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Recognizing Modern Maintenance and Cure as an Admiralty Right

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Abstract

This Note argues that maintenance and cure is a right inherent in general admiralty law. As such, it applies equally to unionized and non-unionized seamen, regardless of whether a bargained-for rate of maintenance and cure exists. Part I traces the development of the doctrine of maintenance and cure. Part II presents and compares the courts' positions on the assessment of maintenance and cure. Part III proposes that maintenance and cure is an admiralty right, implicit in every seaman's employment, which no contractual provision can abrogate. This Note concludes that courts should decide each maintenance and cure case on an individual basis in order to ensure that the rate awarded to the seaman reflects the actual costs incurred.

NOTES

RECOGNIZING MODERN MAINTENANCE AND CURE AS AN ADMIRALTY RIGHT

INTRODUCTION

Since ancient times, seafaring nations have employed the doctrine of maintenance and cure to provide room, board, and medical care for injured seamen.¹ Maintenance and cure provided injured seamen with a per diem living allowance, paid to the seaman by the shipowner, while the seaman recovered ashore.² The doctrine of maintenance and cure was based on the belief that the vessel served as the seaman's home and the seaman should be entitled to continue receiving lodging and food even when sick.³ Traditionally, "maintenance" provided

1. See Laws of Oléron, *reprinted in* 30 F. Cas. 1171 [hereinafter Laws of Oléron]. The twelfth century Laws of Oléron demonstrate how long maintenance and cure has been part of admiralty law. See *id.* Article VI states that shipowners have no obligation to seamen whose own negligence caused the injuries. *Id.* art. VI, at 1174. If injuries occur in the service of the ship, then the owner is liable. *Id.* Article VII sets out the type of service to be rendered to the injured seaman. *Id.* art. VII, at 1174. It noted that "the master ought to set him ashore, to provide lodging and candlelight for him, and also to spare him one of the ship-boys . . . and to afford him such diet as . . . he had on shipboard in his health, and nothing more." *Id.*

Other ancient sea codes imitated the Laws of Oléron by disclaiming liability for self-inflicted injuries but imposing liability, in the form of maintenance and cure, for work-inflicted injuries. See The Laws of Wisbuy, arts. XVIII, XIX (1250), *reprinted in* 30 F. Cas. 1189, 1191; see also Sims, *The American Law of Maritime Personal Injury and Death: An Historical Review*, 55 TUL. L. REV. 973, 975 n.16 (1981) (containing additional sea codes).

2. See *Pelotto v. L&N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979) (noting that maintenance and cure is per diem living and medical allowance paid while sailor "is outside the hospital and has not reached the point of maximum cure"); see also BLACK'S LAW DICTIONARY 954 (6th ed. 1990). BLACK'S LAW DICTIONARY defines maintenance and cure as a

[c]ontractual form of compensation given by general maritime law to seaman who falls ill while in service of his vessel. Seaman is entitled to maintenance and cure if he is injured or becomes ill in service [of] vessel, without regard to negligence of his employer or to unseaworthiness of ship; and "maintenance" is a per diem living allowance for food and lodging and "cure" is payment for medical, therapeutic and hospital expenses; and employer's duty to pay maintenance and cure continues until seaman has reached "maximum cure."

Id.

3. See *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 732 (1943). Justice Rutledge, writing for the Court, stated that "during the period of [the seaman's] tenure the

for the cost of obtaining food and lodging comparable to that which the seaman received at sea.⁴ "Cure" provided for payment of medical expenses incurred in the treatment of the seaman's injury or illness.⁵ Courts historically granted the remedy regardless of the seaman's employment contract.⁶

In the late 1940s and early 1950s, U.S. admiralty unions incorporated maintenance and cure into contracts between unionized seamen and shipowners.⁷ Unions negotiated fixed rates of maintenance and cure for seamen, rather than retaining the traditional remedy of awarding them the expenses actually incurred.⁸ Unions set the rate of maintenance and cure at US\$8.00, an appropriate rate in the 1950s, but one which no longer suffices.⁹ Since then, U.S. courts have split on whether

vessel is not merely his place of employment; it is the framework of his existence. For that reason, among others, his employer's responsibility for maintenance and cure extends beyond injuries sustained because of, or while engaged in, activities required by his employment." *Id.*

4. *Morel v. Sabine Towing & Transp. Co.*, 669 F.2d 345, 346 (5th Cir. 1982) (defining maintenance as "equivalent of the food and lodging to which a seaman is entitled while at sea"); see *supra* note 2 (defining maintenance and cure).

5. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938). In *Calmar*, the U.S. Supreme Court defined cure as "care, including nursing and medical attention during such period as the duty continues." *Id.* The duty to provide cure continued until seaman reached "maximum cure," meaning until the seaman was cured or diagnosed as permanently incurable. *Vella v. Ford Motor Co.*, 421 U.S. 1, 5 (1975); see BLACK'S LAW DICTIONARY 381 (6th ed. 1990) (quoting *Calmar* definition for cure).

Cure provided medical care for injured seamen. See *Calmar*, 303 U.S. at 528. Presently some unions bargain for medical benefits in the form of disability pensions and sick leave for their members. See generally Flaherty, *The Effect of Inflation on Seamen's Maintenance Awards*, 22 S. TEX. L.J. 533, 541 (1982). In those contracts, the pensions and sick leave benefits are supposed to supplement the traditional cure provided to seamen. *Id.*

6. See, e.g., *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 372 (1932); *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 640 (3d Cir. 1990).

7. See *Rutherford v. Sea-Land Serv., Inc.*, 575 F. Supp. 1365, 1370 (N.D. Cal. 1983). The court granted a unionized sailor, assaulted by a fellow crew member, an increase in the contracted rate of maintenance and cure. *Id.* at 1370. The *Rutherford* court noted that "[w]ith the advent of collective bargaining agreements in the 1960's, the union and the shipowners made the rate of maintenance a subject of negotiation, and uniformly adopted the US \$8.00 figure as the daily rate of maintenance." *Id.*; see G. GILMORE & C. BLACK, *THE LAW OF ADMIRALTY* § 6-12, at 307 (2d ed. 1975) (stating that US\$8.00 became accepted maintenance and cure rate after 1950s); Note, *Strict Enforcement of Collectively Bargained Maintenance Rates: Gardiner v. Sea-Land Service, Inc.*, 11 MAR. LAW. 311, 313-14 (1986) (noting *Rutherford* court's statement of incorporation of maintenance and cure into marine employment contracts).

8. See *Rutherford*, 575 F. Supp. at 1370.

9. See *infra* notes 156-57 and accompanying text (discussing how US\$8.00 per day is no longer sufficient to support injured seamen).

to bind unionized seamen to the unions' contractual rates when those rates prove inadequate, or to allow the seamen to recover their actual costs.¹⁰

This Note argues that maintenance and cure is a right inherent in general admiralty law. As such, it applies equally to unionized and non-unionized seamen, regardless of whether a bargained-for rate of maintenance and cure exists. Part I traces the development of the doctrine of maintenance and cure. Part II presents and compares the courts' positions on the assessment of maintenance and cure. Part III proposes that maintenance and cure is an admiralty right, implicit in every seaman's employment, which no contractual provision can abrogate. This Note concludes that courts should decide each maintenance and cure case on an individual basis in order to ensure that the rate awarded to the seaman reflects the actual costs incurred.

I. HISTORICAL DEVELOPMENT OF THE MAINTENANCE AND CURE DOCTRINE

Admiralty law regulates all aspects of shipping.¹¹ It protects shipowners and cargo owners from losses of vessels and cargo.¹² In addition, admiralty law protects seamen from the

10. Compare *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986) (binding unionized sailor to contractual rate of maintenance and cure) with *Barnes*, 900 F.2d 630 (awarding unionized sailor rate of maintenance and cure in excess of collectively bargained-for rate).

11. See *DeLovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776) (presenting overview of U.S. admiralty jurisdiction).

12. See, e.g., *Laws of Wisbuy*, *supra* note 1, at 1191. Article XXII of the Laws of Wisbuy provided protection for both shipowners and cargo owners by stating that [t]he master and mariners are obliged to shew the merchant the cordage that is used for hoisting his goods in and out of the ship; if he does not do it, and there happens any accident, they shall stand to the loss; but if the merchant has seen and approved of it, the damage he sustains shall be borne by himself.

