This article originally appeared in Volume 22 of the Tulane Maritime Law Journal
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Seaman Status Revisited (Yet Again)—A Common Ownership Requirement and a New "Seagoing" Emphasis: *Harbor Tug & Barge Co. v. Papai* ©

Todd D. Lochner

John Papai was painting the housing structure of the tug PT. BARROW when he fell from a ladder and injured his knee.[1] The PT. BARROW's operator, Harbor Tug & Barge Company (HTB), had hired Papai for a one day assignment through the Inland Boatman's Union (IBU) hiring hall.[2] This assignment was the thirteenth time that HTB had hired Papai in a two-and-one-half-month period.[3] Papai had obtained other jobs with various vessels through the hiring hall over a period of two-and-one-quarter years.[4] All of these jobs involved maintenance, longshoring, or deckhand work.[5] On the basis of this employment history, Papai filed a claim for negligence under the Jones Act[6] and a claim for unseaworthiness under general maritime law in the United States District Court for the Northern District of California.[7] The district court granted HTB's motion for summary judgment based upon Papai's lack of "seaman" status.[8] However, the district court denied a motion for reconsideration, and interlocutory appeal was denied by the United States Court of Appeals for the Ninth Circuit.[9] The district court then reaffirmed its summary judgment order.[10] The Ninth Circuit reversed and remanded

1. *See* Harbor Tug & Barge Co. v. Papai, 117 S. Ct. 1535, 1538, 1997 AMC 1817, 1818 (1997).
2. *See id.*
3. *See id.*
4. *See id.*
5. *See id.*
6. 46 U.S.C.A. § 688 (West Supp. 1997).
7. *See Harbor Tug & Barge*, 117 S. Ct. at 1538-39, 1997 AMC at 1819. Papai also filed a claim under section 5 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1997), and a common law negligence claim. *See* Papai v. Harbor Tug & Barge Co., 67 F.3d 203, 205, 1995 AMC 2888, 2890 (9th Cir. 1995), *rev'd*, 117 S. Ct. 1535, 1997 AMC 1817 (1997). His wife joined as a plaintiff claiming loss of consortium. *See id.*
8. *See Harbor Tug & Barge*, 117 S. Ct. at 1539, 1997 AMC at 1819.
9. *See Papai*, 67 F.3d at 205, 1995 AMC at 2890.
10. *See Harbor Tug & Barge*, 117 S. Ct. at 1539, 1997 AMC at 1819. In following *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 1991 AMC 913 (1991), and *Southwest*

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the case for trial on the issue of Papai's seaman status and related claims.[11] Based upon the test of seaman status articulated in *Chandris, Inc. v. Latsis*,[12] the appellate court directed the lower court to consider the totality of the circumstances surrounding Papai's employment.[13] The Ninth Circuit further opined that the twelve other occasions when Papai worked for HTB could also provide a "sufficient connection" to HTB's vessels to establish seaman status.[14] The United States Supreme Court granted certiorari to clarify the "substantial connection" requirement articulated in *Chandris.*[15] The Court held that Jones Act coverage is limited to those who satisfy all of the criteria espoused in *Chandris,*[16] including a substantial connection to a vessel or a fleet of vessels that are under common ownership and control, and "who face regular exposure to the perils of the sea."[17] *Harbor Tug & Barge Co. v. Papai*, 117 S. Ct. 1535, 1997 AMC 1817 (1997).

The noted case marks the fourth time this decade that the United States Supreme Court has addressed the issue of seaman status.[18] The Court's initial three-pronged test for Jones Act seaman status developed in a trilogy of cases decided between 1940 and 1952.[19] To prove seaman

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Marine, Inc. v. Gizoni, 502 U.S. 81, 1992 AMC 305 (1991), the district court reasoned that Papai was not a seaman because he did not have the necessary permanent connection with a vessel. *See Harbor Tug & Barge*, 117 S. Ct. at 1539, 1997 AMC at 1819. This test has been superseded by *Chandris, Inc. v. Latsis*, 515 U.S. 347, 1995 AMC 1840 (1995). *See Harbor Tug & Barge*, 117 S. Ct. at 1539, 1997 AMC at 1819.

11. *See Papai*, 67 F.3d at 208, 1995 AMC at 2895.

12. 515 U.S. 347, 1995 AMC 1840 (1995). The two-prong inquiry articulated in *Chandris* is that "[t]he worker's duties must contribute to the function of the vessel or to the accomplishment of its mission, and the worker must have a connection to a vessel in navigation (or an identifiable group of vessels) that is substantial in terms of both its duration and its nature." *Id.* at 376, 1995 AMC at 1862-63.

13. *See Papai*, 67 F.3d at 206, 1995 AMC at 2891-92. In dissent, Judge Poole characterized the majority opinion thus: "[T]he majority concludes that 'it may be necessary to examine the work performed by the employee while employed by different employers during the relevant time period.' In one stroke, perhaps without even fully realizing it, the majority vitiates the 'connection to a vessel' requirement." *Id.* at 208, 1995 AMC at 2896 (Poole, J., dissenting) (citation omitted).

