure that an employer previously paid. Only one of the cited cases explicitly acknowledged the fact that the *McCorpen* court did not address the issue of restitution of maintenance and cure payments.[46] In *Boudreaux*, the court specifically acknowledged that it was "extending the *McCorpen* defense."[47] The court concluded that there was no evidence that extending *McCorpen* in "limited circumstances" would delay or make uncertain a seaman's right to the traditional benefits of maintenance and cure.[48]

One can deduce from these decisions that the right of an employer to restitution of maintenance and cure payments once a *McCorpen* defense has been proved may need no additional legal justification. The *McCorpen* defense alone provides the employer with its right to recovery. Remarkably, none of the courts granting restitution relied on any precedent, other than *McCorpen*, or invoked any other legal theory supporting recovery

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44. *See* Crow v. Cooper Marine & Timberlands Corp., No. 07-0740-KD-C, 2009 U.S. Dist. LEXIS 2950 (S.D. Ala. Jan. 14, 2009) (finding that the defendant did not present any evidence that employee misrepresented his medical condition to satisfy a *McCorpen* defense, the court granted plaintiff's motion for partial summary judgment on defendant's counterclaim for restitution of maintenance and cure payments as well as unearned wages paid to the plaintiff); Souviney v. John E. Graham & Sons, No. 93-0479-B-C, 1994 WL 416643 (S.D. Ala. Apr. 1, 1994) (in analyzing the defendant's *McCorpen* defense, the court found that "[c]learly, defendant has met his burden as to this defense," and granted employer's summary judgment permitting employer to recover previously paid maintenance and cure); Quiming v. Int'l Pac. Enter., Ltd., 773 F. Supp. 230 (D. Haw. 1990) (where employer proved elements of *McCorpen* defense, court granted employer's motion for summary judgment allowing employer to recover maintenance and cure paid to employee).

45. *See* Vitcovich v. Ocean Rover O.N., 106 F.3d 411 (9th Cir. 1997) (unpublished opinion); Boudreaux v. Transocean Deepwater, Inc., No. 08-1686, 2011 WL 5025268, at *1 (E.D. La. Oct. 20, 2011); *Souviney*, 1994 WL 416643; *Quiming*, 773 F. Supp. 230.

46. *Boudreaux*, 2011 WL 5025268, at *5.

47. *Id.*

48. *Id.*

by an employer. Again, only the *Boudreaux* court examined, and specifically rejected, any invitation to apply state law or to be guided by principles of equity.[49] In *Patterson* and *Vitcovich*, both courts, without relying on any precedent or invoking any equitable principles, allowed the employer to recover undeserved maintenance and cure payments made to an employee.[50] In fact, the courts cited no source for their authority to grant restitution of maintenance and cure benefits.[51]

In *Vitcovich*, the court did explain that its decision was based on the employee's failure to disclose his preexisting condition. But, regardless of the lack of precedent, the court appropriately reached the most sensible solution given the employee's intentional concealment.[52] The unspoken logic of these decisions leads to only one conclusion: where an employer can prove the elements of the *McCorpen* defense, even after benefits have been paid, he should be entitled to restitution.

While several courts have recognized an employer's right to recovery, other courts have not been as receptive to the idea of restitution benefiting the employer. In *Cotton v. Delta Queen Steamboat Co.,*[53] an employee filed an action against his employer seeking maintenance and cure for injuries he suffered from a fall on the employer's vessel.[54] The employer initially made maintenance and cure payments to the employee, but it discontinued payments when it discovered material misrepresentations that the employee made regarding a pre-existing back injury.[55] The employer subsequently sought reimbursement from the employee for the previously made payments.[56] Both the trial court and the appellate court denied the employer restitution even though neither court analyzed the employer's claim of a valid *McCorpen* defense.[57] The court noted that the employer had produced no precedent authorizing such

49. *Id.* at *4-6.
50. Patterson v. Allseas USA, 145 F. App'x 969 (5th Cir. 2005) (per curiam) (unpublished opinion); Vitcovich v. Ocean Rover O.N., 106 F.3d 411 (9th Cir. 1997) (unpublished opinion).
51. *Patterson*, 145 F. App'x 969; *Vitcovich*, 106 F.3d 411.
52. *Vitcovich*, 106 F.3d 411.
53. 36 So. 3d 262 (La. Ct. App. 4th 2010).
54. *Id.* at 264.
55. *Id.*
56. *Id.*
57. *Cotton*, 36 So. 3d 262.

