Committee On Marine Insurance and General Average NEWSLETTER

Spring 2019 | Committee Chair: Andrew D. Kehagiaras, Long Beach, CA | Editor: Julia M. Moore, New York, NY

The following articles, case notes and comments are for informational purposes only, are not intended to be legal advice, and are not necessarily the views of the Maritime Law Association of the United States or the Committee on Marine Insurance and General Average.

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Editor's Comment:

This newsletter would not have been possible without the time, effort and sharp legal analysis of willing attorneys from the MLA's Young Lawyers Committee. I would like to extend special thanks to Olaf Aprans, Esq. of Farrell Smith O'Connell, LLP and Imran O. Shaukat, Esq. of Semmes Bowen & Semmes for coordinating the work that resulted in this edition of the Newsletter.

~~RECENT CASES OF INTEREST~~

ADMIRALTY JURISDICTION

- **COURT EXERCISES ADMIRALTY SUBJECT MATTER JURISDICTION**

***Starr Indem. & Liab. Co. v. Marine Envtl. Remediation Group, LLC*, 2018 A.M.C. 2066 (S.D.N.Y. July 27, 2018)**

Starr Indemnity & Liability Company ("SILC") sold a pollution liability insurance policy (the "Policy") covering Marine Environmental Remediation Group's ("MER") vessel LONE STAR (the "Vessel"). *Id.* at 2067. The Policy covered losses stemming from, *inter alia*, liability under the Oil Pollution Act of 1990, liability arising out of "the discharge of on-oil hazardous substances, . . . and certain fines and penalties incurred under the Federal Water Pollution Control Act ("FWPCA"), Clean Water Act and Rivers and Harbors Appropriations Act." *Id.* at 2069. During the Policy period, the Vessel sank, thereby discharging approximately 1,800 gallons of waste oil. *Id.* MER notified SILC of the incident. *Id*. SILC filed suit pursuant to 28 U.S.C. § 1333, seeking a determination of no coverage under the Policy. MER moved to dismiss for lack of subject-matter jurisdiction under Fed. R. Civ. P. 12(b)(1). Specifically, MER argued because the Vessel was a "dead ship" when the Policy was signed, "the Policy cannot be a maritime agreement." *Id.* at 2069.

In rejecting MER's argument, the District Court concluded that "[t]he Policy covers maritime risks that give rise to maritime jurisdiction." *Id.* at 2068. The District Court reasoned that the dispute concerned "potential dangers to public health and safety and the environment—matters that would directly impact those who conducted maritime commerce in those waters . . . *and* pollution coverage which 'directly implicate[s] the business of maritime commerce.'" *Id.* at 2070 (citing *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of New York*, 822 F.3d 620, 634 (2d Cir. 2016)). Accordingly, MER's motion to dismiss for lack of subject-matter jurisdiction was denied.

Submitted by: Shaukat Imran, Semmes Bowen & Semmes, Norfolk, Virginia

- **COURT DECLINES ADMIRALTY SUBJECT MATTER JURISDICTION**

***OSG v. TEICHMAN GRP*, 328 F. Supp. 3d 625 (S.D. Tex. 2018)**

This cases arises out of the death of two OSG Lightering ("OSG") employees after a crane operator for T & T failed to properly brace the crane's outriggers, causing the crane to fall. T & T provided dockage, equipment and personnel to OSG pursuant to a Master Service Agreement ("MSA").

Wrongful-death and personal injury suits were filed in state court against T & T and OSG. Shortly before mediation, T & T sought defense, indemnity and additional insurance coverage under their MSA with OSG. OSG and its insurers invoked admiralty jurisdiction and sought declaratory judgement of no contractual obligation to defend, indemnify or provide additional insurance coverage. T & T moved to dismiss for lack of subject matter jurisdiction.

In its dismissal for lack of subject matter jurisdiction, the district court concluded that the MSA was not a maritime contract because it did not have a principal objective in maritime commerce. Although the contract was for a maritime activity, it did not meet the requirements to be considered maritime commerce. The court reasoned that not only was the maritime portion of the MSA less than 12% of the services provided under the agreement over time; but the loading and unloading of equipment was not maritime commerce because OSG used the equipment as a part of its lightering operations under separate contracts.

An appeal with the Fifth Circuit Court of Appeals is pending.

Submitted by Guillermo A. Cancio, Esq., Senior Claims Executive, Thomas Miller (Americas), Inc.