14. *See id.* at 206, 1995 AMC at 2892.

15. *See Harbor Tug & Barge*, 117 S. Ct. at 1538, 1997 AMC at 1818.

16. *See supra* note 12 (discussing the *Chandris* two-prong inquiry).

17. *Harbor Tug & Barge*, 117 S. Ct. at 1542-43, 1997 AMC at 1825.

18. *See* Chandris, Inc. v. Latsis, 515 U.S. 347, 1995 AMC 1840 (1995); McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 1991 AMC 913 (1991); Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 1992 AMC 305 (1991).

19. *See* South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 1940 AMC 327 (1940); Norton v. Warner Co., 321 U.S. 565, 1944 AMC 337 (1944); Desper v. Starved Rock Ferry Co., 342 U.S. 187, 1952 AMC 12 (1952). *See generally* David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. Rev. 79 (1985) (surveying the Supreme Court's seaman status tests and *Robison* jurisprudence by category of worker and vessel); Wendy A. Kelly, Note, Chandris, Inc. v. Latsis*: The Supreme Court Addresses the Vessel Connection*

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status the worker was required to show that he (1) aided in the navigation[20] of a (2) vessel engaged in navigation[21] to which the worker had a (3) permanent attachment of the type which commonly characterizes a crew.[22] Though the Court dealt with seaman status several times over the next three decades, those decisions added little to seaman status jurisprudence.[23] Without proper guidance from the Supreme Court, the circuits individually refined this three-prong formulation.[24] During this period of tinkering, the "on board to aid in her navigation"[25] language was twisted to mean "all whose duties contribute to the operation and welfare of the vessel."[26] Furthermore, the "permanent connection" requirement was construed to include workers whose temporal connection with the vessel was brief.[27] In essence, the circuits were largely left to their own devices to answer the incessant question: "Who is a Jones Act seaman?"

The United States Court of Appeals for the Fifth Circuit developed its own formulation in *Offshore Co. v. Robison*,[28] which focused the inquiry on whether the worker was permanently assigned to a vessel or performed a substantial part of his work on the vessel.[29] A substantial amount of jurisprudence has followed in the wake of *Robison*, providing incremental variations on the vessel connection test.[30] These variations in

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Requirement for Seaman Status under the Jones Act, 70 TUL. L. REV. 825 (1995) (setting forth the general evolution of the Jones Act seaman inquiry).

20. *See South Chicago Coal*, 309 U.S. at 260, 1940 AMC at 332.

21. *See Desper*, 342 U.S. at 190-91, 1952 AMC at 14. *But cf.* Senko v. LaCrosse Dredging Corp., 352 U.S. 370, 374, 1957 AMC 891, 895 (1957) (holding that a vessel can be immobile for extended periods of time and still be in navigation for purposes of seaman status). *See also* Kenneth G. Engerrand & Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. 431, 451 (1983); Kelly, *supra* note 19, at 828.

22. *See Norton*, 321 U.S. at 573, 1944 AMC at 343; *see also* Engerrand & Bale, *supra* note 21, at 451; Kelly, *supra* note 19, at 828.

23. *See* Robertson, *supra* note 19, at 90-93 (discussing Butler v. Whiteman, 356 U.S. 271, 1959 AMC 2566 (1958) (per curiam); Grimes v. Raymond Concrete Pile Co., 356 U.S. 252, 1958 AMC 1014 (1958) (per curiam); Texas Co. v. Gianfala, 222 F.2d 382, 1955 AMC 1219 (5th Cir. 1955), *rev'd*, 350 U.S. 879 (1955) (per curiam)); Kelly, *supra* note 19, at 828.

24. *See* Robertson, *supra* note 19, at 94; Kelly, *supra* note 19, at 831.

25. *South Chicago Coal*, 309 U.S. at 260, 1940 AMC at 333; Robertson, *supra* note 19, at 94.

26. Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383, 388, 1953 AMC 846, 852 (6th Cir. 1953); Robertson, *supra* note 19, at 94.

27. *See* Robertson, *supra* note 19, at 94. In *Butler v. Whiteman*, 356 U.S. 271, 1959 AMC 2566 (1958) (per curiam) and *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 1958 AMC 1014 (1958) (per curiam), the Supreme Court held that the plaintiffs were seamen. However, in both of these cases the plaintiffs were connected to a vessel for only a brief period of time; therefore, the lower courts were forced to construe the permanent connection requirement liberally.

28. 266 F.2d 769, 1959 AMC 2049 (5th Cir. 1959).

29. *See id.* at 779, 1959 AMC at 2062.

30. *See generally* Robertson, *supra* note 19, at 79-130.

