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INTRODUCTION
MARINE PROTECTION AND INDEMNITY POLICY
ANNOTATIONS PROJECT

In my view one of the most important functions that a bar association performs is to keep its members current on various aspects of the law and provide assistance and guidance to practitioners in ways that might not be readily available elsewhere. With the publication of this Marine Protection and Indemnity Policy Annotations Project, the Maritime Law Association’s Committee on Marine Insurance and General Average and Subcommittee on Hull and P & I Insurance Coverage have made a truly significant contribution to the aims and goals of this Association and have provided a work of great benefit to its members.

As editor Simon Harter has indicated in his Editor’s Note, the project was conceived by Edward F. (Bret) (LeBreton and James Sutterfield, both of New Orleans, who first discussed the project at a fall meeting of the Association in 1991. It is the successor of a joint project of the ABA and the MLA which resulted in the publication of P & I Annotations in 1982 with a later addenda in 1985. Initially the current project was under the supervision of Bret LeBreton, a former Chair of the Hull and P & I Subcommittee and of the Marine Insurance and General Average Committee. He began the task of assembling the extensive team of contributors and giving direction to the project. Eventually the leadership of the project was taken over by Simon Harter, the immediate past Chair of the Hull and P & I Insurance Subcommittee, who is the editor of this publication. It is mainly because of his herculean efforts and the imposing tasks of bringing this project to completion has been done so successfully.

Simon and Bret have not only provided their leadership and organizational abilities in the preparation of this publication, but they have written chapters as well. In addition, twenty-seven other members of the MLA have contributed to this work. The end product is a publication that collects in one volume the annotations to the primary provisions of the most frequently utilized U.S. marine P & I policy form. In short, the publication is a unique and extremely useful tool for any maritime practitioner dealing with P & I insurance matters.

The Association is grateful for all the time and effort put into the project by Simon Harter, Bret LeBreton, and the twenty-seven other members who authored portions of the work. They should be proud in the knowledge that they have performed a valuable and lasting service to the Association.

William R. Dorsey, III
President
The Maritime Law Association of the United States
June 2001
EDITOR’S NOTE

This project was conceived by Edward F. (“Bret”) LeBreton III and James R. Sutterfield, both of New Orleans, and has been carried out under the auspices of the Subcommittee on Marine P&I Insurance (now the Subcommittee on Hull and P&I Insurance) of the Committee on Marine Insurance and General Average of the Maritime Law Association of the United States. As the initial project editor and in successive roles as Chair of the Hull and P&I Subcommittee and of the Marine Insurance and General Average Committee, Bret LeBreton was a major force in assembling the team of contributors to this project and starting the ball rolling.

The challenging task of bringing the project to completion was very ably and enthusiastically overseen by Jean E. Knudsen of New York, the current Chair of the Marine Insurance and General Average Committee, who in turn received strong support from Howard M. McCormack of New York, Immediate Past President of the MLA, and William R. Dorsey, III of Baltimore, the Association’s current President.

Particular appreciation is owed, of course, to the contributing authors who gave very generously of their time and expertise in preparing the following chapters.

Since U.S. commercial marine insurance coverage is now largely written on the SP-23 form, each author has used the corresponding section of the form as the basis for the particular chapter. We have also included a number of special topics of added relevance to the marine insurance attorney. To those readers who are relatively new to this subject, we recommend that you begin at the end by reading the excellent comparison of the SP-23 and SP-38 forms by F. Ty Edmonson of Boston, which provides a clear and comprehensive overview of the nature and scope of U.S. marine P&I coverage.

Finally, although much effort has been made to provide current information and discussion, the area of P&I insurance is actively litigated and, thus, constantly evolving, and we therefore suggest that this work be treated as but one component of your research and analysis.

SIMON HARTER of New York
Editor and Immediate Past Chair,
Subcommittee on Hull and P&I Insurance
Chapter 1

THE INSURING CLAUSE

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 set forth:

The Insuring Clause is the foundation for all coverage under the SP-23 form. While the balance of policy terms may add, subtract or qualify specific aspects of the coverage, any liability, risk, event or happening must meet the following three fundamental requirements in order to be covered.

Any analysis of coverage must begin with the determination of whether the liability for which indemnity is sought was incurred by the Assured in its capacity “as owner” of a named vessel. Perhaps no other aspect of the SP-23 form is as crucial to the determination of coverage than these two words of limitation, and it is for this reason that the phrase “as owner” is sometimes deleted by agreement of the parties in order to broaden the scope of coverage provided under the policy form.

A second, related requirement is that the particular vessel in connection with which coverage is sought must be named or otherwise clearly identified in the policy. While the SP-23 allows for the insertion of a vessel name at the top of the form, a “Schedule of Vessels” is often attached to the policy listing each vessel included within the scope of the coverage. For this reason, in common parlance the covered vessels are referred to as the “scheduled vessels”.

Finally, coverage under the SP-23 form is intended to be provided on an indemnity basis, as evidenced by the condition that the Assurer will “make good” for any loss, damage or expense which the Assured shall “have become liable to pay and shall pay” on account of a covered liability, risk, event or happening.

I. “AS OWNER” LIMITATION


The Trial Judge was also right in holding that the P&I policy did not cover this claim because Chevron as an additional assured did not become liable “as
owner of” the vessel. The fact findings – which no one can, or does, challenge – are specific. The vessel and her crew were, on the one hand, absolved from all wrong or unseaworthiness. Chevron, on the other hand, was found at fault for the manner in which the crane was operated. The vessel offered nothing further than a condition or locale for the accident.

The must be at least some causal operational relation between the vessel and the resulting injury. The line may be a wavy one between coverage and non-coverage, especially with industrial complications in these ambiguous amphibious operations plus those arising from the personification of the vessel as an actor in a suit in rem. But where injury is done through nonvessel operations, the vessel must be more than the inert locale of the injury. Nothing more occurred here, for it was Chevron’s actions as a platform operator or as a crane operator that caused the harm, and that does not make it a liability of a shipowner. *Id.* at 584 (footnotes omitted).

*Gryar v. Odeco, Inc.*, 719 F.2d 112 (5th Cir. 1983):

Two separate, independent acts of negligence constituted proximate causes of Gryar’s injuries. Because Odeco’s liability was predicated upon its acts as owner of the drilling rig and as Gryar’s employer, and not on any acts as owner of the vessel, Odeco is not covered by the vessel’s P&I insurance, which is limited to owners of the vessel. *Id.* at 116.

*Stockstill v. Petty Ray Geophysical*, 888 F.2d 1493 (5th Cir. 1989):

Simply showing that the vessel caused the accident does not end our inquiry. Geosource must also show that its liability flows from its status as vessel owner. Geosource operated the BB-300 as a bareboat or demise charterer and, therefore, may be considered a vessel “owner” for the purposes of P&I coverage. *Id.* at 1496 (citations omitted).


The only connection a time charterer typically has with the vessel it hires is the right to direct the vessel’s movements. We find persuasive the reasoning of the court below and that of the court in [*Texas E. Transmission Corp. v. Garber Bros.* 547 F.Supp. 821 (E.D. La. 1982)] that when the time charterer exercises this right negligently, it has committed negligence “as owner” of the vessel within the meaning of that phrase in a marine insurance policy. This type of negligent conduct, it seems to us, has the requisite “causal operational relationship” to the vessel, even though the time charterer wholly lacks the authority to direct the minutiae of the vessel’s day-to-day operations. “In this action, Chevron’s contributions to Randall’s death, ordering the vessel to encounter dangerous seas, clearly is related to the vessel.” *Randall [v. Chevron U.S.A.]*, 788 F. Supp. 1398, 1403 (E.D. La.1992)]. The district court correctly
ordered the underwriters to provide insurance coverage to Chevron. *Id.* at 909.


The P&I Underwriters urge, however, that coverage requires some “causal operational relation” between the vessel and the injury. This accident, they contend, bore no connection to the vessel: it occurred on land, and before the men joined the ship ... St. Paul disagrees. It urges that where, as here, one is both an employer of seamen and the owner of vessels, protection and indemnity insurance covers all seamen’s claims regardless of where the injuries occur. Satisfaction of a seaman’s course and scope [of employment], according to St. Paul, establishes the requisite vessel connection .... Inquiries regarding course of employment and P&I coverage may not be identical in all cases; but the insurers here may not deny P&I coverage to Jones Act seamen, working in the service of their covered vessel and arguably injured by the negligence of a fellow seaman. In this case, where the injured men were crewmembers on their employer’s ship, the distinction between Theriot, Inc. as “employer” and as “vessel-owner” is a distinction without a difference. Vessel fault, in this situation, means fault of the vessel’s crew within the performance of their service-related duties. The P&I policies apply. *Id.* at 2459, 2461.


One of the P&I policy’s important features is that it covers only liability incurred as a vessel owner. “It is not a general liability coverage, and when the insured vessel owner’s conduct in some non-vessel-related operation is the cause of the injury ... the loss is not covered since the owner’s liability was not incurred as a vessel owner. 3 *Matthew Bender, Marine Insurance* § 44.04[4], p. 44-14... Treasure Chest maintains that since plaintiffs were employed as crew members on its casino boat, all of their claims can be characterized against Treasure Chest as of a vessel owner. This characterization fails to distinguish between Treasure Chest’s relationship with its employees as a vessel owner and as an employer. Fifth Circuit precedent clearly shows that even though a party may be an insured under a P&I policy, if its liability arises out of an employment relationship with the plaintiff and conduct unrelated to the operation of the insured vessel, there is no coverage under the policy. *Id.* at 1304 (citations omitted).

II. **DELETION OF “AS OWNER”**

*Helaire v. Mobil Oil Co.*, 709 F.2d 1031, 1984 A.M.C. 820 (5th Cir. 1983):

Moreover, even assuming that Mobil’s liability may have arisen from its status as platform operator, indemnification was still properly awarded. The indemnity policy which named Mobil as assured was a standard fleet insurance
policy providing assured’s coverage “against liabilities ... in respect of the vessel”, with one significant deletion. The words “as owner of the vessel named herein” were deleted from this policy. The district court found that this deletion was intended to provide coverage for Mobil regardless of the capacity in which Mobil was sued. Certainly this finding was not clearly erroneous. The policy in contention here makes no distinction between coverage for unloading activities on the one hand and platform activities on the other. Consequently, the court’s indemnification order is proper regardless of whether Mobil incurred liability as a “vessel owner” or as a “platform operator”. *Id.* at 1042 (footnote omitted).

