How Law and Insurance Influence Risk Management: A Path to Incentivize Safety

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Introduction

This article reviews how current business and legal structures support risk management, and whether changes to these structures could increase incentives for risk reduction. This inquiry focuses on the business and legal relationships between key private parties with interests in and responsibilities for the safe condition of commercial vessels in the context of marine insurance coverage,[1] but is applicable to other insurance, rating, and risk management contexts. The principals in this context are shipowners, charterers, cargo owners, and insurance underwriters;[2] other key parties include insurance brokers and ship classification societies and surveyors.

The relevant legal regime addressing these relationships is unique and longstanding, with the U.S. Constitution affording "admiralty and maritime jurisdiction" to the federal courts.[3] While

[1] For a review of safety risk management—i.e., the identification, measurement, and reduction of risks—of commercial vessel operations from an engineering perspective, see generally Stephen Mark Shapiro, Development, Evaluation, and Implementation of Safety Measures to Prevent Marine Accidents (Aug. 1, 1991) (unpublished M. Eng'g thesis, Va. Polytechnic Inst. & State Univ.), https://vtechworks.lib.vt.edu/handle/10919/30919. The relationships of other parties with critical commercial vessel safety interests outside of the marine insurance context, such as flag states that register vessels and the port states where these vessels call, are beyond the scope of this article.

[2] Principals eligible to purchase coverage include those who have an interest against the loss of or damage to the vessel or its cargo—such as charterers, lenders financing ship mortgages, freight forwarders, and underwriters buying reinsurance. *See* WILLIAM TETLEY, INTERNATIONAL MARITIME AND ADMIRALTY LAW 593–95 (2002). The important safety interests of crew members and other maritime workers are addressed by specific laws and are beyond the scope of this article. *See, e.g.*, TETLEY, *supra*, at 561–64 (discussing the Jones Act, 41 Stat. 1007 (1920), codified at 46 U.S.C. § 30104 (2012)).

[3] U.S. CONST. art. III, § 2.

admiralty is among the few remaining areas of federal common law,[4] state laws also come into play regarding aspects of maritime law,[5] and in particular, marine insurance law.[6] Much of U.S. maritime law is taken from or has been influenced by the laws of England in light of England's historic and ongoing role in international shipping, and the significant presence of the shipping industry and related services in London and other parts of the United Kingdom.[7]

For over the past century, since 1906, the U.K. statutory law on marine insurance had been largely stable.[8] However, Parliament recently updated U.K. insurance law, with the Insurance

[4] Am. Dredging Co. v. Miller, 510 U.S. 433, 455 (1994) ("[T]here is an established and continuing tradition of federal common lawmaking in admiralty."); *see also* Norfolk S. Ry. Co. v. James N. Kirby Pty. Ltd., 543 U.S. 14, 28 (2004); NICHOLAS J. HEALY ET AL., CASES AND MATERIALS ON ADMIRALTY 68 (5th ed. 2012); DAVID W. ROBERTSON ET AL., ADMIRALTY AND MARITIME LAW IN THE UNITED STATES 106 n.3, 113 (3d ed. 2015). *But see* ROBERTSON ET AL., *supra*, at 121 n.2 (citing Ernest A. Young, *Preemption at Sea*, 67 GEO. WASH. L. REV. 273 (1999)); Young, *supra*, at 274 (citing Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1341–60 (1996)).

[5] *See* S. Pac. Co. v. Jensen, 244 U.S. 205, 216–18 (1917) (interpreting the "saving to suitors" clause of the Judiciary Act of 1789, § 9, as authorizing state maritime law only for a situation where the uniformity of a national rule is not indicated); *Norfolk S. Ry. Co.*, 543 U.S. at 27 (citing Kossick v. United Fruit Co., 365 U.S. 731, 735 (1961)).

[6] Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 317–21 (1955) (declining to replace state laws with uniform federal common law admiralty rules for interpreting marine insurance contracts in light of longstanding state regulation of insurance in the United States).

[7] *See, e.g.*, LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 4–5 (2d ed. 1991); CARL E. MCDOWELL & HELEN M. GIBBS, OCEAN TRANSPORTATION 24–27, 104–107 (1954); Thomas J. Schoenbaum, *The Twelfth Nicholas J. Healy Lecture on Admiralty Law Wish List: Maritime Matters Our Government Might Profitably Address*, 46 J. MAR. L. & COM. 463, 468–69 (2015). *See generally*, EDGAR GOLD, MARITIME TRANSPORT: THE EVOLUTION OF INTERNATIONAL MARITIME POLICY AND SHIPPING LAW 71–100 (1981); TETLEY, *supra* note 2, at 15–30; James Alsop, *Maritime Law—The Nature and Importance of its International Character*, 34 TUL. MAR. L.J. 555 (2010); William Tetley, *Maritime Law as a Mixed Legal System (With Particular Reference to the Distinctive Nature of American Maritime Law, Which Benefits from Both its Civil and Common Law Heritages)*, 23 TUL. MAR. L.J. 317 (1999).

[8] Marine Insurance Act 1906, 6 Edw. 7 c. 41 (U.K.).

Act 2015[9] coming into force in 2016.[10] It remains to be seen how much of the new Insurance Act 2015 might be adopted through statutory or common law in the United States, whether the new Act may alter the relationships among the key parties, and how changes to these relationships might serve to reinforce incentives for marine safety.

Part I of this article describes the placement of marine insurance coverage and the requisite classification survey. Part II examines relevant legal aspects of marine liability and insurance, including those stemming from the Insurance Act 2015. Part III explores how maritime law and industry practice could evolve to further promote safety through the allocation of relevant risks, and how safety incentives need to be balanced with other legal and practical considerations.

I. Coverage Placement and Ship Classification

While American insurance companies have issued marine insurance since the early days of the United States, it is not unusual for American shipowners to obtain coverage in England.[11] Worldwide, England is still the dominant source of marine insurance.[12] In 1976, only four percent of the world's tonnage was registered in the United States.[13] In light of the global nature of shipping,[14] the particulars of marine insurance policies issued in England remain significant in

[9] Insurance Act 2015, c. 4 (U.K.).
[10] HARRY WRIGHT, THE INSURANCE ACT 2015: A PRACTICAL GUIDE TO CHANGES IN UK INSURANCE LAW 2 (rev. Oct. 2016), http://www.lmalloyds.com/act.
[11] *Cf.* BUGLASS, *supra* note 7, at 3–5; *see* FRANK L. MARAIST ET AL., ADMIRALTY IN A NUTSHELL 127 (6TH ED. 2010);
[12] TETLEY, *supra* note 2, at 581.
[13] ROY L. NERSESIAN, SHIPS AND SHIPPING: A COMPREHENSIVE GUIDE 7 (1981). This figure does not include vessels owned by American interests that are registered under flags of convenience, such as the twenty-two percent of global tonnage registered in Liberia. *See id.* at 5–7 (noting that over a quarter of Liberian flag ships were owned by American interests in 1981). During the first half of the prior century, the American seagoing fleet increased from four percent of global tonnage in 1900 to over thirteen percent in 1950. MCDOWELL & GIBBS, *supra* note 7, at 105.
[14] *See generally* NERSESIAN, *supra* note 13, at 1–10.

both international and U.S. marine insurance law practice.[15] Therefore, a review of how business and legal structures may affect safety should consider those structures in both the United Kingdom and the United States.

A. How Marine Insurance Policies are Issued in England

In England, marine insurance developed in the 1700s and was at first issued almost exclusively by individual underwriters.[16] Corporate insurance entities were effectively barred by statute[17] until 1824.[18] The risks transferred from a shipowner or other "assured" through a marine insurance policy are typically split among multiple underwriters.[19] British brokers, who serve as agents of the shipowners and not the underwriters,[20] arrange policies by providing prospective underwriters a "slip" containing relevant details about the ship, its flag (country of registration), its owner and operator, and the intended voyages and cargoes.[21] The broker and

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[15] This is reinforced by the discussion of British marine insurance policies in sources intended primarily for students and practitioners in the United States. *See generally, e.g.*, ALEX L. PARKS, 1 THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE (1987); THOMAS J. SCHOENBAUM, 2 ADMIRALTY AND MARITIME LAW § 19 (2001); Raymond P. Hayden & Sanford E. Balick, *Marine Insurance: Varieties, Combinations, and Coverages*, 66 TUL. L. REV. 331 (1991). Similarly, it is perhaps also telling that the latest books specific to marine insurance practice in the United State are older than their British and international counterparts. *Compare, e.g.*, BUGLASS, *supra* note 7, *and* PARKS, *supra*, and WILLIAM D. WINTER, MARINE INSURANCE: ITS PRINCIPLES AND PRACTICE (3d ed. 1952), *with* HOWARD BENNETT, THE LAW OF MARINE INSURANCE (2d ed. 2006), *and* OZLEM GURSES, MARINE INSURANCE LAW (2d ed. 2017), *and* SUSAN HODGES, CASES AND MATERIALS ON MARINE INSURANCE LAW (1999), *and* BARIS SOYER, WARRANTIES IN MARINE INSURANCE (3d ed. 2017).

[16] BENNETT, *supra* note 15 ¶ 1.16 (2d ed. 2006).

[17] Bubble Act 1720, 6 Geo. c. 18, § 18 (Eng.).

18 Marine Insurance Act 1824, 5 Geo. 4 c. 114 (Eng.) (repealing provisions of the Bubble Act that effectively limited corporate insurers to two chartered entities); BENNETT, *supra* note 15 ¶¶ 1.16–18 (noting that the two chartered entities made little headway into the market, leaving individual underwriters with over ninety percent of the marine insurance market while the Bubble Act was in effect).