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the Fifth Circuit cases are of particular interest since the Supreme Court has chosen to follow the Fifth Circuit's lead over that of other circuits.[31]

Most notably, in *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*,[32] two workers, who were repairing one of several ferries operated by their employer, drowned when their work boat capsized.[33] The employees had been making repairs to the ferry's machinery while it was underway on the Mississippi River.[34] The Fifth Circuit reversed the district court's summary judgment and held that employees need not be assigned to a single vessel to qualify as Jones Act seamen.[35] The court held that a sufficient connection to a vessel existed if the employees were permanently assigned to or performed a substantial part of their work on several specific vessels.[36]

Bertrand v. International Mooring & Marine, Inc.[37] followed the course first set by *Braniff*. In *Bertrand*, the plaintiffs were part of an anchor and mooring crew whose employer had been hired to relocate an oil rig.[38] The plaintiffs slept, ate, and worked aboard a towing vessel for seven days while the rig was in transit.[39] One of the plaintiffs, who had remained ashore, was dispatched to pick up the anchor crew from the delivery destination in Texas.[40] The plaintiffs were returning to Louisiana in the company van when it was involved in an accident.[41] Several members of the crew, as well as the driver who had stayed ashore, were killed.[42] The court was faced with a dilemma: the policy of the Jones Act is to protect those like the anchor crew, who faced the perils of the sea;

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31. *See* Harbor Tug & Barge Co. v. Papai, 117 S. Ct. 1535, 1540-41, 1997 AMC 1817, 1821-23 (1997); *see also id.* at 1543 n.1, 1997 AMC 1826 n.1 (Stevens, J., dissenting).
32. 280 F.2d 523, 1961 AMC 1728 (5th Cir. 1960).
33. *See id.* at 525, 1961 AMC at 1730.
34. *See id.*
35. *See id.* at 528, 1961 AMC at 1734.

> The usual thing, of course, is for a person to have a Jones Act seaman status in relation to a particular vessel. But there is nothing about this expanding concept to limit it mechanically to a single ship. If the other factors summarized above and set out in such detail in . . . Robison . . . are otherwise present, we see no insurmountable difficulty with respect to element (1) in the fact that such person is "assigned permanently to" several specific vessels "or perform[s] a substantial part of his work on the" several specified "vessel[s]." Of course, it must not be spasmodic and the relationship between the individual and the several identifiable ships must be substantial in point of time and work.

Id. (alterations in original) (citation omitted).

36. *See id.*
37. 700 F.2d 240, 1984 AMC 1740 (5th Cir. 1983).
38. *See id.* at 242, 1984 AMC at 1741.
39. *See id.*
40. *See id.* at 243, 1984 AMC at 1741.
41. *See id.*
42. *See id.*

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however, because some of the towing vessels the plaintiffs served on had been provided by the owners of the oil rigs,[43] the plaintiffs could not establish a connection with an identifiable group of vessels.[44] The court held that the identifiable group of vessels to which the plaintiffs were connected did not need to be under common ownership or control.[45] The court was probably swayed by the fact that the employer often chose to use towing vessels supplied by rig owners, and thus "whether the different vessels [the plaintiffs served on] were under common ownership or control was determined by the employer, not the nature of the claimants' work."[46]

In *Barrett v. Chevron, Inc.*,[47] the plaintiff was a welder's helper engaged in a one-year assignment upon various oil platforms.[48] The plaintiff, who spent twenty to thirty percent of his time working aboard vessels,[49] was injured while moving from a vessel to a jack-up barge.[50] The injury occurred on the eighth day of a fourteen-day shift, most of which had been spent on vessels.[51] The United States Court of Appeals for the Fifth Circuit held that plaintiff's "status as a crew member is determined 'in the context of his entire employment' with his current employer."[52] Based upon the plaintiff's entire employment with this particular employer, plaintiff spent less than thirty percent of his time

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43. *See id.* at 242-43, 1984 AMC at 1741-42.
44. *See id.* at 245, 1984 AMC at 1745-46. The driver of the vehicle,

> while a regular member of the anchorhandling crew, had not been on the last job. He was sent with a company car to pick up the other plaintiffs at the dock and return them to their home base. He had no connection with the [towing vessel,] Aquamarine 503. Plaintiffs were determined to achieve seaman status as a group. Hence, status by way of the connection with the Aquamarine 503 was not an available argument.

Robertson, *supra* note 19, at 109 n.170.
45. *See Bertrand*, 700 F.2d at 245, 1984 AMC at 1744-45.
46. *Id.*, 1984 AMC at 1746.
47. 781 F.2d 1067, 1986 AMC 2455 (5th Cir. 1986).
48. *See id.* at 1068, 1986 AMC at 2456.
49. *See id.* at 1074, 1986 AMC at 2467.
50. *See id.* at 1069, 1986 AMC at 2458.
51. *See id.* at 1074, 1986 AMC at 2467.
52. *Id.* at 1075, 1986 AMC at 2468 (quoting Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1347, 1980 AMC 2625, 2630 (5th Cir. 1980)).

> If Barrett was entitled to have his status decided on the basis of his work during the eight days immediately before his accident, the district court might properly have concluded that he was a member of the crew of a vessel or, indeed, as we have already indicated, that he was not. On the other hand, if the district court was required to consider Barrett's vessel-related work during his entire one-year assignment as a welder's helper to Chevron's Bay Marchand Field, the record does not support a finding that he was a crew member.

Id. at 1074-75, 1986 AMC at 2467.