reimbursement, and the court knew of none for the proposition.[58] The court went on to correctly note that *McCorpen* did not address the issue of restitution.[59]

In *Cotton*, the court pointed out exactly what this comment seeks to address: *McCorpen* alone does not authorize the restitution of maintenance and cure payments made to an employee who was not legally entitled to them. But, the *Cotton* court failed to recognize other theories that support recovery by employers who can prove a *McCorpen* defense, such as unjust enrichment or equitable estoppel. The court also relied on outdated precedent in concluding that no precedent existed recognizing the employer's cause of action.[60] For these reasons, *Cotton* illustrates the exact need for courts to support their restitution of maintenance and cure when a valid *McCorpen* defense is proven with additional legal theories.[61]

Even though courts have allowed recovery of wrongly procured maintenance and cure payments, they have, almost uniformly, remained silent on their rationale for doing so.[62] From this silence, some may infer that no legal basis exists under general maritime law for this recovery. However, general maritime law does recognize principles that support the recovery of these payments by employers.

B. RECOVERY IS SUPPORTED BY CURRENT GENERAL MARITIME LAW PRINCIPLES: EQUITABLE ESTOPPEL AND UNJUST ENRICHMENT

General maritime law already embraces legal concepts of equity that would allow aggrieved employers to recover wrongly

58. *Id.* at 268.

59. *Id.* at 269-70.

60. *Id.* at 268. In concluding that no precedent existed recognizing the employer's cause of action, the court cited to Kirk v. Allegheny Towing Inc., 620 F. Supp. 458, 462-63 (W.D. Pa 1985). The court in *Kirk* stated that "we have discovered no cases where actual restitution of maintenance and cure was required of the seaman." *Cotton*, 36 So. 3d at 268 n.7. As discussed though, there have been several cases since the 1985 *Kirk* decision that have evaluated an employer's cause of action for recovery of maintenance and cure, and some courts have awarded restitution to the employer. *See* discussion *supra* Part III.A.

61. The *McCorpen* court provided no legal theory for its denial of maintenance and cure, but it cited to decisions from other cicuit and district courts that supported the proposition. McCorpen v. Central Gulf S.S. Corp., 396 F.2d 547, 549 (5th Cir. 1968).

62. *See* discussion *supra*, Part III.A.

paid maintenance and cure benefits: equitable estoppel and unjust enrichment. Equitable estoppel and unjust enrichment are both well-established in general maritime law and have been used to prevent inequity. Courts should use these doctrines to support recovery by an employer who has proved the necessary elements of a *McCorpen* defense.

1. THE DOCTRINE OF EQUITABLE ESTOPPEL DENIES THE EMPLOYEE ANY CLAIM TO WRONGFULLY PROCURED MAINTENANCE AND CURE BENEFITS

The doctrine of equitable estoppel is grounded in the adage "no man may take advantage of his own wrong."[63] Estoppel has been further described:

> The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim.[64]

Thus, admiralty courts have used this doctrine to provide relief to parties where justice and equity has demanded.

Generally, application of the doctrine of equitable estoppel in general maritime law arises in two situations: where a shipper and a carrier have a dispute regarding a bill of lading and, as in *Glus v. Brooklyn East District Terminal*, where a defendant has misrepresented a plaintiff's legal rights regarding a cause of action against the defendant to the plaintiff. Equitable estoppel

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63. Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 232 (1959). The Supreme Court used the doctrine of estoppel, which it described as "older than the country itself," to deny the defendant from asserting a statute of limitations defense where the defendant misrepresented the statute of limitations for a Federal Employers' Liability claim to the plaintiff. *Id.* at 234-35.

64. *Glus*, 359 U.S. at 233-34 (quoting Ins. Co. v. Wilkinson, 80 U.S. 222, 233 (1871)).

could also prove to be useful to an employer seeking to recover wrongfully paid maintenance and cure payments. The principle would not provide a direct right to recovery of the payments, but it should serve to estop an employee who has procured maintenance and cure payments by misrepresentation from asserting any right to the funds he has received.