Id.; interview with Joseph C. Sweeney, Professor of Law, Fordham University School of Law (Sept. 10, 1990). Professor Sweeney noted that, in the Sea Codes of Barcelona, estimated to have originated in the thirteenth century, a shipowner was required to have a cat on board the vessel to protect grain cargo against damage from mice. *Id.* If no cat was on board and the grain was damaged, the shipowner was liable to the cargo owner. *Id.* If, however, a cat was present at the inception of the voyage but died before reaching the final port and the grain was damaged, the shipowner had no liability for the damage. *Id.*

severity of seafaring life.¹³ Maintenance and cure is one aspect of admiralty law that protects seamen. The doctrine of maintenance and cure has been part of British admiralty law since 1150 when Eleanor of Guienne brought France's sea codes, the Laws of Oléron, to England.¹⁴ The Laws of Oléron addressed every facet of admiralty voyages, from obtaining vessels to crew requirements, and were cited as authority in the admiralty courts of England.¹⁵ During his reign, King Richard I of England adopted the Laws of Oléron and formally recognized the seaman's right to maintenance and cure.¹⁶

In the United States, admiralty law originated from English common law.¹⁷ Until the end of the American Revolution in 1783, most courts in the American colonies adopted English law, including English admiralty law. To facilitate the hearing of admiralty cases, Courts of the Vice Admiralty were established by the crown in leading ports.¹⁸ After the American Revolution, however, U.S. federal district courts began to fashion their own maintenance and cure laws separate from those of England.¹⁹ The U.S. courts based their maintenance and cure laws on the established principle that a seaman, injured in the service of the ship, received maintenance and cure at the expense of the ship.²⁰

The maintenance and cure doctrine developed in U.S. courts to shield seamen from the severity of the seafaring life.²¹ Justice Story was first to recognize formally the doctrine of maintenance and cure in the United States.²² Justice Story

13. See Laws of Hanse Towns, art. XXXV, *reprinted in* 30 F. Cas. 1197, 1199 (providing lifetime maintenance and cure for seamen maimed or disabled while defending vessel against pirates).

14. See Laws of Oléron, *supra* note 1, arts. VI & VII, at 1174-75.

15. See *id.* at 1171.

16. See 2 M. NORRIS, *THE LAW OF SEAMEN* § 26:3 n.6 (4th ed. 1985). King Edward III gave the Laws of Oléron ultimate confirmation in 1339. See *id.*

17. See generally Sims, *supra* note 1, at 973 n.1. Sims states that maintenance and cure is the oldest branch of maritime personal injury law in the United States because U.S. courts incorporated British maintenance and cure into admiralty law. *Id.*

18. See *THE CONCISE COLUMBIA ENCYCLOPEDIA* 26 (1983) (describing American Revolution); Sims, *supra* note 1, at 973 n.1 (stating that colonists ceased applying new British laws after the American Revolution).

19. See Sims, *supra* note 1, at 973 n.1.

20. See *Harden v. Gordon*, 11 F. Cas. 480, 482 (C.C.D. Me. 1823) (No. 6,047); see also Sims, *supra* note 1, at 978.

21. See *Harden*, 11 F. Cas. at 482-83.

22. See *id.* at 483 (Story, J.); see also *Barnes v. Andover*, 900 F.2d 630, 633 (3d.

argued that because the admiralty laws in Europe consistently recognized maintenance and cure as an admiralty right,²³ the United States should also adopt the doctrine.²⁴

Justice Story saw seamen as "wards of the admiralty,"²⁵ depicting them as poor and friendless individuals who suffered under harsh and dangerous living conditions.²⁶ As a consequence of the severe conditions of the seafaring life, Justice Story declared that seamen needed the protection of maintenance and cure.²⁷ Fearing that shipowners would try to take advantage of seamen's inexperience and coerce them to sign unfavorable contracts, Justice Story reasoned that seamen needed courts to act as their guardians against shipowners.²⁸

Cir 1990) (noting that "duty to provide maintenance and cure was first introduced into American admiralty law by Justice Story"); Note, *Maintenance and Cure: Contract Right or Legal Obligation?*, 62 TUL. L. REV. 625, 625 n.2 (1988) (noting that Justice Story was first to formally recognize maintenance and cure in United States).

23. *Harden*, 11 F. Cas. at 482. Justice Story stated that

I have not been able to detect a single instance, in which the maritime laws of any foreign country throw upon seamen disabled or taken sick . . . the expenses of their cure. On the contrary, these positive ordinances of the principal maritime nations expressly make these expenses a charge upon the ship.

Id.

24. *Id.* at 483. Justice Story declared that, "[i]t would therefore be [a] matter of regret to find incorporated into the common law a doctrine at variance with that, which seems so generally to have received the approbation of continental Europe."

Id.

25. Courts that view seamen as "wards of the admiralty" consider seamen incapable of caring for themselves. *Id.* at 483 & 485; see M. NORRIS, *supra* note 16, at § 26:9 (tracing U.S. adoption of maintenance and cure based on "wards" theory); *infra* notes 27-28 and accompanying text (defining "wards of the admiralty").

26. *Harden v. Gordon*, 11 F. Cas. 480, 483 (C.C.D. Me. 1823) (No. 6,047). Justice Story characterized seamen as being "by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence." *Id.*

27. *Id.* at 485. Justice Story stated that because seamen are naïve and friendless, they require extra protection. *Id.* In another case, he stated that

[i]n a just sense [seamen are considered wards of the admiralty], so far as the maintenance of their rights, and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned.

Brown v. Lull, 4 F. Cas. 407, 409 (C.C.D. Mass. 1836) (No. 2,018).

28. See *Brown*, 4 F. Cas. at 409. Justice Story stated that

courts of admiralty are in the habit of watching with scrupulous jealousy every deviation from [the rights of seamen] in the [sailor's employment contract], as injurious to the rights of seamen, and founded in an unconscionable inequality of benefits between the parties. . . . Seamen are a class of

Justice Story supported the granting of maintenance and cure by explaining that a seaman's pay alone was usually insufficient to meet the expenses of illness.²⁹ Without monetary aid from shipowners, Justice Story suggested, seamen faced hardship or even death, particularly when their illness caused them to be discharged in a foreign port.³⁰

Justice Story found that certain benefits arose to both shipowners and seamen from holding shipowners liable for their employees' welfare.³¹ First, requiring shipowners to bear the expenses of maintenance and cure would encourage them to provide safer working environments, thereby reducing the number of accidents.³² The diminished number of accidents would decrease the number of seamen requesting maintenance and cure, and the shipowner would therefore expend less money on maintenance and cure payments.³³ Second, providing maintenance and cure constitutes good public policy because, if seamen know that the shipowner will pay for work-related injuries, the seamen may more willingly enter the profession and face the dangerous tasks inherent in seafaring.³⁴

persons remarkable for their rashness, thoughtlessness and improvidence. . . . Hence it is, that bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition.

Id.

29. *Harden*, 11 F. Cas. at 483.

30. *Id.*

31. *Id.*

32. *Id.* Justice Story explained the benefit to seamen as being that [t]he master will watch over [the seamen's] health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; but his duty, combining with the interest of his owner, will lead him to succor their distress, and shed a cheering kindness over the anxious hours of suffering and despondency.

Id.

33. *Id.*

34. *Id.* Justice Story explained that there was a great public policy of preserving this important class of citizens for the commercial service and maritime defence of the nation. Every act of legislation which secures their healths, increases their comforts, and administers to their infirmities, binds them more strongly to their country; and the parental law, which relieves them in sickness by fastening their interests to the ship, is as wise in policy, as it is just in obligation It encourages seamen to engage in perilous voyages with more promptitude, and at lower wages . . .

Based on Justice Story's description of seamen as "wards," the U.S. Supreme Court has consistently expanded maintenance and cure rights.³⁵ For example, ancient sea codes required that the injury occur while seamen were in the service of the ship.³⁶ The U.S. Supreme Court, however, broadened the availability of maintenance and cure to include situations in which the seaman received injuries while on shore.³⁷

Gradually, conflict arose over whether maintenance and cure applied when the seaman was contributorily negligent.³⁸ Historically, negligence by a seaman prevented an award of maintenance and cure.³⁹ Subsequently, some U.S. courts be-

and urges the seamen to encounter hazards in the ship's service, from which they might otherwise be disposed to withdraw.

Id.

35. See *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 19 (1963) (noting that maintenance and cure cannot be reduced even if seaman was contributorily negligent); *Warren v. United States*, 340 U.S. 523, 529 (1951) (expanding maintenance and cure to include injuries caused by seaman's own negligence while on shore leave); *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 736-37 (1943) (holding shipowner liable for injuries sustained during seaman's shore leave as long as seaman did not engage in gross misconduct).

36. One court conferred seaman status upon any individual who was, at the time of the injury or illness, "subject to the call of duty as a seaman, and earning wages as such." *The Bouker No. 2*, 241 F. 831, 833 (2d Cir. 1917). A commentator narrowed the definition to "[a]nyone who is a member of the ship's company." Shields, *Seamen's Rights To Recover Maintenance and Cure Benefits*, 55 TUL. L. REV. 1046, 1048 (1981). This clarification distinguished seamen from the other workers who render services to the vessel and might make a claim for maintenance (i.e., harbor workers and offshore workers). Flaherty, *supra* note 5, at 533. In 1972 Congress amended the Longshore and Harbor Workers' Compensation Act (the "LHWCA") to exclude harbor workers from receiving maintenance and cure. 33 U.S.C. §§ 901-950 (1988). The U.S. Supreme Court extended the scope of LHWCA to include offshore workers. See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985); see also *Laws of Oléron*, *supra* note 1, art. VI, at 1174 (requiring injury to occur in service of ship).