**Baza v. Chevron Oil Service Co.**, 1997 A.M.C. 216 (E.D. La. 1996):

The Court therefore holds, as a matter of law, that the “as owner” clause is deleted both when Chevron has chartered a vessel directly from Gauthier and when it has chartered a vessel through a contractor or subcontractor. Accordingly, Chevron is entitled to coverage by the Underwriters whether it is found to be liable as charterer or as a platform owner. *See Helaire v. Mobil Oil Co.*, 1984 A.M.C. 820, 836-7, 709 F.2d 1031, 1042 (5th Cir. 1983) (deleting “as owner” clause removes any distinction between coverage for unloading activities and for platform injuries). In either case, this coverage extends to “personal injury arising in connection with the handling of cargo of the vessel,” Form SP-23 at ¶ 1, and clearly applies to the facts of this case. Because the Court finds that the Underwriters’ obligation does not depend on whether Chevron was liable in its capacity as time charterer or vessel owner, the analysis in *Hodgen v. Forest Oil Corp.*, 1997 A.M.C. 140 (5th Cir. 1996) need not be applied to this case. *Baza, supra* at 220, 220 n.1.

**Gaspard v. Offshore Crane and Equipment, Inc.**, 106 F.3d 1232, 1997 A.M.C. 1858 (5th Cir. 1997):

If the policy had retained the “as owner” language, Anglo-American would have no responsibility to provide coverage for injuries caused by Chevron’s actions as platform operator .... The *Lanasse* court’s reasoning turned on the “as owner” clause in the policy involved in that case. As *Helaire* demonstrates, *Lanasse*’s “causal operational relation” test does not necessarily apply when the parties omit this clause from a protection and indemnity policy. When Chevron went out of its way to omit the clause, and when Anglo-American consented to including Chevron as an additional insured without limiting coverage to Chevron’s liabilities sustained “as owner” of the *Long Island*, the parties created a protection and indemnity policy that could be interpreted to extend coverage to Chevron’s vessel-related negligence committed as platform operator. *Id.* at 1237, 1238.

**III. NAMED, OR “SCHEDULED” VESSELS**

In short, DeFelice’s policy covers McDermott’s liability only “as respects” the “covered” vessel – here, the Miriam M. DeFelice. The Oceana 91 was not listed as a “covered vessel” under that policy. That is, the insurance policy does not purport to cover McDermott’s liability for acts of negligence committed *qua* barge-owner, rather than *qua* charterer. *Id.* at 242.

**City and County of San Francisco v. Underwriters at Lloyd’s, London**, 1998 A.M.C. 1617 (9th Cir. 1998):

We held in *Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d 506 (9th Cir. 1984), in construing a similar provision of a marine insurance policy, that we should follow a judicially fashioned federal admiralty rule for maritime P&I policies. That rule, which we summarized in *Bohemia*, and which we noted did not differ significantly from that applied under California state law, is that P&I provisions indemnify vessel owners only if their liability arises out of their ownership of an insured vessel. *See id.* at 508-10. The district court followed that rule in this case and held that the policy did not cover liability for this accident because it arose out of the operation of Navy vessels that were not insured by the CCSF policy with Hunt. *City and County supra* at 1618.

**IV. INDEMNITY: “LIABLE TO PAY AND SHALL PAY”**


Approximately 5,000 former employees of Prudential Lines sued for asbestos-related injuries. The bankruptcy trustees for Prudential Lines sued its P&I Club after reaching an arrangement with the claimants under which the trustee paid each claimant $300,000 which the claimant then loaned back to the trustee on a non-recourse basis so the trustee could pay the next claimant. This recycling continued until the trustees owed $13 million to the claimants under the non-recourse loans, which the bankruptcy court ordered the P&I club to repay. The Second Circuit affirmed the district court’s finding that this procedure did not satisfy the P&I provision’s “pay first” rule.

*In Exxon Corp. v. St. Paul Fire & Marine Ins. Co.*, 129 F.3d 781, 1998 A.M.C. 913 (5th Cir. 1997), Exxon and St. Paul disputed the scope of coverage for claims arising out
of personal injuries sustained by five people who inhaled fumes aboard a barge transporting sludge. The Fifth Circuit affirmed the district court’s findings that under the wording of the policy, Exxon was not required to have paid the actual settlements in order to claim indemnity under the policy, that the policy wording was not sufficiently clear to allow the underwriter to deduct the costs of defense from the policy limits, and that because the policy did not contain a definition of “occurrence”, the fact that the injuries were separate and occurred over a period of time warranted the district court’s finding of five separate occurrences under the policy.


The narrow question presented is whether, five years after the close of the bankruptcy of a member, a maritime protection and indemnity association with a “pay first” clause in its contract is liable to seamen in direct actions. We conclude that the “pay first” clause in this contract may not be set aside and that it defeats plaintiffs’ cause of action. The pay first clause is a clear provision of the contact and, absent more compelling facts than are presented here, it must be enforced. __Id__ at 6.

In __Hughes v. Prudential Lines, Inc__., 1993 A.M.C. 2179 (Pa. Super. Ct. 1993), __appeal denied__, 535 Pa. 647, 633 A.2d 152 (1993), the insurer was not obligated to pay until the insured had actually incurred a loss (i.e., made payment to the injured party). In this instance, the defendant insured failed to pay the injured plaintiff. The court strictly interpreted the indemnity policy's prepayment clause, explaining that the plaintiff had no third party beneficiary rights under the contract and therefore could not assail the insurer for alternative relief.

In __Sharp v. Johnson Bros. Corp__., 917 F.2d 885, 1991 A.M.C. 894 (5th Cir. 1991), __cert. denied__, 508 U.S. 907 (1993), the primary insurer's P & I policy required it to reimburse the assured for defense costs it "shall pay." In exonerating the primary insurer, the district court determined that the assured paid no defense costs because such costs were paid by the excess insurer. On appeal, however, it was held that when the excess insurer made payments for the assured after the primary insurer denied coverage, the policy subrogated the excess insurer to the assured's rights, allowing it to recover the defense costs it paid.

__Weeks v. Beryl Shipping, Inc__., 845 F.2d 304 (11th Cir. 1988): Under an indemnity policy ... the insurer is liable only for “loss actually paid” the injured party by the insured. __DeCosta v. General Guaranty Ins. Co__., 226 So.2d 104, 105 (Fla. 1969) (emphasis added). Thus, actual payment by the insured is a condition precedent to any obligation on the part of the insurer. __Id__ at 306.
V. GENERAL REFERENCES

Leslie J. Buglass, Marine Insurance and General Average in the United States 410, 502-505 (3d ed. 1991);


Alex L. Parks, 2 The Law and Practice of Marine Insurance and Average 906-914 (1987);

Chapter 2

LOSS OF LIFE, INJURY AND ILLNESS

(1) Liability for loss of life of, or personal injury to, or illness of, any person, excluding, however, unless otherwise agreed by endorsement hereon, liability under any Compensation Act to any employee of the Assured (other than a seaman) or in the case of death to his beneficiaries or others.

Protection hereunder for loss of life or personal injury arising in connection with the handling of cargo of the vessel named herein shall commence from the time of receipt by the Assured of the cargo on dock or wharf or on craft alongside the said vessel for loading thereon and shall continue until delivery thereof from dock or wharf of discharge or until discharge from the said vessel on to another vessel or craft.

(2) Liability for hospital, medical or other expenses necessarily and reasonably incurred in respect of loss of life of, personal injury to, or illness of any member of the crew of the vessel named herein or any other person. Liability hereunder shall also include burial expenses not exceeding Two Hundred ($200) Dollars, when necessarily and reasonably incurred by the Assured for the burial of any seaman of said vessel.

(3) Liability for repatriation expenses of any member of the crew of the vessel named herein, necessarily and reasonably incurred, under statutory obligation, excepting such expenses as arise out of or ensue from the termination of any agreement in accordance with the terms thereof, or by mutual consent, or by sale of the said vessel, or by other act of the Assured. Wages shall be included in such expenses when payable under statutory obligation, during unemployment due to the wreck or loss of the said vessel.
COVERAGE IN GENERAL

Fleet owner assigned one of its permanent crewmembers to lash together two Navy barges "borrowed" for the purpose of a fireworks display, and when crewmember was injured, sought coverage under its fleet P & I policy; held even though crewmember could still sue owner under the Jones Act, owner was not covered by policy for injury occurring on non-listed vessel. City and County of San Francisco v. Underwriters at Lloyds, 141 F.3d 1371, 1998 A.M.C. 1617 (9th Cir. 1998).

Oil platform worker was injured while being lowered in a personnel basket from the oil platform to the deck of a vessel, and claim was made for coverage under vessel's P & I policy; held policy providing indemnity "against the liabilities of the assured ... in respect to the vessel" does not cover accidents in which the vessel had no part, and no coverage was available since jury found vessel was not at fault. Smith v. Tenneco Oil Co., Inc., 803 F.2d 1386, 1987 A.M.C. 1681 (5th Cir. 1986).

Oil platform worker filed suit after being struck by an empty personnel basket being lowered to the deck of a service vessel; platform vessel owner was subsequently dismissed from the case and then sought to recover defense costs under the vessel charterer's P & I policy; held, owner was entitled to a defense under the indemnity clause of the vessel charter and the blanket additional assured provision in the charterer's policy. Clement v. Marathon Oil Co., 724 F. Supp. 431 (E.D. La. 1989).

After tug charterer's employee was injured during cargo operations on barge, the employer's general liability insurer settled the employee's claim and then sought indemnity under separate policy covering employer for charterer's legal liabilities; held, coverage under Form SP 23, which was incorporated into the charterer's legal liability policy, extended to cargo handling operations on both the tug and barge. Cigna Ins. Co. v. Anglo American Ins. Co., Ltd, 1997 WL 729076, 1997 A.M.C. 2913 (D. Alaska 1997).

Tug deck hand was injured by dynamite explosion while working as a pile-driver on attached barge during dredging operation; held, tug owner's P & I policy did not cover employee's injury because the policy did not assure against liability for injuries to employees engaged in operations "wholly disassociated" from the operation of the tug. Employers Mutual Liability Ins. Co. of Wisconsin v. Aetna Ins. Co., 254 F.Supp. 263 (E.D. Mich, 1966).