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aboard vessels.[53] The court reasoned that because the plaintiff did not perform a substantial part of his work on several specified vessels, he did not have a substantial connection with a vessel and therefore did not qualify as a Jones Act seaman.[54]

The Supreme Court broke nearly three decades of silence on the seaman status issue in *McDermott International Inc. v. Wilander*,[55] but it still did not address the substantial connection requirement. The Court merely held that seaman status requires that the "employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its mission.'"[56]

The Supreme Court's next comprehensive decision regarding connection to a vessel and seaman status came in *Chandris, Inc. v. Latsis*.[57] In *Chandris*, the plaintiff suffered a detached retina during a voyage for his employer aboard the S.S. GALILEO.[58] In addition, the ship's doctor was allegedly negligent in his medical care.[59] After shore-side surgery, Latsis sailed with the GALILEO to Germany, where the vessel was in dry dock for six months while undergoing refurbishment.[60] Upon completion, Latsis sailed back to the United States with the vessel, where he filed a Jones Act action.[61] The Supreme Court granted certiorari to conclusively "determine what *relationship* a worker must have to the vessel."[62] The Court held that (1) "an employee's duties must 'contribut[e] to the function of the vessel or to the accomplishment of its

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53. *See id.* at 1076, 1986 AMC at 2469. The Supreme Court has accepted "an appropriate rule of thumb for the ordinary case: a worker who spends less than about 30 percent of his time in the service of a vessel . . . should not qualify as a seaman under the Jones Act." Chandris, Inc. v. Latsis, 515 U.S. 347, 371, 1995 AMC 1840, 1858 (1995). "Since *Barrett*, the Fifth Circuit consistently has analyzed the problem in terms of the percentage of work performed on vessels for the employer in question—and has declined to find seaman status where the employee spent less than 30 percent of his time aboard ship." *Chandris*, 515 U.S. at 367, 1995 AMC at 1855 (citing cases).

54. *See Barrett*, 781 F.2d at 1076, 1986 AMC at 2469.

55. 498 U.S. 337, 1991 AMC 913 (1991).

56. *Id.* at 355, 1991 AMC at 927 (alteration in original) (quoting Offshore Co. v. Robison, 266 F.2d 769, 779, 1959 AMC 2049, 2063 (5th Cir. 1959).

57. 515 U.S. 347, 1995 AMC 1840 (1995). The Court addressed the seaman status issue several years earlier in *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 1992 AMC 305 (1991); however, it did not tamper with the status test. The Court held that though LHWCA and Jones Act coverage are mutually exclusive, a ship repairman is not precluded from Jones Act coverage as a matter of law merely because of his job title. *See id.* at 88, 92, 1992 AMC at 310, 313. *See generally* Kelly, *supra* note 19.

58. *See Chandris*, 515 U.S. at 350, 1995 AMC at 1841-42.

59. *See id.* at 351, 1995 AMC at 1842.

60. *See id.*

61. *See id.*

62. *Id.* at 350, 1995 AMC at 1841.

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mission'";[63] and (2) "a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature."[64] Furthermore, the Court accepted the argument that there was "no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer."[65]

In the noted case, the Supreme Court identified two issues: (1) "whether an administrative ruling in favor of [an] employee on his claim of coverage under the Longshore and Harbor Workers' Compensation Act (LHWCA)[66] bars his claim of seaman status in [a] Jones Act suit";[67] and (2) whether the record would allow a reasonable jury to conclude that Papai is a Jones Act seaman.[68] The Court avoided answering the first question by holding that the latter was dispositive.[69] The Court further narrowed its focus by noting that the Harbor Tug & Barge Company (HTB) did not dispute that the vessel was in navigation or that Papai was contributing to its mission, thereby entirely satisfying the first prong of the *Chandris* test and partially satisfying the second prong.[70] The remaining issue under the second prong of the *Chandris* test was whether Papai had a connection to the PT. BARROW or an identifiable group of vessels "that [was] substantial in terms of both its duration and its nature."[71] In discussing the application of the second prong of *Chandris*, the Court instructed that the inquiry "must concentrate on whether the employee's duties take him to sea,"[72] thereby giving substance to both the duration and nature requirements "and distinguishing land-based from sea-based employees."[73]

The Court first addressed Papai's argument that the identifiable group of vessels to which he was attached were those vessels on which he worked through the IBU hiring hall.[74] The Court began its analysis by tracing the "identifiable group of vessels" concept to *Braniff v. Jackson*

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63. *Id.* at 368, 1995 AMC at 1856 (alteration in original) (quoting McDermott Int'l, Inc. v. Wilander, 498 U.S. 337, 355, 1991 AMC 913, 927 (1991) (quoting Offshore Co. v. Robison, 266 F.2d 769, 779, 1959 AMC 2049, 2062 (5th Cir. 1959)).
64. *Id.*
65. *Id.* at 371-72, 1995 AMC at 1859.
66. 33 U.S.C.A. §§ 901-950 (West 1986 & Supp. 1997).
67. Harbor Tug & Barge Co. v. Papai, 117 S. Ct. 1535, 1538, 1997 AMC 1817, 1818 (1997).
68. *See id.*
69. *See id.*
70. *See id.* at 1540, 1997 AMC at 1821.
71. *Id.* (citing *Chandris*, 515 U.S. at 368, 1995 AMC at 1856).
72. *Id.*
73. *Id.*
74. *Id.*, 1997 AMC at 1821-22.