37. See *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 38 (1943) (stating that going ashore to repair conduit through which vessel discharges cargo would not preclude recovery of maintenance and cure). The extension of maintenance and cure has also been construed to include accidents on land while on shore leave. See *Warren v. United States*, 340 U.S. 523, 530 (1951). In *Warren*, a seaman at a dance hall in Italy drank a bottle of wine and fell off the balcony. *Id.* at 524. The Court awarded maintenance and cure because "it is the ship's business which subjects the seaman to the risks attending hours of relaxation in strange surroundings. Accordingly, it is but reasonable that the business extend the same protections against injury from them as it gives for other risks of the employment." *Id.* at 530.

38. See generally *Bailey, Willful Misconduct in Maintenance and Cure Cases*, 24 S. TEX. L.J. 629, 631 (1983).

39. *Laws of Oléron*, *supra* note 1, art. VI, at 1174. Article VI precluded receipt of maintenance and cure if the sailor was in any way contributorily negligent. *Id.*

gan to award maintenance and cure to injured seamen regardless of fault, holding that only a seaman's willful misconduct would prevent an award of maintenance and cure.⁴⁰

In an attempt to clarify the liability of shipowners for their seamen's injuries, U.S. delegates attended the International Labor Organization conference in Geneva in 1936.⁴¹ Delegates from several countries met at the conference to discuss the possibility of an international agreement regulating shipowners' liability to their seamen.⁴² These conference participants drafted a proposed convention, which the U.S. delegates subsequently submitted to Congress.⁴³ The U.S. Senate ratified the Shipowners' Liability Convention (the "Convention"), and President Franklin D. Roosevelt proclaimed that it would take effect in the United States on October 29, 1939.⁴⁴

Some courts have used this Convention to assert statutory support for the position that maintenance and cure is an admiralty right.⁴⁵ Article 2 of the Convention made shipowners lia-

40. See, e.g., *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 735-36 (1943). In *Aguilar*, the Court awarded maintenance and cure to a seaman who was hit by car while returning to his vessel from shore leave. *Id.*; see Bailey, *supra* note 39, at 633 n.27 & 635-43 (noting that venereal disease, habitual intoxication, and deliberate disobedience of orders were examples of willful misconduct). Bailey argues that courts have eroded these maintenance and cure defenses in attempts to protect seamen. *Id.*; see M. NORRIS, *supra* note 16, at § 26:14 (noting that contributory negligence does not bar maintenance and cure recovery).

The erosion of shipowners' maintenance and cure defenses have made "maintenance and cure . . . available to seamen who in their efforts to entertain themselves in a fashion commensurate with others of their calling become injured or ill. The personal nature of the seamen's activity is of no consequence in assessing their claim for recovery." Shields, *supra* note 37, at 1051; see 2 A. PARKS, *THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE* 845-57 (1987) (giving overview of maintenance and cure, defenses of shipowner, and possible additional causes of action for seaman); Buser, *Seamen's Right to Maintenance and Cure after Refusal of Free Medical Care*, 22 S. TEX. L.J. 587, 588 n.11 (1982) (stating seaman will not recover if injury was intentionally concealed by seaman at inception of employment, or injury was incurred as result of willful behavior).

41. See Shipowners' Liability Convention, 54 Stat. 1693 (1936); see also Farrell v. United States, 336 U.S. 511, 517 (1949) (discussing beginnings of Shipowners' Liability Convention).

42. See Farrell, 336 U.S. at 517.

43. See *id.*

44. See Shipowners' Liability Convention, 54 Stat. at 1704.

45. See, e.g., *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 42 (1943) (stating that Shipowners' Liability Convention confirmed admiralty law procedure which historically provided maintenance and cure to seamen injured while in service of ship).

ble for a seaman's illness and injury, provided that the injury occurred during the employment period, and as long as the seaman did not engage in willful misconduct.⁴⁶ The U.S. Supreme Court held on several occasions that the Convention reinforced the traditional admiralty right of maintenance and cure.⁴⁷ Although the Convention adopted a statutory framework for seamen's misconduct, the Supreme Court held that the Convention did not preempt the general admiralty law rights of seamen.⁴⁸ This holding was consistent with article 12 of the Convention, which stated that the Convention would not affect any national law that granted a more favorable result for the seaman.⁴⁹

II. OPPOSITION IN THE COURTS: "ADMIRALTY RIGHT" VERSUS "CONTRACTUAL OBLIGATION"

U.S. courts generally accept Justice Story's rationale for the need for maintenance and cure.⁵⁰ Most U.S. courts of ap-

46. Shipowners' Liability Convention, art. 2, 54 Stat. 1693, 1695 (1936).

47. See *Vella v. Ford Motor Co.*, 421 U.S. 1, 5-6 (1975); *Warren v. United States*, 340 U.S. 523, 527 (1951); *Farrell v. United States*, 336 U.S. 511, 517-19 (1949); *O'Donnell*, 318 U.S. at 41-42 (1943).

48. *Warren*, 340 U.S. at 527. Justice Douglas, writing for the majority, stated that [w]e find no suggestion that [the Convention] was designed to adopt a more strict standard of liability than that which our maritime law provides. The aim indeed was not to change materially American standards but to equalize operating costs by raising the standards of member nations to the American level.

Id. See generally Annotation, *Supreme Court's Views as to a Seaman's Right, under Maritime Law, to Maintenance and Cure*, 43 L. Ed. 2d 912, 918-19 (1975) (stating that U.S. Supreme Court discussed convention only to state that it did not restrict maritime rights to maintenance and cure).

49. Shipowners' Liability Convention, 54 Stat. 1693, 1700 (1936); see *O'Donnell*, 318 U.S. at 42 (stating that article 12 of Convention permits United States to follow its own laws that are more favorable to seamen); M. NORRIS, *supra* note 16, at § 26:68 (discussing Convention); see also *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 729 (1943) (interpreting several statutes liberally in favor of seamen). Although articles 2 and 4 discuss shipowners' liability, article 12 effectively advances the "admiralty right" theory because it reinforces the position that shipowners' liability for maintenance and cure is implicit in contracts of marine employment and is not predicated on any fault or negligence of shipowners. See Shipowners' Liability Convention, 54 Stat. 1693, 1700.

50. See *Vaughan v. Atkinson*, 369 U.S. 527, 531 (1962) (referring to Justice Story's classic depiction of friendless seamen); see also *Farrell*, 336 U.S. at 523; *Aguilar*, 318 U.S. at 728 n.2; *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528 (1938); *The Osceola*, 189 U.S. 158, 172 (1903); *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 633 (3d Cir. 1990); *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 946 (9th Cir.), *cert. denied*,

peals recognize maintenance and cure as an important part of admiralty law.⁵¹ U.S. courts disagree, however, whether maintenance and cure should be enforced as a contract provision⁵² instead of as a general admiralty law obligation under the special circumstances of a collectively bargained agreement.⁵³ The core of the dissension over "admiralty right" or "contractual obligation" maintenance and cure lies in which interpretation to apply to unionized seamen.⁵⁴

A. Maintenance and Cure as an "Admiralty Right"

Some of the earliest U.S. admiralty decisions identified maintenance and cure as an admiralty right.⁵⁵ The rationale of

479 U.S. 924 (1986); *Morel v. Sabine Towing & Transp. Co.*, 669 F.2d 345, 346 (5th Cir. 1982); *Wood v. Diamond M Drilling Co.*, 691 F.2d 1165, 1170 (5th Cir. 1982); *Incandela v. American Dredging Co.*, 659 F.2d 11, 13-14 (2d Cir. 1981); *Cox v. Dravo Corp.*, 517 F.2d 620, 623 (3d Cir. 1975); *Rutherford v. Sea-Land Serv., Inc.*, 575 F. Supp. 1365, 1369 (N.D. Cal. 1983).

51. See *Barnes*, 900 F.2d 630; *Macedo v. F/V Paul & Michelle*, 868 F.2d 519 (1st Cir. 1989); *Hines v. J.A. Laporte, Inc.*, 820 F.2d 1187 (11th Cir. 1987); *Gardiner*, 786 F.2d 943; *Wood*, 691 F.2d 1165; *Incandela*, 659 F.2d 11; *Evans v. Blidberg Rothchild Co.*, 382 F.2d 637 (4th Cir. 1967).

52. See, e.g., *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777, 781 (E.D. La. 1982) (holding that if there is provision in contract dealing with maintenance and cure, then it must be enforced). The court explained its position by stating that

where the seaman, through the Union as his representative, expressly contracts with his employer for a specific rate of maintenance, whether it be higher or lower than it would otherwise be, the contract between the seaman and his employer establishes, as a matter of law, the rate of maintenance to be paid.