[19] BENNETT, *supra* note 15 ¶ 2.04.

[20] BUGLASS, *supra* note 7, at 9 (citing Anglo-African Merchants Ltd. v. Bayley [1970] 1 QB 311, 322).

[21] BENNETT, *supra* note 15 ¶¶ 2.04–2.08; WINTER, *supra* note 15.

initial ("lead") underwriter negotiate the major terms and the premium as well as the percentage of the policy risk to be assumed by the lead underwriter.[22] The broker then circulates the slip—now incorporating the terms, premium, and percentage accepted by the lead underwriter—to additional prospective underwriters until all of the risk has been accepted.[23] A separate contract is created upon each acceptance.[24] Centuries ago, the total risk might be spread in this manner among fifty individual underwriters.[25] Today it is still common for the risk to be spread among fifteen to twenty underwriters.[26] These underwriters may include the traditional individual underwriters, or syndicates of individuals, as well as incorporated insurance companies.[27]

B. How Marine Insurance Policies are Issued in the United States

In the United States, marine insurance policies may be placed by a broker, who is an agent of the assured, or by an agent of the underwriter.[28] Most American policies on ships are written for the duration of a fixed time rather than the duration of a voyage.[29] Contracts may be placed orally with a written copy to follow.[30] A written agreement to issue a policy may be documented

[22] BENNETT, *supra* note 15 ¶ 2.07 (quoting American Airlines v. Hope, [1974] 2 Lloyd's Rep. 301, 304.
[23] *Id;* 2 SCHOENBAUM, *supra* note 15, § 19-1, at 439–40 (quoting Edinburgh Assurance Co. v. R.L. Burns Corp., 479 F. Supp. 138, 144–45 (C.D. Cal. 1979), *aff'd in part & rev'd in part* 669 F.2d 1259 (9th Cir. 1982)). In 2007, slips that were previously formatted by the individual brokers drafting them were made consistent with the institution of the uniform Market Reform Contract. GURSES, *supra* note 15, at 22. An earlier uniform London Market Principles ("LMP") slip was introduced in 2002. BENNETT, *supra* note 15 ¶¶ 2.02, 2.05.
[24] GURSES, *supra* note 15, at 23 (citing General Reinsurance Corp. v. Forsakringsaktiebolaget Fennia Patria, [1983] 2 Lloyd's Rep. 287).
[25] *See* WINTER, *supra* note 15, at 111.
[26] Seth B. Schafler, *Understanding the Restructured London Insurance Market: Establishing the Key Players and Their Roles*, 6 ENVTL. CL. J. 27, 36 (1993).
[27] *See id.*
[28] *See* BUGLASS, *supra* note 7, at 10. American brokers, while agents of the assured, are paid by the underwriters. WINTER, *supra* note 15, at 128.
[29] BUGLASS, *supra* note 7, at 11.
[30] *See* 1 PARKS, *supra* note 15, at 32–33.

in a binder, which is similar to the slip used in England.[31] However, unlike the English slips, the binder might not represent an immediate commitment of coverage, such as where portions of the total risk remain to be placed with other underwriters.[32] Unlike in England, American marine underwriters are almost entirely corporate entities.[33]

C. Types of Ocean Marine Insurance Policies

Several types of marine insurance policies are available, depending on the interests at risk with respect to each assured.[34] Hull insurance covers the structure and machinery of a ship; it is typically issued for a specific duration of time, but may also be issued to cover one or more specific voyages[35] Hull insurance also includes limited liability coverage for collision with another vessel.[36] The limitation,[37] to three-fourths of the amounts paid by the assured,[38] arose out of the underwriters' concern to provide owners an incentive for careful navigation.[39] Shipowners typically belong to protection and indemnity ("P&I") clubs that provide mutual self-insurance for the remaining quarter of collision liability and for other liabilities such as pollution

[31] *Id.* at 33.
[32] *See id.* at 33–34.
[33] WINTER, *supra* note 15, at 126.
[34] *See* TETLEY, *supra* note 2, at 589–92; *see generally* Hayden & Balick, *supra* note 15 (providing a fuller discussion of the types of coverage addressed in this Section).
[35] *See id.* at 589–90; BENNETT, *supra* note 15 ¶¶ 7.15, 7.20.
[36] *See* TETLEY, *supra* note 2, at 603–04.
[37] This limitation is descriptively known as a "Running Down Clause." *Id.*; HODGES, *supra* note 15, at 535–38.
[38] HODGES, *supra* note 15, at 535; TETLEY, *supra* note 2, at 603–04.
[39] CHARLES WRIGHT & C. ERNEST FAYLE, A HISTORY OF LLOYD'S: FROM THE FOUNDING OF LLOYD'S COFFEE HOUSE TO THE PRESENT DAY 368–69 (1928).

damages.[40] Only one of the world's fourteen P&I clubs is domiciled in the United States.[41] Shippers typically purchase cargo insurance to cover loss or damage to goods shipped by vessel.[42] While basic cargo insurance only covers the goods while on the vessel, the shipper may purchase an extension to cover the "landside risks attendant to ocean transport."[43]

D. Classification Societies

A shipowner engages a classification society to survey its vessel to confirm that the condition of the hull and machinery conform to the technical standards established by the society.[44] Maintaining the vessel "in class" is typically a requirement for underwriting.[45] In colonial times, the underwriter engaged surveyors to assess the condition of prospective assureds' ships.[46] Lloyd's Register of Shipping, a catalog of "classed" vessels meeting the

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[40] BENNETT, *supra* note 15 ¶¶ 16.03–16.13; TETLEY, *supra* note 2, at 591–92; 603–04; *Protection and Indemnity (P&I) Insurance*, THE AMERICAN CLUB, http://www.american-club.com/page/protection-indemnity-insurance (last visited Mar. 14, 2018) (listing the specific liabilities covered by The American Club's P&I policy).

[41] *About the Club*, THE AMERICAN CLUB, http://www.american-club.com/page/about-the-club (last visited Mar. 14, 2018); TETLEY, *supra* note 2, at 591.

[42] *See* BENNETT, *supra* note 15 ¶¶ 10.77–10.83; HODGES, *supra* note 15, at 88–93; TETLEY, *supra* note 2, at 591.

[43] Hayden & Balick, *supra* note 15, at 322 (describing "warehouse-to-warehouse" coverage).

[44] *See* BENNETT, *supra* note 15 ¶ 19.71. *See also* WINTER, *supra* note 15, at 98–99 (describing the process by which a shipowner has a new vessel built under class); Machale A. Miller, *Liability of Classification Societies from the Perspective of United States Law*, 22 TUL. MAR. L.J. 75, 77–81 (1997) (describing the classification process, with particular emphasis on the requisite engineering expertise to develop standards and conduct surveys).

[45] *Id.* at ¶ 19.73 (reprinting hull clause provisions requiring classification as a condition to continued coverage). While classification societies no longer assign vessels different grades of classification based on their seaworthiness, underwriters might glean some assessment of these finer gradations from the societies' survey reports. *See* MUHAMMAD MASUM BILLAH, EFFECTS OF INSURANCE ON MARITIME LIABILITY LAW: A LEGAL AND ECONOMIC ANALYSIS 185 n.62 (2014).

[46] *See* WRIGHT & FAYLE, *supra* note 39, at 85. At least to some extent, underwriters still conducted their own surveys to supplement those by the classification societies at the midpoint of the last century. *See* WINTER, *supra* note 15, at 102. This practice of supplemental surveys resumed, or increased, in recent times. *See* ELIZABETH R. DESOMBRE, FLAGGING STANDARDS: GLOBALIZATION AND ENVIRONMENTAL, SAFETY, AND LABOR REGULATIONS AT SEA 190 (2006);

survey standards of that society, was originally "owned and produced by . . . underwriters."[47] Shipowners, concerned that the survey standards were unfair to older vessels, initiated a rival register, which was "accused of currying favour with shipowners by undue leniency in classification."[48] In response to the rival, Lloyd's Register relaxed its rules, leading the underwriters to lose confidence in both.[49] Stakeholders, including shipowners and underwriters, agreed to merge both registers under broad-based management.[50]

Nearly two hundred years later, many registers are published throughout the world, and concerns as to the survey standards of some societies remain: "Some have pointed to the conflict of interest inherent in the current classification system . . . . [b]ecause shipowners hire and pay the classification societies . . . ."[51] Some shipowners have opted to have their ships classed by societies with less rigorous standards.[52] To address these concerns, the most prominent classification societies formed the International Association of Classification Societies ("IACS"),

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Anders Ulrik, *The Underwriters' Perspective, in* CLASSIFICATION SOCIETIES 37, 41 (Jonathan Lux ed., 1999).

[47] *Id.* at 87.

[48] *Id.* at 304.

[49] *Id.* at 304–05.

[50] *See id.* at 305–07.

[51] DESOMBRE, *supra* note 46, at 187. "When the American Bureau of Shipping introduced stricter survey requirements . . . twenty owners . . . left that classification society." *Id. See also* BENNETT, *supra* note 15, at 592 n.134 ("A classification society surveyor may . . . face a conflict of interest between the fundamental duty to act impartially and ethically . . . and pressure from a shipowner to . . . adopt a less rigorous approach . . . ."); John R. Hutchison, *Practical and Political Considerations, in* CLASSIFICATION SOCIETIES, *supra* note 46, at 27, 32–35 (recounting the relevant history of Lloyd's Register, noting the similar current conflict of interest, and discussing potential alternative structures to address it); Frank L. Wiswall, Jr., *Classification Societies: Issues Considered by the Joint Working Group*, 1997 INT'L J. SHIPPING L. 171, 172–73 (raising "whether the historical relationship, in which a society performs services according to requirements set by the insurer but performs them pursuant to a contract with the insured, needs to be re-examined").