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Ave.-Gretna Ferry Inc.[75] The Court paraphrased the Fifth Circuit thus: "There is 'no insurmountable difficulty' . . . in finding seaman status based on the employee's relationship to 'several specific vessels'—'an identifiable fleet'—as opposed to a single one."[76] From this language arose the rule articulated in *Chandris*, finding seaman status for workers who have "the requisite connection with an 'identifiable fleet' of vessels, a finite group of vessels under common ownership or control."[77]

The Court next noted that the appellate court in *Papai* erred when it did not require common ownership of the vessels on which Papai had been employed.[78] The Court held that the appellate court had misinterpreted the following language in *Chandris*: "[W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer."[79] The *Harbor Tug & Barge* Court explained that instead of commenting on the common ownership requirement, the Court in *Chandris* was addressing an argument made by the employer that Latsis could not be a Jones Act seaman because he lacked a sufficient temporal connection to a vessel in navigation.[80] In finding that Latsis may in fact qualify as a Jones Act seaman, the Court recognized that it was not necessary to focus on the entire period of his employment.[81] The *Harbor Tug & Barge* Court summarized thus: "[i]n *Chandris*, the words 'particular employer' give emphasis to the point that the inquiry into the nature of the employee's duties for seaman-status purposes may concentrate on a narrower, not broader, period than the employee's entire course of employment with his current employer."[82] The Court concluded that in *Chandris* "[t]here was no suggestion of a need to examine the nature of an employee's duties with prior employers."[83] Therefore, the Court held that without proper grounds to focus on Papai's duties with prior employers, the lower court had erred in finding an identifiable group of vessels and disregarding the common ownership requirement.[84]

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75. *See id.*, 1997 AMC at 1822 (citing Braniff v. Jackson Ave.-Gretna Ferry, Inc., 280 F.2d 523, 1961 AMC 1728 (5th Cir. 1960).

76. *Id.* at 1540-41, 1997 AMC at 1822 (quoting *Braniff*, 280 F.2d at 528, 1961 AMC at 1734).

77. *Id.* at 1541, 1997 AMC at 1822 (quoting Chandris, Inc. v. Latsis, 515 U.S. 347, 366, 1995 AMC 1840, 1854 (1995)).

78. *See id.*, 1997 AMC at 1823.

79. *Id.*, 1997 AMC at 1822 (alterations in original) (quoting *Chandris*, 515 U.S. at 371-72, 1995 AMC at 1859).

80. *See id*., 1997 AMC at 1822-23.

81. *See id.*, 1997 AMC at 1823.

82. *Id.*

83. *Id.* (citing *Chandris*, 515 U.S. at 367, 1995 AMC at 1855 (discussing Barrett v. Chevron, Inc., 781 F.2d 1067, 1986 AMC 2455 (5th Cir. 1986) (en banc)).

84. *See id.* at 1543, 1997 AMC at 1825.

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The Court's requirement that only employment with a particular employer may be used to establish seaman status is based upon a policy goal.[85] That goal is to allow both maritime workers and employers to determine before the work day begins who will be covered by the LHWCA or the Jones Act.[86] Presumably, the formula articulated in *Harbor Tug & Barge* has given the seaman status inquiry "workable and practical confines."[87]

Next, the Court addressed Papai's argument that HTB should have predicted his seaman status based upon some of the duties that the IBU hiring hall certified Papai could perform.[88] A description of these duties was in the agreement signed between IBU and HTB.[89] The Court rejected this argument on two grounds.[90] First, the seaman status inquiry is not affected by job title because the inquiry concerns actual duties.[91] Second, because the inquiry is focused upon the employee's connection to actual vessel operations, Papai does not qualify since "he was not going to sail with the vessel after he finished painting it."[92] Moreover, the Court discussed the lack of evidence, which failed to show "that any particular percentage of Papai's work [was] of a seagoing nature, subjecting him to the perils of the sea."[93]

Finally, Papai argued that he qualified as a seaman based upon his employment with HTB over the two-and-one-half months prior to the accident.[94] Papai had performed maintenance work aboard the PT. BARROW three or four times during this two-and-one-half-month period.[95] However, the Court concluded that because none of Papai's work aboard the PT. BARROW was of a seagoing nature, it would be unreasonable to infer that any of his other recent work with HTB was of a seagoing nature.[96]

In the dissenting opinion, the dissent argued that the vessels which Papai was referred to through the IBU hiring hall should be considered an

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85. *See id.* at 1541-42, 1997 AMC at 1823-24.
86. *See id.* (citing *Chandris*, 515 U.S. at 363, 1995 AMC at 1852).
87. *Id.* at 1542, 1997 AMC at 1824.
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.* (discussing South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 260, 1940 AMC 327, 333 (1940)).
92. *Id.*
93. *Id.*, 1997 AMC at 1824-25.
94. *See id.*, 1997 AMC at 1825.
95. *See id.* The record is silent regarding other vessels and the type of work performed during the nine or ten other occasions Papai was employed by HTB. *See id.*
96. *See id.*