Id. at 780.

53. See, e.g., *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371-72 (1932) (holding that maintenance and cure, as common law right, can go to decedent-seaman's personal representative under Jones Act). Justice Cardozo stated that

[c]ontractual [maintenance and cure] is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident. . . . The duty . . . is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties.

Id.

54. See, e.g., *Gardiner*, 786 F.2d at 949. The question applies solely to unionized seamen because all circuits which have ruled on this issue are in agreement that non-unionized seamen should not be held to a contract in which they have had no part. See *Incandela*, 659 F.2d at 14; *Caulfield v. AC&D Marine, Inc.*, 633 F.2d 1129, 1132 (5th Cir. 1981); *Harper v. Zapata Off-Shore Co.*, 563 F. Supp. 576, 583-84 (E.D. La. 1983); *Gauthier v. Crosby Marine Serv., Inc.*, 499 F. Supp. 295, 299 (E.D. La. 1980); *Robinson v. Plimsoll Marine, Inc.*, 460 F. Supp. 949, 950 (E.D. La. 1978).

55. See, e.g., *The Bouker No. 2*, 241 F. 831 (2d Cir. 1917). The U.S. Court of Appeals for the Second Circuit stated that "[b]y the custom of the sea the hiring of

these decisions focused on the traditional concept of maintenance and cure as an admiralty right,⁵⁶ as well as the notion that seamen's ignorance and naïveté necessitated additional protection from the courts.⁵⁷ Affirming the protection of the courts, the U.S. Senate, in 1939, recognized the general admiralty law right to maintenance and cure when it ratified the Shipowners' Liability Convention.⁵⁸ Moreover, many U.S. courts have consistently distinguished maintenance and cure from ordinary contractual rights.⁵⁹

For nearly 150 years, U.S. courts saw maintenance and cure as an unassailable obligation inherent in every seaman's employment.⁶⁰ Courts did not view the doctrine as a custom open to modification or abrogation by practice or agreement.⁶¹ Moreover, the U.S. Supreme Court has held that the right to maintenance and cure must be broadly interpreted in the seaman's favor.⁶² Indeed, according to the Supreme Court, main-

sailors has for centuries included food and lodging at the expense of the ship." *Id.* at 835.

56. See *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 633 (3d Cir. 1990) (attributing rise of maintenance and cure to ancient admiralty codes); *supra* note 1 and accompanying text (describing how duty to provide maintenance and cure arose in medieval sea codes).

57. See *supra* notes 27-35 and accompanying text (illustrating doctrine of seamen as "wards of the admiralty" needing courts' protection from shipowners).

58. Shipowners' Liability Convention, 54 Stat. 1693 (1936); see *Barnes*, 900 F.2d at 634 (detailing 1936 U.S. Senate ratification of Shipowners' Liability Convention and President Franklin D. Roosevelt's proclamation of its commencement on October 29, 1939); Annotation, *supra* note 41 (explaining why several courts disregard Convention).

59. See, e.g., *Vaughan v. Atkinson*, 369 U.S. 527, 532 (1962) (distinguishing maintenance and cure as admiralty right from contract rights and obligations); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371-72 (1932) (noting that admiralty law imposes duty to provide maintenance and cure on shipowners regardless of their desires or any contracts signed).

60. *Pelotto v. L&N Towing Co.*, 604 F.2d 396, 400 (5th Cir. 1979). The court stated that a "seaman's right to maintenance and cure is implicit in the contractual relationship between the seaman and his employer, and is designed to ensure the recovery of these individuals upon injury or sickness sustained in the service of the ship." *Id.*; see *Calmar S.S. Corp. v. Taylor*, 303 U.S. 528 (1938) (holding that maintenance and cure is implicit in employment contract). Several commentators concur with the courts. See, e.g., *Shields*, *supra* note 36, at 1046-47. The author states that "[m]aintenance and cure today is fully recognized and implemented as an implied provision in contracts of marine employment." *Id.*; 1B *BENEDICT ON ADMIRALTY* § 51 (7th ed. 1990) [hereinafter *BENEDICT*]; *M. NORRIS*, *supra* note 16, at § 26:2; *Sims*, *supra* note 1, at 978.

61. See, e.g., *Cortes*, 287 U.S. at 371-72.

62. See *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 735 (1943). The Supreme

tenance and cure is a right imposed by law, and the shipowner cannot contract with an individual seaman to abrogate or do away with it in the way that contractual rights can be negotiated away.⁶³

A number of U.S. courts of appeals today separate maintenance and cure from contract provisions.⁶⁴ Most recently, the U.S. Court of Appeals for the Third Circuit decided the case of *Barnes v. Andover Company, L.P.*⁶⁵ In *Barnes*, the court awarded a unionized seaman a rate of maintenance and cure in excess of the contractually assigned rate.⁶⁶ The plaintiff, George

Court stated that the nature of the liability required that it not be restrictively applied or else the benefits of maintenance and cure protection would be defeated. *Id.* The Court continued by noting that "[i]f leeway is to be given in either direction, all the considerations which brought the liability into being dictate it should be in the sailor's behalf." *Id.*

63. See *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 667 (1943). Justice Jackson opined that

[w]hen the seaman becomes committed to the service of the ship, the maritime law annexes a duty that no private agreement is competent to abrogate, and the ship is committed to the maintenance and cure of the seaman for illness or injury during the period of the voyage, and in some cases for a period thereafter. This duty does not depend upon fault.

Id. (citations omitted); see *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371 (1932); *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 637 (3d Cir. 1990); *Dryden v. Ocean Accident & Guarantee Corp.*, 138 F.2d 291, 293 (7th Cir. 1943). "Admiralty right" proponents agree that

concededly an employee-employer relationship is a contractual one. Probably many of the details of that relationship—wages, hours, etc., are fixed by specific contract provisions and are express contractual rights. But the right here sought to be enforced [maintenance and cure] by the seaman was not founded on a "meeting of the minds"—it was inexorably attached by ancient and established maritime law to every seaman's contract of employment. The parties had no choice in the matter. It was a duty superimposed by law coincidental with the formation of the contractual relation. The seaman could not contract against it—his or his employer's will is powerless to destroy it. This aspect alone reflects the true nature of the right here sought to be enforced. It is a right which the maritime law, in the wisdom of experience, found necessary and just, for the complete protection of seamen, whom maritime law has treated as "wards of admiralty."

Dryden, 138 F.2d at 293 (emphasis in original).

64. E.g., *Barnes*, 900 F.2d at 637 (stating that, while contracts can be modified, maintenance and cure cannot).

65. 900 F.2d 630 (3d Cir. 1990).

66. *Id.* at 640. Most courts permit only non-unionized seamen to recover maintenance and cure above the rate provided for in the contract, because they were not a part of that contract. See, e.g., *Harper v. Zapata Off-Shore Co.*, 563 F. Supp. 576 (E.D. La. 1983); see also *supra* note 54 and accompanying text (discussing non-unionized seamen's awards).

Barnes, a member of the Seafarers International Union, sustained a work-related injury.⁶⁷ Barnes sued the shipowner-defendant, alleging that the defendant's negligence and the unseaworthiness of the vessel caused his injuries.⁶⁸ Barnes requested US\$35.00 per day for maintenance and cure, a sum in excess of the US\$8.00 per day set in the collective bargaining agreement between the Seafarers International Union and the defendant.⁶⁹ The defendant argued that the National Labor Relations Act (the "NLRA")⁷⁰ preempted the seaman's right to claim maintenance above the contractual rate.⁷¹ The court rejected the defendant's claim and ruled that the plaintiff, a unionized seaman, was entitled to more maintenance and cure than the collective bargaining agreement provided.⁷² The *Barnes* court found that maintenance and cure fell outside the scope of collective bargaining⁷³ because, as a traditional right inherent in admiralty law, it could not be abrogated by contractual negotiations.⁷⁴

The *Barnes* court then cited the U.S. Supreme Court's continuous expansion of seamen's rights as reason to enforce the traditional "admiralty right" position.⁷⁵ While noting that the plight of the seaman was not as dreadful as in Justice Story's time, the Third Circuit stated that the U.S. Supreme Court has indicated no recent inclination to modify the well-established doctrine of seamen as "wards of the admiralty."⁷⁶ The Third Circuit, therefore, would also continue to consider seamen as "wards" entitled to maintenance and cure.⁷⁷

67. *Barnes*, 900 F.2d at 632.

68. *Id.*

69. *Id.* Plaintiff also made claims for compensatory and punitive damages but those were settled, thus leaving only the maintenance and cure issue for the court. *Id.*

70. 29 U.S.C. §§ 158(d), 159(a) & 185(a) (1988).

71. *Barnes v. Andover Co.*, 900 F.2d 630, 637-39 (3d Cir. 1990).

72. *Id.* at 640.