[52] *See* DESOMBRE, *supra* note 46, at 183 (recounting the sinking of an oil tanker, with an "enormous oil spill," after its owner opted to have it reclassed by a less prominent society in lieu of submitting to the survey demanded by its former more established society).

which issues joint standards and conducts independent audits of member society surveys.[53] IACS has worked to enforce quality among its members.[54] Further, underwriters can and do factor the reputation of a ship's classification society into its decision to write or continue coverage for the vessel or its cargo.[55]

E. Premium Rates

> To a very large extent, [marine insurance] is inherently a system of estimates and the importance of the judgment and ability of the underwriter cannot be overemphasized.
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> A marine insurance rate is really a composite—a general judgment—of all the numerous factors which have a bearing upon the particular hazard underwritten.[56]

The experience and reputation of the shipowner has traditionally been a major factor in an underwriter's assessment of the overall risk and corresponding premium.[57] It is not entirely clear to what extent a vessel's condition, even as may be inferred from its classification, extends beyond an underwriter's decision to insure a vessel into the premium charged by the underwriter for such coverage.[58] An assured's loss history is clearly a factor, and such information is more

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[53] *See* BENNETT, *supra* note 15 ¶ 19.71, 592 n.134.
[54] *See* DESOMBRE, *supra* note 46, at 186 (noting IACS's expulsion of a society when its surveys were found deficient after a vessel under its class sank).
[55] *See* SUSAN HODGES, LAW OF MARINE INSURANCE 47, 113 (1996).
[56] SOLOMON S. HUEBNER, MARINE INSURANCE 181 (1920). Professor Huebner's observations of nearly a century ago remain accurate today: "[A]n underwriter, such as one operating at Lloyd's of London or a U.S. insurer, will quote an applicant a rate based on a subjective estimate of the risk involved in the particular case." MARK S. DORFMAN, INTRODUCTION TO RISK MANAGEMENT AND INSURANCE 359 (9th ed. 2008). *See also* Shapiro, *supra* note 1, at 28–41 (addressing the challenges in determining these relevant but imprecise risks and translating them into dollars).
[57] *See id.* at 181–83.
[58] *See* BILLAH, *supra* note 45, at 185 (asserting structural seaworthiness as a factor); DORFMAN, *supra* note 56, at 359 (listing seaworthiness as a factor); Jan de Bruyne, *Liability of Classification Societies: Cases, Challenges, and Future Prospectives*, 45 J. MAR. L. & COM. 181, 207 (2014) (citing Sundance Cruises Corp. v. Am. Bureau of Shipping, 7 F.3d 1077, 1084 (2d Cir. 1993) ("[T]he purpose of the classification certificate is . . . to permit Sundance to take advantage of the insurance rates available to a classed vessel.")). But see DESOMBRE, supra note

readily available to the underwriter than information, beyond classification, as to a vessel's condition.[59] British and American insurers have developed guidance for insurers in the form of a "Joint Hull Agreement" to set renewal rates based on a shipowner's claims experience within the preceding three years;[60] however, the precise terms of this Agreement and the extent to which it is uniformly applied is uncertain.[61] With respect to liability, international and domestic U.S. provisions limit the financial liability of shipowners, in large part to lower the rates and increase the availability of insurance coverage—which is compulsory for vessels carrying certain cargoes.[62]

Interestingly, a marine insurance policy need not specify the value of the vessel insured.[63] However, hull policies almost always include a figure or specific basis for a valuation.[64] Similarly, a premium amount is not considered an essential term for establishing a policy contract.[65] Where a policy is established with the premium amount "to be arranged," U.K. law

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46, at 184 n.11 (noting that underwriters refused to set lower rates for IACS-classed vessels); *id.* at 191 (finding that P&I clubs do not typically differentiate rates based on survey results).

[59] BILLAH, *supra* note 45, at 184–85; *cf.* HUEBNER, *supra* note 56, at 190.

[60] D.S. HANSELL, INTRODUCTION TO INSURANCE § 28.8, at 278 (1999). Marine insurance enjoys a partial exemption from U.S. antitrust laws. Merchant Marine Act of 1920 § 29, 15 U.S.C. § 38 (2012). The Senate Judiciary Committee conducted an in-depth review of the marine insurance industry in the context of this exemption in 1960. *See generally*, SUBCOMM. ON ANTITRUST & MONOPOLY, S. COMM. ON THE JUDICIARY, S. REP. NO. 86-1834, at 61–108. (2d Sess. 1960). The Subcommittee suggested a narrow interpretation of the exemption such that "pools or syndicates writing ocean marine coverage should not be permitted to claim the benefits of the exemption except upon a clear showing of the necessity of doing business in this manner." *Id.* at 108.

[61] Chris Reeder, *Maritime Lien Status for Unpaid Hull or Liability Insurance Premiums: Whether the Nonpayment of Hull and Protection and Indemnity Insurance Premiums Should Create a United States Maritime Lien Against the Insured Vessel in Favor of The Insurer*, 15 TUL. MAR. L.J. 285, 291–92 (1991) (noting the terms of the Joint Hull Agreement were not publicly available).

[62] BILLAH, *supra* note 45, at 35–37.

[63] GURSES, *supra* note 15, at 8–9.

[64] *Id.* at 8.

[65] *Id.* at 139–40 (citing Willis Mgmt. v. Cable & Wireless Plc. [2005] Lloyd's Rep. 597).

provides that "a reasonable premium is payable" as a default arrangement.[66] While no U.S. cases have addressed such an unspecified premium, the result if such a case arises—particularly on whether or how to incorporate that provision of U.K. law—would be determined based on the law of the relevant State.[67]..

II. Legal Landscape

Beyond the business and contractual roles and relationships among underwriters, shipowners and other assureds, and classification societies, this article now turns to the legal implications of these roles and relationships that may bear on risk management. Professor Schoenbaum has noted the influence of both the U.K. Marine Insurance Act 1906[68] as well as U.S. state law in light of U.S. Supreme Court guidance often deferring to state law on matters of marine insurance.[69] This Part looks further to the laws of liability, warranty, and privity—particularly in light of the recent U.K. Insurance Act 2015[70]—and its provisions on "fair presentation," which revised the duty of utmost good faith, and outlined responsibility for information that parties know or "ought to know."[71]

A. Liability

Historically, a shipowner's liability has been limited to the loss of her vessel.[72] Limitation facilitates investment in shipping as well as the availability and affordability of liability

[66] *Id.* (quoting the Marine Insurance Act 1906, 6 Edw. 7 c. 41, § 31 (U.K.)).
[67] *See* Robert Bocko et al., *Marine Insurance Survey*, 20 TUL. MAR. L.J. 5, 34 (1995) (citing Wilburn Boat v. Fireman's Fund Ins. Co., 348 U.S. 310, 321 (1955)).
[68] Marine Insurance Act 1906, 6 Edw. 7 c. 41 (U.K.).
[69] Schoenbaum, *supra* note 7, at 468–73 (discussing the ongoing implications of *Wilburn Boat* on the duty of utmost good faith and the law of warranties in the United States).
[70] Insurance Act 2015, c. 4 (U.K.).
[71] *Id.* §§ 3–8. The Insurance Act 2015 also updates the law of warranties. *Id.* §§ 9–11.
[72] THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 12-1, at 809 (5th ed. 2012).

insurance.[73] However, in the United States, the limitation may serve as an undue disincentive to obtaining insurance that might otherwise be prudent and available to cover greater risks.[74] In both England and the United States, the limitation is contingent on the shipowner lacking "privity or knowledge" of the cause of the loss.[75] An underwriter is protected by these limits by virtue of its assured shipowner's limit.[76] State law determines whether a third party may bring a direct action against an underwriter.[77]

The Second Circuit rejected a shipowner's suit for negligence against a classification society, holding that "a shipowner is not entitled to rely on a classification certificate as a guarantee to the owner that the vessel is soundly constructed."[78] The court reserved the question of similar liability to a third party.[79] While the court approvingly cited a district court's earlier

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[73] *See id.* at 809 n.1, 810. *But see* BILLAH, *supra* note 45, at 41–51 (suggesting that limitations tied with insurance may unduly reduce an assured's incentives to minimize risk); Shapiro, supra note 1, at 28–37, 76–81 (discussing the relation among risk reduction, cost, and insurance).

[74] *See* SCHOENBAUM, *supra* note 72, § 12-1, at 811. Professor Schoenbaum notes that U.S. law has not kept pace with updates adopted by other maritime countries. *Id.* § 12-1, at 810–11 (citing the Limitation of Shipowners' Liability Act of 1851, 46 U.S.C. §§ 30501–30512 (2012)).

[75] *Id.* § 12-1, at 810, § 12-6. Relevant jurisprudence interpreting privity in the United Kingdom and the United States diverge. *Id.* at 826 n.1 (citing Richard J. Violino, Note, *The Continuing Conflict between United States and English Admiralty Law on Limitation of Liability: Whose Privity Binds the Corporate Shipowner*, 10 FORDHAM INT'L L.J. 338 (1986)). "[P]rivity or knowledge is deemed to exist [in the United States] when the owner has the means to learn of the unseaworthy condition, or when knowledge could have been obtained from reasonable inspection." Violino, *supra*, at 347 (citing States S.S. Co. v. United States (*The Pennsylvania*), 259 F.2d 458 (9th Cir. 1957)). In England, an owner may be denied limitation of liability for an employee's negligence that an owner might have prevented. *Id.* (citing F.T. Everard & Sons, Ltd. v. London & Thames Haven Oil Wharves, Ltd. (*The Anonity*), [1961] 2 Lloyd's List LR 117 (CA) (Eng.).