Tug owner's P & I policy covered injury to rig employee sustained while removing cargo from barge, despite clause excluding damages as a result of towing, because assisting in the unloading of the barge was an integral part of the tug's operation and such assistance was part of the duties of the crewmembers. Upper Columbia River Towing Co. v. Glens Falls Ins. Co., 179 F. Supp. 705, 1960 A.M.C. 389 (D. Ore. 1959).

Marine policy provided liability coverage for "damages for all loss of life[and] bodily injury" in connection with private pleasure use of yacht, but excluded liability between or among members of the assured's family; held, state statute voiding exclusions of intra-family claims applies to ocean marine insurance, and claim of assured's father for
Employee on gaming casino boat sued employer for sexual discrimination, sexual harassment and infliction of emotional distress; on motion for summary judgment by employer's insurer, held, a P & I policy does not cover non-maritime claims because such claims are unrelated to the employer's role as vessel owner, but the policy will cover maritime claims for emotional distress under the Jones Act and claims for unseaworthiness and maintenance and cure, Plaintiff stated viable claim under the Jones Act and for unseaworthiness due to an unfit crew. *Williams v. Treasure Chest Casino, L.C.C.*, 1998 WL 42586, 1998 A.M.C. 1300 (E.D. La, 1998).


P & I insurer disputed coverage for liability to claimant struck by bullet fired on shore by assured's employee, held, policy only covered liabilities arising from losses suffered by assured in its capacity as owner, and even if assured was liable under principles of respondeat superior, there was no causal relation between vessel's operation or ownership and the employee's negligent act. *American Motorists Ins. Co. v. American Employers Ins. Co.*, 447 F. Supp. 1314, 1978 A.M.C. 1467, 1474 (W.D. La. 1978), remanded, 600 F.2d 15 (5th Cir, 1979), aff'd by opinion after remand, 608 F.2d 624 (1979).

Crewmembers were injured in a highway accident sixty miles from the vessel while being transported by van to the vessel; held vessel owner's liability for resulting personal injury claims was within coverage of P & I policy. *St. Paul Ins. Co. v. American Fidelity Ins. Co.*, 1996 WL 650128,1996 A.M.C. 2458 (E.D. La. 1996), aff'd, 105 F.3d 654 (5th Cir. 1996).

Employee on assured's seafood processing boat drowned, and P & I coverage for the wrongful death claim was disputed on the basis decedent was a “processor” rather than a member of the crew; held claim was outside coverage that was limited to crewmembers, but insurer owed (and breached) its duty to the assured in the first instance to defend complaint alleging crew member status. *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 729 F. Supp. 721 (W.D. Wash. 1989), aff'd, 927 F.2d 459, 1991 A.M. C.3000 (9th Cir. 1991).

Barge owner's employee was injured during pile loading operation, and excess marine insurer denied coverage on the basis of an exclusion of the assured's liabilities to "members of the crews of any vessel owned or operated by the assured;" held, as defined in *McDermott Int'l v. Wilander*, 498 U.S. 337 (1991), a crew member is anyone who performs the work of a vessel and contributes to the vessel's function or the accomplishment of its
Two Venezuelan trainees died and a third was injured in sinking of jackup vessel, and insurer denied coverage on the basis of an exclusion of liability for bodily injuries to "crewmembers;" held, even if insurer had not waived its right to assert exclusion, the term "crewmember" was not defined in the policy and is ambiguous, and must be construed against the insurer. In re Cudd Pressure Control, Inc., as owner and operator M/V HOUMAS, 2000 U.S. Dist. LEXIS 4678 (E.D. La. 2000).

Seaman working as divers' tender on service vessel slipped on diesel oil on dock and was injured, and assured sought liability coverage under policy endorsement for injury which "occurs while diving;" held, that because exclusions and ambiguities are strictly construed against the insurer, the endorsement is deemed to include the entire diving operation in and out of the water. K elloch v. S&H Subwater Salvage, Inc., 397 F. Supp. 738, 1974 A.M.C. 2516 (E.D. La. 1972).

Crew member was injured three days after corporate owner of tug sold all its stock and replaced its directors and officers, and the new corporate owner settled the claim and sought reimbursement under P & I policy; held, the assured was barred from recovery by its violation of the policy provision against "changes of management" without the insurer's approval, which voided the policy. Parfait v. Central Towing Inc., 660 F.2d 608, 1982 A.M. C. 698 (5th Cir. 1981), petition for rehearing denied, 667 F.2d 1189, 1982 A.M.C. 1865 (5th Cir. 1982).

After seaman's estate obtained judgment against vessel owner in excess of primary P & I policy limits, excess insurer sought to prevent primary insurer from applying against the policy limits the amounts paid for attorney's fees and defense costs; held, unambiguous wording in primary policy included defense costs within policy limits, and even if wording were ambiguous, the construction to be adopted must include defense costs so as to favor the assured rather than the excess insurer, since otherwise the assured would have to bear those costs. Geehan v. Trawler Arlington Inc., 547 F. 2d 132, 1976 A.M. C. 25 (1st Cir. 1976).

Seaman's suit against vessel owner and P & I insurer was settled for an amount in excess of the primary P & I policy limits, and because policy included legal fees in the coverage, primary insurer sought to reduce its share of the settlement by the attorney's fees and defense costs incurred in defending the claim; held, in the absence of an express defense agreement among assured, primary insurer and excess insurer, the primary insurer is deemed to have incurred the expenses for its own defense and could not deduct them from the policy limits. Verrett v. Ordoyne Towing Co., Inc., 1977 A.M.C. 795 (E.D. La. 1974).

LONGSHORING EXCEPTION

Crew member attached shore-side steam hose to vessel fitting while vessel was in process of discharging oil cargo, and was injured when hose burst; held, crew member was not engaged in stevedoring work and therefore stevedoring exception clause in P & I policy

Shore-based barge cleaner fell into hold of barge, and coverage for unseaworthiness claim was contested by workmen's compensation insurer; *held*, exclusion in employer's liability section of policy as to liability under workmen's compensation laws was not sufficiently specific to preclude coverage. *Harris v. Olympus Terminals & Transport Co.*, 516 F.2d 922 (5th Cir. 1975).

Workmen's compensation and employer's liability policy, which covers sums the assured is obligated to pay because of bodily injury sustained by an employee in the course of employment, includes the assured's liability for maritime remedies under the Jones Act and for unseaworthiness and maintenance and cure. *Garcia v. Queen, Ltd.*, 487 F.2d 625, 1973 A.M.C. 2425 (5th Cir. 1973).

Shore-based net mender subject to Longshoremen and Harbor Workers' Compensation Act fell on board docked fishing vessel, and P & I insurer and workmen's compensation insurer contested responsibility for the settlement of the resulting claim *held*, exclusion in P & I policy as to liability to employees under any compensation act did not apply, such that both the P & I and the workmen's compensation policies covered the claim. *Voisin v. Ocean Protein, Inc.*, 321 F. Supp. 173, 1971 A.M.C. 464 (E.D. La. 1970).

Injured barge employee received payments under Longshoremen and Harbor Workers' Compensation Act, then filed suit under Jones Act and for unseaworthiness, and insurer on workmen's compensation and employer's liability policy contested coverage, *held*, exclusion in employer's liability coverage as to workmen's compensation operated only to distinguish different coverages and did not prohibit claims for damages under applicable coverage of employer's liability section. *Brickley v. Offshore Shipyard, Inc.*, 270 F. Supp. 985, 1967 A.M.C. 1886 (E.D. La. 1967).

**OCCUPATIONAL DISEASE**

Assured sought coverage under multiple P & I policies for asbestos exposure claims; *held*, the "continuous trigger" rule of state law applied because no established admiralty rule governs asbestos-related injuries, and no compelling need exists for a uniform federal rule. *Skinner Corp. v. Fireman's Fund Ins. Co.*, 1996 A.M. C. 1517 (W.D. Wash. 1996).

Each asbestos claim by a seaman against a vessel owner arises from a separate "occurrence," such that deductible in P & I policy applies to each claim and assured has the right to demand full coverage under the policy as to each claim in which the claimant suffered asbestos exposure, and therefore asbestos injury, during the policy period. *Dicola v. American Steamship Owners Mutual Protection & Indemnity Assoc. (In re Prudential Lines, Inc.)*, 158 F.3d 65, 1999 A.M.C. 609 (2d Cir. 1998)(applying New York law).

Sand blaster asserted Jones Act claim for silicosis contracted by exposure to silica dust over five-year period; *held, by* the terms of the policies, only the insurer who had
the risk on the last day of exposure to silica dust could be liable. *McMillian v. Coating Specialists, Inc.*, 427 F. Supp. 54 (E.D. La. 1976).

Seaman employed as sandblaster and spray painter contracted silicosis from exposure to silicon dioxide over eleven-year period, and coverage was disputed as between prior policies of employer's liability insurance and P & I insurance; *held*, employer's liability coverage was defined to apply only when last day of exposure occurred during policy period, and since disease manifested during P & I policy period, P & I insurer was solely responsible for indemnifying employer. *Froust v. Coating Specialists, Inc.*, 364 F. Supp. 1154, 1974 A.M.C. 204 (B.D. La. 1973), *aff’d*, 494 F.2d 1352 (5th Cir. 1974).

**ACCIDENT OR OCCURRENCE/DEDUCTIBLE**

Where vessel owner was insured under P & I policies over several years, each initial exposure of a seaman to asbestos during a policy period is treated as a separate occurrence, a single deductible is applicable to each claim under a policy, and assured has the right to demand that one policy pay full coverage for each claim in which a seaman suffered asbestos exposure, and therefore injury, during the policy period. *Dicola v. American Steamship Owners Mutual Protection & Indemnity Assoc. (In re Prudential Lines, Inc.)*, 158 F.3d 65, 1999 A.M.C. 609 (2d Cir. 1998) (applying New York law).

Five employees of assured asserted claims arising from exposure to sludge being transported from assured’s gas treatment facility, and assured sought coverage of policy limits as to each claim; *held*, each employee's injury was a separate occurrence because P & I policy failed to define an occurrence," and therefore policy limits applied to each claim. *Exxon Corp. v. St. Paul Fire and Marine Ins. Co.*, 129 F.3d 791, 1998 A.M.C. 913 (5th Cir. 1997).