73. *Id.*

74. *Barnes*, 900 F.2d at 635; see *supra* note 53 and accompanying text (discussing Cardozo's holding that right to maintenance and cure is implicit in very fact of employment, not in employment contract).

75. *Barnes*, 900 F.2d at 637.

76. *Id.* The court demonstrated the Supreme Court's continued espousal of the seaman as a ward of the admiralty as late as 1976. *Id.*; see *Oil, Chemical & Atomic Workers Int'l Union v. Mobil Oil Co.*, 426 U.S. 407, 421 (1976) (holding, most recently, that seamen are still "wards").

77. *Barnes v. Andover Co.*, 900 F.2d 630, 637 (3d Cir. 1990).

The Third Circuit rejected the defendant's contention that the NLRA preempted the general admiralty law rules regarding maintenance and cure.⁷⁸ The court reached its conclusion by determining the preemptive effect of a federal statute over federal common law.⁷⁹ The court noted that if congressional legislation speaks directly to the case law alleged to have been preempted, the legislation then preempts the federal common law.⁸⁰ The court held that none of the NLRA provisions cited by the defendant spoke directly to the question of maintenance and cure.⁸¹ Therefore, the court held that the NLRA did not preempt the admiralty obligation to pay maintenance and cure to the unionized seaman.⁸² The court stated that when Congress intends to preempt common law rights, it does so explicitly.⁸³ The court held that it would not do away with the right

78. *Id.* at 637-39. The defendant presented several provisions of the National Labor Relations Act (the "NLRA") to support its argument for preemption. *Id.* (citing 29 U.S.C. §§ 158(d), 159(a) & 185(a) (1982)). The defendant contended that one provision, which provides for an exclusive grievance and arbitration procedure, suggested that the collective bargaining agreement should control the proceedings. *Barnes*, 900 F.2d at 638 (citing 29 U.S.C. § 185(a) (1982)). The court pointed out that according to the U.S. Supreme Court, the provision did not bind seamen to the grievance procedures required in the collective bargaining agreement. *Id.* Rather, seamen could continue to use the traditional remedy of suing in federal court. *Id.*

Next, the defendant argued that the provision which establishes elected union representatives as the exclusive bargaining agents for the seamen gave the union agents the power to bargain away maintenance and cure if they thought it best. *Barnes*, 900 F.2d at 638 (citing 29 U.S.C. § 159(a) (1982)). The court dismissed that interpretation by stating that the provision did not directly address the issue of whether admiralty rights could be appropriately bargained for or bargained away. *Id.*

The defendant argued that a final provision, which requires unions and employers to bargain in good faith over employment terms, suggested that the collective bargaining agreements reached by the union and the employer reflect a good faith compromise. *Barnes*, 900 F.2d at 638 (citing 29 U.S.C. § 158(d) (1982)). The court held against this interpretation because the section did not directly speak to whether admiralty rights were open to abrogation through the bargaining process. *Id.* at 638-39; see *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 356 (1971) (noting that NLRA did not preempt general admiralty rights of seamen).

79. *Barnes*, 900 F.2d at 637-38. The court used the U.S. Supreme Court's preemption test. *Id.*; see *City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (setting forth preemption test). The test requires a determination of whether the legislation directly addresses the point at issue, and whether applying the federal common law would necessitate an overruling of the laws Congress specifically enacted. *Id.* at 312-17.

80. *Barnes*, 900 F.2d at 637-38.

81. *Id.* at 639.

82. *Id.*

83. *Id.* at 638.

to maintenance and cure until Congress expressly instructed it to do so.⁸⁴

Courts and commentators argue that unions no longer adequately represent the maintenance and cure interests of seamen.⁸⁵ The *Barnes* court suggested that by retaining a US\$8.00 per day rate of maintenance and cure, unions have effectively abolished maintenance and cure for their members.⁸⁶ Other courts have expressed their displeasure with the established figure of US\$8.00 a day, claiming that it violated the Supreme Court's directive against abrogating the seaman's right to maintenance and cure.⁸⁷ Arguably, employers and unions who bargain for US\$8.00 per day are not truly bargaining in good faith.⁸⁸ Even some of the courts that adhere to the "contractual obligation" interpretation have expressed hesitancy at enforcing the US\$8.00 figure because it is inadequate.⁸⁹

84. *Id.* at 640. The court explained its reasoning by stating that "unless Congress determines that the circumstances giving rise to the need for maintenance have changed and that collective bargaining is now a more appropriate way to deal with the issue of the ill or injured seaman, the common law remedy must remain in full force." *Id.*

85. See *infra* notes 90-93 & 148-50 and accompanying text (discussing inadequate union representation).

86. *Barnes v. Andover Co.*, 900 F.2d 630, 637 (3d Cir. 1990). The defendant stated that setting the maintenance and cure rate at US\$2.00 would constitute an abrogation of the union contract. The Third Circuit disagreed, addressing the defendant's concept of abrogation by questioning the union's retention of "the 1952 rate of \$8 a day when \$8 a day in 1952 dollars would have a value of \$32.24 in 1985." *Id.*

87. See *Incandela v. American Dredging Co.*, 659 F.2d 11, 14 (2d Cir. 1981); *Harper v. Zapata Off-Shore Co.*, 563 F. Supp. 576, 582-84 (E.D. La. 1983); *Rutherford v. Sea-Land Serv., Inc.*, 575 F. Supp. 1365, 1370 (N.D. Cal. 1983).

88. See Note, *Punitive Damages For Maintenance And Cure: Is It How Much You Pay Or How You Pay It*—*Harper v. Zapata Off-Shore Co.*, 10 MAR. LAW. 103 (1985). The student commentator poses the question of whether,

[w]ith current daily maintenance rates greatly in excess of \$8.00, it is doubtful whether a court would accept an employer's alleged good faith belief that \$8 per day will suffice for food and lodging expenses of an injured seaman. Employers who currently pay an \$8 daily rate of maintenance must be aware of its ever increasing inadequacy and the possibility of punitive damages resulting from such payment.

Id. at 115.

89. See, e.g., *Dixon v. Maritime Overseas Corp.*, 490 F. Supp. 1191 (S.D.N.Y. 1980), *aff'd*, 646 F.2d 560 (2d Cir. 1980), *cert. denied*, 454 U.S. 838 (1981). In *Dixon*, the U.S. District Court for the Southern District of New York upheld the US\$8.00 rate because the Court of Appeals bound them. *Id.* at 1194. It explained that "[t]he growing burden of inflation, the high cost of living and the diminished value of

B. Maintenance and Cure as a "Contractual Obligation"

Some courts adopt the view that maintenance and cure can be a contractual provision.⁹⁰ These courts note that unions represent seamen at the bargaining table.⁹¹ Courts, therefore, must bind them to the contractual provisions to which they have agreed.⁹² Beginning in 1980, an increasing number of courts have bound unionized seamen to the rate of maintenance and cure set in the union's collective bargaining agreement.⁹³

money are factors about which we are not unsympathetic . . . our Circuit Court has fixed the daily rate for maintenance and cure at \$8.00 and we feel so bound." *Id.*; see *Gajewski v. United States*, 540 F. Supp. 381 (S.D.N.Y. 1982). In *Gajewski*, the court seemed to indicate that, if the plaintiff-seaman had presented evidence regarding his expenses, it would have granted his request for increased maintenance and cure. *Id.* at 388. Judge Duffy stated:

I certainly appreciate in these inflationary times how difficult it is to support one's self on eight dollars a day. However, absent any evidence upon which to base an increased maintenance award, I am constrained to adhere to the plaintiff's union contract and award eight dollars a day as the maximum daily rate recoverable.

Id.; see *Hodges v. Keystone Shipping Co.*, 578 F. Supp. 620 (S.D. Tex. 1983). In *Hodges*, the court agreed that the higher rate was reasonable, but was bound by the union agreement to enforce the US\$8.00 rate. *Id.* at 622. The court noted that "the rate of \$30 per day [as awarded by the jury] is a reasonable amount, substantiated by the record. However, the issue of the reasonableness of this amount is moot as plaintiff's rate of recovery of maintenance is limited by the [National Maritime Union] contract." *Id.*

90. See, e.g., *Macedo v. F/V Paul & Michelle*, 868 F.2d 519, 522 (1st Cir. 1989).

91. See *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777, 780 (E.D. La. 1982). In *Grove* the court emphasized the importance of union representation when it stated that there could not "be asserted an argument of unequal bargaining position between the parties. On the contrary, there is every indication that the rate of maintenance in the collective bargaining agreement was freely negotiated between the Union, as representative of its members, and the employer." *Id.*

92. See *id.* at 887. The court stated that

if there exists a valid collective bargaining agreement between the seaman's union and his employer, which expressly sets forth the rate of maintenance to be paid a seaman employee should he become ill or injured, then the Plaintiff, as a party to that agreement, will be bound by its terms.

Id.; *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777 (E.D. La. 1982).