[76] *Id.* § 12-4, at 816.

[77] *Id.* § 12-4, at 816–17. An underwriter effectively retains its derivative liability limit in a direct action. *Id.* at 817 n.6.

[78] Sundance Cruises Corp. v. Am. Bureau of Shipping, 7 F.3d 1077, 1084 (2d Cir. 1993). The court based its holding on the shipowner's own responsibility for its vessel's condition as well as the large differential between the cost of classification and the cost of damages that liability could pose. *Id.*

[79] *See id.*

discussion of classification society liability,[80] the Second Circuit did not fully follow the district court's analysis distinguishing the imputation of a warranty of seaworthiness upon a classification society, which the district court rejected,[81] from "the duty to use due care to detect and warn of hazards,"[82] which the district court suggested "appears to provide a sounder basis for tort liability of a ship classification society."[83] The Second Circuit also explicitly rejected the first,[84] while perhaps impliedly rejecting the latter by ignoring it.[85]

The Second Circuit later allowed a similar claim based on a duty of care in contract, where the plaintiff was a cargo owner that had retained a surveyor to ensure that a ship's cargo hold was free from contamination.[86] The court distinguished this survey, which it found to have conferred a guarantee of noncontamination, from the classification survey found not to have

[80] *Id.* (citing Great Am. Ins. Co. v. Bureau Veritas, 338 F. Supp. 999, 1009–13 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 235 (2d Cir. 1973).
[81] *Great Am. Ins. Co.*, 338 F. Supp. at 1009, 1011–12.
[82] *Id.* at 1012.
[83] *Id.* (citing Skibs A/S Gylfe v. Hyman-Michaels Co. (*The Gyda*), 304 F. Supp. 1204, 1210, 1214 (E.D. Mich. 1969) (finding that the National Cargo Bureau—a corporation providing inspection services to the shipping industry—that was engaged by the plaintiff ship charterer and cargo owner to "oversee the loading of . . . cargo for . . . the protection of the interest of the insurance underwriters," had breached its contractual duties by: (1) by removing its surveyor from the scene during most of the loading period, and (2) by failing to advise the charterer that it was unsafe to sail with the cargo already at dangerous temperatures)). *But see* Miller, *supra* note 44, at 90–93 (criticizing the *Great American* opinion as unduly hesitant to impose liability).
[84] *Sundance Cruises Corp.*, 7 F.3d at 1084.
[85] *Id.* at 1084–85 (finding the owner's ultimate responsibility for seaworthiness sufficient grounds to dispose of "all of Sundance's tort and contract claims").
[86] Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc., 38 F.3d 1279, 1284 (2d Cir. 1994). The court found that the contractual duty of care precluded an independent duty of care in tort. *Id.*

conferred a guarantee of seaworthiness in *Sundance Cruises*.[87] The court left the surveyor responsible for most of the nearly $1 million of contamination damage to the cargo.[88]

The Second Circuit subsequently considered but ultimately avoided the question of whether a classification society may be liable in tort for recklessness to an injured third party.[89] The court found that even if such an action were available, the plaintiff's case failed to meet the standard that would be applicable: that the defendant disregarded "an unjustifiably high risk of harm to another caused by the defendant's actions . . . that was obvious and thus should have been known to the defendant."[90]

The Fifth Circuit addressed the liability of a classification society to a shipowner in *Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp.*[91] In *Otto Candies*, a vessel that had been classed

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[87] *Id.* at 1285. The court noted that "guarantee[ing] the condition of the hold so as to insure the preservation of the cargo," *id.* at 1285, was the "end and aim of the [inspection] transaction," *id.* at 1284 (quoting Glanzer v. Shepard, 135 N.E. 275, 275 (N.Y. 1922)), whereas the survey in *Sundance Cruises* was conducted "merely . . . to take advantage of the insurance rates available to a classed vessel," *id.* at 1285 (quoting *Sundance Cruises Corp.*, 7 F.3d at 1084). *But see id.* at 1288–89 (Mishler, J., dissenting) (finding that International Ore held a position, knowledge, and responsibility comparable to that of the shipowner in *Sundance Cruises*). *Sundance Cruises* distinguished its holding from *Glanzer* by noting that Glanzer was a buyer who had foreseeably relied on a weight certificate issued by a weigher retained by the seller. *Sundance Cruises Corp.*, 7 F.3d at 1084 (citing *Glanzer*, 135 N.E. at 275). Judge Cardozo in *Glanzer* found that "the law impose[d] a duty [of the weigher] toward buyer as well as seller in [that] situation," *Glanzer*, 135 N.E. at 275, and that there was no "need to state the duty in terms of contract or of privity" since "[g]iven the contract and the relation, the duty [was] imposed by law," *id.* at 276. With respect to the "safe berth warranty," *see* discussion *infra* note 143, a shipowner is entitled to it as a third-party beneficiary where a charterer receives the warranty directly from a facility that is unaware of the owner's identity. *See* In re Frescati Shipping Co., 718 F.3d 184, 199–200 (3d Cir. 2013), *cert. granted on other grounds sub nom.* CITGO Asphalt Ref. Co. v. Frescati Shipping Co., 139 S. Ct. 1599, (U.S. Apr. 22, 2019) (No. 18-565).

[88] *Id.* at 1281–82, 1286 (majority opinion). The court found that the apportionment of damage in tort was error, but that it was procedurally barred from raising the damage award to the full amount of damages in contract since the appellant did not cross-appeal that issue. *Id.* at 1286.

[89] Espana v. Am. Bureau of Shipping, Inc., 691 F.3d 461, 463 (2d Cir. 2012).

[90] *Id.* at 469 (quoting Farmer v. Brennan, 511 U.S. 825, 836 (1994)).

[91] 346 F.3d 530 (5th Cir. 2003). Judge Jones's opinion heavily cites Miller, *supra* note 44.

by Nippon Kaiji Kyokai ("NKK"), the Japanese classification society, required extensive repairs to meet the classification standards of the American Bureau of Shipping ("ABS") after the vessel was purchased by Otto Candies for passenger service in the United States.[92] Otto Candies sued NKK for the cost of those repairs, claiming that NKK negligently misrepresented the condition of the vessel by issuing it a classification certificate.[93] In affirming the district court's judgment awarding damages to Otto Candies, the Fifth Circuit agreed with the finding below "that NKK provided false information by issuing a class certificate free of recommendations in light of the various defects in the hull and machinery."[94] The Fifth Circuit similarly upheld the lower court finding that Otto Candies "justifiably relied on the false information."[95] Even so, the Fifth Circuit held that this false information and reliance constituted negligent misrepresentation only "because NKK actually knew at the time it reclassified the [vessel] that the results of the classification survey were to be conveyed to Otto Candies for the purpose of influencing its [purchase] decision,"[96] whereas "mere foreseeability" of reliance would be "insufficient."[97]

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[92] *Id.* at 532–33.

[93] *See id.* at 533, 537–38. The elements for a claim of negligent misrepresentation include (1) that the defendant, in the course of providing professional services, provided false information guiding the plaintiff in a business transaction; (2) that the defendant failed to exercise reasonable care in obtaining that information; (3) that the plaintiff justifiably relied on the false information in the business transaction the defendant intended to influence; (4) that the plaintiff suffered economic loss due to the transaction; and (5) the defendant knew that the information it provided was for the benefit and guidance of the plaintiff or a "limited group" including the plaintiff. *Id.* at 535 (citing RESTATEMENT (SECOND) OF TORTS § 552 (AM. LAW INST. 1977)).

[94] *Id.* at 537.

[95] *Id.* at 538.

[96] *Id.* at 537.

[97] *Id.* at 536. *But cf.* In re Frescati Shipping Co., 718 F.3d 184, 199–200 (3d Cir. 2013), *cert. granted on other grounds sub nom.* CITGO Asphalt Ref. Co. v. Frescati Shipping Co., 139 S. Ct. 1599, (U.S. Apr. 22, 2019) (No. 18-565) (finding a shipowner is entitled to a warranty arising from a charterer'safe berth contract clause as a third-party beneficiary, even where another charterer, who grants the warranty to the charterer in privity with the shipowner, is unaware of the shipowner's identity). The Third Circuit also appears receptive to certain shipowner claims of negligent misrepresentation, at least where the vessel is an invitee. *See id.* at 213–14. The

The Fifth Circuit believed that the circumstances bringing such liability must be limited in order to avoid chilling the willingness of societies to survey vessels not in prime condition, diminishing the owner's duty to maintain seaworthiness, and unduly increasing classification costs and fees.[98] The Fifth Circuit's reasoning in *Otto Candies*, would seem similarly applicable to a prospective suit by an underwriter rather than a shipowner; however, it may be important that *Otto Candies* was decided under general federal maritime law, and not state law.[99]

On the surface, the Second Circuit, as reflected through *Sundance Cruises*, and the Fifth Circuit, as reflected through *Otto Candies*, are in conflict—as Sundance Cruises rejected classification society liability to a shipowner, while *Otto Candies* affirmed such a claim.[100] The *Sundance Cruises* rejection was most specifically to a "guarantee" of seaworthiness while the *Otto Candies* allowance was as to "negligent misrepresentation."[101] Arguably, if not persuasively, this difference in terminology might avoid a conflict; such avoidance relies on distinguishing breach of a "guarantee" from "negligent misrepresentation."[102] However, the

court entertained the same shipowner's claim that a docking facility provided incorrect information *to its vessel* as to the maximum safe draft of ships docking there. *Id.* However, the court upheld the district court's finding that the specific information provided by the facility to the vessel was "factually irrelevant to the casualty." *Id.*

[98] *See id.* at 535.

