Current Issues in Insuring and Managing Vessel-Related Risks

Andrew D. Kehagiaras[1]

Vessel owners and operators today face traditional risks, such as operational safety, collisions, perils of the sea, and piracy. Conventional forms of marine insurance, such as hull and machinery, protection and indemnity, and general liability coverages, insure against many of those risks. The first two sections of this paper will focus on how courts have recently construed certain issues related to the management of such traditional risks. The first section will examine a case that challenges the notion as to the nature of the coverage that a protection and indemnity insurer provides, which insurers and vessel owners likely take for granted. The second section will examine two recent cases dealing with the doctrine of uberrimae fidei—not whether it applies, but rather whether parties to a contract of marine insurance can contract so the doctrine does *not* apply.

The adoption of new technologies in the shipping and logistics industries has created new risks. Anyone with Internet connectivity through a smartphone can have the world in his or her hands. And just as criminals can put their hands into unsuspecting pockets and steal those phones or their owners' personal data, criminals can also cause harm to mariners, vessels, cargoes, international commerce, and the environment. The shipping and marine insurance industries are responding to those cyber risks and encouraging stakeholders to implement safeguards. The third section of this paper will survey recent developments in the area of maritime cyber security, including how protection and indemnity clubs are approaching the issue.

I. P&I Coverage As Liability Insurance: Are You *Bodden* What the Southern District of Florida Is Selling?

A. Brief Background on P&I Coverage

"[P]rotection and indemnity (P&I) insurance [is] a form of coverage by which shipowners and charterers are protected against the risk of liability to third parties."[2] P&I cover is a form of mutual insurance, further to which shipowners agree to insure each other as to certain third-party liabilities.[3] Shipowners formed P&I clubs "to insure against risks for which they could not obtain commercial coverage . . .."[4] Historically, the "key rule [of P&I cover] requires each member to first pay its liabilities and only then look to the club to share the cost," which is commonly known as the "pay-to-be-paid rule."[5]

> One court summarized the origin and scope of P&I coverage as follows:
> Historically, P & I policies are issued to protect owners of a vessel from risks not encompassed by the Hull policy. *Quigg Brothers-Schermer, Inc. v. Commercial Union Ins. Co.*, 223 F.3d 997, 1000 (9th Cir. 2000), quoting *Ins. Co. of America v. Board of Comm'rs of the Port of New Orleans*, 733 F.2d 1161, 1165 (5th Cir. 1984),

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[1] Mr. Kehagiaras is a founding partner of the Long Beach law firm Roberts & Kehagiaras LLP. He received his J.D. from Wayne State University Law School in 1997 and his LL.M. in Admiralty and Maritime Law from Tulane University School of Law in 1998. Mr. Kehagiaras is admitted to practice in California and Michigan.

[2] John D. Kimball, *The Central Role of P&I Insurance in Maritime Law*, 87 Tul. L. Rev. 1147, 1148 (2013).

[3] *Id*.

[4] *Id.* at 1148–49 (footnote omitted).

[5] Seaboard Shipping Corp. v. Jocharanne Tugboat Corp., 461 F.2d 500, 503 n.2 (2d Cir. 1972).

quoting *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500 (2d Cir. 1972). Unlike, the Hull policy, the P & I policy generally provides liability insurance for tortious liability the owner of the vessel incurs as a consequence of his ownership of the vessel. *Lanasse v. Travelers Ins. Co.*, 450 F.2d 580 (5th Cir. 1971); *S. S. Underwriting Ass'n v. Landry*, 281 F.2d 482 (1st Cir. 1960). The P & I policy indemnifies the insured for specific enumerated risks arising out of the legal liability of the insured as the owner of a vessel scheduled on the policy. WILLIAM E. O'NEIL, *Insuring Contractual Indemnity Agreements Under CGL, MGL, and P & I Policy*, 21 Mar. Law. 359, 373 (Summer 1997), quoting ROBERT T. LEMON, II, The Lanasse Rule and the Additional Assured's Dilemma Under American-Form P & I Policies, 21 J. MAR. L. & COM. 503, 503 (Oct. 1990). P & I policies do not obligate the underwriter to provide a defense to the assured, only to compensate him for loss.[6]

B. Is P&I Coverage Under an Industry-Standard Form in the United States Nevertheless *Liability* Insurance Under Florida Law?

1. Background on *Bodden*

In September 2019, the United States District Court for the Southern District of Florida denied the defendant insurer's motion to dismiss in *Bodden v. Travelers Property Casualty Company of America*,[7] in part ruling that the P&I form at issue was ambiguous as to whether it was an indemnity policy or a liability policy.[8] The Court ruled that under Florida law, the Court was bound to give the most expansive view to the coverage available under the form, which meant treating the P&I form as a *liability* policy.[9] Treating the form as such meant that the plaintiffs stated claims for relief under Florida's nonjoinder statute, under which a person who is not insured under a liability policy cannot bring a direct action against the liability insurer for a cause of action that is covered by the policy without first obtaining a settlement or verdict against the insured.[10]

The facts of *Bodden* are unusual and unfortunate. In June 2013, the plaintiffs, the captain and the five crewmembers of the tugboat *Billy G*, departed Fort Pierce, Florida with a barge in tow for delivery to Gonaives, Haiti.[11] But the *Billy G* ran out of fuel off the coast of Cuba, where the Cuban Coast Guard seized the vessel.[12] The plaintiffs were stranded in Cuba for nearly a year without food, money, supplies, or medical treatment.[13] "During that year they ate rats and insects in order to survive; suffered various illnesses and injuries that were left untreated; and suffered losses of maintenance, cure, and wages."[14]

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[6] Blair v. Suard Barge Servs., No. 03-909, 2004 U.S. Dist. LEXIS 2461 at *25–*26, 2004 AMC 1144 (E.D. La. Feb. 18, 2004).
[7] No. 18-25095-Civ-Scola, 2019 U.S. Dist. LEXIS 151733, 2019 AMC 2369 (S.D. Fla. Sep. 6, 2019).
[8] *Id.* at *7–*8,
[9] *Id*.
[10] *Id.* at *8.
[11] *Id.* at *2.
[12] *Id*.
[13] *Id.* at *3.
[14] *Id*.

There were three lawsuits that arose out of the *Billy G*'s seizure. First, after the plaintiffs' repatriation, they sued the operator and manager of the *Billy G*, Suncoast Shipping LLC ("Suncoast"), in Florida state court.[15] The plaintiffs alleged damages for Suncoast's failure to repatriate them, failure to provide maintenance and cure, and Jones Act negligence, among other claims.[16] Travelers initially defended that action.[17] But Travelers later withdrew its defense, after obtaining a default judgment in a parallel declaratory action that Travelers filed in federal court against Suncoast to void the policy as to Suncoast's claims for the loss of the tug and barge.[18] Travelers did not name the captain and five crewmembers as defendants in the declaratory judgment action.[19]

The plaintiffs obtained a judgment against Suncoast in the state action.[20] The plaintiffs then sued Travelers, arguing that their state court judgment against Travelers' insured gave them standing to sue Travelers under Florida Statutes section 627.4136, which states in relevant part:

> It shall be a condition precedent to the accrual or maintenance of a cause of action against a *liability insurer* by a person not an insured under the terms of the *liability insurance contract* that such person shall first obtain a settlement or verdict against a person who is an insured under the terms of such policy for a cause of action which is covered by such policy.[21]

Travelers argued that because its policy was a policy of indemnity, the plaintiffs had no right to bring a direct action against Travelers under the above statute and, on that basis, filed a motion to dismiss the plaintiffs' first amended complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[22] The Court rejected that argument and denied Travelers' motion, holding:

