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## Glynn v. Roy Al Boat Management Corp., CA9, 57 F.3d 1495, 6/21/95

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provision reserving the right of Sea-Land to use another vessel "to perform all or part of the carriage without giving notice to the shipper. It also contained a provision limiting liability to \$500.00 per container for damage occurring during carriage unless the shipper declared a higher value on the face of the bill. Yang Machine had not declared a higher value.

Yang Machine brought suit against Sea-Land in district court, bringing a summary judgment motion for damages in the amount of \$241,700. Sea-Land cross-motivated for summary judgment, to limit its liability to \$1,000.00 based on the contract and 46 U.S.C. app. § 1304(5).

The lower court granted Yang Machine's motion, finding Sea-Land had unreasonably deviated by its restowage of cargo aboard the *Sealand Patriot*. On appeal, the ninth circuit reversed, holding that Sea-Land had not unreasonably deviated from the contract and Yang Machine had failed to exercise its option to declare value beyond the \$500 limitation. The appeals court remanded, limiting Sea-Land's liability.

The question before the appeals court was whether Sea-Land's transfer of Yang Machine's cargo from the *Merchant Prince* to the *Sealand Patriot* constituted an unreasonable deviation, ousting Sea-Land from the \$500 package limitation of 46 U.S.C. app. § 1304(5).

Under COGSA, carrier liability for damage to cargo is limited to \$500 per package. This limitation does not exist if either an unreasonable deviation from the terms of the bill of lading occurs, or if the shipper has not been afforded the opportunity to declare a value exceeding the \$500 package limit.

The ninth circuit first discussed the district court's assertion that Sea-Land unreasonably deviated because the bill of lading did not contain a transshipment clause, which allows a carrier to transfer cargo from one vessel to another during carriage. The district court opined that the transfer from one ship to another violated the contract. The ninth circuit found that Clause 3 in the bill of lading gave Sea-Land the right to use another vessel to complete all or part of the voyage and provided sufficient notice to Yang Machine of that possibility. Clause 3 in Sea-Land's bill, although not containing the word "transshipment," contained language found in bills of lading of other major car-

riers which the district court agreed contained sufficient notice of potential transshipment. Using a substitute vessel for completion of the voyage was, the appeals court held, a transshipment and not a deviation from the contract of carriage.

Yang Machine contended that Clause 3 in Sea-Land's bill of lading was a "liberty clause." A liberty clause is a clause which may be unenforceable if it gives a carrier unreasonable freedom to alter aspects of carriage. In evaluating the content of Clause 3, the ninth circuit determined that the clause contained two separate and distinct paragraphs. Although the first paragraph contained language found in a typical liberty clause, the second, containing language permitting Sea-Land to use a substitute vessel for all or part of the carriage, was enforceable, since it did not contain typical liberty clause language.

The limitation under COGSA would not have been available, the court also stated, if the shipper had not been given "fair opportunity" to declare a value higher than \$500. The court was unconvinced by Yang Machine's claim that the limitation of liability provisions noted on the bill prevented it from declaring actual value, since the shipper had never inquired into making a declaration of higher value. Yang Machine's contention regarding lack of opportunity was further weakened by the fact that the company had previously shipped via Sea-Land on many occasions and never contested the limitation clause in the bill nor attempted to declare higher value. The shipper's failure to claim higher value was probably prompted, the court observed, by an economic decision, since it would have had to pay higher fees to insure the cargo beyond the express limitation. This rationale was supported by the fact that Yang Machine separately insured the cargo, receiving payment from its insurer after the cargo was damaged.

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## Seaman's Damages

### NO PUNITIVE DAMAGES FOR FAILURE TO PAY MAINTENANCE & CURE TO JONES ACT SEAMAN

**Ninth circuit awards reasonable attorney's fees— but not punitive damages— on claim for willful and persistent failure of employer to either investigate maintenance and cure claim or to pay maintenance.**

(*Glynn v. Roy Al Boat Management Corp.*, CA9, 57 F.3d 1495, 6/21/95)

Christopher Glynn (Glynn) was hired as a crew member in late January 1992 by Daniel J. Shawhan (Shawhan), captain and master of the F/V *No Problem*, a boat owned by Roy Al Boat Management Corporation (Roy Al). Glynn signed a written agreement which stated terms of his employment, such as the compensation arrangement, grounds for termination, etc. While the *No Problem* was docked in Honolulu, Hawaii, Glynn was fired for coming late to work.

Glynn brought suit under the Jones Act and general maritime law, alleging he had sustained injuries while he was a crew member of the *No Problem*. The jury returned verdicts favoring Glynn on his claims for unseaworthiness, negligence and maintenance against both Roy Al and Shawhan, finding both to be Jones Act employers. (The court had left the issue of whether or not Shawhan was an employer to the jury.) The jury also awarded punitive damages after determining defendants had acted "arbitrarily, willfully, and with bad faith" in neglecting to provide maintenance and cure. The district judge granted judgment n.o.v. in favor of defendants on the issue of punitive damages on the basis that such damages were unavailable as a matter of law, but awarded attorney's fees on the claim for maintenance and cure. The court denied Glynn prejudgment interest since he had failed to request that the jury consider the question. Plaintiff and defendants appealed to the ninth circuit.