POLICY CONTRACT CONSTRUCTION

- **DEFENSE COSTS**

ACL, et al. v. WQIS, *slip op.* 09-cv-7957 (Nov. 7, 2018 S.D.N.Y.)

This case arose out of a collision that occurred on July 23, 2008 in the lower Mississippi River, when the downbound tanker M/V TINTOMARA struck the Tank Barge DM-932, resulting in a spill of over 300,000 gallons of oil from the barge. As the owner of the barge, American Commercial Lines ("ACL") was designated by the United States Coast Guard as the "Responsible Party" under the Oil Pollution Act of 1990 ("OPA '90")

and thus liable for all costs associated with the clean-up of the oil, as well as the payment of governmental and third-party claims. The total amount of the claims for clean-up and third-party liabilities paid by ACL's insurers as of April, 2018, was in excess of $90,000,000.
At the time of the casualty, ACL had at least $300 million in liability coverage, written in four layers. The Water Quality Insurance Syndicate ("WQIS") insured the first layer of pollution cover, in the amount of $5,000,000. Due to the magnitude of the spill, and the extent of the resulting clean-up activity, the cost and expense incurred by ACL for clean-up exceeded $5,000,000 within a few days after the casualty. Thereafter, ACL's excess insurers covered all cleanup costs and pollution liability, including all defense costs incurred by ACL from the date of the casualty, without reservation.

More than a year after the casualty, ACL and its excess insurers made a claim against WQIS alleging that the WQIS Policy covered all of the pollution related defense costs incurred by ACL as a result of the casualty, even after the primary liability limit of the WQIS Policy was exhausted. WQIS conceded that its policy covered defense costs in addition to its basic limit, but only in respect of defense costs incurred prior to the exhaustion of the primary limit. WQIS reimbursed ACL and its excess insurers for all defense costs incurred prior to August 27, 2008, the agreed date that WQIS made its final pollution liability payment under the Policy. Defense costs incurred after that date, in the amount of over $10 million, remained in dispute.

The action commenced by ACL and the excess insurers in the United States District Court for the Southern District of New York in September, 2009, asserted two breach of contract claims against WQIS. In November, 2009, the parties cross-moved for summary judgment on the pleadings. On March 29, 2010, the Hon. Judge Lewis A. Kaplan granted ACL's Motion for Judgment on the Pleadings, holding that WQIS was obligated to reimburse ACL for costs incurred by ACL in the investigation and defense of all claims even after the WQIS Policy limit had been exhausted. *American Commercial Lines LLC v. Water Quality Insurance Syndicate*, 09 Civ. 7957, 2010 WL 1379763, at *3 (S.D.N.Y. Mar. 29, 2010). WQIS appealed from the March 29, 2010 Order. However, on March 14, 2011, the Second Circuit Court of Appeals dismissed the interlocutory appeal for lack of appellate jurisdiction, because WQIS' Answer to the Complaint asserted unresolved affirmative defenses. In September, 2013, Plaintiffs moved for partial summary judgment seeking to dismiss certain of WQIS' affirmative defenses and, in October, 2013, WQIS filed a motion for partial summary judgment in opposition to Plaintiffs' motion and seeking summary judgment enforcing WQIS' affirmative defense that "since ACL has never sought or obtained WQIS' prior consent to the defense costs sought to be recovered in this action, WQIS is not liable for such defense costs." On April 8, 2014, Judge Kaplan adopted a Magistrate Judge's finding that WQIS did not repudiate liability for defense costs under the WQIS Policy, and that because ACL failed to seek or obtain WQIS' consent to incur the costs of seventeen other vendors retained by ACL, Plaintiffs are not entitled to reimbursement for those costs paid to those vendors.

A Final Judgment was entered by the District Court on December 11, 2015, and the parties subsequently cross-appealed from the Final Judgment. In a Summary Order dated February 10, 2017, the Second Circuit affirmed the judgment of the District Court to the extent it granted partial summary judgment on the issue of repudiation, and vacated the judgment to the extent it granted partial summary judgment on the pleadings on the issue of contract interpretation. The Second Circuit then remanded the matter to the District Court "to assess the extrinsic evidence as well as any further evidence adduced through discovery and give effect to the intent of the parties." *Am. Commercial Lines LLC, et al. v. Water Quality Ins. Syndicate*, 679 F. App'x 11, 16 (2d Cir. 2017).