Equitable estoppel has been employed to make a carrier liable to a cosignee for false or misleading statements in a bill of lading.[65] It is based on "a notion of fair dealing and good conscience,"[66] and "[i]t is designed to aid the law in the administration of justice where without its aid injustice might result."[67] Justice Breyer stated while serving on the United States Court of Appeals First Circuit:

> Traditionally, the doctrine of equitable estoppel operates to preclude a party who has made representations of fact through his words or conduct from asserting rights which might perhaps have otherwise existed as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquired some corresponding right.[68]

Equitable estoppel has also been used to deny defenses to defendants who have intentionally made misrepresentations to plaintiffs regarding the plaintiff's legal rights. In particular, equitable estoppel has been frequently used to prevent unjust invocation of statutes of limitations.[69] One of the key elements for asserting a claim of estoppel in these cases is a delay in filing of

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65. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 8-12, 517 (2d ed. 1994); *see also* The Carso, 43 F.2d 736 (S.D.N.Y. 1930), *modified*, 53 F.2d 374 (2d Cir. 1931).

66. World Fuel Servs., Inc. v. SE Shipping Lines PTE, Ltd., No. 10-4605, 2011 WL 5403210, at *5 (E.D. La. Nov. 8, 2011) (quoting Gibbs v. Carnival Cruise Lines, 314 F.3d 125, 133 (3d Cir. 2002) (citing Marine Transp. Servs. Sea-Barge Group, Inc. v. Python High Performance Marine Corp., 16 F.3d 1133, 1138 (11th Cir. 1994) (internal quotations omitted)).

67. *Id.*

68. Oxford Shipping Co. v. N.H. Trading Corp., 697 F.2d 1, 4 (1st Cir. 1982) (quoting Precious Metals Assocs., Inc. v. Commodities Futures Trading Comm'n., 620 F.2d 900, 908 (1st Cir. 1980) (quoting 2 J. Pomeroy, EQUITY JURISPRUDENCE § 804, pp. 1421-22 (3d ed. 1905))).

69. Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1323 (11th Cir. 1989) (per curiam) (quoting Glus v. Brooklyn E. Dist. Terminal, 359 U.S. 231, 233 (1959)).

suit by the plaintiff as a result of a defendant's misrepresentations.[70]

Courts have applied this doctrine when three elements are present: "(1) a representation of fact by one party contrary to a later asserted position; (2) good faith reliance by another party upon the representation; and (3) a detrimental change in position by the later party due to the reliance."[71] Although the application of equitable estoppel in general maritime law has arisen most frequently in the two contexts described above, the elements of equitable estoppel can be applied in other circumstances where equity demands.[72] The same underlying principles should be applied to the issue of undeserved maintenance and cure payments. If the elements of equitable estoppel from above are applied to the factual scenario involving an allegation of wrongfully paid maintenance and cure payments, it becomes clear that the doctrine should apply to prevent an employee from claiming a right to the payments he has received.

First, the employee represented that he had no prior medical conditions. Second, the employer relied on the employee's representation in good faith when deciding to hire the employee. Lastly, the employer paid maintenance and cure benefits to the employee believing that the employee's injuries were caused solely by an injury during the course of employment. Thus, equitable estoppel prevents a seaman from taking advantage of his own wrongdoing.

Equitable estoppel has not been used in this way in the past, but this usage would only constitute a narrow expansion of the

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70. *Id.* at 1324 (quoting Burke v. Gateway Clipper, Inc., 441 F.2d 946, 949 (3d Cir. 1971); Sanchez v. Loffland Bros. Co., 626 F.2d 1228, 1231 (5th Cir. 1980)).

71. World Fuel Servs., Inc. v. SE Shipping Lines PTE, Ltd., No. 10-4605, 2011 WL 5403210, at *5 (E.D. La. Nov. 8, 2011) (citing Marine Transp. Servs. Sea-Barge Group, Inc. v. Python High Performance Marine Corp., 16 F.3d 1133, 1139 (11th Cir. 1994)).