93. *Dixon v. Maritime Overseas Corp.*, 490 F. Supp. 1191 (S.D.N.Y. 1980) (binding seaman to collective bargaining agreement, regardless of inadequate rate of maintenance and cure); see *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986) (stating that when collectively bargained agreements include maintenance and cure, it must be presumed that rate was set through negotiations which seamen agreed to, and therefore, agreement binds seamen); see also *Al-Zawari v. American S.S. Co.*, 871 F.2d 585 (6th Cir. 1989); *Macedo v. F/V Paul & Michelle*, 868 F.2d 519 (1st Cir. 1989); *Gaspard v. Taylor Diving & Salvage Co., Inc.*,

The seminal "contractual obligation" case is *Gardiner v. Sea-Land Service, Inc.*⁹⁴ The U.S. Court of Appeals for the Ninth Circuit in *Gardiner* was the first U.S. federal appellate court to uphold the enforcement of a collectively bargained rate of maintenance and cure regardless of its reasonableness or adequacy.⁹⁵ The U.S. Court of Appeals for the First Circuit⁹⁶ and the U.S. Court of Appeals for the Sixth Circuit⁹⁷ have followed the *Gardiner* holding and enforced the contractual maintenance and cure rate.

In *Gardiner*, seven unionized seamen filed a declaratory class action against a defendant class of admiralty employers.⁹⁸ The seamen asserted a right, under admiralty law, to maintenance and cure payments in excess of the US\$8.00 per diem rate set in their contracts.⁹⁹ The defendant shipowners argued for enforcement of the collective bargaining agreement by claiming that the NLRA preempted traditional maintenance and cure.¹⁰⁰

The *Gardiner* court rejected the preemption argument because the NLRA did not specifically address admiralty law.¹⁰¹ The court, however, concluded that promoting the national labor policy of encouraging collective bargaining agreements was a compelling reason to enforce the contract.¹⁰² The court

649 F.2d 372 (5th Cir. 1981); *Castro v. M/V Ambassador*, 657 F. Supp. 886 (E.D. La. 1987); *Hodges v. Keystone Shipping Co.*, 578 F. Supp. 620 (S.D. Tex. 1983); *Gajewski v. United States*, 540 F. Supp. 381 (S.D.N.Y. 1982); *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777 (E.D. La. 1982); *Dixon v. Maritime Overseas Corp.*, 646 F.2d 560 (2d Cir. 1980), *cert. denied*, 454 U.S. 838 (1981).

94. 786 F.2d 943 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986).

95. *See id.* at 947-50; *see also* Note, *supra* note 7, at 315 (stating that *Gardiner* court was first U.S. appellate court to rule whether inadequate maintenance and cure in collectively bargained agreement would be enforced).

96. *Macedo*, 868 F.2d 519.

97. *Al-Zawhari*, 871 F.2d 585.

98. *Gardiner*, 786 F.2d at 945.

99. *Id.*

100. *Id.* at 947; *see supra* note 82 and accompanying text (setting forth NLRA provisions argued by defendant). The *Gardiner* court stated that the NLRA provisions did not preempt traditional admiralty maintenance and cure, because they did not specifically address maintenance and cure. *Gardiner*, 786 F.2d at 948. The congressional test for determining whether a federal law preempts a common law is whether the federal law addresses that common law specifically. *Id.* at 947.

101. *Gardiner*, 786 F.2d at 949.

102. *Id.* at 948-49; *see NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967). In *Allis-Chalmers*, Justice Brennan explained that the "[n]ational labor policy has been built on the premise that by pooling their economic strength and acting through a

further stated that the employment contract resulted from vigorous debate and accommodation by both parties, and should be viewed as a whole and enforced in its entirety.¹⁰³ The court reasoned that, because a great deal of compromising occurs before the final contract is agreed upon, judicially discarding one provision of that unified contract would threaten the viability of the entire contract.¹⁰⁴ The court stated that it was inappropriate to refuse to enforce certain provisions in collective bargaining agreements while at the same time giving full force to other provisions.¹⁰⁵ *Gardiner* held that only if the collective bargaining agreement as a whole was unfair could the court disregard the agreement, including the maintenance and cure provision.¹⁰⁶

The court held that it would not be fair to disregard the collectively bargained agreement after the parties had already negotiated its terms extensively.¹⁰⁷ The court stated that, if the rate of maintenance is expressly included and set at US\$8.00, it is because the union negotiated that as part of the entire contract.¹⁰⁸ Furthermore, the court stressed that maintenance and cure is not set randomly without regard to the rate but rather as part of a package of benefits.¹⁰⁹ Therefore, the *Gardiner* court would bind seamen to the agreements unions obtain unless there was proof that the entire contract was un-

labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions." *Id.* at 180.

103. *Gardiner*, 786 F.2d at 949.

104. *Id.*

105. *Id.* The court indicated the importance of considering the collective bargaining agreement as a whole by stating that "[w]e cannot fairly say that this rate [maintenance and cure], as a consequence of the normal 'give and take' process of collective bargaining, is not entitled to the same reliability accorded to other terms and conditions within the same agreement." *Id.*; see *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777, 780 (E.D. La. 1982) (supporting premise that "give and take" ensures fair contracts).

106. *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 949 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986).

107. *Id.*

108. *Id.* The court indicated the importance of viewing the contract as a unified whole when it noted that the "rate of maintenance is but one of many elements contained within the Union contract and over which the parties negotiate, and there may be a considerable amount of 'give and take' exercised by the parties in coming to a final agreement on all of the elements." *Id.* (citing *Grove v. Dixie Carriers, Inc.*, 553 F. Supp. 777, 780 (E.D. La. 1982)).

109. *Id.* at 949.

fair.¹¹⁰

The proponents of the "contractual obligation" theory state that the duty to provide maintenance and cure cannot be abrogated entirely but it can be modified by the contract.¹¹¹ Some proponents contend that a low maintenance and cure rate does not signify that maintenance and cure has been abrogated by the parties because the rate has been set, presumably, after good faith bargaining.¹¹²

"Contractual obligation" proponents disagree with the ancient doctrine treating seamen as "wards of admiralty" in need of the courts' protection.¹¹³ They point to improved living conditions on board vessels since the 1800s to support their position.¹¹⁴ Additionally, commentators suggest that the benefits obtained for seamen, such as union disability plans and pensions, actually provide the injured seaman with more benefits than the collectively bargained rate of maintenance and cure would indicate.¹¹⁵

The "contractual obligation" proponents agree that unions play a paramount role in the protection of seamen.¹¹⁶

110. *Id.* The court opined that "the nature of the 'give and take' process of collective bargaining suggest [sic] that acceptance of a particular package of benefits should be binding on the union members." *Id.*

111. See *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 371 (1932) (stating that maintenance and cure could not be abolished by any agreement or contract); see also *Al-Zawhari v. American S.S. Co.*, 871 F.2d 585, 588 (6th Cir. 1989) (stating that duty to provide maintenance and cure cannot be entirely abrogated because it is an implied contractual provision).

112. *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 645 (3d Cir. 1990) (Lifland, J., dissenting).

113. See *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 948 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986); Note, *supra* note 23, at 633 & 639.

114. Note, *supra* note 23, at 633 (noting improvement in seamen's conditions include upgrading living conditions aboard vessels and unionization). *But see* Whittemore, *Toward Maritime Strength*, N.Y. Times, May 1, 1981, at A31, col. 2 (stating "high losses at sea of both men and ships, largely a result of human error, standards of education, training, and management of seafaring and on-shore maritime personnel should be examined").

115. See, e.g., Flaherty, *supra* note 5, at 541 (listing sick leave, disability plans, and pensions as some benefits unions obtain in exchange for low *per diem* rate of maintenance and cure); see also Note, *supra* note 23, at 639 (proposing that unions now act as seamen's "friends" by protecting their interests through collective bargaining agreement and courts should enforce collectively bargained agreements because resulting contracts include benefits which meet best interests of seamen).

116. See, e.g., *Gardiner*, 786 F.2d at 948 (pointing to national labor policy for encouraging collective bargaining which asserts that seamen are better represented in unions).

The national labor policy of encouraging collectively bargained agreements is based on the combined economic strength of union members.¹¹⁷ The union provides the most effective method of negotiating for improvements because of its large membership.¹¹⁸ Courts supporting the "contractual obligation" view reason that seamen, by combining their strength into one union, are effectively represented in negotiations with the shipowner.¹¹⁹

III. *MAINTENANCE AND CURE IS AN ADMIRALTY RIGHT*

The core of dissent over maintenance and cure lies in whether to apply the remedy as an "admiralty right" or as a "contractual obligation."¹²⁰ Traditional and modern admiralty theories prove, however, that maintenance and cure is a general admiralty law remedy.¹²¹ The courts should, therefore, enforce the "admiralty right" interpretation of maintenance and cure.