A bench trial was held before Magistrate Judge Robert W. Lehrburger in April, 2018. In a Decision and Order dated November 7, 2018, Judge Lehrburger found that the phrase "liabilities covered" contained in the separate defense costs coverage of the WQIS Policy does not include liabilities incurred after the Policy's primary pollution liability limit of $5,000,000 was exhausted, and entered judgment in favor of WQIS. In so finding,

the District Court stated "that the extrinsic evidence convincingly demonstrates that the parties never intended for WQIS to continue paying pollution defense costs . . . once WQIS no longer had to indemnify claims under [the Policy's primary pollution liability coverage]." As a result, once the primary pollution liability limit was reached by WQIS' final payment on August 27, 2008, ACL no longer had any "liabilities covered," and therefore WQIS was no longer obligated to cover defense costs under the Policy. Plaintiffs did not appeal from the District Court's Decision and Order.

Submitted by John Woods, Esq. and Corey Greenwald, Esq. Clyde & Co. New York, New York

- **SUMMARY JUDGMENT, DECLARATORY JUDGMENT**

***Nat'l Liab. & Fire Ins. Co. v. Jablonowski*, No. 3:16-cv-02031-WWE, 2018 U.S. Dist. LEXIS 164784, 2018 WL 4623027, 2018 AMC 2857 (D. Conn. Sep. 26, 2018)**

Summary judgment granted in an action by marine insurers for declaratory judgment denying coverage under recreational yacht policy where owner claimed vessel was total constructive loss due to extensive mold damage allegedly caused by electrical fire and benevolent sanding by mystery vandal.

Background – Plaintiff insurers issued a Yacht Policy to Defendant John Jablonowski ("Jablonowski") for his 1962 wooden auxiliary sailboat, PAULA LYNN ("Boat") for an agreed $90,000.00 value covering the Boat and boating equipment. During the coverage period Jablonowski filed a claim for the insured value of the Boat after an "ongoing" electrical fire at the shore power cord connection allegedly cut off electricity to an onboard space heater causing "immediate consequential property damage in the form of mold and/or mildew growth throughout the Boat's interior" ("Fire Claim"). Three (3) days after the Fire Claim's denial (and eight (8) days after the expiration of the Yacht Policy) Jablonowski made a new claim premised on the theory that the damage was the product of vandalism when the Boat's cabin top and V-berth were sanded by an unidentified person – according to Jablonowski, the mystery vandal's actions caused the mold spores to spread throughout the Boat ("Vandalism Claim"). Plaintiffs agreed to consider the new Vandalism Claim and reconsider the previously-denied Fire Claim in light of Jablonowski's continued allegations. Counsel took Jablonowski's pre-litigation examination, and after both claims were subsequently denied, Plaintiffs filed an Amended Complaint for Declaratory Judgment.

Fire Claim – In moving for summary judgment, Plaintiffs argued that there was no fire. Plaintiffs' expert, who was neither deposed nor directly challenged by Jablonowski, opined that pyrolysis but no ignition or combustion occurred. Moreover, Plaintiffs argued that the contention forwarded by Jablonowski that a fire was ongoing within the power cord connection "all winter" was implausible. Therefore, since there was no fire or evidence to support its existence, there could be no coverage under the Yacht Policy for "immediate consequential property damage resulting from fire," as coverage for "any loss caused directly or indirectly by wear and tear, gradual deterioration, mechanical or electrical breakdown, overheating" was expressly excluded. In response, Jablonowski argued that the kind of "slow burn" alleged to have occurred in the shore power cord could nevertheless constitute a fire for legal purposes. Following a discussion of the applicable legal authority the court determined that "[f]ire […], as used in an insurance policy, implies accidental combustion accompanied by visible flame or glow." Since Jablonowski neither witnessed nor produced any evidence of such a flame or glow and Plaintiffs' expert report specifically determined there had been no combustion, the court concluded Jablonowski would be unable to establish that a fire occurred at trial and granted summary judgment for Plaintiffs with respect to the Fire Claim.