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identifiable group of vessels.[97] First, the dissent argued that the court of appeals properly relied on language found in *Chandris* when it considered Papai's employment history with employers other than HTB.[98] The dissenters asserted that "[i]f the type of work a maritime worker customarily performs would entitle him to seaman status if performed for a single employer, [then] the worker should not be deprived of that status simply because the industry operates under a daily assignment rather than a permanent employment system."[99]

Second, the dissent noted that the majority was concerned that an employer would not know whether a worker is covered under the LHWCA if previous employers are considered in the status test.[100] The dissent argued that "[t]his fear is exaggerated, since an employer who hires its workers out of a union hiring hall should be presumed to be familiar with the general character of their work."[101]

The dissent's final argument was that the point of the *Chandris* formula was to ensure that a "specific activity being performed at the time of the injury is not sufficient to establish the employee's status under the Jones Act."[102] The dissenters further argued that the character of the employee's "history in the market from which a vessel owner obtains all of its crews" is as relevant as a particular assignment.[103] Additionally, the dissent added in a footnote that they also would have affirmed the portion of the lower court's holding that permitted Papai to pursue his Jones Act claim despite a LHWCA administrative ruling which provided him with LHWCA recovery.[104]

The force and effect of any Supreme Court decision depends on the willingness of the lower courts to implement that decision. If the lower courts continue to focus attention on whether the employee's duties take him to sea, then the effect of the *Harbor Tug & Barge* decision will be to

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97. *See id.* at 1543, 1997 AMC at 1826 (Stevens, J., dissenting). Justice Stevens wrote the dissenting opinion in which Justices Ginsburg and Breyer joined. *See id.*

98. *See id.* at 1543, 1997 AMC at 1827. "[W]e see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer." Chandris, Inc. v. Latsis, 515 U.S. 347, 371-72, 1995 AMC 1840, 1859 (1995).

99. *Harbor Tug & Barge*, 117 S. Ct. at 1543-44, 1997 AMC at 1827 (quoting *Papai*, 67 F.3d at 206, 1995 AMC at 2892) (first alteration in original).

100. *See id.* at 1544, 1997 AMC at 1827.

101. *Id.*

102. *Id.*

103. *Id.*, 1997 AMC at 1828.

104. *See id*. at 1544 n.2, 1997 AMC at 1828 n.2 (citing Southwest Marine, Inc. v. Gizoni, 502 U.S. 81, 1992 AMC 305 (1991)); *see also* Papai v. Harbor Tug & Barge Co., 67 F.3d 203, 208, 1995 AMC 2888, 2894 (9th Cir. 1995), *rev'd*, 117 S. Ct. 1535, 1997 AMC 1817 (1997); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 6-52, at 435 (2d ed. 1975).

This article originally appeared in Volume 22 of the Tulane Maritime Law Journal
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entirely replace the "substantial connection in both duration and nature" language found in *Chandris*. The Court used the "seagoing" inquiry in reference to the substantial duration and nature elements of *Chandris*'s second prong.[105] The Court mandated that the inquiry regarding the "nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea."[106] This focus provides "substance to the inquiry both as to the duration and nature of the employee's connection to the vessel."[107] The Court was not attempting to replace the duration and nature inquiry with a seagoing requirement;[108] however, some lower courts have come dangerously close to doing so.[109]

Although *Harbor Tug & Barge* has only recently come down from the Supreme Court, its effects already are being felt in both the Ninth and Fifth Circuits. In *Cabral v. Healy Tibbits Builders, Inc.*,[110] the plaintiff worked for Healy Tibbits Builders (Healy) for almost eleven months on various land and sea-based projects.[111] Cabral then temporarily left Healy's employ for a period of two-and-one-half months before being rehired.[112] During Cabral's second term of employment, he spent ninety percent of his time as a crane operator on a "crane barge."[113] While stepping aboard the anchored barge at the start of a workday, Cabral fell and injured himself.[114] The first prong of the *Chandris* test was undisputed, and the court did not reach the issue of whether the barge was a vessel in navigation.[115] However, the United States Court of Appeals for the Ninth Circuit held that Cabral failed the substantial connection test and therefore was not a Jones Act seaman.[116] The court cited *Harbor Tug & Barge Co. v. Papai* for the proposition that "the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks."[117] In relying upon this statement, the