72. *World Fuel Servs., Inc.*, 2011 WL 5403210 (examining the application of equitable estoppel to a contract dispute); Aggarao v. Mitsui O.S.K. Lines, Ltd., 741 F. Supp. 2d 733, 740-41 (D. Md. 2010) (citing Brantley v. Republic Mortg. Ins. Co., 424 F.3d 392, 396 (4th Cir. 2005) (applying equitable estoppel to enforce an arbitration agreement between an employer and a seaman)); Sea Byte, Inc. v. Hudson Marine Mgmt. Servs., Inc., 565 F.3d 1293, 1303-05 (11th Cir. 2009) (affirming the district court's use of equitable estoppel to prevent a party from changing its position during trial regarding proposed conclusions of law submitted pretrial); *Keefe*, 867 F.2d 1318 (finding that equitable estoppel applies equally to statutes of limitations established in law and in contract).

doctrine's application. An employer would still have to first prove the elements of a successful *McCorpen* defense. Equitable estoppel would only serve to dispel any claim of right to the payments that the seaman has received as a result of his intentional misrepresentation of his medical history. In this way, applying equitable estoppel only supplements the already well-established *McCorpen* defense. Because the elements of the two doctrines are very similar, any employer who can prove a *McCorpen* defense should also easily be able to prove the necessary elements of equitable estoppel; therefore, a court evaluating the claim should not encounter the situation where an employer can prove one and not the other.

2. UNJUST ENRICHMENT RESULTS FROM ALLOWING AN EMPLOYEE TO RETAIN WRONGFULLY PROCURED MAINTENANCE AND CURE BENEFITS

Unjust enrichment is a second equitable principle recognized in admiralty that supports recovery by an employer. Admiralty law recognizes the legal concept of unjust enrichment.[73]

> The doctrine of unjust enrichment or recovery in quasi-contract . . . applies to situations where as a matter of fact there is no legal contract, but where the person sought to be charged is in possession of money or property which in good conscience and justice he should not retain, but should deliver to another.[74]

Although admiralty courts do apply unjust enrichment based on general maritime law precedent, they frequently draw upon the state law of the jurisdiction in which they sit to provide the substantive elements of an action for unjust enrichment.[75] Three

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73. Archawski v. Hanioti, 350 U.S. 532 (1956); Billfish, Inc. v. Campbell, 187 F.3d 646 (9th Cir. 1999) (unpublished opinion); Gulf Oil Trading Co. v. Creole Supply, 596 F.2d 515, 520 (2d Cir. 1979); Kane v. M/V *Leda*, 355 F. Supp. 796. 801 (5th Cir. 1972).

74. Barna Conshipping, S.L. v. 2,000 Metric Tons, More or Less, of Abandoned Steel, 410 F. App'x 716, 722 (4th Cir. 2011) (per curiam) (quoting Matarese v. Moore-McCormack Lines, Inc., 158 F.2d 631, 634 (2d Cir. 1946) (unpublished opinion)).

75. *In re* Park W. Galleries, Inc., MDL No. 09-2076RSL, 2010 WL 56044, at *2 (W.D. Wash. Jan. 5, 2010) (drawing elements of unjust enrichment from Washington state common law); Cashman Scrap & Salvage, L.L.C. v. Bois D'Arc Energy, Inc., No. 07-7068, 2009 WL 3150234, at *4 (E.D. La. Sept. 28, 2009) (citing Aqua-Terra Constr. & Eng'g Sys. v. Oak Harbor Inv. Props., L.L.C., No. 06-1864, 2008 WL 3539728, at *3 (E.D. La. July 31, 2008) (applying Louisiana state law elements of

common elements for a cause of action for unjust enrichment are: (1) a benefit conferred on the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstance as to make it inequitable for the defendant to retain the benefit without payment of its value.[76]

Application of the doctrine of unjust enrichment in favor of the employer is appropriate where the employee has paid undue maintenance and cure as a result of material misrepresentations. When applying the elements of a cause of action for unjust enrichment, this becomes clear very quickly. First, the plaintiff, employer, has conferred a benefit upon the defendant, employee, in the form of monetary payments for maintenance and cure. Second, the employee likely appreciates the benefit being conferred upon him by his employer because in most cases he is out of work and in need of income. Lastly, the employee's acceptance and retention of the funds provided by his employer that results from his concealment of prior medical conditions strikes at the heart of inequity. The purpose of an employer's pre-screening of employees is to prevent injuries to those same employees by not assigning them tasks that may aggravate a pre-existing medical condition. Injustice results when an employee is allowed to shirk any legal responsibility for his concealment of a material, preexisting medical condition. For these reasons, admiralty courts should rely on long-established principles of admiralty law to allow an employer to recover wrongfully procured maintenance and cure payments from an employee.