Claim was made that five deaths resulting from a capsizing should be treated as separate occurrences under P & I policy that stated "each occurrence shall be treated separately, for a series of claims hereunder arising from the same occurrence shall be treated as due to that occurrence;" *held*, under the "causation theory," all of the deaths resulted from the single occurrence of the capsizing and one policy Emmit would apply, but without deduction of defense costs. *Albany Ins. Co. v. Blain*, 1987 A.M.C. 1469 (N.D. Cal. 1987).

Ferry collision resulted in 78 deaths, and claimants asserted each death was separate occurrence triggering policy limits for each claim; *held*, one “accident or occurrence” results when damage to a variety of persons or objects arises immediately from a single cause, and therefore P & I insurer was obligated to pay only $300, 000 for aggregated claims; insurer was not, however, entitled to include costs of pursuing declaratory judgment action within policy limit. *McKeithen v. S. S. Frosta* 430 F Supp 899, 1978 A.M.C. 31 (E.D. La. 1977).

Deductibles under P & I policies are intended to free underwriters from small claims; they are not to assure that payment will be made only to solvent policyholders and insurer may not defeat obligation to indemnify by showing that assured's portion of payment
was advanced by third party or financed in some other fashion. Liman v. American Steamship 

ADDITIONAL ASSURED

Platform worker was injured while unloading equipment from a workboat, and 
after being held liable, platform owner sought coverage as an additional assured under P & 
I policy issued to workboat owner; held policy identified platform owner as additional 
assured only in respect of claims "which may be brought by the named Assured's 
employees," and therefore platform owner had no coverage as to claims by its own 
employees. Ocean Drilling & Exploration Co., Inc. v. Mont Boat Rental Services, Inc., 799 
F.2d 213 (5th Cir. 1986).

Crew member brought action against bareboat charterer of crewboat for 
injuries arising out of crew change in stormy weather conditions; charterer was named as 
additional assured on owner's P & I policies, but insurers contested coverage on grounds that 
charterer was not acting as "owner;" held, charterer's orders for crew change were issued in 
the capacity of an "owner pro hac vice" and therefore its liability was within coverage. Offshore Logistics Services v. Mutual Marine Office, 462 F.Supp. 485, 1981 A.M. C. 1154 
(E.D. La. 1978).

Oil rig worker was injured while attempting to transfer from a crewboat to his 
employer's drilling rig; after paying a share of the settlement, employer sought 
reimbursement from the crewboat owner's P & I policy; held, employer was deemed to be an 
additional assured under provision extending coverage to "anyone for whom the vessel is 
working," but employer's liability was not covered since it arose out of negligence as owner 
of the rig and as an employer, not as a vessel owner. Gryar v. Odeco, Inc, 719 F.2d 112, 
1986 A.M.C. 1359 (5th Cir. 1983).

Vessel owner's P & I policy named the charterer as additional assured, and 
charterer sought coverage for claim arising from the charterer's negligent operation of a crane 
in removing a welding machine from the deck of the vessel; held, claim was excluded from 
coverage because the vessel contributed nothing more than the inert locale for the accident, 
and the crane operation was not related to the operation, navigation or management of the 

Barge owner chartered tug and crew to tow its barge; tug employee fell in open 
hatch of barge and sued both the barge owner and his employer, and barge owner sought 
coverage under tug's P & I policy; held barge owner was named as additional assured in the 
tug's policy only with regard to tug as a "named vessel," and therefore was not covered for 
its negligence as barge owner in leaving the hatch open. Wedlock v. Gulf Mississippi Marine 

Barge owner sought coverage under tug's P & I policy as to claims arising out 
of allision with submerged gas line; held, barge owner was named as an additional assured
only "in respect of the insured tug, and liability was premised on its negligence as "a service company anxious to perform services for its customers without delay" in directing tug captain to proceed through a dangerous area without a guide boat or pipeline charts. Dow Chemical Co. v. Tug Thomas Allen, 349 F.Supp.1354, 1974 A.M. C. 781 (E.D. La. 1972).

The owner, demise charterer and sub-bareboat charterer of a fishing vessel were named assureds in a layered employer's liability policy, and the demise charterer also had separate employer's liability and umbrella policies. The vessel broke apart at sea, causing deaths and injuries to the crew and loss of the vessel, due to the negligence of the sub-bareboat charterer as the employer of the crew. The insurer on the layered liability policy settled the claim and sought contribution from the demise charterer's insurers; held, no contribution would be allowed since the negligent employer was a named assured only under the layered liability policy, and when one of two policies covers a negligent employee, while the other covers his employer who has a right of indemnity against the employee, the insurer of the employee must bear the entire loss. Berkeley v. Fireman's Fund Ins. Co., 407 F. Supp. 960, 1976 A.M. C. 856 (W.D. Wash. 1975).

Supply boat owner's P & I policy permitted the boat's charter to oil rig owner, and named rig operator as an additional assured; boat captain slipped on mud accumulated on deck of boat due to negligence of the rig operator, who sought coverage under P & I policy; held coverage denied because rig operator was covered only for conduct “as owner” of supply boat, neither the supply boat nor her owner was at fault, and liability of rig operator was premised on its negligence as a rig operator. LaCross v. Craighead, 466 F. Supp. 880, 1982 A.M. C. 2692 (E.D. La. 1979).

Boat captain serviced company yacht and was authorized to use yacht at his own expense for fishing trips with friends and relatives; held, captain was a permissive user and omnibus assured under P & I policy, such that coverage extended to captain's negligence on fishing trip with passengers unknown to yacht owner. Travelers Indemnity Co. v. Gulf Weighing Corp., 352 F.Supp. 335,1974 A.M.C. 2478 (E.D. La. 1972).

INDEMNITY CLAIMS

Pilot fell while transferring by ladder from vessel to pilot launch and brought suit against vessel owner, who in turn sued launch owner for indemnity or contribution; after contributing to settlement of pilot's claim, launch owner sought coverage from its marine insurer; held, exclusion in policy as to “any claim for loss of life, illness or injury to pilots who are members of the Virginia Pilot Association” barred coverage because it extended to any claim whose basis was injury to a pilot, regardless of the procedural route taken for the claim to reach the insurer. Virginia Pilot Assoc. v. U S. Fire Ins. Co., 1991 A.M. C. 1915 (E.D. Va. 1991).

Repairman was injured aboard a dredge and settled his claim against the owner, who then recovered indemnity from the repairman's employer under the Ryan doctrine governing the warranty of workmanlike service. The employer was assured under a general liability policy and an employer's liability policy, and both insurers denied coverage; held,
exclusion in general liability policy as to bodily injury to any employee of the assured was sufficient to exclude liability under the Ryan warranty, while exclusion in employer's liability policy as to persons subject to the Longshoremen and Harbor Workers' Compensation Act was sufficient only to exclude direct liability for employees' maritime injuries and did not exclude coverage for indemnity liability originating from an employee's maritime injury. *Parfait v. Jahncke Service, Inc.*, 484 F.2d. 296, 1973 A.M.C. 2447 (5th Cir. 1973), *cert. denied*, 415 U.S. 957, 94 S. Ct. 1485 (1974).

**INSOLVENCY OF ASSURED**

Seamen and trustee for bankrupt vessel owner adopted “recycling arrangement” to settle personal injury claims whereby funds were disbursed to each seaman but were immediately returned to trustee as non-recourse loans, and trustee then sought recovery from P & I insurer; *held* the trustee's payments were sham transactions and were sham transactions and failed to trigger the indemnity obligation of P & I insurer. *Dicola v. American Steamship Owners Mutual Protection & Indemnity Assoc.* (In re Prudential Lines, Inc.), 158 F. 3d 65, 1999 A.M. C. 609 (2d Cir. 1998) (applying New York law).

Seamen obtained default judgments against insolvent assured, then sued P & I insurer under New York direct action statute; *held* insurer's obligation on indemnity policy does not arise until after assured suffers actual monetary loss and seamen had no right of action under New York law; however, case was remanded to district court for determination of whether New York insurance law violated equal protection clause of the United States Constitution. *Ahmed v. American Steamship Owners Mutual Protection & Indemnity Assoc.*, 640 F.2d 993, 1981 A.M. C. 897 (9th Cir. 1981). On remand, *held* that statutory exemption of marine insurance policies from general prohibition against use of assured's bankruptcy as a defense to third party actions was not unlawfully discriminatory against merchant seamen and did not violate equal protection clause. *Ahmed v. American Steamship Owners Mutual Protection & Indemnity Assoc.*, 1982 A.M.C. 1228 (N.D. Cal. 1982), *aff'd per curiam*, 701 F.2d 824 (9th Cir. 1983).


Loading supervisor sued vessel owner and P & I insurer for injuries incurred when mooring line parted; vessel owner was insolvent and insurer sought retroactive cancellation of its policy for nonpayment of premiums or "release calls;" *held* insurer remained liable under policy, and could not offset unpaid calls against judgment amount, because nonpayment occurred subsequent to accident and Louisiana law bars insurers from avoiding coverage due to assured's insolvency. *Weiland v. Pyramid Ventures Group*, 511 F.Supp. 1034, 1981 A.M.C. 2846 (M.D. La. 1981).
Where P & I underwriters refused to defend personal injury claims against a bankrupt shipowner, the shipowner's trustee was, under New York law, entitled to indemnity from the underwriters if trustee paid the full amount of judgments or settlements exceeding the policy deductible under an agreement where each claimant agreed to refund the deductible amount to the bankrupt's estate in exchange for recognition of his claim in that amount as a general creditor of the bankrupt. *Liman v. American Steamship Owners Mutual Protection & Indemnity Assoc.*, 299 F.Supp. 106, 1969 A.M.C. 1669 (S.D.N.Y. 1969), *aff’d*, 417 F.2d 627 (2d Cir. 1969), *cert. denied*, 397 U.S. 936 (1970).
Chapter 3

LOSS TO PROPERTY BY COLLISION AND OTHER CAUSES

(4) Liability for loss of, or damage to, any other vessel or craft, or to the freight thereof, or property on such other vessel or craft, caused by collision with the vessel named herein, insofar as such liability would not be covered by full insurance under the .......................................................... (including the four-fourths running-down clause).

(a) Claims under this clause shall be settled on the principle of cross-liabilities to the same extent only as provided in the running-down clause above mentioned.