[99] *Id.* at 534 n.1. A similar suit by an underwriter attempting to recover from or avoid its responsibilities under a policy may well turn on state law. *See supra* notes 6, 69 and associated text.

[100] *See supra* notes 78, 89 and accompanying text.

[101] *See supra* notes 78, 88 and accompanying text. *See also* Miller, *supra* note 44, at 103–04 (suggesting negligent misrepresentation as an appropriate cognizable standard).

[102] *See* P.F. Cane, *The Liability of Classification Societies*, 1994 LLOYD'S MAR. & COM. L.Q. 363, 365 ("[I]t does not follow from the [Second Circuit's] proposition that a certificate contains no warranty of that which is certified that the giver of the certificate is under no duty to take care in issuing the certificate.").

Fifth Circuit understood its *Otto Candies* opinion as creating a conflict, as it characterized *Sundance Cruises* as rejecting a claim for negligence.[103]

It is not entirely clear whether negligence or negligent misrepresentation may afford a shipowner with a cognizable cause of action against a classification society under English law.[104] However, at least with respect to a third party, such as the owner of cargo lost on a sunken classed vessel, such tort actions are precluded under English law.[105]

In *Mariola Marine Corp. v. Lloyd's Register of Shipping (The Morning Watch)*,[106] the facts bore some similarity to those in *Otto Candies*. The Morning Watch underwent a special survey for an owner in preparation for the listing and sale of the vessel through a broker; Lloyd's was aware that this was the purpose of the special survey.[107] The court found that this constituted Mariola's reasonably foreseeable reliance on the vessel's class based on the special survey.[108] However the court found that English law does not presume proximity among parties based merely on reasonably foreseeable reliance on a vessel's classification, and that the particulars of

[103] *See Otto Candies*, 346 F.3d at 534; *see also* Miller, *supra* note 44, at 96–97.
[104] *Compare In re* Lloyd's Register N. Am., Inc., 780 F.3d 283, 296 (2015) (Elrod, J., dissenting) (noting that negligent misrepresentation is not cognizable under English law), *with* Cane, *supra* note 102, at 365 ("It is well accepted . . . that building surveyors . . . can certainly be held liable for failure to take reasonable care in conducting the survey.").
[105] *See* Peter Cane, Case and Comment, *Classification societies, cargo owners and the basis of tort liability* (The Nicholas H), 1995 LLOYD'S MAR. & COM. L.Q. 433, 434–35. Plaintiffs might face fewer hurdles to classification society liability on the European continent. *See* Bertrand Courtois, *Exposing Class Liability*, MAR. ADVOC., no. 22, April 2003, *as posted in* AVO-ARCHIVE, http://www.avoarchive.com/display.php?id=815 (last visited Apr. 7, 2018). Mr. Courtois also summarizes the *Morning Watch* and *Nicholas H* opinions discussed *infra*. *Id.*
[106] [1990] 1 Lloyd's Rep. 547 (QB) (Eng.).
[107] *Id.* at 557.
[108] *Id.* The elements of a claim for negligent misrepresentation under English law include (1) reasonable foreseeability of reliance, (2) proximity of the plaintiff to the defendant, and (3) that a duty of care be "just and reasonable" in light of the circumstances. *Id.* at 556.

Mariola's relationship with Lloyd's lacked the "requisite degree of proximity."[109] The court then declined to reach whether a duty of care would be "just and reasonable."[110]

Whether a third-party action against a classification society could be "just and reasonable" was considered and rejected in *Marc Rich & Co. v. Bishop Rock Marine Co.* ("*The Nicholas H*").[111] This case was an action in tort by a cargo owner against the classification society that surveyed and cleared The Nicholas H after it underwent temporary hull repairs in Puerto Rico; the vessel, carrying $6 million of bulk metal belonging to the cargo owner, left port and sank days later.[112] Lord Steyn, writing for the House of Lords, opened his analysis by noting that "[i]n this area the common law develops incrementally on the basis of a consideration of analogous cases where a duty has been recognised or desired."[113] He reaffirmed that the proximity element must be satisfied regardless of whether the claimed damages are physical or economic.[114] The lack of contact between the classification society and the cargo owner suggested a lack of proximity.[115] However, Lord Steyn found that even assuming without deciding that plaintiffs had established sufficient proximity with the classification society,[116] the claim must fail as not being just and reasonable.[117]

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[109] *Id.* at 561. The court noted that the sale of the vessel was not the sole purpose of the survey, that Mariola was not the prospective purchaser at the time of the survey, and that a prudent purchaser might well have arranged for a more thorough type of survey. *See id*. at 561–63.
[110] *Id.* at 563.
[111] [1996] 1 AC 211 (HL) (appeal taken from Eng.).
[112] *Id.* at 231–32.
[113] *Id.* at 236.
[114] *Id.* at 235–36. The cargo owners unsuccessfully argued that the proximity element does not apply in actions for physical damage. *Id.*
[115] *See id.* at 238.
[116] *Id.* at 241.
[117] *Id.* at 242.

Lord Steyn's analysis finding such a cause of action not to be just and reasonable relied heavily on the economic relationships between underwriters, classification societies, shipowners, and cargo owners—and the practical and policy implications that would result from allowing such claims.[118] He was also mindful that the purpose of a classification society is to "classif[y] merchant ships in the interests of safeguarding life and ships at sea."[119] Perhaps the key consideration for Lord Steyn was the impact that tort liability would have on the international rules regarding shipping contracts and limits on liability.[120] He noted:

> Cargo owners take out direct insurance in respect of the cargo. Shipowners take out liability risks insurance in respect of breaches of their duties of care in respect of the cargo. The insurance system is structured on the basis that the potential liability of shipowners to cargo owners is limited under the Hague Rules and by virtue of tonnage limitation provisions. And insurance premiums payable by owners obviously reflect such limitations on the shipowners' exposure.[121]

Lord Steyn continued:

> [I]f a duty of care is held to exist in this case, the potential exposure of classification societies to claims by cargo owners will be large. That greater exposure is likely to lead to an increase in the cost to classification societies of obtaining appropriate liability risks insurance. Given their role in maritime trade classification societies are likely to seek to pass on the higher cost to owners. Moreover, it is readily predictable that classification societies will require owners to give appropriate indemnities. Ultimately, shipowners will pay.[122]

Peter Cane characterized Lord Steyn's opinion as taking the "risk management approach" to tort liability, which focuses on "whether shifting the injured's loss to the injurer would result in an improvement in the way the risk of such losses is distributed in society."[123] That contrasts

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[118] *See id.* at 238–42. Lord Steyn cited heavily from Cane, *supra* note 102.
[119] *Id.* at 230.
[120] *See id.* at 238–40.
[121] *Id.* at 239.
[122] *Id.* at 240.
[123] Cane, *supra* note 104, at 434–35.

with the "interactional approach," which Cane describes as "being the allocation of losses according to principles of personal responsibility for the causation of injury and damage[,] . . . in correcting wrongs, in providing compensation for losses[,] and in deterring certain types of unacceptable behaviour."[124] He found Lord Lloyd's dissent exemplified this approach.[125]

Lord Lloyd argued that their Lordships were "not here asked to extend the law of negligence into a new field. We are not even asked to make an incremental advance."[126] He found that the classification society's purpose, "promoting the safeguard of life and property at sea," established proximity with the crew since the surveyor "knew that their lives would be at risk if he allowed the ship to sail in an unseaworthy condition."[127] He applied this proximity to the cargo since "it is a universal rule of maritime law—certainly it is the law of England—that ship and cargo are regarded as taking part in a joint venture."[128] Lord Lloyd found "[t]he fact that the cargo owners were unaware that [the surveyor] had been called in . . . quite beside the point."[129] In arguing that a duty of care would be "just and reasonable," Lord Lloyd noted that "[r]emedies in the law of tort are not discretionary. Hospitals also are charitable non-profit making organisations. But they are subject to the same common duty of care . . . ."[130] Lord Lloyd was also skeptical of any negative impact that a classification society's duty of care might have on the marine insurance regime:

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[124] *Id.* at 433.
[125] See *id.* at 433–34.
[126] *Marc Rich & Co.* [1996] 1 AC at 230 (Lord Lloyd, dissenting).
[127] *Id.* at 225.
[128] *Id.* at 226.
[129] *Id.* at 227.
[130] *Id.* at 228. *See also* James A. Henderson, Jr., *The Constitutive Dimensions of Tort: Promoting Private Solutions to Risk-Management Problems*, 40 FLA. ST. U. L. REV. 221, 254 (2013) (noting the decline of judicial recognition of charitable immunities with the greater availability of insurance).

> [T]he court should be wary of expressing any view on the insurance position without any evidence on the point, and should not speculate as to the effect, if any, of an extra layer of insurance on the cost of settling claims. For what it may be worth, I would for my part doubt whether it would make much difference. More generally, I suspect that a decision in favour of the cargo owners would be welcomed by members of the shipping community at large, who are increasingly concerned by the proliferation of substandard classification societies.[131]

B. Warranty of Seaworthiness

An assured impliedly warrants or guarantees the seaworthiness[132] of his vessel to his insurance underwriter as of the start of a voyage under a policy issued for that voyage.[133] In the United States, this warranty extends to the duration of the voyage.[134] The warranty of seaworthiness stems more from a purpose to protect an insurer from undue risks that the insurer has not in fact knowingly agreed to underwrite, rather than to discourage negligence by a

[131] *Id.* at 229.

[132] "[T]hat the materials of which the ship is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, sails, and rigging, stores, equipment, and outfit, generally, are such as to render it in every respect fit for the proposed voyage or service." BUGLASS, *supra* note 7, at 41 (quoting WENDELL PHILLIPS, 1 A TREATISE ON THE LAW OF INSURANCE ¶ 695, at 378 (5th ed. 1867)). *See also* GURSES, *supra* note 15, at 117 (citing similar definitions of "seaworthiness" from historic and modern cases).