C. RECOVERY BY THE EMPLOYER IS SUPPORTED BY COMMON LAW PRINCIPLES

Although very little general maritime law precedent for the recovery of wrongly paid maintenance and cure claims exist, general maritime law can draw from other sources of law, including state and federal common law or statutes, to provide a substantive rule of law where none currently exists. The Supreme Court has described general maritime law as "'an amalgam of traditional common-law rules, modifications of those rules, and newly created rules,' drawn from both state and federal

unjust enrichment)); Fowler v. Towse, 900 F. Supp. 454, 460 (S.D. Fla. 1995) (applying Florida state unjust enrichment law).

76. 26 WILLISTON ON CONTRACTS § 68:5 (4th ed. 1999).

sources."[77] Recently in *Atlantic Sounding*, the Supreme Court noted "that '[a]dmiralty is not created in a vacuum; legislation has always served as an important source of both common law and admiralty principles.'"[78] Finally, although it is generally true that "[w]ith admiralty jurisdiction comes the application of substantive admiralty law," the exercise of federal admiralty jurisdiction does not automatically preclude the application of state law.[79]

Thus, admiralty courts are not bound only to general maritime law jurisprudence in their search for an equitable remedy to the problem at hand. Admiralty courts do no harm to the uniformity principle of general maritime law by adopting widely accepted common law principles for rules absent from the general maritime law, and the mere fact that no prior general maritime law precedent has developed does not prevent an admiralty court from creating an equitable remedy. Failure to allow employers to recover wrongly paid maintenance and cure claims does not comport with many statutory and decisional common law principles. The sources of these principles include common law unjust enrichment, the LHWCA, and state no-fault workers compensation systems.

1. COMMON LAW UNJUST ENRICHMENT SHOULD GUIDE MAY BE USED AS A GUIDE TO ADMIRALTY COURTS

Although unjust enrichment is recognized under admiralty law the contours of the principle are not as well developed as in common law.[80] Specific applications may vary, but unjust enrichment is recognized in some form in every jurisdiction of the United States by either common law or statute. Furthermore, admiralty courts already frequently look to state law to provide the substantive elements for a cause of action in unjust enrichment. Therefore, common law precedent, although not binding on admiralty courts, should prove instructive in the

77. Saratoga Fishing Co. v. J. M. Martinac & Co., 520 U.S. 875, 878 (1997) (quoting East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 865 (1986)); s*ee also* Fitzgerald v. U.S. Lines Co., 374 U.S. 16, 20 (1963); Kermarac v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959).

78. Atl. Sounding Co., Inc. v. Townsend, 129 S. Ct. 2561, 2573-74 (2009) (citing Miles v. Apex Marine Corp., 498 U.S. 19, 24 (1990)).

79. Grubart v. Great Lakes Dredging & Dock Co., 513 U.S. 527, 545-46 (1995) (citing East River S.S. Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864 (1986)).

80. *See* discussion *supra*, Part III.B.2.

application of the doctrine, and admiralty courts should take note of the common law application of unjust enrichment in avoiding the unjust result of rewarding an employee for his material misrepresentations.

2. PROVISIONS OF THE LHWCA SUPPORT RECOVERY BY AN EMPLOYER

Employers owe maintenance and cure to seamen without to fault. Thus, analogs can be found in the compensation due under the LHWCA and state workers' compensation systems. The LHWCA provides compensation for a class of workers commonly referred to as "longshoremen" who were historically excluded from state workers' compensation coverage.[81] Longshoremen are land-based workers who are employed to perform services on, for, or around vessels.[82]

Prohibiting an employer from recovering payments made as a result of the false representations of an employee does not comport with provisions of the LHWCA.[83] Although the LHWCA applies exclusively to longshoremen and not to seaman, the LHWCA is a no-fault based remedy for an injured employee, like maintenance and cure.[84] Some courts agree that an employer has no cause of action to recover wrongfully paid compensation benefits.[85] However, unlike fraudulent procurement of maintenance and cure payments, the LHWCA imposes criminal liability upon the employee for fraudulently procuring LHWCA benefits.[86] The LHWCA also anticipates some situations in which recovery of benefits paid to an employee may occur.[87] For example, when compensation was paid to the employee and the claim was adjudicated, an employee is required to repay benefits conferred on him.[88] If, after adjudication, an employee seeks to

81. THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 5-1, 326 (4th ed. 2004).

82. *Id.*

83. 33 U.S.C. §§ 901-50 (2006).

