March 15, 2013

ROYSTON RAYZOR
Est.1892

Houston
Pennzoil Place
711 Louisiana St., Ste 500
Houston, Texas 77002
TEL: 713.224.8380
FAX: 713.225.9945

Galveston
The Hunter Building
306 22nd Street, Ste. 301
Galveston, Texas 77550
TEL: 409.763.1623
FAX: 409.763.3853

Corpus Christi
Frost Bank Plaza
802 N. Carancahua, Ste. 1300
Corpus Christi, Texas 78401
TEL: 361.884.8808
FAX: 361.884.7261

Rio Grande Valley
55 Cove Circle
Brownsville, Texas 78521
TEL: 956.542.4377
FAX: 956.542.4370

San Antonio
Fountainhead Tower
8200 I.H. 10 West, Ste. 610
San Antonio, Texas 78230
TEL: 210.524.9696
FAX: 210.524.9811

Fifth Circuit Rejects "Restitution-via-*McCorpen*" Counterclaim

By: Michael E. Streich

In *Boudreaux v. Transocean Deepwater, Inc.*, No. 12-30041 (5th Cir. filed March 14, 2013), the Fifth Circuit Court of Appeals addressed the "novel" issue (at least in this Circuit) of whether maritime law recognizes a cause of action for restitution by a defendant who successfully establishes a *McCorpen* defense to maintenance and cure liability. Rejecting Transocean's attempt to recover maintenance and cure payments unjustly received by an "injured" seaman, Judge Patrick Higginbotham relied on previous 5th Circuit and Supreme Court precedent, and especially emphasized the traditional notion that seamen are wards of admiralty law, to deny a "restitution-via-*McCorpen*" claim.

The plaintiff in *Boudreaux* failed to disclose serious back problems during a Transocean pre-employment physical, affirmatively answering "no" to several inquiries. Less than five months after hire, Boudreaux claimed he injured his back while servicing equipment. Consequently, Transocean paid maintenance and cure for nearly five years. However, in 2008, Boudreaux filed suit against Transocean seeking further maintenance and cure, and punitive damages for mishandling claims. Unfortunately for Boudreaux, Transocean discovered his previous back problems during discovery and established a successful *McCorpen* defense on partial summary judgment. Transocean then filed a counterclaim against Boudreaux on a "novel theory" – contending that its successful *McCorpen* defense automatically established its right to restitution under the general maritime law for the previously paid maintenance and cure payments. The district court agreed with Transocean and awarded summary judgment on its counterclaim.

The Fifth Circuit, however, declined to recognize Transocean's "novel attempt to invoke [*McCorpen*] as an affirmative right of recovery." The Court noted that allowing such a sweeping counterclaim would run opposed to maritime law's charge to safeguard the well-being of seamen and could have a powerful effect in settlement negotiations. If need be, the Court said, employers are allowed to offset any Jones Act damages recovered by the seaman to the extent they duplicate maintenance and cure previously paid. Further relying on the Fifth Circuit's opinion in *Brown v. Parker Drilling Offshore Corp.*, in which the Court found that a *McCorpen* defense does not require a finding of subjective intent to conceal, the Court determined that a "restitution-via-*McCorpen*" counterclaim would threaten a seaman with potentially "crushing liability for misstatements found material." As can be seen, a majority of the Court's reasoning focused on protecting seamen from potentially disabling judgments (although likely uncollectible), a course the Court believe comports with the "existing fabric of maritime law."

Judge Edith Brown Clement did contribute to the debate with a dissent, however. Citing a 1974 case out of the Ninth Circuit, which adopted the position that

restitution is available upon a successful establishment of a *McCorpen* defense, Judge Clement expressed her approval of an equitable principle allowing an employer to recover those payments unjustly received by seamen who engage in willful and intentional misconduct.

The opinion may be accessed via the Fifth Circuit website at:
http://www.ca5.uscourts.gov/opinions/pub/12/12-30041-CV0.wpd.pdf

Michael E. Streich is an Associate Attorney at Royston, Rayzor, Vickery & Williams LLP. He assists corporate clients in all phases of litigation in state and federal trial courts and at arbitration proceedings. His experience includes matters involving patent infringement, admiralty and maritime law, vessel collisions and allisions, personal injury defense, commercial transactions, air and sea cargo claims, and other litigation matters.

713.224.8380 | Michael.Streich@roystonlaw.com