> The policy here provides that Travelers will "make good to [Suncoast] . . . all such loss and/or damage and/or expense as [Suncoast] shall as owners of the vessel named herein have become liable to pay and shall pay on account of liabilities, risks, events, and/or happenings" as set forth in the policy. (Policy at 36.) The policy then identifies fourteen categories of losses, injuries, expenses, damages, charges, and penalties that are covered by the policy. (*Id.* at 36-40.) Eleven of these provisions are specifically introduced as "Liability for" whatever the corresponding damage is. (*Id.*)[23]

2. The P&I Form At Issue in *Bodden*

To understand the precise issue in *Bodden*, it is important to understand that the P&I coverage at issue was not coverage under the rules of an international P&I club, further to which rules clubs provide "cover" and typically do not issue policies.[24] Instead the Travelers policy at

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[15] *Id.* at *1–*2.
[16] *Id.* at *3.
[17] *Id*.
[18] *Id.* at *4.
[19] *Id*.
[20] *Id*.
[21] *Id.* at *6 (emphasis added).
[22] *Id*.
[23] *Id.* at *6–*7.
[24] See Norman J. Ronneberg, Jr., *An Introduction to the Protection & Indemnity Clubs and the Marine Insurance They Provide*, 3 U.S.F. Mar. L.J. 1, 6–7 (1990).

issue included a number of forms of the American Institute of Marine Underwriters (AIMU), including its SP-23 form P&I policy.

The AIMU "has over 100 years of service as the trade association representing the United States ocean marine insurance industry as an advocate, educator and information center."[25] The AIMU's website contains a repository of forms and clauses the AIMU has "promulgated as standard wordings for voluntary use in the industry."[26] Among the forms is SP-23, which is entitled "Protection and Indemnity," the last revision of which was in January 1956.[27]

In its moving papers, Travelers argued that its policy was "an industry form policy known as the 'SP-23' (which appears on the policy face)" and that "[t]he SP-23 is a standard maritime insurance form of protection and indemnity policy."[28] A leading admiralty treatise agrees: "In the United States, the most commonly used wording for commercially written P&I coverage is the SP-23 form."[29] The Southern District of Florida's ruling did not address Travelers' argument as to the SP-23's being an industry-standard form in wide use in the United States.

The SP-23 provides coverage for specified perils. As the Fifth Circuit has stated: "The SP-23 form lists fourteen specific types of loss or damage as perils or risks insured against; these enumerated perils by no means would cover the entire range of a shipowner's liability."[30] The Southern District of Texas similarly held that the SP-23 "is not 'occurrence'-based, but instead based on circumstances which require [the insurer] to indemnify the policyholder for specific enumerated perils."[31]

3. Analysis of the Denial of Travelers' Motion to Dismiss

Travelers' brief in support cited to the Fifth Circuit case of *Gabarick v. Laurin Maritime America Inc.*,[32] among other cases, for the proposition that the SP-23 is an industry-standard P&I form. *Gabarick* arose out of a collision between a tanker and a barge under tow, which collision resulted in an oil spill into the Mississippi River.[33] At issue on appeal was whether defense costs eroded the liability limit of the towing company's P&I policy, which was on the SP-23, with some modifications.[34]

Gabarick began its analysis by stating that there was no entrenched federal maritime law rule as to whether defense costs erode a P&I policy's limit.[35] The Fifth Circuit continued:

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[25] AIMU, https://www.aimu.org/ (last visited Jan. 5, 2020).
[26] Forms List, https://www.aimu.org/resources/formsmenu.html (last visited Jan. 5, 2020).
[27] Form SP-23, http://www.aimu.org/forms/SP-23%20%28Revised%201-56%29.pdf (last visited Jan. 5, 2020).
[28] Defendant's Motion to Dismiss Plaintiff's First Amended Complaint and Memorandum of Law, Bodden v. Travelers, No. 1:18-cv-25095-RNS (S.D. Fla. Apr. 1, 2019), ECF No. 25.
[29] 8 Benedict on Admiralty § 12.06 (citing Steinwinder v. McCall's Boat Rentals, 815 So. 2d 1059, 1060 n.1, 2002 AMC 1314 (La. Ct. App. 2002)).
[30] St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co., 666 F.2d 932, 941 (5th Cir. 1982).
[31] Axis Ins. Co. v. Buffalo Marine Servs., No. H-12-0178, 2013 U.S. Dist. LEXIS 132333 at *42 (S.D. Tex. Sep. 12, 2013).
[32] 650 F.3d 545, 2011 AMC 1912 (5th Cir. 2011).
[33] *Id.* at 550.
[34] *Id.* at 550–51.
[35] *Id.* at 552.

> However, marine insurance commentators have recognized that defense costs are typically included within the P&I policy's liability limit. The Maritime Law Association of the United States instructs that for P&I policies "[t]here is no coverage for legal expenses in excess of the policy limits, such expenses being included within, and no[t] in addition to, policy limits." P&I policies do not ordinarily create a duty to defend *and are indemnity policies, not liability policies*. With only a duty to pay covered claims and no duty to defend, reimbursement of defense costs must be footed on the indemnification, which is limited to the agreed upon policy limit.[36]

Gabarick turned to the applicable state law and observed that that under Louisiana law, defense costs toward a covered liability under a P&I policy erode that policy's limit.[37] And as to the SP-23, the Court observed that the form "provides coverage for '[c]osts, charges, and expenses reasonably incurred and paid by the Assured in defense against any liabilities insured against,'" as to which "'[l]iability hereunder in respect of any one accident or occurrence is limited to the amount hereby insured.'"[38] The Court ruled that that language was unambiguous and it was clear that defense costs were to be included within the policy's limits: "This P&I policy unambiguously written against the backdrop of traditional principles of maritime law that defense costs erode P&I limits of liability."[39]

In *Steinwinder v. McCall's Boat Rentals, Inc.*,[40] which preceded *Gabarick*, the Louisiana Court of Appeal has likewise observed that "[f]orm SP-23 is the most common standard document providing P&I coverage."[41] *Steinwinder* arose out of an accident in which the plaintiff sustained injuries during his transfer in a personnel basket from a vessel to a platform.[42] At issue was vessel-owner McCall's general liability and P&I policies, and the former's exclusion as to any sums due under an SP-23 P&I policy "whether or not such coverage is in place"—McCall had such a policy.[43] The Court affirmed summary judgment in favor of the general liability insurer, rejecting the argument that the general liability policy's exclusion was an "escape clause" and holding that "the CGL policy issued by Storebrand clearly and unambiguously excludes from coverage any risks covered by a P&I policy and that the exclusion applies regardless of whether such P&I coverage is actually in place."[44]

Gabarick, *Steinwinder*, and the other above-cited authorities are not from Florida or the Eleventh Circuit. Based on the author's research, the overwhelming majority of cases that have construed SP-23 policies are from courts in the Fifth Circuit and Louisiana. Still, Travelers seemingly had the law of marine insurance on its side in *Bodden* , not to mention the nature and history of P&I cover, to support the argument that a P&I policy is an indemnity policy—as the name states. But Florida law differs, at least as to the direct action statute at issue.

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[36] *Id.* at 552–53 (footnotes omitted, emphasis added).
[37] *Id.* at 553 (footnote omitted).
[38] *Id.* at 554.
[39] *Id.* at 556.
[40] 815 So. 2d 1059, 2002 AMC 1314 (La. Ct. App. 2002).
[41] *Id.* at 1060 n.1, 2002 AMC 1314 (La. Ct. App. 2002).
[42] *Id.* at 1059.
[43] *Id.* at 1061.
[44] *Id.* at 1062.