84. White v. Bethlehem Steel Corp., 222 F.3d 146, 148 (5th Cir. 2000) (citing Rodriguez v. Compass Shipping Co., 451 U.S. 596, 616 (1981)); *see* 33 U.S.C. §§ 901-50 (2006).

85. Ceres Gulf v. Cooper, 957 F.2d 1199, 1206 (5th Cir. 1992) (holding "the LHWCA does not provide an employer with a right to recover advance payments wrongfully aid, such as through fraud, when no LHWCA is owed"); Stevedoring Servs. of Am., Inc. v. Eggert, 953 F.2d 552 (9th Cir. 1992).

86. 33 U.S.C. § 931 (2006).

87. 20 C.F.R. 702.225(b)(2) (2011).

88. *Id.*

withdraw his claim, the withdrawal must be approved by the district director of the Office of Workers' Compensation Programs (hereinafter OWCP), and the employee must repay "the amount of benefits previously paid because of the claim that is being withdrawn or it can be established to the satisfaction of the [OWCP] that repayment of any such amount is assured."[89]

3. THE PUNITIVE NATURE OF NO-FAULT STATE WORKERS' COMPENSATION SYSTEMS SUPPORTS RECOVERY BY THE EMPLOYER

Requiring restitution of fraudulently procured maintenance and cure payments also accords with the punitive themes pervasive in state workers' compensation systems. Similar to the LHWCA, many states impose criminal liability upon an employee that fraudulently procures workers' compensation benefits. In addition, many of these states require restitution of workers' compensation benefits as a result of their criminal activity.

In opposition to the application of state law principles in admiralty is the uniformity principle of admiralty law. Courts have long sought to provide uniformity in general maritime law.[90] Fortunately, in the situation at hand, it is not necessary to rely on common or state law principles to come to an equitable solution because general maritime law principles and precedent support restitution.[91] This comment does not propose that admiralty courts apply restitution statutes found in state workers' compensation systems or state unjust enrichment laws. The fact that restitution is available in those common law systems only serves to illustrate the wide acceptance of the principle at issue. Fraud on the part of an employee should not be rewarded under general maritime law any more than it should be

89. *Id.*

90. The Lottawanna, 88 U.S. 558, 575 (1875) ("One thing . . . is unquestionable; the Constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states."). *See generally* Norfolk S. R.R. Co. v. Kirby, 543 U.S. 14 (2004); Romero v. Int'l Terminal Operating Co., 358 U.S. 354 (1959); Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942); Pan. R.R. Co. v. Johnson, 264 U.S. 375 (1924); S. Pac. Co. v. Jensen, 244 U.S. 205 (1917).

91. *See* discussion *supra*, Part III. A-B.

under a state workers' compensation program or any other legal system where payments are made to him.

D. EMPLOYERS COULD USE CONTRACTS TO GUARANTEE THEIR RIGHT TO RECOVER WRONGFULLY PROCURED MAINTENANCE AND CURE PAYMENTS

One possible solution to this problem that would forgo the application of any lofty equitable principle is for an employer to affirmatively contract for his right to recover wrongfully procured maintenance and cure payments. Although this approach has not been tested in any admiralty court as of yet, it seems a viable alternative to the methods and rationales discussed above. Admiralty courts have long recognized that seamen are "emphatically the wards of the admiralty [court]," but this status does not preclude them from entering into valid contracts.[92] Admiralty courts have placed one important limitation on a seaman's ability to contract: a seaman's right to maintenance and cure may not be abrogated by contract.[93] Short of this limitation though, admiralty courts have permitted contracts to alter maintenance and cure obligations.[94] Admiralty courts have gone so far as to allow seamen to release employers from liability for an injury so long as the agreement was "fairly made with and fully comprehended by the seaman."[95] If the outermost boundary of contractual capacity for a seaman is the prohibition of against abrogating maintenance and cure benefits, contracts granting an employer who can prove a *McCorpen* defense the right to recover maintenance and cure benefits paid to an employee surely falls within this boundary.

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92. Garrett v. Moore-McCormack Co., 317 U.S. 239, 246 (1942) (quoting Harden v. Gordon, 11 F. Cas. 480, 485 (No. 6,074) (C.C.D. Me. 1823) (Story, J.)).

93. Vaughan v. Atkinson, 369 U.S. 527, 532-33 (1962) (quoting Cortes v. Baltimore Insular Lines, 287 U.S. 367, 371 (1932) (Cardozo, J.)).