(b) Claims under this clause shall be divided among the several classes of claims enumerated in this policy and each class shall be subject to the deduction and special conditions applicable in respect of such class.

(c) Notwithstanding the foregoing, if any one or more of the various liabilities arising from such collision has been compromised, settled or adjusted without the written consent of the Assurer, the Assurer shall be relieved of liability for any and all claims under this clause.

1. LIABILITY FOR LOSS OR DAMAGE

Law Reviews

A general discussion of the language found in Clause 4 as it pertains to Protection and Indemnity, as well as the running-down clause, can be found at 43 Tulane L. Rev. 576-578 (1967).

Treatises

Liability for loss or damage arising from a collision; the raising, removal or destruction of wrecks of other vessels; loss or damage to other vessels cargo, or damage to any harbor, wharf, pier, stage or similar structure resulting from insured vessel colliding with another

The collision clause includes coverage for ...payments for damage to the cargo of the insured vessel by the non-carrying vessel involved in the collision and included by that vessel in her counterclaim against the insured or carrying vessel in accordance with American Law. Buglass, *Marine Insurance and General Average in the United States*, 396 (Cornell Maritime Press, 3d ed. 1991).

**Federal Cases**

*United States Supreme Court*

An impairment of the seaworthiness of a vessel by contact with another is not necessary to constitute a collision within the meaning of an insurance policy, when as a result of the impact cracks are made from one-half to one and one-half inches wide for a distance of eleven feet in the iron plating of the vessel's bulwarks.

Vessels may be in collision within the meaning of an insurance policy when only one of them is in motion while the other is at a wharf fully loaded and ready to proceed upon her voyage. *London Assurance v. Companhia de Moagens do Barreiro*, 167 U.S. 149 (1896).

*Fifth Circuit

United States Court of Appeals*

In maritime law and insurance practice, the term *any peril* covers those risks associated with the seas including damage caused by collision without regard to crew negligence. *In re Gulf & Midlands Barge Line, Inc* 509 F.2d 713 (5th Cir. 1975).

Although shipowner's running-down clause was held to extend coverage to a bareboat charterer, the clause was by its terms not against any liability incurred but only an indemnity against loss. The charterer could thus recover from the insurer only upon proof of the amounts actually paid by the charterer. *Stuyvesant Insurance Co. v. Nardelli*, 286 F.2d 600 (5th Cir. 1961).

*Fifth Circuit

District Court*

In *Seminole Asphalt Refining, Inc. v. M/V Delbert, Jr.*, et al., 1987 A.M.C. 2230 (E.D.La. 1987), otherwise not reported, the court determined the term *damages* in the American Institute Tug Form to include pre-judgment and post-judgment interest by stating, [b]ased upon the wording of the policy and the testimony of the expert witnesses, Leslie Buglass and Ray Hicks, it is the Court's finding that the word "damages" as utilized in the Collision and Tower's Liability Clause (a) of the American Institute Tug Form . . . includes all sums which the insured is legally obligated to pay for losses sustained as a result of a casualty, including pre-judgment and post-judgment interest.
In a collision between a pushboat with its tow and anchored vessels, a marine insurance policy covered the assured's fleet wherever moored, since the policy specifically stated that it covered accidents occurring anywhere in the world. *Walter G Hougland, Inc. v. M/V Carport and The Barge G-1*, 194 F. Supp. 723 (E.D. La. 1961).

**Ninth Circuit**
**District Court**

In a suit arising out of a collision between insured's sailboat and another vessel during a sailboat race, an exclusion in a marine insurance policy barring insurer's liability for claims arising from use of insured's sailboat in races where there was an international YRU jury was ambiguous, that ambiguity must be settled in favor of insured according to Hawaiian law, therefore collision clause coverage was afforded. *Barber v. Chatham*, 939 F.Supp. 782 (D. Haw. 1996).

**Eleventh Circuit**
**United States Court of Appeals**

In *Bender Shipbuilding & Repair Company, Inc. v. C.N. Brasileiro*, 874 F.2d 1551 (11th Cir. 1989), a shipbuilder brought suit against its insurer, seeking a declaration that its builder's risk marine policy covered the shipbuilder's liability for liquidated damages for delay in delivery of a floating dry dock. The floating dock had broken her moorings and collided with a vessel. The assured argued that coverage under the collision clause extended to protect the assured from contractual liability to a third person arising as a result of the collision. Held: the policy did not incorporate the shipbuilder's contract with a shipyard and did not cover the shipbuilder's contractual liability for liquidated damages. Further held: the collision liability or "running-down" clause of the policy did not cover the shipbuilder's liability for liquidated damages, but rather, was intended to cover liability for damage to other vessels or property caused by a collision. Followed by *Trinity Indus. v. Insurance Co of North America*, 916 F.2d 267.

**Eleventh Circuit**
**District Court**

Seller’s insurance policy covered collision which occurred after sale but before buyer took delivery of a tug, even if the delivery of the tug to buyer was not necessary to constitute transfer of title. *S. C. Loveland v. East West Towing*, 415 F.Supp. 596 (S.D. Fla. 1976).

**State Cases**

**Louisiana**

Massachusetts

Insurer's liability for injury done by insured vessel to another by reason of collision due to negligence of the vessel's master and crew is well settled, and the rule will not be reconsidered. Blanchard v. Equitable Safety Insurance Co., 94 Mass. (12 Allen) 386 (1866).

Underwriters, insuring a vessel against perils of the sea, are bound to pay the assured the amount paid in damages to the owners of another vessel resulting from a collision with the vessel insured, occasioned by the negligence of the master and crew of the insured vessel. Nelson v. Suffolk Insurance Co., 62 Mass. (8 Cush.) 477, 54 Am. Dec. 770 (1851).

Pennsylvania

The policy providing for indemnification where in consequence of collision with another vessel the vessel or its owner becomes liable to pay "and shall pay" amounts for damages resulting therefrom, the vessel being sold at a judicial sale and the proceeds applied in full satisfaction under agreement of judgment or greater amount, the proceeds of the judicial sale of the vessel and not the amount of the judgment constitutes the amount to be indemnified to the assured. Gaucher v. Providence Washington Insurance Co., 3 Pa. Super Ct. 230, 40 W.N.C. 112 (1897).

Foreign Cases

Vessel, insured under usual three-fourths running-down clause which limits insurer's liability to the value of the vessel, negligently ran down another vessel and the insured vessel was sold under an admiralty decree and proceeds were paid over to the other vessel. The proceeds paid over were less than the value of the insured vessel, and the underwriter was only liable for three-fourths of the proceeds actually paid out and not the value of the insured vessel since the clause of the policy limited the insurer's liability to three-fourths of the sum so paid as damages. Thompson v. Reynolds, (1857) 7 El. & El. 172, 119 Eng. Rep. 1211.

A marine insurance policy which protected and indemnified a vessel for damages from collision with any other vessel which it should "pay in respect to injury to such other ship or vessel itself," did not cover sums paid to a tug owner with which the vessel had collided where the sums represented statutory expenses of wreck removal. The sums were not paid "in respect to injury to such other ship or vessel." Burger v. Indemnity Mutual Marine Assurance Co., (1900) 2 Q.B. 348.

Hull underwriters of a vessel insured under the institute time clause and the three-fourths running-down clause which ran into a sunken vessel which was being salvaged, were only liable under the three-fourths running-down clause for the actual damage to the vessel including the equipment of the salvors and for depreciation of the sunken vessel. The hull policy did not cover the damages to the salvage company for the increased costs of raising the vessel. Chapman v. Fisher, (1904) 20 T.L.R. 319.

A vessel, insured under the standard institute policy with the running-down clause and under a P & I policy, collided with the submerged wreck of a vessel which had sunk 4 to 5 months previously and which salvors were attempting to raise. The vessel was found to blame for the
collision and had to pay damages. Since the salvors had a reasonable expectation of being able to salvage the submerged vessel so that it could be repaired and again navigated it still remained a vessel and the collision was covered under the three-fourths running-down clause of the collision clause of the institute policy. *Pelton Steamship Co. v. North of England P & I Association*, (1925) 22 L.L. Rep. 510.

2. ANY OTHER VESSEL OR CRAFT

**Treatises**

The determination of whether a wreck is a vessel for liability and insurance purposes is a question of fact. Templeman & Greenacre describe such a determination in the following way: Whether impact with a sunken vessel is or is not a collision with a ship or vessel must depend upon the circumstances then existing. If there were reasonable expectation of salving the sunken vessel so that she might have been repaired and navigated, then she must be regarded as a ship within the meaning of the clause. It therefore follows that if there were no reasonable prospect of salving and repairing the sunken ship, then there was impact with a wreck, and not a collision with a ship or vessel. Templeman & Greenacre, *Marine Insurance Great Britain*, 298 (MacDonald and Evans, 1934).

**Federal Cases**

**United States Supreme Court**

A wharfboat that is not used for transporting goods or persons, but used as a warehouse or office is not a vessel. *Evansville & B. G. Co. v. Chero Cola Co.*, 271 U.S. 19 (1926).


Vessels may be in collision within the meaning of an insurance policy, when only one of them is in motion while the other is at a wharf fully loaded and ready to proceed upon her voyage. *London Assurance v. Companhia de Moagens do Barreiro*, 167 U.S. 149 (1896).


**Second Circuit**

**United States Court of Appeals**

The ordinary form of hull policy insuring against liability by reason of collision between the insured vessel and any other ship or vessel, but excluding liability for injuries to harbors, wharves, and similar structures consequent on the collision, covers liability for injuries to a
third vessel when the vessel collided with is forced against such third vessel, and hence such liability was excluded from a P & I policy expressly excluding losses covered by the ordinary form of hull policy. United States v. American Insurance Co. of Newark, N.J., 16 F. Supp. 218 (S.D.N.Y. 1936).

Second Circuit
District Court

The fact that a structure floats or is capable of navigation does not make it a vessel. Some such structures operate merely as extensions of land or work platforms. The key features of a work platform are: a) workers and equipment move to it; it does not transport them to the work site (under its own power, by tow, or otherwise); b) any transport function the structure performs or can perform is incidental to its main purpose of serving as a work platform; c) the structure is moored or fixed in place; and d) the structure is used as a work platform. Thus a flexifloat modular barge that transported workers and equipment from the shore to a worksite in the middle of a river is a vessel. Koernschild v. W.H. Streit Inc 834 F. Supp. 711 (D N J 1993). See also DiGiovanni v. Traylor Brothers Inc. 1990 U.S. Dist LEXIS 12548.