Vandalism Claim – The Yacht Policy covered property damage for any accidental cause, including vandalism. However, because vandalism was not defined by the Yacht Policy the district court followed the applicable rules of construction set forth by the Connecticut Supreme Court – “which has long looked to Webster's Third International Dictionary for guidance when determining the "usual and ordinary" meaning of contract language – and defined "vandalism" as the "[w]illful or malicious destruction or defacement of things of beauty or of public or private property." In response Plaintiffs’ argued the mere sanding of the Boat’s interior could not amount to vandalism without evidence of willful or malicious destruction. This position was further bolstered by Jablonowski’s pre-litigation examination testimony, during which he admitted the mystery sander’s actions may have been benevolent, intending simply to clean the mold. Thus, without any direct evidence of malicious intent, the court determined it would be unreasonable “to infer that a prospective vandal would choose to covertly sand the interior cabin as a means to cause harm to the vessel.” Moreover, in granting summary judgement with respect to the Vandalism Claim, the court found the Yacht Policy’s mold or mildew exclusion lent further support to Plaintiffs’ denial of coverage. Although the mold and mildew exclusion included exceptions for immediate consequential property damage resulting from fire, explosion, sinking, etc., there was no such exception for vandalism.

Submitted by: Dan Stillman, Esq. Davey & Brogan, Norfolk, Virginia

<u>OTHER INSURANCE CLAUSE INVALIDATED BY STATE STATUTE</u>

***NATIONAL LIABILITY v. STATE FARM*, 2018 WL 2446664 (4th Cir. May 31, 2018)**

This case arises from a yacht accident in Virginia that occurred in August 2016. The vessel owner was insured against bodily injury claims arising from the ownership, maintenance or use of a private pleasure watercraft by separate policies specifically insuring watercraft issued by State Farm Fire and Casualty Company and National Liability and Fire Insurance Company. Each policy contains an “other insurance” clause. State Farm’s “other insurance” clause provides that it will pay a pro rata share of any claim up to the limit of its policy. National Liability’s “other insurance” clause, provides that its coverage will apply only after any other coverage has been exhausted.

Virginia Statute 38.2 2-2204 (A) disallows any provision that limits or reduces coverage for liability arising from the ownership, maintenance of use of any watercraft. The Virginia Supreme Court has invalidated clauses that apportion insurance company obligations as excess of any other policy on the basis that they reduce coverage pursuant to §38.2 2-2204 (A). The same court has held that policies that provide liability coverage, like homeowner’s policies, are not subject to §38.2 2-2204 (A).

State Farm appealed the U.S. District Court for the Eastern District of Virginia’s holding that National Liability’s “other insurance” clause is valid under §38.2 2-2204 (A), and that the two policies could be reconciled to require that State Farm first cover the claim up to the limits of its policy before National Liability would be required to pay. In applying Virginia law, the Fourth Circuit Court of Appeals overruled the district court, holding that because both policies were specifically intended to insure the owner’s liability arising from ownership, or operation of the vessel, policy language in National Liability’s policy was null and void as it conflicts with Virginia Statutes.

Submitted by Guillermo A. Cancio, Esq., Senior Claims Executive, Thomas Miller (Americas), Inc

UBERRIMAE FIDEI STRICTISSIMI/UTMOST GOOD FAITH

***QBE Seguros v. Morales–Vazquez*, 260 F.Supp.3d 148 (D.P.R. 2016)**

United Kingdom's abolition of *uberrimae fidei* doctrine did not require abolition of doctrine from American maritime law.

Plaintiff QBE Seguros ("QBE") is a Puerto Rico corporation authorized to sell ocean marine insurance in Puerto Rico. In March 2014, Defendant Carlos Morales–Vazquez ("Morales") applied to have QBE insure his 48' yacht and warranted that the statements and answers on the application are true and correct. QBE issued a marine insurance policy that ran from March 2014 to March 2015. The policy stated that it "shall be void and without effect" if the insured made a false statement or representation with respect to the insurance, or concealed or misrepresented any material fact or circumstance relating to the insurance. In October 2014, the 48' yacht sustained damages as a result of a fire, Morales informed QBE of the damage, and QBE immediately began investigating the claim. In July 2015, the surveyor assigned by QBE informed them that around 2010 a different insurance company had adjusted a yacht insurance claim for Morales. When questioned by QBE about this claim a month later, Morales stated under oath that around 2010 he owned a 40' yacht and grounded the vessel while no one else was aboard. The incident in 2010 resulted in a total loss of the 40' yacht. In his application for insurance of the 48' yacht, Morales did not disclose the 2010 incident in response to a question asking whether he had any accidents or losses in connection with a vessel he owned, operated, or controlled. QBE's insurance application also asked Morales to detail his boating experience by listing the boats he owned or operated. When questioned by QBE, Morales admitted under oath that he owned five vessels not included in his 2014 insurance application for the 48' yacht. QBE brought this action under the court's admiralty jurisdiction against Morales, seeking a judgment declaring that Morales's marine insurance policy is *void ab initio*, that Morales breached a "warranty of truthfulness," or that the policy does not cover all of Morales's claimed losses.