A. Maintenance and Cure is Based on General Admiralty Law, Not on Contract Principles

Maintenance and cure cannot be abrogated or contracted away and, therefore, should be removed from the bargaining process altogether.¹²² Courts adopting the "contractual obligation" approach base most of their rationale on the fact that seamen elect their union representatives to bargain for them.¹²³ These courts state that because seamen are represented at the bargaining table, they forfeit their right to dis-

117. See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967); see also Note, *supra* note 7, at 316 (explaining that unions bargain most effectively for seamen because they represent combined economic strength of members).

118. See Note, *supra* note 7, at 316.

119. See *supra* note 105 and accompanying text (defining national labor policy).

120. See generally Note, *supra* note 7, at 316 (discussing how rise of unions began dispute over whether to consider maintenance and cure "maritime right" or "contractual obligation"). For a discussion of both viewpoints, see *supra* notes 54 & 55 and accompanying text.

121. See *supra* notes 27-35 & 60-65 and accompanying text (discussing traditional and modern maritime theories).

122. See generally *Cortes v. Baltimore Insular Line, Inc.* 287 U.S. 367, 371-72 (1932).

123. See, e.g., *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 949 (9th Cir.) (noting that bartering nature of collective bargaining negotiations indicate that resulting contracts should be enforced), *cert. denied*, 479 U.S. 924 (1986).

pute the final agreement.¹²⁴ These courts, however, mistakenly assume that maintenance and cure is an appropriate subject for negotiation. As an admiralty right, maintenance and cure inexorably attaches to each seaman's employment contract regardless of the parties' intentions.¹²⁵ Maintenance and cure is an ancient right, implicit in the very fact of maritime employment.¹²⁶ Contractual negotiations cannot abrogate or modify it, and it is therefore inappropriate to include maintenance and cure in a collectively bargained agreement.¹²⁷

"Contractual obligation" proponents also argue that setting aside a collectively bargained provision would discourage collective bargaining agreements.¹²⁸ Although maintenance and cure has been included in maritime employment contracts, severance would not harm national labor policy because maintenance and cure, as an admiralty right and not a contractual right, is not a proper subject for negotiation.¹²⁹ Removal of maintenance and cure from the scope of bargaining would eliminate various courts' dilemmas whether to disregard a collectively bargained-for provision. It would thus strengthen the collective bargaining process and national labor policy. Moreover, national labor policy does not specifically apply to admiralty issues.¹³⁰ It is therefore inconsistent to ignore a general admiralty law right of a seaman in order to protect an arguably

124. See, e.g., *id.* at 949-50.

125. See *supra* notes 55 & 61-66 and accompanying text (detailing how right is implicit in fact of employment).

126. See *supra* notes 55 & 61-66 and accompanying text (noting that maintenance and cure is ancient right implicit in employment).

127. See *Brown v. Lull*, 4 F. Cas. 407 (C.C.D. Mass. 1836) (No. 2,018). Justice Story set forth one of the most powerful explanations of why maintenance and cure cannot be included in contractual negotiations. *Id.* at 409. He stated that "[w]henever, therefore, any stipulation is found in the shipping articles, which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, as founded upon imposition or an undue advantage taken of their necessities and ignorance, and improvidence." *Id.*

128. See *supra* notes 112-17 and accompanying text (discussing why "contractual obligation" proponents think that collective bargaining agreements would suffer if not enforced in their entirety).

129. But see *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 640 (3d Cir. 1990) (stating that maintenance and cure can be part of negotiations as long as final rate is realistic and adequate); *Rutherford v. Sea-Land Serv., Inc.*, 575 F. Supp. 1365, 1373 (N.D. Cal. 1983) (stating that collective bargaining agreement can include maintenance and cure but that shipowners cannot enforce provision if it is inadequate).

130. *Barnes*, 900 F.2d at 639.

irrelevant national labor policy.¹³¹

Courts espousing the "contractual obligation" approach emphasize union representation of seamen.¹³² Unions, however, do not adequately represent the needs of seamen.¹³³ The sheer volume of cases that allege insufficient maintenance and cure indicates the lack of adequate representation.¹³⁴ The scarcity of jobs for seamen suggests that unions may be more willing to accept unfair bargains, including a low rate of maintenance and cure, in order to obtain jobs for their members.¹³⁵ Moreover, unions may agree to a lower daily rate of maintenance and cure in exchange for items such as sick leave and union disability pensions.¹³⁶ Unions have used maintenance and cure as a bargaining chip, and have constructively given it away even though some seamen depend upon maintenance and cure to finance their recovery from their illnesses.¹³⁷

B. Courts Should Enforce the Traditional View of Maintenance and Cure as an Admiralty Right

The doctrine of maintenance and cure originated in the ancient sea codes.¹³⁸ In the United States, the doctrine even-

131. *Id.* at 640.

132. *See supra* note 97 and accompanying text (listing courts adhering to "contractual obligation" view).

133. *See supra* notes 90-92 & *infra* note 149 and accompanying text (discussing inadequate representation provided by unions).

134. At least thirty-seven U.S. cases address insufficient maintenance and cure. *See, e.g., Barnes v. Andover Co.*, 900 F.2d 630 (3d Cir. 1990).

135. *See generally* Ruben, *Collective Bargaining and Labor-Management Relations*, 112 MONTHLY LAB. REV. 25 (1989) (noting unions' struggles against lack of jobs available to union members due to competition from non-union workers).

136. Flaherty, *supra* note 5, at 541. These tactics may have been appropriate prior to 1981, when the U.S. Public Health Service Hospitals were still open and gave free medical care to seamen, allowing the sailor to use all of his daily US\$8.00 maintenance and cure award on maintenance. *Id.* In 1981, however, the Omnibus Budget Reconciliation Act terminated seamen's rights to free health care by closing the U.S. Public Health Service Hospitals. 42 U.S.C. § 248(b) (1988).

137. *See, e.g., Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 950 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986). The court demonstrated that the union knew of its members' need for increased maintenance and cure, yet the union bargained it away. *Id.* at 949. The court explained that "[i]n 1975 the Marine Engineers Beneficial Association requested an increase in the maintenance rate to \$20.00 and in 1981 the Seafarers International Union asked for an increase to \$12.00. Both proposals were withdrawn as part of the give and take of collective bargaining." *Id.*

138. *See supra* note 1 and accompanying text (discussing how ancient sea codes formed basis for considering maintenance and cure an admiralty right).

tually gained support through the Supreme Court's classification of maintenance and cure as an admiralty right.¹³⁹ As an admiralty right, it was not subject to abrogation by any agreement or contract.¹⁴⁰ U.S. courts should continue to award maintenance and cure on the basis of actual cost to seamen because that is the traditional method of award.¹⁴¹ Moreover, an actual cost award takes inflation into account¹⁴² and removes the award from the reach of unions that are increasingly unable to strike a fair bargain on behalf of their members due to their diminishing power.¹⁴³

Traditionally, courts viewed maintenance and cure as an absolute right¹⁴⁴ that had to fulfill seamen's actual needs.¹⁴⁵ The ancient codes and U.S. case law both provided that injured seamen receive maintenance and cure comparable to what was provided on board the vessel.¹⁴⁶ This interpretation of the right provided seamen with the actual out-of-pocket expenses.¹⁴⁷

The current disagreement in the courts over which doctrine to enforce unfairly penalizes unionized seamen. When the unions became powerful in the 1940s, they included maintenance and cure in the contract negotiations and set the main-

139. See *De Zon v. American President Lines, Ltd.*, 318 U.S. 660, 667 (1943) (stating that duty to provide maintenance and cure arose once seaman entered service of ship and no private agreement could abrogate that duty).

140. See *supra* notes 52-53 and accompanying text (noting that U.S. courts consistently held maintenance and cure as implied in employment contract, regardless of contracts stating otherwise; and therefore could not be ignored).

141. See *Rutherford v. Sea-Land Serv., Inc.*, 575 F. Supp. 1365, 1369-70 (N.D. Cal. 1983).

142. *Id.*

143. See Sawyer, *Mutinous Band Bids to Clear Decks of Maritime Union Leaders*, Wash. Post, Mar. 20, 1983, at A2 (describing mismanagement and lack of adequate representation by union leaders of National Maritime Union for union's dwindling membership).

144. See *Rutherford*, 575 F. Supp. at 1369.

145. See *id.* The court noted that maintenance and cure should be equivalent to seamen's actual costs and stated that "[e]vidence of the seaman's actual expenditures is the preferred method of determining the amount of the daily maintenance payment owed to the seaman." *Id.* (citation omitted).

146. See *Laws of Oléron*, *supra* note 1, art. VII, at 1174-75 (requiring shipowner to provide food and lodging equivalent to shipboard conditions); see also *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 729 (1943); *Barnes v. Andover Co., L.P.*, 900 F.2d 630, 634 (3d Cir. 1990); *The Bouker No. 2*, 241 F. 831, 835 (2d Cir. 1917).