The main issues in the case involved determination of who was Glynn's true Jones Act employer; whether attorney's

fees were available under a claim for maintenance and cure; and whether the Supreme Court's *Miles* decision and ninth circuit precedent precluded punitive damages on a general maritime action.

The ninth circuit noted that in order for Glynn to recover under the Jones Act he had to show a defendant was his employer. *Cosmopolitan Shopping Co. v. McAllister*, 337 U.S. 783, 787 n.6 (1949). The district court had found as a matter of law that an employer/employee relationship existed between Glynn and Roy Al. The ninth circuit rejected Roy Al's argument that the jury could have found Glynn to be a joint venturer or independent contractor on the basis of the compensation arrangement, which was based on a receipt of a percentage of profits. The appellate court concluded that no reasonable jury could have found factually that Glynn was anything other than an employee, considering several factors such as payment, direction, supervision and source of power to hire and fire. *Matute v. Lloyd Bermuda Lines, Ltd.*, 931 F.2d 231, 236 (3d Cir.), *cert. denied*, 502 U.S. 919 (1991).

The appeals court also concluded that the district court had erred in submitting defendant Shawhan's employer status as a jury question. The court stated that, since there could only be one employer for the purposes of the Jones Act and that it had already been determined that Roy Al was Glynn's employer, the jury should not have been permitted to consider the question of whether or not Shawhan was also Glynn's employer.

With respect to the issue of whether Glynn was entitled to attorney's fees, the ninth circuit noted that it was well established, since *Vaughan v. Atkinson*, 369 U.S. 527 (1962), that an injured seaman could recover attorney's fees where defendant had acted willfully and persistently in failing to pay maintenance and cure. The court treated the issue as abandoned by defendant Roy Al, since it did not seriously contest the issue of its "willful and persistent" failure to either investigate Glynn's claim or pay maintenance.

The appeals court, instead, focussed on Glynn's assertion that the lower court had not properly set the level of fees on his claim. The court determined that the lower court did not abuse its discretion in fixing the amount of fees awarded and

that the amount awarded was reasonable, affirming the result. The ninth circuit observed with approval that the district court, in fixing the fees, had used factors set forth in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 69-70 (9th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976), such as time and labor required, novelty and difficulty of the question involved, skill necessary to pursue the claim, preclusion of other employment, etc.

The ninth circuit focussed in the critical part of its opinion on the issue of whether the district court had erred in finding that Glynn was not entitled to punitive damages on the maintenance and cure claim. The court, in its analysis, relied on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), concluding that punitive damages are not recoverable for defendant's willful, arbitrary and persistent failure to pay maintenance and cure. *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495, 1505. The court extended the *Miles* rationale limiting nonpecuniary recovery to general maritime causes of action on the theory that such recovery was not provided for in the "uniform plan of maritime tort law Congress created."

The appeals court rejected Glynn's argument that it should not abandon the ninth circuit's recognition of punitive damages for failure to pay maintenance and cure under the pre-*Miles* precedent of *Evich v. Morris*, 819 F.2d 256 (9th Cir.), *cert. denied*, 484 U.S. 914 (1987). The court pointed out that the language in *Evich* supporting plaintiff's position was dictum. The ninth circuit expressly refused to follow the fifth circuit's opinion in *Guevara v. Maritime Overseas Corp.*, 34 F.3d 1279 (5th Cir. 1994), where the court upheld a punitive damage award for failure to pay maintenance and cure. The ninth circuit noted that decisions upholding punitive damages relied "directly or indirectly" on the *Vaughan* case. The Supreme Court in that case had acknowledged for the first time that damages for failure to give maintenance and cure may include "necessary expenses, including attorney's fees, when the failure to pay maintenance is willful and persistent." *Glynn*, 57 F.3d at 1504. The ninth circuit concluded that there is no reason why the plaintiff

should be awarded punitive damages in addition to attorney's fees since attorney's fees alone were a powerful incentive deterring employers from willfully and arbitrarily refusing to pay maintenance and cure.

As to other issues raised, the court ruled that Glynn's failure to submit the question of prejudgment interest to the jury served as a waiver on his prejudgment entitlement and that the district court had not erred in finding that a magistrate could not order payment of maintenance and cure as a condition for lifting a default against defendants. The lower court had found that there was a disputed issue of fact as to whether any injury had befallen Glynn aboard the *No Problem*, which required a determination before he could prevail and, therefore, such an action by the magistrate would have been premature.

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## COGSA Carriers

### CHARTERER CAN BIND VESSEL OWNER DESPITE CHARTER-PARTY INDEMNITY CLAUSE BY SIGNING "FOR THE MASTER"

**Charter party authorizing charterer to sign for master could bind vessel owner as COGSA carrier even though charter party expressly included indemnification provision; shippers failed to meet fifth circuit privity standard or make *prima facie* bailment claim against owner.**

(*Thyssen Steel Company v. M/V Kavo Yerakas*, CA5, 50 F.3d 1349, 4/27/95)

Thyssen Steel Company (Thyssen) entered into a contract with Europe-Overseas Steamship Lines (Eurolines) to carry steel from Europe to Texas aboard the ship *M/V Kavo Yerakas*, which had been time chartered to Eurolines by its owner, Dodekaton Corporation (Dodekaton). Pursuant to loading the cargo of steel pipe, bills of lading were issued and signed by the Eurolines agent "for the master."