In rejecting Travelers' argument that its SP-23-based P&I coverage was indemnity coverage, the Court looked to Florida law and relied on the Florida Supreme Court case of *Da Costa v. General Guaranty Insurance Company of Florida*.[45] "The Florida Supreme Court, in a case Travelers itself even cited (albeit for another proposition), long ago evaluated nearly identical language and concluded 'the policy is one of protection against liability rather than against loss actually paid.'"[46]

Da Costa does not state that the policy at issue there as an SP-23. But the opinion's quoted language from the policy at issue all but confirms that it was on form SP-23 or, at the very least, contains the SP-23's language. The title of the policy in *Da Costa* was "Protection and Indemnity" and its initial assuring provision stated in relevant part:

> The Assurer hereby undertakes to make good to the Assured or the Assured's executors, administrators and/or successors, all such loss and/or damage and/or expense as the Assured shall as owners of the vessel named herein have become liable to pay and shall pay on account of the liabilities, risks, events and/or happenings herein set forth:
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> (1) Liability for loss of life of, or personal injury to, or illness of, and [*sic*] person * * *.
>
> (2) Liability for hospital, medical, or other expenses * * *.
>
> (3) Liability for repatriation expenses of any member of the crew * * *.[47]

The above language from the *Da Costa* policy is identical to the language in the SP-23 and to the SP-23 form at issue in *Bodden*.[48] The Florida Supreme Court found a "patent ambiguity" in the policy: "Here there are present not just one provision which might imply indemnity against loss *actually paid* by the Assured, but other clauses just as strongly implying indemnity against *liability*."[49] The Court, thus, treated the SP-23-based P&I policy as a hybrid P&I/liability policy:

> The initial assuring provision quoted above, although capable of being construed to require payment of the loss by the Assured before accrual of any right against the Assurer, is itself ambiguous and capable of at least two different constructions, depending upon placement of emphasis and punctuation by the reader. We will consider, however, that this particular provision marks the policy as one of indemnity against loss actually paid.
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> All other policy provisions, or the absence of certain standard clauses, characterize the policy as one of protection against liability. The "Action against Assurers" clause, appearing as a condition and limitation of the policy, purports to require that the Assured sue the Assurer within one year after payment of a claim by the Assured if no final judgment is entered, or within one year after final judgment is entered.

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[45] 226 So. 2d 104 (Fla. 1969).

[46] Bodden, *supra* n.7, 2019 U.S. Dist. LEXIS 151733 at *7 (quoting Da Costa, 226 So. 2d at 106–07).

[47] *Da Costa*, *supra* n.45, 226 So. 2d at 105.

[48] Exhibit 1 to First Amended Complaint, Bodden v. Travelers, No. 1:18-cv-25095-RNS (S.D. Fla. Apr. 1, 2019), ECF No. 17-1; Form SP-23, http://www.aimu.org/forms/SP-23%20%28Revised%201-56%29.pdf (last visited Jan. 5, 2020).

[49] *Da Costa*, *supra* n.45, 226 So. 2d at 106 (emphasis in original).

> If the Assured failed to pay or satisfy a judgment within one year, assuming this to be a policy of indemnity against loss paid, then the Assured would lose all rights against the Assurer whatsoever, in spite of the fact that the Assurer claims its liability begins only when the judgment or claim is paid. This absurd result reveals that no presumption that the policy is one of indemnity against loss paid can be reasonably implied from this provision.
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> The presence of a "no action" clause providing that no action will lie against an insurer unless brought for losses actually sustained *and paid* in money is generally indicative of an indemnity rather than a liability policy. The absence of this type of no action clause in the policy before us likewise indicates that the policy is one of protection against liability rather than against loss actually paid.[50]

The Supreme Court of Florida held that other than the initial assuring provision, the policy at issue "appears to insure against liability rather than against loss actually paid."[51] Particularly interesting in *Da Costa* is its criticism of the policy at issue for its *lack* of a "no action" clause that contains language that conditions an action against the insurer on the insured's having actually sustained a loss *and* paid it. The Court quoted the policy's "Actions against Assurers" and it is identical to the SP-23 form's "Actions against Assurers" clause, both of which state:

> *No action* shall lie against the Assurer for the recovery of any *loss sustained by the Assured* unless such action is brought against the Assurer within one year after the final judgment or decree is entered in the litigation against the Assured *or in case the claim against the Assurer accrues without the entry of such final judgment or decree*, unless such action is brought within one year from the date of the *payment* of such claim.[52]

By its express language, the above clause *is* a "no action" clause. *Da Costa* takes issue with it because the Court was looking for language *in that clause* as to "losses actually sustained *and paid in money*."[53] But that ignores the express language in the assuring clause, which unambiguously states the P&I assurer's undertaking to pay the assured, as owner of the named vessel, all loss, damage, or expense that the assured shall become liable to pay "and shall pay" as to the specified perils in the policy. Alternatively, *Costa* assails the SP-23's assuring agreement as being internally inconsistent, if not at odds with the rest of the form, which to *Da Costa* included mostly language of liability insurance.

Da Costa resolved the "ambiguity and confusion" in favor of providing the insured with the maximum amount of coverage under the policy, which was to treat it as a liability policy.[54] Adopting *Da Costa*'s reasoning as to the same base form of P&I policy, the Southern District of Florida likewise ruled in *Bodden* that Travelers' policy was ambiguous and confusing and,

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[50] *Da Costa*, *supra* n.45, 226 So. 2d at 106–07 (footnotes omitted).
[51] *Id.* at 107.
[52] Form SP-23, http://www.aimu.org/forms/SP-23%20%28Revised%201-56%29.pdf (last visited Jan. 5, 2020). (emphasis added). Travelers' "Actions against Assurers" clause is identical, other than its misspelling of the word "judgment." Exhibit 1 to First Amended Complaint, Bodden v. Travelers, No. 1:18-cv-25095-RNS (S.D. Fla. Apr. 1, 2019), ECF No. 17-1.
[53] *Da Costa*, *supra* n.45, 226 So. 2d at 106 (emphasis in original).
[54] *Id*.

therefore, construed it as a liability policy, which afforded the plaintiffs standing under Florida Statutes section 627.4136.[55]

It is surprising that in *Bodden*, the Southern District of Florida did not discuss the Eleventh Circuit's case of *Weeks v. Beryl Shipping, Inc.*[56] In *Weeks*, the Eleventh Circuit affirmed the Middle District of Florida's grant of summary judgment to The London Steam-Ship Owners' Mutual Insurance Association Limited (London P&I Club). The issue before the Eleventh Circuit was "a narrow one: whether the particular P & I policy in this case is a liability policy or an indemnity policy."[57]

The P&I coverage in *Weeks* was *not* from the SP-23. And the Florida direct action statute that was at issue in *Bodden* was not so in *Weeks*. But the Eleventh Circuit applied Florida law discussed *Da Costa*'s rule of "losses actually sustained and paid in money" in holding that the language of the relevant London P&I Club rule satisfied *Da Costa* and that the Club's P&I cover was "clearly an indemnity policy."[58] The London P&I Club's rule's pay-to-be-paid language stated

> Provided always that in the case of a liability *actual payment* (which shall be made out of monies belonging to him absolutely and not by way of loan or otherwise) *by the Member of the full amount of such liability shall, unless the Committee otherwise decide, be a condition precedent to the right of the Member to recover and the obligation of the Association to satisfy and make good*.[59]

The Eleventh Circuit concluded that if the above "language does not make the policy an indemnity policy, we do not see how it would reasonably be possible for an insurer to write such a policy."[60] The author respectfully submits that the same is true as to SP-23's assuring provision and that the ruling in *Bodden* that a standard P&I form that has been in use for over 64 years is not unambiguously an indemnity policy would be surprising, if not shocking, to the AIMU and American P&I insurers. The ruling that the SP-23 is a liability policy under the Florida statute runs afoul of the form's insuring agreement, if not the premise of P&I cover: As the Fifth Circuit held in *Conoco, Inc. v. Republic Insurance Co.*,[61] because the insured had not paid the claimant, the P&I insurer had "incurred no obligation under the indemnity insurance contract."[62]