[133] *See* BENNETT, *supra* note 15 ¶¶ 19.20, 19.23. Policy terms typically waive enforcement of this warranty against a cargo owner as it is typically less practical for a cargo owner to warrant the seaworthiness of a vessel carrying her cargo. *Id.* ¶ 19.21; ROBERTSON ET AL., *supra* note 4, at 467 n.1. The commonly used Inchmaree Clause, which insures against latent risks that are not otherwise covered by a hull policy, has been interpreted as waiving the warranty of seaworthiness with respect to latent conditions—particularly in the United States. *See* 1 PARKS, *supra* note 15, at 391–94; SOYER, *supra* note 15, § 6.29, at 204.

[134] BUGLASS, *supra* note 7, at 42.

shipowner or operator.[135] However, this warranty does give a shipowner a financial incentive to ensure seaworthiness.[136]

In English time policies, providing for a specific time period of coverage rather than for coverage during a specific voyage, a shipowner's implied warranty of seaworthiness—which in breach could void the entire *policy* as of its outset—is replaced by an underwriter's unseaworthiness defense against a specific *claim*.[137] A shipowner's lack of awareness of an unseaworthy condition due to mere negligence may not give rise to this defense, at least in England, but intentional unawareness of a suspected unseaworthy condition will.[138]

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[135] BENNETT, *supra* note 15 ¶ 19.22 (noting that the warranty obviates the need to show that the unseaworthiness was the cause of a loss, as such a showing may be difficult or impossible); *cf.* Sundance Cruises Corp. v. Am. Bureau of Shipping, 7 F.3d 1077, 1084 (2d Cir. 1993) ("Sundance may be here likened to a truck owner seeking recovery from a truck inspection service because it issued a safety certificate shortly before the truck's negligently maintained brakes failed."). *But see* Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp, 346 F.3d 530, 535 (5th Cir. 2003) ("Imposition of undue liability on classification societies could . . . diminish owners' sense of responsibility for vessel safety . . . ."); Emp'rs Ins. of Wausau v. Occidental Petroleum Corp., 978 F.2d 1422, 1433 (5th Cir. 1992) ("The absolute nature of this implied warranty of seaworthiness is grounded in a public policy choice."). *Id.* (quoting The Caledonia, 157 U.S. 124, 134 (1895) ("The warranty is intended to take 'away all temptation to expose life and property to the dangers of the seas in vessels not fitted to encounter or avoid them.'")).

[136] *See* SOYER, *supra* note 15, § 3.46, at 87–88; *cf.* Shapiro, *supra* note 1, at 23, 76.

[137] *See* BENNETT, *supra* note 15 ¶¶ 19.30–19.31. *See also* GURSES, *supra* note 15, at 121, 169, 181 (noting that the under the Insurance Act 2015, policies now only lapse when a warranty of seaworthiness has been breached, and coverage may resume after the unseaworthy condition is remedied). It remains to be seen if U.S. jurisprudence will incorporate this modified remedy.

[138] *See* BENNETT, *supra* note 15 ¶¶ 19.31–19.34. The degree and nature of a shipowner's awareness, or lack thereof, of a condition constituting unseaworthiness for the purposes of this defense is reflected through the term "privity" as used in English law. *See* GURSES, *supra* note 15, at 117–119, 181–82; SOYER, *supra* note 15, § 3.68, at 101–04 (interpreting "privity" as used in the Marine Insurance Act 1906, 6 Edw. 7 c. 41, § 39(5)). *But cf.* cases cited *supra* note 75 (denying limitation of liability in the Ninth Circuit due to information the owner was deemed responsible to have known, and in England, where liability was denied due to an employee's negligence). Section 39(5) of the Marine Insurance Act 1906 remains in effect and was not amended by the Insurance Act 2015. *See* SOYER, *supra* note 15, § 3.60, at 96.

In the United States, an implied warranty of seaworthiness exists at the start of a time policy.[139] Under some authorities, this is a lesser "warranty," analogous to the unseaworthiness defense against a specific claim in English law.[140] However, the Fifth Circuit has clarified that such lesser warranty applies only subsequent to the attachment of the policy, and that an absolute implied warranty applies under the "American Rule" at its very start.[141] Commentators have criticized the American Rule for placing American underwriters at a competitive disadvantage as well as affording inadequate protection to American shipowners and ship mortgagees, despite the value of high maintenance standards.[142] But supporters counter that a stern warranty is justified precisely to enforce high standards.[143]

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[139] BUGLASS, *supra* note 7, at 42.

[140] *See id.* at 42, 44–45 (quoting Gregoire v. Underwriters at Lloyds, Combined Cos., 559 F. Supp. 596, 600–01 (D. Alaska 1982)).

[141] *See* Emp'rs Ins. of Wausau v. Occidental Petroleum Corp., 978 F.2d 1422, 1431–32, 1435–36 (5th Cir. 1992). The court expressly rejected *Gregoire* and reaffirmed that a higher degree of warranty properly applies at the inception of time policies under American Rule than under the English rule. *Id.* at 1434–35. The policy at issue in *Wausau* was underwritten by a combination of American and English underwriters, but only the American underwriters brought this suit to recover payment. *Id.* at 1424. The court also found that the implied warranty of seaworthiness is a matter of federal maritime law, but noting some that authorities allocate it to state law. *Id.* at 1431 n.9. *See also* State Nat'l Ins. Co. v. Anzhela Explorer, L.L.C., 812 F. Supp. 2d 1326, 1365–66, 1377–78 (S.D. Fla. 2011) (providing a thorough discussion of the initial absolute and lesser continuing warranties of seaworthiness under the American Rule).

[142] *See, e.g.*, BUGLASS, *supra* note 7, at 43–44.

[143] *Emp'rs Ins. of Wausau*, 978 F.2d at 1433. See also *id.* (discussing possible rationale for the English Rule, as codified in the Marine Insurance Act 1906 § 39(5), to include "a legislative compromise between the arguments advanced by shipowners against implying an absolute warranty in time policies and the arguments advanced by insurers in favor."). There is also disagreement as to the scope of the "safe berth clause," whereby a charterer agrees with the shipowner that facilities selected by the charterer will be safe for the vessel. *See* In re Frescati Shipping Co., 718 F.3d 184, 200 (3d Cir. 2013), *cert. granted sub nom.* CITGO Asphalt Ref. Co. v. Frescati Shipping Co., 139 S. Ct. 1599, (U.S. Apr. 22, 2019) (No. 18-565). The Fifth Circuit held that the standard contract clause constitutes a representation creating a duty of due diligence rather than a warranty. Orduna S.A. v. Zen–Noh Grain Corp., 913 F.2d 1149, 1156–57 (5th Cir. 1990). The Fifth Circuit explained that its interpretation promotes safety by affording an incentive to the master as well as to the charterer. *Id.* However, the Second Circuit held that this clause creates a warranty. Park S.S. Co. v. Cities Serv. Oil Co., 188 F.2d 804, 806 (2d Cir. 1951)

The lesser subsequent implied warranty in the United States might well be breached by a shipowner's negligence that results in an unseaworthy condition, though the case law on this point is not entirely clear;[144] similarly, negligence of the crew resulting in unseaworthiness, or their awareness of a subsequent unseaworthy condition apart from the shipowner's awareness, is less likely to be imputed to the shipowner to constitute a breach.[145] A shipowner affords a separate absolute warranty of seaworthiness to a cargo owner, regardless of whether her ship is insured under a time policy past the initial attachment of the policy.[146]

(citing Stag Line Ltd. v. Bd. of Trade (1950) 84 Lloyd's Rep 1 (EWCA) 6 (Eng.)) ("[T]he charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice."). The Third Circuit recently adopted the Second Circuit's interpretation. *Frescati Shipping*, 781 F.3d at 202–03. The U.S. Supreme Court has granted certiorari to resolve the circuit split and set the case for oral argument on Nov. 5, 2019. *See* Petition for Certiorari at 2, CITGO Asphalt Ref. Co. v. Frescati Shipping Co., No. 18-565, (U.S. Oct. 26, 2018), *cert. granted* 139 S. Ct. 1599 (U.S. Apr. 22, 2019); Docket, CITGO Asphalt Ref. Co., No. 18-565 (U.S. Jul. 8, 2019). U.K. law still maintains the clause to be a warranty, but no longer an absolute one. *See* Gard Marine & Energy Ltd. v. China Nat'l Chartering Co. [2017] UKSC 35 [26] (allocating risks among the owner, charterer, and insurers). The outcome can obviously hinge on the precise text of the safe berth clause used in the contract.

[144] *See* L & L Mar. Serv., Inc. v. Ins. Co. of N. Am., 796 F.2d 1032, 1035–36 (noting the ambiguity and inconsistency of relevant case law, but affirming that an owner's negligence may constitute a breach of the implied warranty despite the resulting conflict with English law); Lemar Towing Co. v. Fireman's Fund Ins. Co., 352 F. Supp. 652, 660, 665 (E.D. La. 1972) (finding the shipowner breached the warranty through "neglect" by hiring an incompetent crew). *See also* HODGES, *supra* note 15, at 505–06 (quoting *Lemar Towing*, 352 F. Supp. at 660, to distinguish "incompetence" of the master or crew, which constitutes an unseaworthy condition, from their "negligence," which does not);

[145] *See State Nat'l Ins. Co.*, 812 F. Supp. 2d at 1377–78 (finding that the crew hired by an owner was not per se incompetent, thereby absolving the owner of knowledge of an unseaworthy condition despite the crew's subsequent negligence and incompetence in responding to a casualty that caused the loss of the vessel); BUGLASS, *supra* note 7, at 43 (quoting an American Maritime Cases headnote summarizing Texaco v. Universal Marine, 400 F. Supp. 311, 324–25, 1976 AMC 226 (E.D. La. 1975). *But see* cases cited *supra* note 75 (denying limitation of liability in the Ninth Circuit due to information the owner was deemed responsible to have known, and in England, where liability was denied due to an employee's negligence).