A floating structure adjacent to wharf used to store oars and sails and as a means of access from the wharf to small boats is not a vessel. Woodruff v. One Covered Scow, 30 F. 269 (E.D.N.Y. 1887).

A floating crane is a vessel. The O Boyle No.1, 64 F.Supp 378 (S.D.N.Y. 1946).
Second Circuit
Arbitration

Where a barge in a large tow listed, dumped its cargo and then righted, suffering damage, and where part of the dumped cargo struck an adjacent barge causing it to capsize and damage other adjacent barges, the hull policy was liable for direct hull loss, the hull policy and P & I policy are liable for loss to adjacent barges with the hull policy running-down clause providing coverage up to its limit (minus deductible) and the P & I policy for the balance (minus deductible). New York Trap Rock Corp., 1956 A.M.C. 469 (Arb. at N.Y. 1955).

Under the running-down clause of a hull policy, the hull of a former naval sloop, stripped of her fittings and for many years used as a storage vessel for gunpowder, left permanently at anchor and not attached or moored to shore, was a "ship or vessel" within the language of the policy. Coelleda-Swallow, 1932 A.M.C. 1044 (Arb. at N.Y. 1932).

Fifth Circuit
United State Court of Appeals

A mobile drilling barge was held to be a vessel in a Jones Act case on the theory that the law should develop along with the development of unconventional vessels. Offshore Co. v. Robinson, 266 F.2d 769, 780 (5th Cir. 1959). See also Rousse v. American Ins. Co., 165 A.M.C. 2629, 2636 (La. Dist. Ct. 1964).

A drilling rig jacked up out of water in position to drill was not a vessel. Dresser v. Fidelity & Guaranty, 580 F.2d 806 (5th Cir. 1978).

A rig for plugging and abandoning oil wells which had to be towed but was moved to plug 63 different wells in 19 locations over two years is a vessel. Manuel v. P.A.W. Drilling & Well Service Inc., 135 F.3d 344 (5th Cir 1998).

A spar for exploiting offshore oil wells is not a vessel. It was not permanently anchored to the seabed, but attached to several pylons that were permanently anchored. It was expected to stay in the same position until the wells to which it was attached were exhausted, some fifteen years later. Fields v. Pool Offshore, Inc, 182 F.3d 353 (5th Cir 1999).

A dry cargo barge had been converted to a permanently moored work platform from which painting and sandblasting services were provided to barges. It is not a vessel. Davis v. Cargill, 808 F.2d 361 (5th Cir. 1986).

Fifth Circuit
District Court


Sixth Circuit
District Court
A floating structure used for pumping out coal barges, which was capable of being moved on the water by ropes attached to its capstans or by being towed is a vessel. *Barnes Co. v. One Dredge Boat*, 169 F. 895 (E.D. Ky. 1909).

**Ninth Circuit**  
**District Courts**

A timber-and-styrofoam "derrick barge" is not a vessel because it was used "solely as a structure upon which to float a clamshell shovel so that it could do the required dredging work". *Lash v. Ballard Construction Co.*, 707 F.Supp. 461, 464 (W.D. Wash. 1989).

**Eleventh Circuit**  
**Court of Appeals**

A floating drydock is not a "vessel" within the meaning of admiralty jurisdiction when the drydock is moored and in use as a drydock. See *Keller v. Dravo Corp.*, 441 F.2d 1239, 1244 (5th Cir. 1971), cert. denied, 404 U.S. 1017, 92 S. Ct. 679, 30 L. Ed. 2d 665 (1972); *Bernardo v. Bethlehem Steel Co.*, 314 F.2d 604, 608 (2d Cir. 1963) (floating drydock is not "vessel" within the meaning of Jones Act); and *Bender Shipbuilding & Repair Company, Inc. v. C.N. Brasileiro*, 874 F.2d 1551 (11th Cir. 1989).

Floating drydocks have been classified as "vessels" for admiralty purposes when they become active in some way in navigation. *United States v. Moran Towing & Trans. Co.*, 374 F.2d 656, 663 (4th Cir. 1967), vacated 389 U.S. 575, 88 S. Ct. 689, 19 L. Ed. 2d 775 (1968) (floating drydocks in transit across navigable waters are vessels within admiralty jurisdiction under the Wreck Act); *J.M.L. Trading Corp. v. Marine Salvage Corp.*, 501 F. Supp. 323, 325-26 (E.D.N.Y. 1980) "When floating drydock is treated like a ship or vessel and is used like one, thereby losing its attributes as an extension of land, it may very well be found to be within the admiralty jurisdiction of the Federal courts." *Bender Shipbuilding & Repair Company, Inc. v. C.N. Brasileiro*, 874 F.2d 1551 (11th Cir. 1989).

**State Cases**

**Massachusetts**

Collision with the wreck of a vessel that sank hours before was not a collision with another vessel because the cost of raising the vessel exceed her value, therefore diminishing the likelihood that the wreck would return to service as a vessel. *Burnham v. China Mutual Insurance Co.*, 189 Mass. 100, 75 N.E. 74 (1905). See also *Templeman & Greenacre, Marine Insurance Great Britain*, 298 (MacDonal and Evans, 1934). But see *Pelton Steamship Co. v. North of England P & I Association*, (1925) 22 L.L. Rep. 510 (wreck held to be vessel, therefore liable, since it was likely to return to service).

**California**

Waverunners are powered by a jet pump engine that is wholly located inboard. The policy at issue excluded coverage for all inboard motor power watercraft. Held: as the waverunner s

**New Hampshire**

The collision of an inboard-outboard powered boat was covered by marine insurance policy even though the policy excluded coverage of inboard motors exceeding 50 horsepower since there are three discrete groups of motors: (1) inboard; (2) inboard-outboard; and (3) outboard. *Martenson v. Massie*, 113 N.H. 181, 304 A.2d 372 (1973).

**Mississippi**

A welding barge used to repair offshore oil collection and storage facility is a vessel. *Texaco, Inc v. Addison*, 613 So. 2d 1193 (Miss. 1993)

**Foreign Cases**

Insured vessel attempted to tow a derelict wreck upside down and lost his vessel. The derelict wreck was not a vessel. *Wheeler v. South British Fire & Marine Ins. Co.*, 6 W.N. (N.S.W.) 39 (1899) (Aus.).


In a collision with a wreck which salvors were attempting to raise, the wreck was deemed a vessel since the salvors had a reasonable expectation that the vessel would return to navigational service. *Pelton Steamship Co. v. North of England P & I Association*, (1925) 22 L.L. Rep. 510.

An underwriter can recover, under a policy of reinsurance, for collision liability payments paid out to a steamer which had collided with a barge which had just been sunk by collision with another vessel. Although at the moment when the steamer struck the barge, the barge could not be navigated, she became navigable as soon as it was raised and thus always remained a vessel, even though temporarily non-navigable. *Chandler v. Blogg*, [1898] 1 Q.B. 32.

A tug which struck another vessel's anchor in the riverbed to which the other vessel was attached by a chain came into collision with another vessel within the meaning of the marine insurance policy which covered any damage caused to any of the tugs "owing to actual collision between any such tug and any vessel, etc." A vessel's anchor is regarded as part of the vessel. *In re Margetts v. Ocean Accident & Guaranty Corp*, [1901] 2 K.B. 792.


A vessel, insured under the Institute Time Clauses with the collision clause attached, dragged
its anchor and collided with a flying boat [seaplane] which was at anchor. A flying boat is not a ship or vessel within the clause. *Polpen Shipping Co. v. Commercial Union Assurance Co.*, [1943] 1 K.B. 161.

3. CAUSED BY COLLISION

*Federal Cases*

*United States Supreme Court*

There must be a causal relationship between warlike operation and a collision to take a loss from collision out of marine policy and to bring it within the coverage of a war risk policy that insures against all consequences of warlike operations. *Standard Oil Co. of New Jersey v. United States*, 340 U.S. 54, 71 S.Ct. 135 (1950).
Second Circuit
United States Court of Appeals

A running-down clause of a policy of marine insurance, providing that the insured will reimburse the owner for damages paid "if the ship hereby insured shall come into collision with any other ship or vessel," is intended to protect the insured only in case his ship actually herself comes into contact with the injured ship, and there is no liability thereunder where the insured ship by her suction caused another to sheer and come into collision with a third, although she was held liable in damages therefore in a suit for the collision. *Western Transit Co. v. Brown*, 152 F. 476 (S.D.N.Y. 1907), aff'd, 161 F. 869 (2d Cir. 1908).

Second Circuit
District Court/Arbitration

Where a barge in a large tow listed, dumped its cargo and then righted, suffering damages, and where part of the dumped cargo struck an adjacent barge causing it to capsize and damage other adjacent barges, the hull policy was liable for direct hull loss, the hull policy and P & I policy are liable for loss to adjacent barges with the hull policy running-down clause providing coverage up to its limit (minus deductible) and the P & I policy for the balance (minus deductible). *New York Trap Rock Corp.*, 1956 A.M.C. 469 (Arb. at N.Y. 1955).

The extended running-down and stranding clauses used in the tower's liability policy do not cover damage caused by reason of the vessels in tow striking against the banks of a canal, or touching bottom, nor do these clauses cover damage to the tow. The term "collision" in a marine policy means the striking together of two vessels, or the striking of a vessel, while navigating, with a floating object. It does not mean contact between a vessel and the bottom or side of a channel. *Lehigh & Wilkesbarre Coal Co. v. Globe & Rutgers Fire Insurance Co.*, 6 F.2d 736 (2d Cir. 1925), U.S. App. LEXIS 2124, 43 A.L.R. 215 (2d Cir. N.Y. 1925) aff'd *Lehigh & Wilkesbarre Coal Co. v. Globe & Rutgers Fire Insurance Co.*, 1924 A.M.C. 589 (S.D.N.Y. 1924).

A running-down or a collision clause in the marine policy of insurance on a vessel providing that the insurer will indemnify the assured "if the vessel hereby insured shall come in collision with another vessel and the assured becomes liable to pay and shall pay, any sum or sums for damages resulting therefrom to said other vessel," applies only where there is an actual contact between the insured and another, and the insurer is not liable in case of a collision between a tow of the insured vessel and another, although the insured vessel may have been subjected to liability for such collision. *Coastwise Steamship Co. v. Aetna Insurance Co.*, 161 F. 871 (S.D.N.Y. 1908).