Other jurisdictions are in line with *Gabarick*, *Steinwinder*, and *Weeks*. The Washington Court of Appeals has held that "[t]he coverage section of [SP-23] lists 14 'liabilities, risks, events and/or happenings' for which the assurer would provide *indemnity*."[63] Likewise, in construing an SP-23 P&I policy, the United States District Court for the District of New Jersey held that "as is

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[55] Bodden, *supra* n.7, 2019 U.S. Dist. LEXIS 151733 at *7–*8.
[56] 845 F.2d 304, 1988 AMC 2187 (11th Cir. 1988).
[57] *Id.* at 306.
[58] *Id*.
[59] *Id.* at 307 (emphasis added).
[60] *Id.* (footnote omitted).
[61] 819 F.2d 120, 1987 AMC 2975 (5th Cir. 1987).
[62] *Id.* at 123.
[63] Ross v. Frank B. Hall & Co., 870 P.2d 1007, 1008, 1994 AMC 2378 (Wash. Ct. App. 1994) (emphasis added).

typical, the obligation for the underwriters to pay under the P&I policy is on an indemnification basis."[64]

*Bodde*n was setting up to become a case of great interest to the marine insurance community that could have reached the Eleventh Circuit and, perhaps, the Supreme Court. But the parties settled the case in November 2019. And so the split in authorities as to the SP-23's construction remains.

II. Contracting Around Uberrimae Fidei

The duty of uberrimae fidei or "utmost good faith" is a duty that a prospective insured owes to a marine insurer. Uberrimae fidei is a requires the party seeking marine insurance to disclose all circumstances known to the party that materially affect the risk.[65] "The doctrine of uberrimae fidei imposes a duty of utmost good faith . . . and 'requires that an insured fully and voluntarily disclose to the insurer all facts material to a calculation of the insurance risk."[66] All federal circuits that have considered the issue, with the exception of the Firth Circuit, have held that uberrimae fidei is a well-entrenched rule of maritime law.[67] Regardless of the "entrenchment" of uberrimae fidei as a rule of marine insurance law, two recent cases have considered whether parties can contract out of that rule.

In *GEICO Marine Insurance Company v. Shackleford*,[68] GEICO sought a declaratory judgment that the subject liability-only marine insurance policy on Shackleford's 1981 65-foot sailing vessel did not cover the loss because of his breach of a navigational warranty in the policy, the implied warranty of seaworthiness, and the duty of uberrimae fidei. Shackleford bought the vessel in 2009, after which it had sustained damage by a lightning strike and because of negligent repairs in 2012.[69]

In March 2016, had been moored in the water awaiting repairs after Shackleford and his prior insurer had agreed that the vessel had been a constructive total loss.[70] Because the marine repair facility that was to haul the vessel from the water and perform the repairs required liability insurance, Shackleford bought a liability-only policy from GEICO.[71] In relevant part, the policy's

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[64] La Reunion Francaise Soc. Anon. D'Assurances Es Des Reassurances v. J.E. Brenneman Co., No. 01-5612, 2007 U.S. Dist. LEXIS 47312 at *40 (D.N.J. June 28, 2007).
[65] Atlantic Specialty Ins. Co. v. Coastal Envtl. Grp. Inc., ___ F.3d ___, No. 18-3236-cv, 2019 U.S. App. LEXIS 36859 at *23 (2d Cir. Dec. 13, 2019).
[66] Certain Underwriters at Lloyds v. Inlet Fisheries Inc., 518 F.3d 645, 648, 2008 AMC 305 (9th Cir. 2008) (citations and internal quotations omitted).
[67] Lloyd's v. San Juan Towing & Marine Servs., 778 F.3d 69, 81–82, 2015 AMC 694 (1st Cir. 2015) ("[T]three of our sister circuits -- the Third Circuit in 2008, the Ninth Circuit in 2008, and the Eighth Circuit in 2014 -- formally recognized the doctrine as established admiralty law. Moreover, the Second and Eleventh Circuits -- courts that have recognized uberrimae fidei as an established maritime rule since at least the 1980s[.]") (citations omitted). *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882, 1991 AMC 2211 (5th Cir. 1991) is the outlier. "We therefore conclude, albeit with some hesitation, that the uberrimae fidei doctrine is not 'entrenched federal precedent.'" *Id.* at 889.
[68] 316 F. Supp. 3d 1365 (M.D. Fla. 2018).
[69] *Id.* at 1368.
[70] *Id*.
[71] *Id*.

"Port Risk Ashore" endorsement contained a restriction that stated that there was "no coverage for navigation, and [that] coverage will only apply to the insured vessel while the boat is out of the water."[72]

In May 2016, after some repair work and surveys as to the vessel's condition, Shackleford requested GEICO to place "full coverage" on the vessel and to remove the Port Risk Ashore restriction so he could sail the vessel from the repair facility in Bradenton, Florida to a facility in Fort Lauderdale, Florida for further repairs.[73] Shackleford provided copies of the surveys to GEICO and it removed the Port Ashore Restriction and the new endorsement, like the original one, had a blank spaced next to "Navigation Area."[74] But the policy's new declarations page's "cruising limits" section included "U.S. Atlantic and Gulf Coastal waters."[75]

Shackleford sailed his vessel to Fort Lauderdale.[76] In early June, while at anchor near Fort Lauderdale, the vessel sustained damage during a storm.[77] Shackleford arranged for the vessel's haul-out and repairs, and he made a claim under this GEICO policy.[78]

At the bench trial, and as to the uberrimae fidei issue, GEICO argued that Shackleford breached that duty by failing to disclose the vessel's condition and value.[79] But citing to the Eleventh Circuit's decision in *King v. Allstate Insurance Company*,[80] the Court held that the parties had contracted out of the duty of uberrimae fidei: "[P]arties to a marine insurance policy may contract out of *uberrimae fidei* so long as the contract is not void as to public policy or statute."[81]

In *King*, under both the subject policy's terms and Louisiana law, "the policy would be void only if the insured *intentionally* concealed or misrepresented a material fact during the application process."[82] To the Fifth Circuit, it was the parties' right to agree to that more stringent standard for a prospective insured: "It is clear that the parties are free to 'contract-out' or 'contract around' state or federal law with regard to an insurance contract, so long as there is nothing void as to public policy or statutory law about such a contract."[83] Despite the obvious nexus to maritime law, the Court held that there is nothing "sacred" about that body of law or marine insurance and, therefore, cast the issue as "one more purely a matter of generic contract law."[84] In that context, the Fifth Circuit concluded that nothing compelled it "to find that maritime law *must* apply in all cases and to all issues involving insurance on boats."[85]

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[72] *Id*.
[73] *Id.* at 1369.
[74] *Id*.
[75] *Id*.
[76] *Id*.
[77] *Id*.
[78] *Id*.
[79] *Id.* at 1377.
[80] 906 F.2d 1537, 1991 AMC 204 (11th Cir. 1990).
[81] *Id.* (citing King v. Allstate Ins. Co., 906 F.2d 1537, 1542 (11th Cir. 1990)).
[82] *Id.* at 1539 (emphasis in original).
[83] *Id.* at 1540 (citation omitted).
[84] *Id*.
[85] *Id.* at 1541 (emphasis in original).