[146] *See Texaco*, 400 F. Supp. at 324–25 (distinguishing a "breach of a nondelegable duty [from] a claim alleging bad faith or neglect").

Just as a shipowner's awareness of an unseaworthy condition may void a policy or afford his insurance underwriter a defense to a claim under it, an underwriter's awareness of that condition—and issuance of the policy in spite of her awareness—may weigh against a finding of unseaworthiness or preclude the underwriter from asserting it as a defense.[147] "[T]he absolute nature of th[e] warranty [of seaworthiness] does not insulate an insurer from the legal ramifications of its own conduct."[148] The Insurance Act 2015[149] codifies the emerging doctrine in England "that an insurer's failure to enquire when sufficiently put on notice [is] a waiver" with respect to the duty of fair presentation.[150] The Insurance Act 2015 has also clarified the related prior provisions on further information that an insurer was deemed to "know," "ought to

[147] *Cf.* Luria Bros. & Co. v. Alliance Assurance Co., 780 F.2d 1082, 1090–91 (2d Cir. 1986) (finding that an underwriter waived a misrepresentation defense since the underwriter knew, should have known, or suspected that the vessel was unseaworthy due to a prior fire); SOYER, *supra* note 15, § 6.48, at 212 (noting that an insurer's issuance of a policy after awareness of a warranty breach constitutes waiver); s*ee State Nat'l Ins. Co.*, 812 F. Supp. 2d at 1368 (finding the fact that "[t]he underwriter [had] approved the crew that was on the vessel at the time of loss" was "significant" and constituted evidence that the crew was competent and, therefore, the vessel seaworthy); St. Paul Fire & Marine Ins. Co. v. Christiansen Marine, Inc., 893 So. 2d 1124, 1033–35 (Ala. 2004) (citing *Luria Bros. & Co.* to affirm a finding that an underwriter was estopped from raising an unseaworthiness defense since evidence of unseaworthiness within a surveyor's report was information that the underwriter knew or ought to have known by requesting it); GURSES, *supra* note 15, at 125 (citing Weir v. Aberdeen (1819) 106 Eng. Rep. 383 (holding that the underwriter's knowledge of unseaworthiness prior to issuing a policy waived the warranty of seaworthiness). *But see* 1 PARKS, *supra* note 15, at 264 n.176 (citing cases where an underwriter's awareness was not held to constitute waiver or estoppel from reliance on the warranty of seaworthiness); SOYER, *supra* note 15, § 6.03, at 190 (citing Sleigh v. Tyser [1900] 2 QB 333, 337–38 (Eng.) (finding that a Lloyd's surveyor's approval of a vessel's fittings and cargo arrangement on behalf of the underwriter was not sufficiently unequivocal conduct to constitute the underwriter's waiver of the assured's warranty of seaworthiness)).

[148] *St. Paul Fire & Marine Ins. Co.*, 893 So. 2d at 1133.

[149] Insurance Act 2015, c. 4 (U.K.).

[150] Bernard Rix, *Conclusion: General Reflections on the Law Reform, in* THE INSURANCE ACT 2015: A NEW REGIME FOR COMMERCIAL AND MARITIME LAW 113 (Malcolm Clarke & Baris Soyer eds., 2016) (discussing the operation of the Insurance Act 2015 § 3(4)(b), 3(5)(e)). *See also* Insurance Act 2015, c. 4, Explanatory Notes ¶ 45 (noting some courts had already adopted that approach).

know" or "is presumed to know."[151] It remains to be seen whether, in the course of resolving cases where the Insurance Act 2015 may be relevant authority, U.S. or English courts might more broadly extend this concept of deemed knowledge—and of any resulting waiver of the misrepresentation defense—from the duty of fair presentation to the warranty of seaworthiness.[152]

III. Suggestions for Allocating Risks

This Part looks at measures that the marine insurance industry could take as well as areas where relevant law as to liability and insurance compensation could evolve to reduce the risk of loss through unsafe or unseaworthy conditions. However, case law suggests that safety is but one of several goals and factors that must be considered in the adjudication of disputes allocating responsibility for these losses. Relatedly, it is important that the overall system of relevant parties and tribunals places responsibility for risk management squarely on the parties most competent to perform that task, and not on courts and arbitrators.[153] Therefore, an "optimal"

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[151] Insurance Act 2015 §§ 3(5)(b)–(d), 5(1)–(3). *See also* Insurance Act 2015, Explanatory Notes ¶¶ 60–67. An underwriter is held to "know" information in a report by his surveyor. Id. ¶ 63. *See also* GURSES, *supra* note 15, at 82–89 (comparing information an insurer was responsible for under the Marine Insurance Act 1906's duty of utmost good faith with the similar information under the Insurance Act 2015's duty of fair presentation); Rix, *supra* note 150, at 113–15 (describing knowledge for which the Insurance Act 2015 holds an insurer responsible for the purposes of fair presentation).

[152] *Cf.* Insurance Act 2015, Explanatory Notes ¶ 6 ("The [prior] 1906 Act [was] written in clear forthright terms, which can constrain the courts' ability to develop the law."). From an American perspective, this quote is quite remarkable for both its restrained approach to the role of statutes as well as its correspondingly expansive view of the judiciary's role in lawmaking. *See also* cases cited *supra* notes 147–48 (including examples where some U.S. courts have already found an underwriter's conduct in light of knowledge to have waived a warranty of seaworthiness defense).

[153] See James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 477–78 (1976); Henderson, *The Constitutive Dimensions of Tort*, *supra* note 130 at 246–47 (describing how tort law delegates duties for setting standards to risk managers). Even where parties attempt to allocate risk and responsibility by contract, vague provisions can defeat their intent. *See, e.g.*, James A. Henderson, Jr., *Contract's Constitutive*

selection of measures might *not* necessarily be one that maximizes safety incentives in light of other potential substantive and process impacts.

Certainly safety is an important consideration.[154] Equity in the allocation of responsibility is another key factor.[155] Practicality with respect to industry operations is crucial.[156] Uniformity in laws and in their interpretation support commerce in a global context.[157] These are all important criteria for the marine risk management system.

The marine insurance industry is in a key position to promote the seaworthiness of the vessels it insures.[158] Underwriters decide what risks will they insure and determine the premiums they will charge shipowners to do so.[159] Underwriters have a strong financial

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Core: Solving Problems by Making Deals, 2012 U. ILL. L. REV. 89, 131 n.231 (2012) (noting difficulties courts have enforcing "best efforts" provisions).

[154] *See, e.g.*, text accompanying *supra* note 127 (discussing Lord Lloyd's dissent in *The Nicholas H*, highlighting the safety of life and property at sea); *see also* Emp'rs Ins. of Wausau v. Occidental Petroleum Corp., 978 F.2d 1422, 1433 (5th Cir. 1992) (quoting The Caledonia, 157 U.S. 124, 134 (1895) (characterizing the warranty of seaworthiness as an incentive for safety)).

[155] *See, e.g.*, Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp., 346 F.3d 530, 537–38 (5th Cir. 2003) (compensating an owner who had justifiably relied on false information provided by a classification society) Sundance Cruises Corp. v. Am. Bureau of Shipping, 7 F.3d 1077, 1084 (2d Cir. 1993) ("Sundance may be here likened to a truck owner seeking recovery from a truck inspection service because it issued a safety certificate shortly before the truck's negligently maintained brakes failed."); Glanzer v. Shepard, 135 N.E. 275, 275 (N.Y. 1922) (finding that a weigher held a duty to both the buyer and seller in the sale of a product sold by weight).

[156] *See, e.g.*, text accompanying *supra* notes 120–22 (quoting Lord Steyn's majority opinion in *The Nicholas H*, counseling caution in that new precedents allocating liability could negatively impact the marine insurance and shipping industries). See also Damien L. O'Brien, *The Potential Liability of Classification Societies to Marine Insurers under United States Law*, 7 U.S.F. MAR. L. J. 403, 420 (1995) (predicting similar "far reaching ramifications").

[157] *See, e.g.*, Graydon S. Staring & George L. Waddell, *Marine Insurance*, 73 TUL. L. REV. 1619, 1647 (1999) (criticizing the lack of uniformity resulting from the Fifth Circuit's holdings on the American Rule); Young, *supra* note 4, at 341–42, 347 n.475, 357–58 (discussing the merits of uniform rules for maritime commerce and outlining proposals for determining when federal maritime law should preempt state law). *See also* discussion *supra* note 143 on the lack of uniformity on interpretation of safe berthing clauses.

[158] *See generally* BILLAH, *supra* note 45, at 176–99.