94. *Garrett*, 317 U.S. 239 (allowing, although cautiously, seamen to contractually release employers from liability for injury); *see* Cabrera Espinal v. Royal Caribbean Cruises, Ltd., 253 F.3d 629, 631 (11th Cir. 2001) (allowing for the alteration of maintenance and cure remedies by contract). Many circuits allow for the alteration of daily maintenance and cure benefit rates by contract. *Cabrera*, 253 F.3d 629; Baldassaro v. United States, 64 F.3d 206, 212 (5th Cir. 1995); Blainey v. Am. S.S. Co., 990 F.2d 885, 887 (6th Cir. 1993); Macedo v. F/V Paul & Michelle, 868 F.2d 519, 521-22 (1st Cir. 1989); Gardiner v. Sea-Land Serv., Inc., 786 F.2d 943 (9th Cir. 1986).

95. *Garrett*, 317 U.S. at 248 (quoting Harmon v. United States, 59 F.2d 372, 373 (5th Cir. 1932)).

An employer could simply require employees to sign an agreement that incorporates the elements of the *McCorpen* defense and requires employees to reimburse the employer for any payments made where those elements are proved. Although this route likely still requires a judicial determination of whether the elements of the *McCorpen* defense are proven, it at least solidifies the contractual right of the employer to recover. The contract provides an affirmative right of the employer to recover wrongfully paid maintenance and cure payments, and therefore, provides a much more streamlined approach to recovery.

E. GRANTING RESTITUTION ENCOURAGES EMPLOYERS TO BEGIN PAYING BENEFITS QUICKLY

Allowing employers to recover wrongfully procured maintenance and cure payments also serves important policy ends. In addition to affirming the availability of punitive damages, the *Atlantic Sounding Co. v. Townsend* decision also encourages claims for failure to pay maintenance and cure by dangling the fruit of punitive damages before an employee and his counsel. To counteract this added incentive, courts should allow employers to recover payments that it was not legally obligated to make under the *McCorpen* defense. By allowing employers the opportunity to recover benefits paid, employers are encouraged to begin payment of benefits immediately. Immediate payment is beneficial to the employee who is often out of work due to his injury and to the employer who can proceed with a more thorough investigation of the accident and the employee's medical history without accusations of unwarranted delays. Judicial recognition of an employer's right to restitution is necessary to encourage immediate payment of benefits and thereby counter the incentive to seek punitive damages provided by *Atlantic Sounding*.

Opponents will argue that granting employers a right to recovery is a hollow victory because many employees may be judgment proof. Although in many cases an employee may in fact be judgment proof, an employer's inability to recovery should not be a justification for the denying the employer the right to recovery. Inability of a successful party to recovery monetary damages is a risk that many litigants face, but it is immaterial to the determination of the rights of the parties. If an employer sees value in proceeding against an employee for restitution, that is a decision it must make in light of the possibility that the employee

cannot repay the benefits, but courts should accord the employer the right to seek restitution if it so chooses.

IV. CONCLUSION

An employer should be able to recover wrongfully procured maintenance and cure payments where a successful *McCorpen* defense can be proved. Admiralty courts have already recognized this cause of action and, in cases where employers have proven the necessary elements of a *McCorpen* defense, have awarded restitution to employers. Admiralty courts should use the doctrines of equitable estoppel and unjust enrichment to support an employer's right to recover and prevent an employee from taking advantage of his own wrong. The concept of penalizing an employee for a material misrepresentation of pre-existing health condition is not a foreign one. Under similar no-fault compensation systems, such as the LHWCA and state workers' compensation, an employee may be subject to criminal penalties that may include restitution of benefits. Alternatively, employers should use contracts to guarantee their right to recover undue maintenance and cure payments.

Providing this right to employers serves to equally benefit both employers and employees. By providing a method of recovery, employers are encouraged to pay claims promptly without fear of later discovering disqualifying misrepresentations by an employee. Prompt payment of a claim by an employer is inherently beneficial to an employee who may be in need of immediate income as a result of an incapacitating injury. This solution also removes the threat of punitive damages claims under *Atlantic Sounding* because employers lack any meaningful reason to delay payment of maintenance and cure benefits. Therefore, punitive damages would be reserved for situations in which they were intended, truly egregious behavior of an employer, not delay from an employer's good faith investigation.