105. *See Harbor Tug & Barge*, 117 S. Ct. at 1540, 1997 AMC at 1820-21.
106. *Id.*, 1997 AMC at 1821.
107. *Id.*
108. *See id.*
109. *See* Cabral v. Healy Tibbits Builders, Inc., 118 F.3d 1363, 1997 AMC 2419 (9th Cir. 1997), *reh'g en banc denied and amended by* 128 F.3d 1289 (9th Cir. 1997); *In re* National Marine, Inc., No. CIV.A.96-3144, 1997 WL 426092, (E.D. La. July 24, 1997).
110. 118 F.3d 1363, 1997 AMC 2419 (9th Cir. 1997).
111. *See id.* at 1364, 1997 AMC at 2419.
112. *See id.*
113. *See id.*, 1997 AMC at 2420.
114. *See id.*
115. *See id.* at 1365, 1997 AMC at 2421.
116. *See id.* at 1366, 1997 AMC at 2423.
117. *Id.* (citing Harbor Tug & Barge Co. v. Papai, 117 S. Ct. 1535, 1540, 1997 AMC 1817, 1821 (1997) ("[T]he inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea."); Chandris, Inc. v. Latsis, 515

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court reasoned that Cabral was not a seaman because he only had a "transitory or sporadic connection with Barge 538,"[118] since he produced "no evidence showing that he was ever aboard Barge 538 when it was anywhere but the Ford Island Ferry Project."[119]

In the Fifth Circuit, the issue arose during a limitation proceeding. *In re National Marine, Inc.*[120] involved a barge owner (National Marine) who had filed for limitation, and an employee (Vicknair) who brought a Jones Act cross claim against his employer (Bunge Corporation) in the limitation proceeding.[121] Vicknair worked at Bunge's grain export facility, and his task was to board any barge that came to the dock to assist in "unloading the barges, by attaching crane lines for removing the covers from the barges,"[122] and by securing the barge via a pulley system.[123] The United States District Court for the Eastern District of Louisiana held that in addition to not having a connection to an identifiable fleet, the "death knell" for the claim was that the "nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea."[124] Consequently, the court held that "Vicknair's duties never took him to sea—they required him to remain on shore, boarding only vessels that had been moored. Thus, under the prevailing legal tests, Vicknair is not a seaman. . . ."[125]

In *Cabral*, the Ninth Circuit dodged the question of whether the vessel was in navigation by finding that the substantial connection requirement was dispositive.[126] The *Cabral* court's substantial duration and nature analysis almost exclusively focused on whether the plaintiff went to sea.[127] In *In re National Marine*, the district court did not focus exclusively on the seagoing inquiry, but it did hold a prominent place in the court's opinion.[128] If these two opinions are indicative of the way the lower courts will interpret *Harbor Tug & Barge Co. v. Papai*'s "seagoing"

U.S. 347, 370, 1995 AMC 1840, 1857 (1995) ("[T]he Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.'" (quoting Seas Shipping Co. v. Sieracki, 328 U.S. 85, 104, 1946 AMC 698, 712 (1946) (Stone, C.J., dissenting))).

118. *Id.*

119. *Id.*

120. No. CIV.A.96-3144, 1997 WL 426092, at *1 (E.D. La. July 24, 1997).

121. *See id.* at *1-*2.

122. *Id.* at *1.

123. *See id.*

124. *Id.* at *3 (quoting Harbor Tug & Barge Co. v. Papai, 117 S. Ct. 1535, 1540, 1997 AMC 1817, 1821 (1997)).

125. *Id.*

126. *See* Cabral v. Healy Tibbits Builders, Inc., 118 F.3d 1363, 1366 n.1, 1997 AMC 2419, 2424 n.1 (9th Cir. 1997), *reh'g en banc denied and amended by* 128 F.3d 1289 (9th Cir. 1997).

127. *See id.* at 1366, 1997 AMC at 2424.

128. *See In re National Marine*, 1997 WL 426092, at *2-*3.

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inquiry, then this query may replace the duration and nature analysis entirely.[129]

Harbor Tug & Barge reiterated the point made in *Chandris*: the goal of the substantial connectivity test is to exclude from coverage those "whose employment does not regularly expose them to the perils of the sea."[130] Though this statement appeared in *Chandris*, the Court in *Harbor Tug & Barge* gave it new force by mandating that the focus of the substantial connection requirement must "concentrate on whether the employee's duties take him to sea."[131] This focus may prove to be problematic.[132] In the Jones Act status analysis, "going to sea" is not necessarily dispositive;[133] however, as a practical matter it may become a prerequisite, leaving the lower courts to struggle with the question of what it means to go to sea.

To illustrate the problem of a stringent "seagoing" focus, consider the following hypothetical. Assume that a seaman was hired in December to man the engine rooms aboard two gambling boats owned by the Gilton Gambling Group. The seaman lived ashore and alternated his work time: one week on the S.S. SNAKE EYES and one week on the S.S. LUCKY 13. Each vessel was required to maintain a schedule and actually sail; however, they usually did not sail on over half of their scheduled sailing times. In February, the seaman was injured while working in SNAKE EYES' engine room when a pipe breached under pressure. This seaman had been employed for three months but never was aboard either vessel while they were underway. The seaman filed a claim under the Jones Act, and the defendant filed a motion for summary judgment based upon plaintiff's seaman status.

The hypothetical seaman maintains the vessels' engines. His job contributes to the function of the vessels, satisfying *Chandris*'s first prong. Furthermore, the plaintiff is connected to an identifiable group of vessels that are under common ownership, thereby satisfying a portion of the substantial connection inquiry. The only remaining issue is whether that connection is substantial in terms of both its duration and nature.