Fifth Circuit
United States Court of Appeals

Collision with jackup drilling rig while jacked up out of water in position to drill was collision with fixed object and not collision with vessel for policy coverage purposes. *Dresser v. Fidelity & Guaranty*, 580 F.2d 806 (5th Cir. 1978).
State Cases

Alabama

Coverage under first liability policy does not cover damages caused by the bit on a barge hooking and pulling a cable attached to a piling since pulling does not constitute a collision even though the piling is classified as a structure and the cable is an integral part of such a structure within the context of the marine insurance policy. Protransco, Inc. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd., 349 So.2d 585 ( Ala. Civ. App. 1977).

The maritime law definition of collision has come to mean the violent contact of a vessel with another vessel even though one vessel is not in motion. The express terms of marine insurance policies have broadened the meaning of collision to include contact by a vessel with any moving or stationary object. Protransco, Inc. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd., 349 So.2d 585 (Ala. Civ. App. 1977).

Florida

The striking of a submerged object is one of the "perils of the sea" as that phrase is used in a marine insurance policy, and not within the collision clause coverage of the policy. Harding v. American Universal Insurance Co., 130 So. 2d 86 (Fla. App. 1961).

Massachusetts

Coverage of "the risk of collision sustained" or "loss sustained by collision with another vessel" does include contact with a wreck, sunk several hours before, the costs of whose raising would have exceeded her value when raised. Burnham v. China Mutual Insurance Co., 189 Mass. 100, 75 N.E. 74 (1905).

New York

Bumping or pounding together of vessels being towed by the same tug is a "collision" within the meaning of that term in a policy covering collisions while the vessels shall be in the tow of a tug. Tice Towing Line v. Western Assurance Co., 214 N.Y.S. 637, 216 App. Div. 202 (1926).

"Collision," as that term is used in a marine insurance policy in this state includes an accidental contact between a vessel and a floating, but nonnavigable, object. Carroll Towing Co. v. Aetna Insurance Co., 196 N.Y.S. 698, 203 App. Div. 430 (1922).

When the master of the vessel insured designedly takes the chance of running into a perfectly apparent obstruction, although with the hope and expectation that the vessel will successfully meet the encounter, the contact is not a "collision". Newton Creek Towing Co. v. Aetna Insurance Co., 48 N.Y.S. 927, 23 App. Div. 152 (1897), rev'd, 163 N.Y. 114, 57 N.E. 302 (1900).

North Carolina
Contact between a vessel and a submerged obstruction is not a "collision" within the meaning of that term as used in a marine insurance policy. *Baum v. Girard Fire & Marine Insurance Co.*, 228 N.C. 525, 46 S.E.2d 324 (1948).

**Texas**

The term "collision" used in connection with marine perils generally has reference to a collision between two vessels or between a vessel while navigating and some other floating object, and, also, according to some authorities, contact between a vessel in navigation and certain fixed objects, such as piers, wharves, bulkheads and pilings. *Hanover Insurance Co. v. Sonfield*, 386 S.W.2d 160 (Tex. 1965).

**Virginia**

Contact with a sunken or floating obstruction of unspecified nature, is not a "collision" within the meaning of that term as used in the insurance contract. *Cline v. Western Assurance Co.*, 101 Va. 496, 44 S.E. 700 (1903).

**Foreign Cases**

Underwriter is not liable under a policy in the general form [no collision clause] for damages that the assured has been compelled to pay because the assured's ship came into collision with another ship and where the assured's ship had to pay balance to the other ship on the principle of a single liability. This payment by assured along with the expenses of wages and provisions for the crew of the assured while the ship was being repaired cannot be charged to the underwriters since these expenses are not necessary nor proximate effects of perils of the sea. *De Vaux v. Salvador*, [1836] 4 Ad. & E. 420, 111 Eng. Rep. 845.

An underwriter who issued a policy on a vessel which ran aground and, on the tide falling, was found to be resting amidships on a wreck of a previously sunken steamer which was projecting one foot above the bank and which insured vessel subsequently shifted forward off the wreck and onto a bank of iron ore which had previously formed the cargo of another sunken vessel could recover under a policy of reinsurance which covered "loss or damage through collision with (inter alia) any . . . sunken wreck. *The Munroe*, [1893] P. 248.

A vessel insured against damage from collision with any object, but not from perils of the sea, could recover where the ship ran against a snag in a river which caused a leak that was temporarily plugged, but became unplugged when being towed because of the motion of the water and was then run aground. The initial injury to the ship was held to be the proximate cause of all the damage. *Reischer v. Borwick*, [1894] 2 Q.B. 548.

Where insured vessel is driven by wind and sea against an artificial sloping bank of boulders formed outside of a breakwater of a harbor, the loss is caused by a collision [a striking against] and therefore plaintiff could recover under a policy of reinsurance for the loss paid out where the policy covered any risk or loss or damage through collision, etc. *Union Marine Insurance Co. v. Borwick*, [1895] 2 Q.B. 279.
An underwriter can recover, under a policy of reinsurance, for collision liability payments paid out to a steamer that had collided with a barge that had just been sunk by collision with another vessel. Although at the moment when the steamer struck the barge, the barge could not be navigated, she became navigable as soon as it was raised and thus always remained a vessel, even though temporarily nonnavigable. Chandler v. Blogg, [1898] 1 Q.B. 32.

A tug which struck another vessel's anchor in the riverbed to which the other vessel was attached by a chain came into collision with another vessel within the meaning of the Marine Insurance Policy which covered any damage caused to any of the tugs "owing to actual collision between any such tug and any vessel, etc." A vessel's anchor is regarded as part of the vessel. In re Margetts v. Ocean Accident & Guaranty Corp., [1901] 2 K.B. 792.

Where a steamship's anchor and propeller became fouled in the fishing nets of a fishing vessel which when sighted was over a mile away, there was no collision with a ship or vessel within the meaning of the Collision Clause attached to the usual form of the Hull policy and therefore the insurance society was liable under its protection and indemnity policy for the damage to the nets. Bennett Steamship Co. v. Hull Mutual Steamship Protecting Society, [1913] 3 K.B. 372, aff'd, [1914] 3 K.B. 57.

Where a vessel, insured by the institute time clause with the three-fourths running-down clause, by its negligent navigation came into slight contact with another ship, and the other vessel, which had reversed her engines to maneuver to avoid the collision came into contact with and collided with a third ship, the collision with the third ship was a consequence of the collision between the insured vessel and the other ship and thus was covered within the meaning of the clause. William France Fenwick & Co. v. Merchants' Marine Insurance Co., [1914] 3 K.B. 827 [1915] 3 K.B. 290.

Where a vessel was covered by insurance which covered loss for damage received by collision with any object [ice included] other than water, the vessel was covered for damage caused by contact with rocky ground in which it was thereafter stranded and suffered further damage. The contact with any natural feature was held to be within the meaning of the policy and thus the collision with the rocky ground and all resulting damage was covered under the policy. Mancomunidad del Vapor Frumiz v. Royal Exchange Assurance, [1927] 1 K.B. 567.

4. WITH THE VESSEL NAMED HEREIN

Federal Cases

Second Circuit
District Court

Although a tugowner was specifically included as a named assured in barge's P & I policy, the policy did not cover the towing tug's liability for negligently bringing the barge into collision with bridge without any fault on the part of the barge itself. The New York & Long Branch Railroad v. United States, 1976 A.M.C. 2253 (S.D.N.Y. 1976) (otherwise unreported).

A running-down or a collision clause in the marine policy of insurance on a vessel, providing
that the insurer will indemnify the assured "if the vessel hereby insured shall come in collision with another vessel and the assured becomes liable to pay, and shall pay, any sum or sums for damages resulting therefrom to said other vessel," applies only where there is an actual contact between the insured and another, and the insurer is not liable in case of a collision between a tow of the insured vessel and another, although the insured vessel may have been subjected to liability for such collision.  *Coastwise Steamship Co. v. Aetna Insurance Co.*, 161 F. 871 (S.D.N.Y. 1908).

**State Cases**

**Ohio**


**Foreign Cases**

Where a vessel, insured by the Institute Time Clauses with the three-fourths running-down clause, by its negligent navigation came into slight contact with another ship, and the other vessel, which had reversed her engines to maneuver to avoid the collision came into contact with and collided with a third ship, the collision with the third ship was a consequence of the collision between the insured vessel and the other ship and thus was covered within the meaning of the clause.  *William France Fenwick & Co. v. Merchants' Marine Insurance Co.*, [1914] 3 K.B. 827, [1915] 3 K.B. 290.

5. **INSOFAR AS SUCH LIABILITY WOULD NOT BE COVERED, ETC.**

**Federal Cases**

**United States Supreme Court**

Under a P & I policy containing a specific exclusion for risks covered by "Tug Syndicate Form," P & I underwriters were not required to indemnify assured tug owner for amounts paid in settlement of collision claims.  Under a policy insuring against the usual perils of the sea, the underwriters are not liable to repay to the insured the damages paid by him to the owners of another vessel and cargo, suffered in a collision occasioned by the negligence of the master of the insured vessel.  *The General Mutual Insurance Co. v. Sherwood*, Fed. Case No. 12776 (1847) rev'd, 55 U.S. (14 How.) 351 (1852).

**First Circuit**

**United States Court of Appeals**

Collision clause of P & I policy made insurer liable for owner's personal liability from collision to extent that it exceeded maximum value that could have been covered by standard hull policy.  Therefore, owner, whose hull policies did not provide collision coverage, was not entitled to

Where P & I policy issued by English marine insurer provided that insured was covered for loss of or damage to any other vessel as a result of collision with insured vessel, insofar as such liability would not be covered by insurance under standard form of policy on hull and machinery issued by American Marine Insurance Syndicate, including four-fourths running-down clause, the insurer undertook to cover insured for collision losses he might become liable for and pay in excess of those which could possibly be covered by insurance on hull and machinery of his boat when written in current standard American form. Protection and Indemnity policy gave protection for collision losses, which could not be covered by American hull policy in standard form regardless of whether collision losses were in fact actually covered by any existing hull policy or not. *Steamship Mutual Underwriting Association v. Landry*, 281 F.2d 482 (1st Cir. 1960), aff'g *Landry v. Steamship Mutual Underwriting Association*, 177 F. Supp. 142 (D. Mass. 1959).

