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EMPLOYERS CANNOT RECOVER AMOUNTS ERRONEOUSLY PAID FOR MAINTENANCE AND CURE TO SEAMAN WHO CONCEALED PRE-EXISTING INJURIES

A seaman who suffers injury or illness while in the service of a vessel is entitled, regardless of fault, to payment from his employer for maintenance (i.e., living expenses) and cure (i.e., medical expenses) until the point in time that the seaman reaches maximum medical improvement. An employer has few defenses to a seaman's maintenance and cure claim. However, one defense that is frequently successful is a *McCorpen* defense. In order to establish a successful *McCorpen* defense, an employer must prove that (1) the seaman willfully concealed a pre-existing injury or illness at the time of employment, (2) the concealed information was material to the employer's hiring decision, and (3) the pre-existing injury or illness is causally related to the current injury or illness. A successful *McCorpen* defense bars the seaman from further recovery of maintenance and cure.

A recent trend in maritime law has been for defense attorneys who have successfully established a *McCorpen* defense to file a counterclaim against the seaman asserting claims of fraud and unjust enrichment, and seeking restitution of all maintenance and cure erroneously paid to the seaman. A number of motions for summary judgment have recently been granted in favor of employers in the Eastern District of Louisiana, allowing restitution of amounts erroneously paid to seaman who willfully concealed pre-existing injuries or illnesses. These rulings gave hope to employers that the balance was shifting away from the protection of seamen as "wards of the court" and towards a more balanced playing field.

This hope proved to be fleeting, however, as the U.S. Fifth Circuit in *Boudreaux v. Transocean Deepwater, Inc.*, No. 12-30041 (5th Cir. 3/14/2013), recently reversed a district court decision awarding reimbursement to an employer for amounts erroneously paid to a seaman. The trial court initially granted the employer's motion for summary judgment following a successful *McCorpen* defense, finding that a successful *McCorpen* defense automatically establishes a right to restitution under general maritime law.

The Fifth Circuit reversed the decision, refusing to adopt the district court's novel maritime cause of action providing an employer with an automatic right to restitution for benefits previously paid following the successful establishment of a *McCorpen* defense. In doing so, the Court cited a line of cases providing that a worker's fraud in procuring employment does not vitiate the employment relationship and does not relieve the employer of its duties to the seaman should he suffer injury or illness in its employ, thus further reinforcing the concept that the Court is charged with safeguarding the well-being of seaman. The Court also was concerned by the fact that a *McCorpen* defense does not require the employer to establish the same level of culpability required for common law fraud, yet ignored the issue of unjust enrichment as a basis for an employer's cause of action altogether.

Judge Clement, relying on the equitable principle of unjust enrichment, wrote a well-reasoned dissent stating that she believed the requirements of restitution are satisfied in all cases in which a *McCorpen* defense is successfully established. Every employer who successfully establishes a *McCorpen* defense must demonstrate that a seaman made an intentional and willful misrepresentation and relied on that misrepresentation to seek benefits to which he was not entitled. According to Judge Clement, this showing is sufficient to establish a claim for restitution under the equitable principle of unjust enrichment. Judge Clement also noted that the Ninth Circuit has also previously recognized an employer's cause of action to recover erroneously paid maintenance and cure benefits upon a successful establishment of a *McCorpen* defense.



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This case is yet another example of the uphill battle with which an employer is faced in defending a Jones Act claim. While the decision does not definitively rule out all recovery by an employer as a result of a seaman's willful concealment of a pre-existing injury or illness, such as when the seaman's actions alone are sufficient to constitute fraud, it has eliminated an extremely effective means of leverage in settling Jones Act claims. This decision also reinforces the need for employers to utilize a thorough, well-drafted, post-employment medical questionnaire in the hiring process.

– [Matthew S. Lejeune](#)

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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