[159] *See id.* at 184–86.

incentive to minimize risk so as to minimize losses, and have the ability to reinforce similar financial incentives among their assureds.[160]

One way that underwriters can and perhaps must do this is through the classification societies.[161] Underwriters largely rely on information provided by shipowners and classification societies to evaluate risk.[162] The Insurance Act 2015 reinforces an underwriter's duty to avail herself of the information that a classification society can reasonably obtain through a prudent survey—and to make further inquiry where information and experience suggest further information is needed to properly assess a risk.[163] To this end, underwriters should engage more directly and proactively with the classification societies; it is not enough to accept at face value the classification and related surveys that a *shipowner* has paid for. Lead underwriters should directly contract and pay for the survey services and information they need to properly assess risk, putting themselves in clear privity with the classification society.[164]

Turning now to jurisprudence as an element of the marine risk management system, it is possible that certain laws or interpretations intended to promote safety may do so at the expense of "fairness" to an owner or classification society that is consequently held responsible for a loss;

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[160] *See id.;* Shapiro, *supra* note 1, at 70–71.
[161] *See supra* Section I.D.
[162] *See* BILLAH, *supra* note 45, at 180–83, 185–86.
[163] *See* Peter MacDonald Eggers, *The Fair Presentation of Commercial Risks Under the Insurance Act 2015, in* THE INSURANCE ACT 2015: A NEW REGIME FOR COMMERCIAL AND MARITIME LAW, *supra* note 150, at 17–20; *see also supra* notes 150–51 and accompanying text.
[164] Shapiro, *supra* note 1, at 79–81; s*ee also supra* notes 75, 87. It is also certainly prudent for a shipowner to retain a classification society to support the shipowner in her duty to maintain a seaworthy vessel. See text accompanying *infra* notes 167–68. While the shipowner and underwriter do have not have complete mutuality of interest with regard to information relevant to the issuance of a policy and its premium, the divergence of interest is not clearly so great as to suggest a conflict of interest in a classification society serving and holding a duty to both. *Cf.* Glanzer v. Shepard, 135 N.E. 275, 275 (N.Y. 1922)). This is not to say that underwriters and owners should necessarily share the cost of the same survey, but rather that the use of separate classification societies by each could entail significant additional costs not clearly justified.

or an owner who does not fully recover from an insured loss due to a broad definition of unseaworthiness liability; or an underwriter who is estopped from denying covering for a loss in light of information the underwriter should have known and acted upon.

But jurisprudence promoting safety may also increase fairness by holding a classification society responsible—to at least some extent in contribution—for reckless failure to exercise due care in performing a survey ordered by an owner to ensure her existing vessel is seaworthy; for a survey ordered for a prospective owner to ensure the vessel he is negotiating to buy is seaworthy—or that the costs needed to make the vessel seaworthy are properly identified; or for a survey ordered by an underwriter so that he is fully apprised of the risk he is about to underwrite for a premium he determines to be commensurate with that risk.[165]

In this regard, the Second Circuit in *Sundance Cruises* improperly conflated "guarantee" with the exercise of due care.[166] The court offered the analogy of a truck driver seeking contribution from a brake inspector after an accident involving failed brakes.[167] It is to be

[165] While courts have a critical role, but often face challenges, in placing liability according to established rules of decision and contractual provisions agreed between parties seeking to manage their respective risks, courts are even less equipped to define due care than to determine whether a standard defined elsewhere, such as in contact provisions or applicable industry standards, has been met. Henderson, *Expanding the Negligence Concept*, *supra* note 153, at 499. *See also id.* at 479 (citing United States v. Carroll Towing Co., 159 F.2d 169, 173–74 (performing extensive risk calculations to determine the care due)); *id.* at 490 (noting challenges in a court's use of expert testimony in determining negligence). In *Orduna S.A. v. Zen–Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990), the court rejected an appellant's contention that "the district court was compelled to accept its expert's testimony . . . because of his prominence in the field." *Id.* at 1154. "We cannot say the district court committed clear error in accepting the testimony of other experts over that of [appellant's] no matter how eminent or learned [appellant's] expert was." *Id.*

[166] *See supra* note 102 and accompanying text.

[167] Sundance Cruises Corp. v. Am. Bureau of Shipping, 7 F.3d 1077, 1084 (2d Cir. 1993) ("Sundance may be here likened to a truck owner seeking recovery from a truck inspection service because it issued a safety certificate shortly before the truck's negligently maintained brakes failed.").

expected that a prudent truck owner would have his truck inspected by a reputable brake inspector, just as a prudent shipowner—in furtherance of his duty to maintain a seaworthy vessel—might order a survey by a reputable classification society. Far from serving to shirk responsibility, hiring an inspector or surveyor is in keeping with such responsibility. And both the truck owner and shipowner should expect that their inspector and surveyor will exercise due regard—and in any event not reckless disregard—in performing such inspection or survey.[168] Courts should hold a classification society responsible where its reckless disregard or grossly negligent misrepresentation is the cause of or has contributed to a loss.[169] There is no reason to believe that the insurance regime could not adapt to such an allocation of responsibility, to include affording insurance coverage to classification societies to cover losses now borne elsewhere.[170] It may well work out that the concerns of both Lord Steyn and Lord Lloyd can be mutually reconciled in practice.[171]

With respect to the warranty of seaworthiness, the American Rule places a greater duty—and incentive—upon a shipowner to ensure his vessel is seaworthy.[172] The English Rule

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[168] *See supra* note 102.

[169] *See* Otto Candies, L.L.C. v. Nippon Kaiji Kyokai Corp., 346 F.3d 530, 537–38 (5th Cir. 2003); Great Am. Ins. Co. v. Bureau Veritas, 338 F. Supp. 999, 1012 (S.D.N.Y. 1972). Of course, in such situations a court should not require that a classification society bear all such damages from a loss where it determines that the equities suggest that an owner, underwriter, or other party should share in the loss. *See also* Henderson, *Expanding the Negligence Concept*, *supra* note 153, at 520–21 (discussing certain relations between parties, the performance of "certain professions, businesses, and trades," and tangible injuries to persons or property as justifiable limited exceptions to the usual rule denying liability for economic harm). A grossly negligent or reckless disregard standard, rather than a reasonable care standard, may still provide significant incentives to surveyors and classification societies, while avoiding the adjudication concerns noted by Professor Henderson and the disincentives to classification societies raised by Lord Steyn in *The Nicholas H* and by the Second Circuit in *Sundance Cruises*. *See supra* notes 78, 122 and accompanying text.

[170] *See* text accompanying *supra* note 131.

[171] *See* text accompanying *supra* notes 121–22, 131.

[172] *See supra* note 141 and accompanying text.

consequently allocates greater risk to the underwriter.[173] There is no clear answer here; while greater incentives for safety are generally preferable, avoiding a policy for unseaworthiness is absolute—and may absolve an insurer from covering a loss unrelated to the seaworthiness issue.[174] Conversely, under the English Rule, reimbursing an assured for a loss subsequent to a prior known state of unseaworthiness could absolve a shipowner if the actual cause of the loss is unseaworthiness but where that cannot be firmly determined.

It may well be that the greater good here is to opt for uniformity. The benefit of the stronger safety incentive created by the American Rule may be outweighed by the disadvantages of inconsistent rules.[175] Perhaps any loss of safety incentive due to a more uniform but lenient warranty can and should be recouped through greater imputation of negligence or awareness to the shipowner, thereby more easily triggering a defense from the more lenient warranty.[176] Similarly, a court should look to the information known or ought to have been known by an underwriter—and the underwriter's conduct in light of that information—in determining whether the equities lean toward allowing an otherwise proper unseaworthiness defense in part or in

[173] *See supra* note 143.

[174] SOYER, *supra* note 15, § 3.43, at 85–86. *See also id.* §§ 3.77–84 (discussing how the English Rule has addressed causation); *cf.* Malcolm Clarke, *The Future of Warranties and Other Related Terms in Contracts of Insurance*, *in* THE INSURANCE ACT 2015: A NEW REGIME FOR COMMERCIAL AND MARITIME LAW, *supra* note 150, at 56–57 (discussing causation more generally with respect to insurance warranties).

[175] *See supra* note 157; *see also* Emp'rs Ins. of Wausau v. Occidental Petroleum Corp., 978 F.2d 1422, 1424 (5th Cir. 1992) (describing the loss of a vessel insured by a combination of English and American underwriters, but where only the American underwriters were seeking to avoid coverage).

[176] *See* cases cited *supra* notes 75, 144. Where it is appropriate to afford certain assureds, such as ship mortgagees, coverage despite a shipowner's breach of a warranty, the policy clauses can incorporate a provision allowing such coverage—such as is traditionally done in cargo policies.

full.[177] There is no reason this should be an all or nothing decision if the discernible equities of the situation auger for a compromise result.[178]

Conclusion

Marine insurance plays a vital role in promoting global commerce by pooling and underwriting marine transportation risks. Lives and fortunes depend on how these risks are addressed and allocated. Safety incentives should be a major factor in risk allocation; however, legislatures and the courts must also give due regard to other important and potentially competing goals such as equity, practicality, and uniformity. Due to the status of federal admiralty law as one of the few remaining areas of federal common law, U.S. courts have an unusual role and responsibility to establish substantive policy in this area through case law. English courts also have a large policymaking role in marine insurance law, and the Insurance Act 2015 will likely afford courts with opportunities to exercise this role in the near future.

[177] *See* cases cited *supra* note 147.

[178] *Cf., e.g.*, Gard Marine & Energy Ltd. v. China Nat'l Chartering Co. [2017] UKSC 35 [26] (moderating the safe berth warranty to reallocate liability in certain circumstances). Interpretation of safe berth clauses, *see* discussion *supra* note 143, is yet another area where uniformity within the United States and with English law would help shipowners and charterers to knowledgeably allocate such risks among each other and their insurers. *See* Brief for The Mar. Law Ass'n of the U.S. and the Ass'n of Ship Brokers & Agents (USA) as Amici Curiae Supporting Petitioners at 6–7, CITGO Asphalt Ref. Co. v. Frescati Shipping Co., No. 18-565 (U.S. Nov. 30, 2018), *cert. granted* 139 S. Ct. 1599 (U.S. Apr. 22, 2019).