Against the backdrop of *King*, the *GEICO* court held that the parties there likewise agreed to something other than uberrimae fidei in the GEICO policy's "Fraud and Concealment" section, which stated: "There is no coverage from the beginning of this policy if you or your agent has omitted, concealed, misrepresented, sworn falsely, or attempted fraud in reference to any matter relating to this insurance before or after any loss."[86] As *King* had done, the Southern District of Florida held that the "Fraud and Concealment" section placed a higher standard on the insurer in seeking to void the policy: "When read in conjunction with the application, this language essentially requires an *intent to defraud* on the part of the applicant/insured, a much more stringent standard than that imposed by the doctrine of uberrimae fidei."[87] The Court ruled that GEICO had not met it burden as to the lower uberrimae fidei standard, let alone proving intent to defraud.[88]

The Court entered judgment for Shackleford, having also ruled that the vessel was seaworthy and that the policy did not contain a navigational limit and, even had there been such a limit, GEICO impliedly waived it when it agreed that Shackleford could sail the vessel to Fort Lauderdale.[89] GEICO appealed and the Eleventh Circuit reversed, having found that the policy contained a navigational limit, i.e., that the vessel had to be north of Cape Hatteras, North Carolina from June 1st to November 1st annually, if the vessel was afloat.[90] Because that finding was dispositive, the Eleventh Circuit did not address the issue as to whether Shackleford had breached the duty of uberrimae fidei.[91]

XL Specialty Ins. Co. v. Prestige Fragrances, Inc.[92] is another recent case in which a federal district court considered the issue of whether parties to a contract of marine insurance may contract out of the duty of uberrimae fidei. While the Court ultimately made no ruling under Second Circuit law as to whether parties could do so, the Court's reasoning was interesting.

Insurer XL Specialty filed a declaratory judgment action, seeking a declaration that three "ocean marine cargo" policies it issued to Prestige for 2014-2015, 2015-2016, and 2016-2017 were void ab initio. At issue was a theft from Prestige's warehouse over the July 4, 2017 weekend that resulted in a loss of over $1.2 million in stored goods.[93] XL Specialty's position was that in investigating that theft, "XL Specialty discovered that Prestige misrepresented and failed to disclose to XL Specialty material information when Prestige sought and applied for coverage under the [Prestige] Policies."[94]

XL Specialty moved for summary judgment as to its amended complaint, arguing that Prestige violated its duty of uberrimae fidei by failing to disclose three prior marine cargo losses.[95]

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[86] *Id*.
[87] *Id.* (emphasis added).
[88] *Id.* at 1378.
[89] *Id.* at 1374 n.10.
[90] Geico Marine Ins. Co. v. Shackleford, ___ F.3d ___, No. 18-12105, 2019 U.S. App. LEXIS 37228 at *8 (11th Cir. Dec. 17, 2019).
[91] *Id.* at *9.
[92] 2019 U.S. Dist. LEXIS 194707 (S.D.N.Y. Nov. 8, 2019).
[93] *Id.* at *27.
[94] *Id*.
[95] *Id.* at *30–31.

Prestige argued that maritime law was inapplicable and that XL Specialty knew of the prior losses and insurance claims.[96]

Preliminary to the uberrimae fidei issue, the Court considered whether the policies were maritime contracts, as to which maritime law could apply. After considering the Supreme Court's 2004 decision in *Norfolk Southern Railway Company v. Kirby*[97] and Second Circuit decisions that followed, the Court held that the primary or principal objective of the three marine open cargo policies was the establishment of marine insurance coverage, notwithstanding that there would be land-based storage of the cargoes after their ocean importation into the United States.[98] For that reason, the three policies were subject to maritime law.[99]

Prestige argued that notwithstanding the application of maritime law, the parties had contracted out of the duty of uberrimae fidei.[100] To support its argument, Prestige cited to the following language in the 2016 policy's "Fraud Notice" section:

> [t]he proposed insured affirms that the foregoing information is true and agrees that these applications [for insurance] shall constitute a part of any policy issued whether attached or not and that *any willful concealment or misrepresentation of a material fact or circumstances shall be grounds to rescind the insurance policy*.[101]

In analyzing the issue, the Court noted that the Second Circuit had not addressed whether parties can contract out of uberrimae fidei.[102] The Court compared the Eleventh Circuit's approach in *King*, on which district court in GEICO had relied, with the Ninth Circuit's approach in *New Hampshire Insurance Company v. C'Est Moi, Inc.*,[103] where the panel stated that contracting out of uberrimae fidei was an "open question" in the Ninth Circuit.[104] The Ninth Circuit commented that if it were possible to modify or eliminate an insured's uberrimae fidei duty, "it would certainly require very clear policy language, unequivocally disclosing a mutual intent to supersede the insured's common law obligation."[105] Because of uberrimae fidei's status as a well-entrenched doctrine in the Ninth Circuit, "only 'an unambiguous statement' in the policy, purporting to supersede the doctrine in express terms, would be sufficient to accomplish that purpose."[106]

XL Specialty ultimately did not rule on the issue of contracting out of uberrimae fidei because the language that purportedly accomplished that was inapposite and insufficient. "The Court need not resolve whether parties may contract out of the doctrine of uberrimae fidei, or what specificity and clarity of language would be required to do so, because the language on which Prestige relies cannot reasonably be construed — under any standard— as contracting out of that

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[96] *Id.* at *31.
[97] 543 U.S. 14, 25, 2004 AMC 2705 (2004) (Where the "principal objective of a contract is maritime commerce," the contract is maritime.)
[98] XL, *supra* n.92, 2019 U.S. Dist. LEXIS 194707 at *34–40.
[99] *Id.* at *41.
[100] *Id*.
[101] *Id.* (emphasis added).
[102] *Id.* at *42.
[103] 519 F.3d 937, 2008 AMC 931 (9th Cir. 2008).
[104] *Id.* at 938–39.
[105] *Id.* at 939.
[106] *Id.* (quoting T. Schoenbaum, *The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*, 29 J. Mar. L. & Com. 1, 13 (1998)).

duty."[107] The Court held that the above Fraud Notice was not part of the policies and that the warnings in that section were unrelated to marine cargo insurance at issue in the action.[108]

Even applying the stringent *New Hampshire* standard, the author expects that freedom of contract will prevail. Given that courts routinely construe insurance policies against insurers so as to maximize benefits to insureds, the author expects that future decisions could focus on insurers' power, as drafters, to control the language in policies—certainly as to form policies, if not as to manuscripted ones.

III. Time to Think About Maritime Cybersecurity

A. Introduction

According to a 2019 Safety Alert from the United States Coast Guard (USCG): "[W]ith engines that are controlled by mouse clicks, and growing reliance on electronic charting and navigation systems, protecting these systems with proper cybersecurity measures is as essential as controlling physical access to the ship or performing routine maintenance on traditional machinery.[109] To the USCG, "cybersecurity is not just an IT issue, but is rather a fundamental operational imperative in the 21st century maritime environment."[110] The shipping and insurance industries have recently taken concrete actions to educate stakeholders on cybersecurity and to implement protective practices and measures, or in the USCG's words, "implementing basic cyber hygiene measures."[111]

B. Recent Cyber Incidents

Maritime-related cyber crime is not new. But there have been some stark examples in recent years. Over a two-year period starting in June 2011, drug traffickers used hackers to infiltrate computer networks that controlled the movement and location of containers in the Port of Antwerp.[112] With that access, the criminals were able to dispatch truckers to pick up certain containers laden with cocaine and heroin, included among legitimate cargoes.[113] After discovery of the breaches and an installation of firewall, the criminals "counter-punched" by breaking into the premises and installing key-logging devices onto the computers.[114] That allowed the criminals to remotely access keystrokes and screen-grabs.[115] After investigating multiple instances of "missing" containers, Belgian and Dutch authorities broke-up the operation and made arrests and seizures of cash and property.[116]

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[107] XL, *supra* n.92, 2019 U.S. Dist. LEXIS 194707 at *43.
[108] *Id*.
[109] USCG Safety Alert 06-19, Cyber Incident Exposes Potential Vulnerabilities Onboard Commercial Vessels, https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/INV/Alerts/0619.pdf, accessed on Jan. 4, 2020.
[110] *Id*.
[111] *Id*.
[112] Tom Bateman, *Police warning after drug traffickers' cyber-attac*k, BBC News (Oct. 16, 2013), https://www.bbc.com/news/world-europe-24539417.
[113] *Id*.
[114] *Id*.
[115] *Id*.
[116] *Id*.