Morales counterclaimed, alleging breach of contract and entitlement to consequential damages. Morales moved for judgment on the pleadings, and to dismiss the complaint for failure to state a claim. First, he highlights that the U.K. Insurance Act of 2015 abolished the *uberrimae fidei* doctrine in the United Kingdom. Second, he contends that the Supreme Court has instructed federal courts to adopt "uniform and harmonious application[s] of American and English marine insurance law." Third, he contends that federal courts must "follow the lead" and abolish the uberrimae fidei doctrine from American maritime law.

The court rejects Morales' contentions and held that the United Kingdom's abolition of *uberrimae fidei* doctrine did not require abolition of *uberrimae fidei* doctrine from American maritime law, despite undesirability of disharmony on issue between nations. The court confirmed the well-established, long-standing rule of *uberrimae fidei* that continues to be applied by circuit courts in United States. The court also confirmed that an insured's "loss history" is a relevant and material fact that must be disclosed to the insurer, as the insured's loss history affects the riskiness of issuing an insurance policy. The court held that QBE's arguments were sufficient to establish a plausible violation of the *uberrimae fidei* doctrine, and to maintain QBE's declaratory judgment action.

Submitted by Andrew Anastor, Esq., Claim Specialist, Multinational, Chubb North America

CHOICE OF LAW: FEDERAL MARITIME LAW APPLIES TO ALL-RISK POLICY

***Chartis Property Casualty Co. v. Inganamort*, 2019 WL 1277518 (D.N.J. Mar. 20, 2019)**

In *Chartis Property Casualty Co. v. Inganamort*, 2019 WL 1277518 (D.N.J. Mar. 20, 2019), Plaintiff Chartis Property Casualty Company ("Chartis") insured a 65-foot Sportfish vessel (the "Vessel") owned by John and Joan Inganamort ("Defendants"). In September 2011, the Vessel partially sunk while docked in Florida. *Id.* at *1. Chartis claimed that a hole caused by Defendants' failure to upkeep the Vessel caused it to sink. Defendants maintained that heavy rainstorms caused the Vessel to sink. *Id.*

Chartis filed a declaratory judgment action, seeking, *inter alia*, a judgment that insurance coverage was barred and/or limited. Specifically, Chartis argued that the insurance policy at issue, an "all-risk" policy, only covered losses that the policyholders could prove were "fortuitious," and that Defendants proffered no evidence to demonstrate a fortuitous loss. *Id.* at *3. Defendants argued that Florida state law applied rather than admiralty law, and that under Florida law Chartis possessed "the burden of proof that there is an exception to coverage." *Id* at *2.

The United States District Court for the District of New Jersey concluded that federal admiralty law controlled the analysis of the dispute, finding that the fortuitous loss rule was "an entrenched federal rule" and therefore state law did not apply. *Id.* at *2. The fortuity rule states that "all-risk policies in marine insurance contracts only cover losses caused by fortuitous events." *Id.* at *3 (citing *Youell v. Exxon Corp.*, 48 F.3d 105, 110 (2d Cir.), *cert granted, judgment vacated on other grounds*, 516 U.S. 801 (1995). Ultimately, the court concluded that Defendants presented no evidence demonstrating that the partial sinking of the Vessel was caused by fortuitous events, and therefore Chartis' motion for summary judgment was granted. *Id.* at *5.

Submitted by Shaukat Imran, Semmes Bowen & Semmes, Norfolk, Virginia

LIMITATION ACT

- **NOTICE OF CLAIM FOR PURPOSES OF LIMITATION OF LIABILITY**

***Brown v. Edwards*, 2018 WL 4599839 (S.D. Tex. 2018).**

This limitation of liability action arose out of damage sustained by Virginia's on the Bay in Port Aransas, TX when Hurricane Harvey struck the region at the end of August 2017. Gene Brown's vessel was torn from its dock during the storm and reportedly stuck the piers in Virginia's marina. At the time of the loss, Brown's vessel was valued at approximately $2,000.00. On September 26, 2017 counsel for Virginia's submitted a demand letter to Brown, including pictures of physical damage, for damages caused by his vessel. On November 3, 2017, Brown's carrier, Boat US, denied coverage on the basis of an "Act of God" defense. On March 26, 2018, Counsel for Virginia's communicated to Boat US asserting that Brown failed to properly secure the vessel.