147. *Gardiner v. Sea-Land Serv., Inc.*, 786 F.2d 943, 946 (9th Cir.), *cert. denied*, 479 U.S. 924 (1986).

tenance and cure rate at US\$8.00 per day, which was reasonable at that time.¹⁴⁸ Unions have since kept the rate at US\$8.00 per day.¹⁴⁹ This rate is no longer adequate because inflation has caused the cost of food and lodging on land to reach a level which seamen cannot afford with the contractual rate of maintenance and cure.¹⁵⁰ Recently, non-unionized seamen have received increased maintenance and cure awards because the courts concluded that US\$8.00 a day was "starvation payment"¹⁵¹ and the expectation that lodging and meals could be found for that price was "unrealistic, if not pure fantasy."¹⁵² A unionized seaman cannot live on US\$8.00 any easier than a non-unionized seaman can. It seems unfair, therefore, to subject the unionized seaman to that rate of maintenance and cure. Furthermore, it is ironic that unionized seamen, who as union members should receive more protec-

148. See BENEDICT, *supra* note 62, § 51, at 4-74; G. GILMORE & C. BLACK, *supra* note 7, § 6-12, at 307 (both discussing setting of US\$8.00 rate of maintenance and cure).

149. *Barnes v. Andover Co.*, 900 F.2d 630, 635 (3d Cir. 1990).

150. See *Rutherford v. Sea-Land Serv., Inc.*, 575 F. Supp. 1365, 1370 (N.D. Cal. 1983) (stating that "it is now generally recognized that \$8.00 per day is no longer a sufficient sum for a seaman to secure lodging and three meals."); see also BENEDICT, *supra* note 62, at § 51, at 4-74. Benedict stated that

[d]espite the recent rapid rate of inflation the standard amount of maintenance recovery has not been increased since the 1950's. Today, practically no one is capable of maintaining himself at the \$8.00 per day, especially ashore. If maintenance is to retain the same definition that it had many year's ago, this rate is obviously unrealistic; even the most penurious seaman would probably be unable to maintain himself ashore today on a paltry [sic] \$8.00 per day.

Id. (footnotes omitted); see Note, *supra* note 92, at 116 (noting that "\$8.00 daily rate of maintenance is woefully inadequate").

151. *Harper v. Zapata Off-Shore Co.*, 563 F. Supp. 576, 582 (E.D. La. 1983); accord *Morel v. Sabine Towing & Transp. Co.*, 669 F.2d 345 (5th Cir. 1982) (awarding sailor US\$20 per day in Port Arthur, Texas); *Incandela v. American Dredging Co.*, 659 F.2d 11 (2d Cir. 1981) (awarding US\$26.80 per day in New York City); see, e.g., *Castro v. M/V Ambassador*, 657 F. Supp. 886, 887 (E.D. La. 1987) (illustrating that courts have not ignored unique problem of non-union seamen). When dealing with non-union seamen even the courts which favor a contractual interpretation agree that non-union seamen should not be held to a contract which they were not party to in the bargaining sessions. *Id.* In *Castro*, the court noted that it had

previously held that in the absence of a union contract expressly providing for a specific rate of maintenance, the amount of maintenance to which an ill or injured seaman is entitled is a question of fact to be determined by the trial court based upon the evidence presented.

Id.

152. *Rutherford*, 575 F. Supp. at 1370.

tion against inadequate compensation than non-unionized seamen, are in actuality at a disadvantage during maintenance and cure litigation.

Today, it would be unreasonable to expect any seaman to survive on a maintenance and cure award of US\$8.00 per day.¹⁵³ Statistics indicate that inflation has caused U.S. prices to increase by 500% since World War II, when the rate of US\$8.00 was set.¹⁵⁴ The U.S. District Court for the Eastern District of Louisiana calculated the effect of inflation on prices and determined that US\$8.00 per day for maintenance and cure in 1945 was the rough equivalent of US\$40.00 a day in Louisiana in 1983.¹⁵⁵ Many courts that have heard cases for maintenance and cure in the past decade have concluded that US\$8.00 a day is a sorely inadequate amount of money on which to live.¹⁵⁶

Opponents of the "admiralty right" position might argue that awarding seamen their actual expenditures for maintenance and cure would necessitate a complex case-by-case review to determine those actual expenditures. As far back as 1938, however, the U.S. Supreme Court said that a seaman's recovery must be measured on a case-by-case basis by the reasonable cost of the maintenance and cure to which the seaman is entitled at the time of trial, including such amounts as may be needful in the immediate future.¹⁵⁷ Case-by-case review, with the purpose of awarding seamen their actual costs, would

153. See *infra* notes 154-56 and accompanying text (explaining how insufficient US\$8.00 per day is for seamen); see also G. GILMORE AND C. BLACK, *supra* note 7, § 6-12, at 307. The commentators stated that

[t]he failure to adjust the rate to reflect inflation suggests that maintenance is no longer regarded as a living allowance sufficient to support even the proverbially impecunious unmarried male seaman in the modest circumstances to which he is thought to be entitled.

Id.; see BENEDICT, *supra* note 62.

154. *Harper v. Zapata Off-Shore Co.*, 563 F. Supp. 576, 584 n.4 (E.D. La. 1983).

155. *Id.*

156. See *supra* notes 153-55 (demonstrating that US\$8.00 is inadequate). The U.S. Court of Appeals for the Fifth Circuit, in *Curry v. Fluor Drilling Services, Inc.*, handled the question with a more conservative, though more permanent, response. *Curry v. Fluor Drilling Servs.*, 715 F.2d 893, 896 (5th Cir. 1983). The majority declined to award the seaman the increased rate because he failed to offer any evidence of his expenditures. *Id.* Judge Tate, in his dissent, stated that the Western District of Louisiana has a jurisprudential rule which presumes fifteen dollars per day to be an equitable rate of maintenance, in the absence of proof indicating otherwise. *Id.*

157. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 531 (1938). Moreover, in 1983,

actually reduce the amount of maintenance and cure litigation because shipowners would realize that they must pay the actual costs and thus they would rarely contest the requested rate. If a case did reach the courts, a court could inquire into four factors to determine maintenance and cure: the seaman's actual costs, expert testimony on the cost of food and lodging in the area, the maintenance rates given in the local union contracts, and previous court awards.¹⁵⁸

Opponents might argue further that an actual cost method would provide seamen the opportunity to defraud their shipowner and would be significantly more expensive than a *per diem* rate. Seamen could not take advantage of the shipowner by requesting exorbitant rates, however, because the shipowner usually knows the on-shore cost of living.¹⁵⁹ The shipowner's alternative to paying actual costs would be to contract for an inadequate rate of maintenance and cure, thereby opening himself to lawsuits, expensive attorney's fees, and the subjective opinion of a jury, which might award more than the seaman's actual costs.

Many seamen, unionized and non-unionized, bring suit

the *Rutherford* court stated that courts have used the case-by-case method for many years, so continuing that practice would not be burdensome:

This case-by-case litigation was the practice of the courts before the advent of collective bargaining agreements that set maintenance rates. A continuation of that practice is no burden on the courts, especially as the seamen are the wards of the courts. Further, lack of certainty or inconvenience are not reasons to abrogate the seaman's important right to maintenance.

Rutherford v. Sea-Land Serv., Inc., 575 F. Supp. 1365, 1371 n.5 (N.D. Cal. 1983).

158. *Rutherford*, 575 F. Supp. at 1369. The court stated that, historically, the preferred method of determining the new maintenance rate was by receiving evidence of the seaman's actual expenditures. *Id.*; see M. NORRIS, *supra* note 16, at § 26:70. This commentator suggested that

[i]t is the duty of the courts, under the general maritime law . . . to award maintenance in favor of the seaman and the rate thereof. While the rate of maintenance as agreed by the seamen's [sic] unions and the shipowners may be considered by the courts when determining the proper amount, nevertheless such agreements should not be followed if they lead to an unjust, inequitable, unreasonable and unrealistic result and thus harmful to the seaman.

Id. at 174-75.

159. Note, *supra* note 22, at 637-38. The student commentator states that "[e]mployers also know what it costs the [seamen] to live ashore when the facilities of the vessel are denied them. These companies will avoid paying for something from which they receive no return, and the seamen will avoid a *per diem* which does not reimburse their expenses." *Id.*

for increased maintenance and cure because the contractual rates set by the unions are ineffective. Until seamen receive maintenance and cure equivalent to their actual costs, the litigation will continue.

CONCLUSION

Maintenance and cure is recognized as an ancient admiralty right implicit in contracts of marine employment. This right originated in the belief that the vessel served as the seaman's home and the seaman should not be deprived of that shelter once an illness begins. When a seaman was forced to seek lodging and medical attention on land, the shipowner had to provide the injured seaman with room and board comparable to that provided on the vessel. That standard of awarding maintenance and cure, in effect, resulted in providing the seaman with the actual costs incurred. The method of awarding actual costs incurred should continue because it alone adequately meets the maintenance and cure needs of seamen.

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