Unsurprisingly, cyber crime has come to the shores of the United States—literally. In June 2017, Maersk was one of about 7000 companies globally that had to deal with a malware attack from a worm called "NotPetya."[117] Maersk lost access to its systems that operate its shipping terminals, something that took two weeks to fix and cost the company as much as $300 million.[118] The attack shut down Maersk's APM Terminal at the Port of Los Angeles, the largest cargo terminal there, between June 27 and July 1, 2017, leaving at least one ship waiting at anchor.[119]

In September 2018, the Port of San Diego and others were the victims of a ransomware attack.[120] "Ransomware" is software encrypts the victim's files, as to which the criminal then demands a ransom, in exchange for access to the files.[121] A federal grand jury indicted two Iranian citizens for the scheme, as part of which, they demanded payment in bitcoin to unlock the frozen data.[122] "The malware limited access to permits and public documents for several days. Computers that handled administrative functions for the Harbor Police also were affected."[123] The Port of San Diego refused to pay and, fortunately, lost no data.[124] As a specially-designated "Strategic Port for the U.S. Department of Defense, the port had followed prior FBI guidance and had implemented strong security practices, including a backup system for electronic information. Other victims were not as prepared, as the hackers collected more than $6 million in ransom from some of the victims—there were 200 of them in 10 states.[125]

On May 24, 2019, the USCG released Marine Safety Information Bulletin (MSIB) number 04-19, entitled "Cyber Adversaries Targeting Commercial Vessels."[126] The MSIB warned that "[c]yber adversaries are attempting to gain sensitive information including the content of an official Notice of Arrival (NOA) using email addresses that pose as an official Port State Control (PSC) authority such as: **port @ pscgov.org**."[127] The MSIB also warned of the USCG's having received reports of malware from masters who had reported such activity to the Coast Guard National Response Center in accordance with Title 33 of the Code of Federal Regulations.[128]

On July 8, 2019, the USCG released Safety Alert number 06-19, entitled "Cyber Incident Exposes Potential Vulnerabilities Onboard Commercial."[129] According to the USCG, a deep draft

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[117] Jill Leovy, *Cyberattack cost Maersk as much as $300 million and disrupted operations for 2 weeks* (Aug. 17, 2017, 5:35 PM), https://www.latimes.com/business/la-fi-maersk-cyberattack-20170817-story.html.
[118] *Id*.
[119] *Id*.
[120] Mike Freeman, *2 Iranian men indicted for ransomware cyberattacks on U.S. targets, including Port of San Diego* (Nov. 28, 2018, 9:59 AM), https://www.sandiegouniontribune.com/business/technology/sd-fi-charges-port-of-san-diego-ransomware-20181128-story.html.
[121] https://www.merriam-webster.com/dictionary/ransomware (last visited Dec. 31, 2019).
[122] *Id*.
[123] *Id*.
[124] *Id*.
[125] *Id*.
[126] Cyber Adversaries Targeting Commercial Vessels, https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/MSIB/2019/MSIB_004_19.pdf (last visited Jan. 4, 2020).
[127] *Id.* (emphasis in original).
[128] *Id*. (citing 33 C.F.R. § 101.305 (reporting requirements as to suspicious activities, breaches of security, and of transportation security incidents)).
[129] Cyber Incident Exposes Potential Vulnerabilities Onboard Commercial Vessels, https://www.dco.uscg.mil/Portals/9/DCO%20Documents/5p/CG-5PC/INV/Alerts/0619.pdf (last visited Jan. 4, 2020).

vessel on an international voyage bound for the Port of New York and New Jersey experienced a malware attack that "significantly degraded the functionality of the onboard computer system," though the attack did not impact essential vessel controls.[130] USCG led an interagency team of cyber experts that "found that the vessel was operating without effective cybersecurity measures in place, exposing critical vessel control systems to significant vulnerabilities."[131]

Safety Alert 06-19 "strongly recommends" the vessel and facility owners, operators, and other responsible parties take the following basic measures to improve cybersecurity:

1. Segment Networks. "Flat" networks allow an adversary to easily maneuver to any system connected to that network. Segment your networks into "subnetworks" to make it harder for an adversary to gain access to essential systems and equipment.
2. Per-user Profiles & Passwords. Eliminate the use of generic log-in credentials for multiple personnel. Create network profiles for each employee. Require employees to enter a password and/or insert an ID card to log on to onboard equipment. Limit access/privileges to only those levels necessary to allow each user to do his or her job. Administrator accounts should be used sparingly and only when necessary.
3. Be Wary of External Media. This incident revealed that it is common practice for cargo data to be transferred at the pier, via USB drive. Those USB drives were routinely plugged directly into the ship's computers without prior scanning for malware. It is critical that any external media is scanned for malware on a standalone system before being plugged into any shipboard network. Never run executable media from an untrusted source.
4. Install Basic Antivirus Software. Basic cyber hygiene can stop incidents before they impact operations. Install and routinely update basic antivirus software.
5. Don't Forget to Patch. Patching is no small task, but it is the core of cyber hygiene.
6. Vulnerabilities impacting operating systems and applications are constantly changing – patching is critical to effective cybersecurity.[132]

C. Recent Legal Developments

In the area of public international law, the International Maritime Organization ("IMO") has been and remains at the forefront. The IMO "is the United Nations specialized agency with responsibility for the safety and security of shipping and the prevention of marine and atmospheric pollution by ships."[133] The Maritime Safety Committee (MSC) is among the committees and subcommittees of the IMO that carry out its work.

In the 2013 publication "IMO—What It Is," the IMO explained that "the MSC deals with all matters relating to the safety of shipping, as well as addressing maritime security issues and

[130] *Id*.
[131] *Id*.
[132] *Id*.
[133] Introduction to IMO, http://www.imo.org/en/About/Pages/Default.aspx, accessed on Jan. 2, 2020.

piracy and armed robbery against ships."[134] In the last three years, the MSC has increased its focus on cyber risks:

> Maritime cyber risk refers to a measure of the extent to which a technology asset could be threatened by a potential circumstance or event, which may result in shipping-related operational, safety or security failures as a consequence of information or systems being corrupted, lost or compromised.
>
> Cyber risk management means the process of identifying, analysing, assessing and communicating a cyber-related risk and accepting, avoiding, transferring or mitigating it to an acceptable level, considering costs and benefits of actions taken to stakeholders.[135]

The IMO's work as to maritime cyber risks is in line with its past work as to traditional maritime safety and security concerns. Following a number of accidents in the late 1980s, in 1989 the IMO adopted Guidelines on Management for the Safe Operation of Ships and for Pollution Prevention. "The objective was to ensure safety at sea, prevention of human injury or loss of life, and avoidance of damage to the environment, in particular, the marine environment, and to property."[136] Four years later, the IMO adopted the International Safety Management (ISM) Code, which became mandatory in 1998.[137]

The purpose of the ISM Code is to provide an international standard for the safe management and operation of ships and for pollution prevention.[138] "The Code establishes safety-management objectives and requires a safety management system (SMS) to be established by 'the Company', which is defined as the owner or any other organization or person, such as the manager or bareboat charterer, who has assumed responsibility for operating the ship and who, on assuming such responsibility, has agreed to take over all duties and responsibility imposed by the Code."[139]

To make the ISM Code mandatory, in 1994 the IMO's Assembly added the ISM Code to International Convention for the Safety of Life at Sea (SOLAS),[140] by adding Chapter IX, entitled "Management for the Safe Operation of Ships."[141] In the United States, Congress codified the ISM Code by statute and through implementing federal regulations.[142]

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[134] IMO—What It Is, http://www.imo.org/en/About/Documents/What%20it%20is%20Oct%202013_Web.pdf.

[135] http://www.imo.org/en/OurWork/Security/Guide_to_Maritime_Security/Pages/Cyber-security.aspx, accessed on Jan. 2, 2020.