Brown filed for exoneration from or limitation of liability on May 2, 2018. Virginia's filed a motion to dismiss arguing Brown's filing for limitation of liability is untimely considering he first had notice of the claim as of September 26, 2017 and the deadline to file is 6 months after receiving first notice of a claim. The court held that September 26, 2017 letter constituted adequate notice of a reasonable possibility of a claim that could possibly exceed the vessel's value. The pictures and description of the physical damage conveyed a reasonable

possibility that the damages would exceed $2,000.00. Although Brown argued he had insufficient notice due to lack of specificity of the demand by Virginia's, the court explained Boat U.S.'s November 3, 2017 denial of liability conveyed an understanding of a reasonable possibility of a claim by specifically referencing the date of loss, location of loss, scope of damage, and claimed negligence.

The Fifth Circuit Court of Appeals affirmed the district court's ruling on March 21, 2019.

Submitted by Guillermo A. Cancio, Esq., Senior Claims Executive, Thomas Miller (Americas), Inc.

- **INSURED PROTECTED BY LIMITATION ACT INJUNCTION**

***SCF Waxler Marine, L.L.C. v. ARIS T M/V*, 902 F.3d 461 (5th Cir. 2018)**

Fifth Circuit finds that Interlocutory decree granting statutory limitation of liability is not appealable under 28 U.S.C. § 1292(a)(3).

This litigation arose out of a collision between bulk carrier *Aris T*, a tank barge, a towing vessel, and two shoreside structures along the Mississippi River at Norco, Louisiana, just upriver from New Orleans. Prior to the accident, the *Aris T* was proceeding upriver as two towing vessels, the *Elizabeth M. Robinson* and *Loretta G. Cenac*, were moving downriver. During *Loretta G. Cenac*'s attempted pass of the *Elizabeth M. Robinson*, *Aris T* struck the portside of an empty tank barge which in turn struck another tank barge connected to another towing vessel as well as multiple berths. The National Transportation Safety Board determined that the probable cause of the collision of bulk carrier *Aris T* with tank barge, towing vessel, and shoreside structures was the failure of the pilot on the *Aris T* to take early and effective action to mitigate the risk presented by the developing upriver traffic situation, and the distraction of the captain on the *Loretta G. Cenac* from safety-critical navigational functions as a result of his cell phone use. The accident resulted in damages estimated to exceed $60 million.

After litigation was filed in the United States District Court for the Eastern District of Louisiana, *Loretta G. Cenac* filed for Exoneration from or Limitation of Liability under 46 U.S.C § 30511. Pursuant to Louisiana's direct action statute, appellants impleaded *Loretta G. Cenac's* Protection & Indemnity insurers. The issue became whether the primary P&I policy, issued by the Primary Insurers and followed by all Excess Insurers, had a *Crown Zellerbach* clause to allow insurers to limit their liability to that of the *Loretta G. Cenac*. *See Crown Zellerbach Corp. v. Ingram Indus., Inc.* 783 F.2d 1296 (5th Cir. 1986) (en banc). Appellants filed a motion for partial summary judgment on the *Crown Zellerbach* issue and the district court denied the motion, and held that P&I covering the vessel has a *Crown Zellerbach* clause thereby permitting the excess insurers to limit their liability to that of the insured vessel.

Appellants argued that the Fifth Circuit had appellate jurisdiction because the district court, in denying their motion for partial summary judgment, granted the Excess Insurers rights that did not exist before that decision. Appellants emphasized the finality of the district court's decree that *Cenac* could actually limit its liability in the case even though the district court did not rule on the issue of liability. The Excess Insurers argued that the Fifth Circuit lacks jurisdiction to hear the interlocutory appeal under § 1292(a)(3) because the district court failed to "determin[e] the rights and liabilities of the parties."

The Fifth Circuit denied appellants interlocutory appeal, holding that the provision providing for interlocutory appeal does not afford the Court of Appeals jurisdiction where the underlying claim for liability has not been

adjudicated. The court emphasized their willingness to hear appeals where indemnity or coverage by an insurer of an insured is altogether denied and where the district court concluded that a party was negligent and thus not entitled to limitation. The Court did not find a compelling reason to distinguish between a district court's determination of a contractual entitlement rather than statutory entitlement to limit liability, neither decision is reviewable on appeal under § 1292(a)(3).

Submitted by Andrew Anastor, Esq., Claim Specialist, Multinational, Chubb North America

ITEMS FOR FUTURE ISSUES MAY BE SUBMITTED TO:

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