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129. *But see* Waller v. American Seafood Co., No. 97-CA-0302, 1997 WL 607012, at *1 (La. Ct. App. Oct. 1, 1997). A pipe fitter who volunteered for a 20-day journey to complete construction of a vessel during its delivery to the owners was injured when the ship violently rolled. *See id.* at *1, *3-*4. The court of appeal overturned the district court's summary judgment, finding that the plaintiff was not a seaman as a matter of law, and remanded for further proceedings. *See id.* at *4.

130. *See* Harbor Tug & Barge Co. v. Papai, 117 S. Ct. 1535, 1540, 1997 AMC 1817, 1821 (1997) (quoting Chandris, Inc. v. Latsis, 515 U.S. 347, 368, 1995 AMC at 1840, 1856 (1995)).

131. *Id.*

132. *See generally* Jack L. Allbritton, *Seaman Status in* Wilander*'s Wake*, 68 TUL. L. REV. 373, 397-98 (1994).

133. *See id.*

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Based upon *Harbor Tug & Barge*, a court should not focus so stringently on the "seagoing" inquiry that it becomes dispositive of the entire seaman status analysis. Although the *Harbor Tug & Barge* Court merely sought to provide "substance" to the duration and nature prong of the substantial connection analysis,[134] the hypothetical court may be tempted to grant the motion for summary judgment and thereby dispose of the case based upon the plaintiff's failure to go to sea. All too easily, a court could follow the Ninth Circuit's lead in *Cabral*, in which the seagoing inquiry was dispositive.[135]

The other requirement espoused in *Harbor Tug & Barge*, that the identifiable group of vessels to which a seaman is attached must be under common ownership and control,[136] is antithetical to the policy of protecting seamen.[137] The Court's decision is at odds with the realities of the maritime industry. After *Harbor Tug & Barge*, the large portion of the maritime industry which operates on a daily assignment system rather than a permanent employment system may become exempt from the Jones Act, despite the fact the employees would be Jones Act seamen if they worked for a single employer.[138] Though this is a concern, the paramount issue now is not what the law should be, but rather how to approach the post-*Harbor Tug & Barge* analysis.

Harbor Tug & Barge instructs that when considering a defendant's motion for summary judgment on seaman status, the court must decide whether (1) the employee's duties contributed "to the function of the vessel or to the accomplishment of her mission"[139] and (2) if the seaman had "a connection to a vessel in navigation (or to an identifiable group of such vessels)"[140] under the "requisite degree of common ownership or control,"[141] and that connection must be "substantial in terms of both its duration and its nature."[142] *Harbor Tug & Barge* further instructs that the duration and nature analysis "must concentrate on whether the employee's duties take him to sea."[143]

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134. *See Harbor Tug & Barge*, 117 S. Ct. at 1540, 1997 AMC at 1821.

135. *See* Cabral v. Healy Tibbits Builders, Inc., 118 F.3d 1363, 1366, 1997 AMC 2419, 2423-24, *reh'g en banc denied and amended by* 128 F.3d 1289 (9th Cir. 1997).

136. *See Harbor Tug & Barge*, 117 S. Ct. at 1541, 1997 AMC at 1822.

137. *See id.* at 1543-44, 1997 AMC at 1826-27 (Stevens, J., dissenting).

138. *See id.* at 1544, 1997 AMC at 1827 (citing Papai v. Harbor Tug & Barge Co., 67 F.3d 203, 206, 1995 AMC 2888, 2892 (9th Cir. 1995), *rev'd*, 117 S. Ct. 1535, 1997 AMC 1817 (1997)).

139. *Id.* at 1540, 1997 AMC at 1820 (quoting Chandris, Inc. v. Latsis, 515 U.S. 347, 368, 1995 AMC 1840, 1856 (1995)).

140. *Id.* (quoting *Chandris*, 515 U.S. at 368, 1995 AMC at 1856).

141. *Id.* at 1543, 1997 AMC at 1825.

142. *Id.* at 1540, 1997 AMC at 1821.

143. *Id.*

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In the noted case, the Supreme Court purported to merely apply *Chandris*; however, there are three notable developments in *Harbor Tug & Barge*. First, the identifiable group of vessels to which a seaman has a substantial connection must be under common ownership or control.[144] Second, whether the plaintiff's duties take him to sea is of heightened importance in the seaman status inquiry.[145] Third, the substantial duration and nature inquiry may not include the consideration of a plaintiff's duties with previous employers.[146] The Court granted certiorari "to provide clarification."[147] Whether they succeeded is debatable. Since the Supreme Court is unlikely to address the issue again in the near future, there is one result that both the plaintiff and defense bar may agree upon: there will be plenty of work for the admiralty bar in *Harbor Tug & Barge*'s wake.

144. *See id.* at 1543, 1997 AMC at 1825.
145. *See id.* at 1540, 1997 AMC at 1821.
146. *See id.* at 1541, 1997 AMC at 1822.
147. *Id.* at 1538, 1997 AMC at 1818.