[136] Development of the ISM Code, http://www.imo.org/en/OurWork/HumanElement/SafetyManagement/Pages/Default.aspx, accessed on Jan. 2, 2020.

[137] Id.

[138] ISM Code and Guidelines on Implementation of the ISM Code, http://www.imo.org/en/OurWork/HumanElement/SafetyManagement/Pages/ISMCode.aspx, accessed on Jan. 2, 2020.

[139] Id.

[140] International Convention for the Safety of Life at Sea (SOLAS), Nov. 1, 1974, [1979-1980], 32 U. S. T. 47, T. I. A. S. No. 9700.

[141] Antonio J. Rodriguez and Mary Campbell Hubbard, The International Safety Management (ISM) Code-A New Level of Uniformity, 73 Tul. L. Rev. 1585 at 1591; *see also* 33 C.F.R. § 96.120(b)(3).

[142] *See* 33 C.F.R. § 96.100 ("This subpart implements Chapter IX of the International Convention for the Safety of Life at Sea (SOLAS), 1974, International Management Code for the Safe Operation of Ships and for Pollution Prevention (International Safety Management (ISM) Code), as required by 46 U.S.C. Chapter 32.").

Under United States law, the ISM Code applies to a vessel on a foreign voyage or a foreign vessel departing from a place under jurisdiction of the United States, which vessel is a passenger vessel or that is at least 500 gross tons and is a tanker, freight vessel, bulk freight vessel, high speed freight vessel, or self-propelled mobile offshore drilling unit.[143] Each responsible person must submit to the Secretary of Homeland Security, through the United States Coast Guard, an SMS that describes how that person and all vessels of that person will comply with the ISM Code and its implementing regulations.[144] An SMS is "a structured and documented system enabling Company and vessel personnel to effectively implement the responsible person's safety and environmental protection policies."[145] Upon approval of an SMS, the vessel receives a Safety Management Certificate, which must be on board the vessel, along with a copy of a Document of Compliance, which evidences compliance with the ISM Code, and which documents the vessel must have as a condition to operate.[146]

In June 2017, the MSC adopted Resolution MSC.428(98) - Maritime Cyber Risk Management in Safety Management Systems.[147] "The resolution encourages administrations to ensure that cyber risks are appropriately addressed in existing safety management systems (as defined in the ISM Code) no later than the first annual verification of the company's Document of Compliance after 1 January 2021."[148] By that date, shipowners must incorporate cyber risk management into a vessel's SMS.[149] That is a significant industry development that will gather momentum throughout 2020, much as the IMO's regulations to cut sulfur oxide emissions did in 2019, before going into effect on 1 January 2020.

In July 2017, the IMO adopted the Guidelines on Maritime Cyber Risk Management (IMO Guidelines).[150] Where Resolution MSC.428(98) was a one-page document to alert and encourage the industry, "[t]he guidelines provide high-level recommendations on maritime cyber risk management to safeguard shipping from current and emerging cyber threats and vulnerabilities and include functional elements that support effective cyber risk management."[151] The IMO Guidelines contain a non-exhaustive list of vulnerable systems:

1. Bridge systems;
2. Cargo handling and management systems;
3. Propulsion and machinery management and power control systems;
4. Access control systems;
5. Passenger servicing and management systems;
6. Passenger facing public networks;

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[143] 46 U.S.C. § 3202(a)–(b).
[144] 46 U.S.C. § 3204(a).
[145] 33 C.F.R. § 96.120(b), 33 C.F.R. § 96.120(b).
[146] 46 U.S.C. § 3204(c).
[147] IMO Maritime cyber risk, http://www.imo.org/en/OurWork/Security/Guide_to_Maritime_Security/Documents/Resolution%20MSC.428(98).pdf (last visited Jan. 5, 2020).
[148] *Id*.
[149] *Id*.
[150] IMO Guidelines on Maritime Cyber Risk Management, MSC-FAL.1/Cir.3, http://www.imo.org/en/OurWork/Security/Guide_to_Maritime_Security/Documents/MSC-FAL.1-Circ.3%20-%20Guidelines%20On%20Maritime%20Cyber%20Risk%20Management%20(Secretariat).pdf.
[151] *Id*.

7. Administrative and crew welfare systems; and
8. Communication systems.[152]

The IMO instructs that the industry should pay attention to both information technology systems and operational technology systems.[153] The former's focus is the use of data as information, while the latter focuses on the use of data to control or monitor physical processes.[154]

D. Actions By the Private Shipping Industry Stakeholders

1. BIMCO's Cyber Guidelines

Among the resources the Cyber Guidelines list for additional guidance and standards are the Guidelines on Cyber Security Onboard Ships that the Baltic and International Maritime Council (BIMCO) and 20 shipping industry stakeholder organizations, including the International Group of Protection & Indemnity Clubs (International Group), the International Union of Marine Insurance, and International Association of Independent Tanker Owners. BIMCO and its industry partners published the first version of the guidelines (BIMCO Guidelines) in February 2016 and the second version in July 2017. The most recent version of the BIMCO Guidelines is from December 2018.[155]

The BIMCO Guidelines agree with the IMO that the industry should pay attention to information (IT) and operational technology (OT) systems. The BIMCO Guidelines distinguish between cyber security, "which is concerned with the protection of IT, OT, information and data from unauthorised access," and cyber safety, which "covers the risks from the loss of availability or integrity of safety critical data and OT.[156] The BIMCO Guidelines focus on the following areas:

1. Identifying threats and understanding the cyber security threats to the ship;
2. Identifying vulnerabilities within the ship's cyber security system;
3. Assessing risk exposure and the likelihood of being exploited by external threats;
4. Developing protection and detection measures in order to minimize impact;
5. Establishing contingency plans to reduce the threat's impacts; and
6. Responding appropriately to and recovering from cyber security incidents.[157]

"The commitment of senior management to cyber risk management is a central assumption" underlying the BIMCO Guidelines.[158] Without disclosing the names of the affected persons, there are numerous helpful examples of incidents in the BIMCO Guidelines that can educate or sensitize the industry and its senior managers.[159] In one case, a virus in a new vessel's Electronic Chart Display and Information System prevented the vessel from sailing. The delay and the repair costs were in the hundreds of thousands of dollars.[160] In another case, two ship agents in

[152] *Id*.
[153] *Id*.
[154] *Id*.
[155] BIMCO, *Industry Publishes Improved Cyber Guidelines*, https://www.bimco.org/news/priority-news/20181207-industry-publishes-improved-cyber-guidelines (last visited Dec. 31, 2019).
[156] *Id*.
[157] *Id*.
[158] *Id*.
[159] *Id*.
[160] *Id*.

different ports, and at different times, unwittingly sent e-mail attachments with ransomware to an unsuspecting shipowner, which decided to pay the ransom.[161] Finally, during a bunker survey, the surveyor requested permission to access an onboard computer to print documents for his signature. The surveyor inserted a USB flash drive that introduced malware onto the ship's administrative network that personnel subsequently discovered, while experiencing a "computer issue."[162]

2. P&I Cover for Cyber Risks

With the International Group's participation with the BIMCO Guidelines, cybersecurity is unquestionably a priority for the International Group's membership, which insures the P&I liability of 90 percent of the world's tonnage.[163] But P&I coverage for cyber risks is a more nuanced and fact-intensive issue.

This sub-section of the paper will survey the rules and cyber-specific publications of three P&I clubs the author chose at random: The Japan Ship Owners' Mutual Protection & Indemnity Association (The Japan P&I Club), The Standard Club Ltd (Standard Club) and The United Kingdom Mutual Steam Ship Assurance Association (Europe) Limited (UK P&I Club). Those and other P&I clubs are communicating with their members about cybersecurity. As to coverage, the unifying theme is that the rules of those three clubs do not expressly exclude cyber incidents. But the rules generally exclude war risks and acts of terrorism. And so depending on the facts of a given loss, the clubs may have to investigate the underlying facts and circumstances to determine whether coverage exists for such loss, as with the example of an apparent terrorist incident as to which no one has claimed responsibility or for which there is no discernible reason.

a. The Japan P&I Club

Over the last two years, The Japan P&I Club has published three circulars to inform and update its members on cyber risks and cyber security. In the first circular, from November 2017, the Club "introduces" its members to cyber risks and states: "When the cyber attack would not fall under 'war' or 'act of terrorism' under the rule 35, a member's normal P&I cover will respond."[164] The second circular, from February 2018, addresses international regulations and guidance on cyber security, including the BIMCO Guidelines, which the Club states are "the most comprehensive guidance for the shipping industry."[165] The second circular also referred the Club's members to the IMO's work and its Cyber Guidelines.[166]

The third circular, from March 2018, contains two hypothetical cyber incidents and commentary from the Club.[167] The first hypothetical concerns a vessel's running aground because of an onboard computer failure.[168] An uninstalled software patch would have prevented the failure

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[161] *Id*.
[162] *Id*.
[163] About the International Group, https://www.igpandi.org/about (last visited on Jan. 5, 2020).
[164] The Japan P&I Club, Cyber Risks and Cyber Security (No. 1), No. 929-17/11/10, https://www.piclub.or.jp/wp-content/uploads/2017/11/No.929_Cyber_Risks_and_Cyber_Security_(No.1).pdf (last visited on Jan. 5, 2020).
[165] The Japan P&I Club, Cyber Risks and Cyber Security (No. 2), No. 944-18/2/20, https://www.piclub.or.jp/wp-content/uploads/2018/02/No.944_Cyber_Risks_and_Cyber_Security_(No.2).pdf (last visited on Jan. 5, 2020).
[166] *Id*.
[167] The Japan P&I Club, Cyber Risks and Cyber Security (No. 3), No. 924-18/3/15, https://www.piclub.or.jp/wp-content/uploads/2018/03/No.949_Cyber_Risks_and_Cyber_Security_(No.3).pdf (last visited on Jan. 5, 2020).
[168] *Id*.

and, therefore, the grounding and the resulting loss of half the vessel's cargo—recalling the USCG's suggestion to keep software up to date.[169] The circular considers whether the non-updated software rendered the vessel unseaworthy and whether the owner could argue that it exercised due diligence to make the vessel seaworthy given the failure to update the software.[170] Nevertheless, the circular concludes that P&I cover *should* respond in the above circumstances.[171]

In May 2018, The Japan P&I Club published a 42 -page Loss Prevention Bulletin entitled "Cyber risk and Cyber security countermeasures."[172] The Bulletin states that while the Club's Rules do not specifically address cyber risks, the Club would address then in the ordinary course under the Rules: "When the cyber attack would not fall under the definition of 'war' or 'act of terrorism' under rule 35, a member will be subject to cover along with his normal P&I insurance."[173]

b. The Standard Club

In the March 2017 issue of the Club's "Standard Bulletin," the Club outlined how its P&I cover works as to shipboard cyber risks.[174] Similar to The Japan P&I Club, the Standard Club's Rules contain no express cyber exclusion. "As such, a member's normal P&I cover will continue to respond to P&I liabilities arising out of a cyber attack so long as the attack in question does not constitute 'terrorism', 'a hostile act by or against a belligerent power' or another war risk excluded under rule 4.3 of the club's rules."[175]

To determine whether a cyber attack is an act of terrorism, the Club would look to the motivation behind the act.[176] In the absence of a public cause behind such an act, there would likely be no cover.[177] The Club's board has the power to make that determination, which would be "final" as between the Club and member.[178]

c. The UK P&I Club

In March 2018, the Club published a "Q&A on Cyber Risks and P&I Cover."[179] As is the case with The Japan P&I Club and the Standard Club, the Rules of the UK P&I contain no exclusion for cyber risks. "As a general rule, P&I liabilities – which are set out in Rule 2 of the UK Club Rules – are not subject to any exclusion of cyber risks.[180] But the risk must still arise out

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[169] *Id*.
[170] *Id*.
[171] *Id*.
[172] The Japan P&I Club, P&I Loss Prevention Bulletin, Cyber risks and cyber security countermeasures, Vol. 42, https://www.piclub.or.jp/wp-content/uploads/2018/05/Loss-Prevention-Bulletin-Vol.42-Full.pdf (last visited on Jan. 5, 2020).
[173] *Id*.
[174] Rupert Banks, *Cyber risks and P&I insurance implications* (Mar. 2017), https://www.standard-club.com/media/2533601/standard-bulletin-march-2017.pdf (last visited Jan. 5, 2020).
[175] *Id*.
[176] *Id*.
[177] *Id*.
[178] *Id*.
[179] The UK P&I Club, Cyber risks and P&I Insurance, https://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/2018/Brochure/Cyber_Risks_and_PandI_Insurance.pdf (last visited Jan. 5. 2020).
[180] *Id*.

of the operation of the ship and, according to the Q&A, the paying of money to ransomware hackers to regain access to data or systems would not be a covered risk.[181]

The exclusion for P&I war risks, including terrorism, could mean that there is no cover for a cyber attack.[182] Again, the actor's motive will be determinative.[183] "Terrorist acts are generally regarded as those aiming to kill, maim or destroy indiscriminately for a political, religious or ideological cause."[184] There would be no cover for such act, but there likely would be, subject to the rules, as to an act of commercial sabotage or an act of a disgruntled individual.[185]

Notwithstanding the above, the Club's Q&A discusses an interesting conundrum: A Club member could also be a member of the UK War Risks Club, such that all else being equal, the member could have coverage in case of a cyber attack that is excluded as a war risk or act of terrorism under the Club's rules. But "[t]he UK War Risks Club excludes cover for any losses, liabilities, costs or expenses directly or indirectly caused by or contributed to by or arising from the use or operation, as a means for inflicting harm, *of any computer virus*."[186] There would, therefore, be no cover for such a loss under either of the member's two club covers.[187] But there is a "giveback" in 2018, in that the computer virus exclusion would only apply after claims exceed $50 million for the 2018 policy year.[188]

IV. Conclusion

Traditional vessel-related risks have no gone away. In the week leading up to this paper's submission, acts of piracy have resulted in multiple kidnappings and deaths.[189] And a mooring accident in Denmark led to an 8000-gallon oil spill.[190] Vessel owners and operators, their insurers, and, the author's favorite, *their lawyers*, must continue to keep up to date with industry and legal developments. Technology has proven to be a double-edged sword. Real-time, on-demand "everything" has become a way of life. But the World War II admonition that "loose lips sink ships" has given way to "loose clicks sink ships."[191] Cybersecurity is not the next frontier. It is the current challenge.

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[181] *Id*.
[182] *Id*.
[183] *Id*.
[184] *Id*.
[185] *Id*.
[186] *Id*.
[187] *Id*.
[188] *Id*.
[189] The Maritime Executive, *Four Dead, Three Kidnapped in Nigerian Pirate Attack* (Jan. 5, 2020, 8:07 AM), https://www.maritime-executive.com/article/four-dead-three-kidnapped-in-nigerian-pirate-attack; The Maritime Executive, *Pirates Kidnap Eight from Greek Product Tanker off Cameroon* (Dec. 31, 2019, 7:00 AM), https://www.maritime-executive.com/article/pirates-kidnap-eight-from-greek-product-tanker-off-cameroon.
[190] The Maritime Executive, *Mooring Accident Leads to Spill Off Danish Petroleum Terminal* (Jan. 5, 2020, 9:33 AM), https://www.maritime-executive.com/article/mooring-accident-leads-to-spill-off-danish-petroleum-terminal.
[191] Safety4Sea, *Loose clicks sink ships* (Sep. 18, 2017), https://safety4sea.com/loose-clicks-sink-ships/.