After the decision in *Steamship Mutual Underwriting Association v. Landry*, 281 F.2d 482 (1st Cir. 1960), most Protection and Indemnity clubs and underwriters changed their rules or policies to state that no liability attached to assured to assured for any loss, damage, or expenses which would be payable under the terms of the American hull form or policy (or similar hull coverage) whether or not the vessel was fully covered by such insurance sufficient in amount to pay such loss, damage, or expense in full. Buglass, *Marine Insurance and General Average in the United States*, 397 (Cornell Maritime Press, 3d ed. 1991).

**Second Circuit**

**United States Court of Appeals**

Where scow and tug had common owner, the fact that there was hull insurance on scow which was not at fault but which was injured partly through fault of tug, for which underwriters of tug were liable under sistership clause of their policy, did not reduce underwriter's liability by amount of hull insurance on theory that underwriters could compel collection of hull insurance for their benefit in absence of any clause in policy on tug giving underwriters benefit of any interest in any insurance which might cover any vessel damaged through fault of tug, notwithstanding provisions of cross-liabilities and tower's liability clauses in policy on tug. *Aetna Insurance Co. v. Henry DuBois Sons Co.*, 144 F.2d 262 (2d Cir. 1944), aff'g *Aetna Insurance Co. v. Henry DuBois Sons Co.*, 53 F. Supp. 516 (S.D.N.Y. 1943).

The ordinary form of hull policy insuring against liability by reason of collision between the insured vessel and any other ship or vessel, but excluding liability for injuries to harbors, wharfs, and similar structures consequent on the collision, covers liability for injuries to a third vessel when the vessel collided with is forced against such third vessel, and hence such liability was excluded from a P & I policy expressly excluding losses covered by the ordinary form of hull policy. *United States v. American Insurance Co. of Newark, N.J.*, 89 F.2d 8 (2d Cir. 1937), rev'g *United States v. American Insurance Co. of Newark, N.J.*, 16 F. Supp. 218 (S.D.N.Y. 1936).
Where club insurance policy indemnified assured for loss or damage arising from collision with another ship to extent that such liability was not covered by hull insurance containing clause for settlement of claims thereunder on the principle of cross-liabilities and exempting hull underwriters from liability for any sum which assured should pay or become liable to pay in respect of insured ship's cargo, the principle of cross-liabilities did not apply to settlement of collision loss or damage not covered by hull insurance. New York & Cuba Mail Steamship Co. v. American Steamship Owners' Mutual Protection & Indemnity Association, 72 F.2d 694 (2d Cir. 1934), cert. denied, 293 U.S. 622 (1934).

**Fourth Circuit**  
United States Court of Appeals

A dredge owner's protection & indemnity policy provided no coverage for damages arising from a collision between a fishing boat and the dredge's pontoon or pipe when such a policy requires that attachments or implements are to be listed in a schedule and dredge's hull policy separately listed such pontoons and pipes. Commercial Union Insurance Company v. Charleston Marine Leasing, 843 F. Supp. 124 (E.D. Va. 1994), aff'd, Commercial Union Insurance Company v. Charleston Marine Leasing, 52 F.3d 320, 1996 A.M.C. 608, (4th Cir. 1995).

**Fifth Circuit**  
United States Court of Appeals

Liability for damages arising from an allision between a tug and platform were excluded from coverage by insured's protection and indemnity policy because such policy contained exclusions of tower's liability and losses covered by a hull policy. Employer's Insurance of Wausau v. International Marine Towing, 864 F.2d 1224 (5th Cir. 1989).

Wausau was affirmed and applied by American Gulf VII, Inc v. Otto Candies, Inc 172 F.3d 867; 1997 U.S. Dist. LEXIS 13414 (5th Cir 1999). American Gulf concerned liability for damaged cranes leased to a ship for a long sea voyage. The cranes were covered by a standard hull policy, and were thus excluded by the P & I policy.

Damage to an unmanned oil barge, without motive power, and in complete control of the tug's crew was within the coverage of the Tug's Syndicate Form Hull Insurance policy, and not within the coverage of the barge's protection and indemnity policy, which latter expressly provided against liability where the assured had other coverage. United States Fire Insurance Co. v. Gulf States Marine Mining Co., 262 F.2d 565 (5th Cir. 1959), rev'g Gulf States Marine & Mining Co. v. Norwich Union Fire Insurance Society, 168 F. Supp. 863 (S.D. Tex. 1958).

**Fifth Circuit**  
District Court

An endorsement was attached to P & I policy providing that underwriters would cover excess
collision and tower's liability "as provided in lines 78 through 111 of the American Institute Tug Form 53R-1." In a previous decision, the court held that the hull policy did not cover collision liabilities because the assured breached the continuing warranty of not sending the vessel to sea in a known unseaworthy condition. The court held that since the endorsement to the P & I policy incorporated the terms of the hull policy, it also incorporated the warranty and, therefore, there was no coverage for excess collision and tower's liability under the endorsement to the P & I policy. The assured cannot except itself from its duties simply by "camouflaging its responsibilities under a hull policy in a P & I policy." *Insurance Company of North America v. John Bordlee Contractors*, 543 F. Supp. 597 (E.D. La. 1982).

Where P & I policy contained an exclusionary clause excluding liability for any loss, damage or expense in connection with any accident covered under four-fourths running-down clause, and the collision between insured vessel and another vessel was covered by the four-fourths running-down clause, protection and indemnity clauses in the policy did not offer additional coverage so as to bind insurer to pay to the assured the amount remaining on judgment against the assured. *Stuyvesant Insurance Co. v. R. Leloup Shrimp Co.*, 333 F. Supp. 233 (S.D. Tex. 1971).

*Ninth Circuit*

*District Court*

Where a barge sank and oil escaped into the water, the barge owner was denied coverage for cleanup expenses incurred by the Navy as the P & I policy contained a valid pollution exclusion clause. *Healy Tibbitts Construction Co. v. Foremost Insurance Co.*, 482 F. Supp. 830 (N.D. Cal. 1979).

*State Cases*

*Louisiana*

Exclusion of liability for any loss, damage or expense which would be payable under the terms of the American Tug Syndicate standard form of policy on hull and machinery, etc., whether or not the vessel were fully covered by such insurance sufficiently in amount to pay such loss, damage, or expense, is unambiguous and does not depend upon whether such insurance is actually maintained by the assured. *DeBardeleben Coal Corp. v. P & I Underwriting Syndicate*, 34 So. 2d 62 (La. App. 1948).

6. CROSS-LIABILITIES

*Federal Cases*

*Second Circuit*

*United States Court of Appeals*

Where a clause in P & I policy provided for settling of claim on principle of cross-liabilities in case of "both to blame" collision, liability was limited by law, and where liability of owner of tanker, which collided with steamship as a result of joint fault, was limited, cross-liability theory
could not be used even if tanker had incurred liability under running-down clause, and tanker could only recover under policy on principle of indemnity and tanker, which had already been reimbursed, was entitled to no further recovery. DieselTanker A.C. Dodge Inc. v. A.B. Stewart, 262 F. Supp. 6 (S.D.N.Y. 1966), 376 F.2d 850 (2d Cir. 1966), cert. denied, 389 U.S. 913 (1967).

Where scow and tug had common owner, the fact that there was hull insurance on scow which was not at fault but which was injured partly through fault of tug, for which underwriters of tug were liable under sistership clause of their policy, did not reduce underwriters liability by amount of hull insurance on theory that underwriters could compel collection of hull insurance for their benefit in absence of any clause in policy on tug giving underwriters benefit of any interest in any insurance which might cover any vessel damaged through fault of tug, notwithstanding provisions of cross-liabilities and tower's liability clauses in policy on tug. Aetna Insurance Co. v. Henry DuBois Sons Co., 144 F.2d 262 (2d Cir. 1944), aff'g Aetna Insurance Co. v. Henry DuBois Sons Co., 53 F. Supp. 516 (S.D.N.Y. 1943).

Where a club policy indemnified assured for loss or damage arising from collision with another ship to extent that such liability was not covered by hull insurance containing clause for settlement of claims thereunder on the principle of cross-liabilities and exempting hull underwriters from liability for any sum which assured should pay or become liable to pay in respect of insured ship's cargo, the principle of cross-liabilities did not apply to settlement of collision loss or damage not covered by hull insurance. Club insurer was liable on basis of single liability for any collision loss or damage imposed by law on assured and not covered by hull insurance. New York & Cuba Mail Steamship Co. v. American Steamship Owners' Mutual Protection & Indemnity Association, 72 F.2d 694 (1934), cert. denied, 293 U.S. 622 (1934).

**Foreign Cases**

Where there is a collision between two vessels by which one of them is more damaged than the other, and, both being to blame, they share the damage equally, there is no cross-liability on the part of each vessel to pay one-half of the damage sustained by the other, but only a single liability, that is, the liability of the vessel less damaged to pay one-half of the amount by which the damage to the other vessel exceeds the damage to it. The owner of the more damaged vessel is not entitled to recover, via the running-down clause, for damages to the other vessel, since the only liability is the liability of the less damaged vessel to the more damaged vessel. London Steamship Owners' Insurance Co. v. Grampian Steamship Co., 24 Q.B.D. 32 [1889], aff'd, 24 Q.B.D. 663 [1890].

Defendant insurers underwrote a policy of insurance on a vessel against total loss and also for three-fourths of collision liability on the principle of cross-liabilities, which defendants reinsured only for total loss with the plaintiff. The insured vessel collided with another, both vessels to blame and the insured vessel's one-half of damages were exceeded by the damages to the other vessel so the insured vessel had to pay, under the Admiralty Rule of single liability, one-half of the difference. Defendant's payments to vessel owners for its total loss and under the running-down clause were ascertained by bringing into account the principle of cross-liability but plaintiff was not entitled to the benefit of a credit in respect of the other vessel's liability on the principle of cross-liability since plaintiff was only a reinsurer for total loss and not on the running-down clause to which the principle of cross-liabilities applied. Young v.
7. TOWAGE

Federal Cases

Second Circuit
United States Court of Appeals

Where scow and tug had common owner, the fact that there was hull insurance on scow which was not at fault but which was injured partly through fault of tug, for which underwriters of tug were liable under sistership clause of their policy, did not reduce underwriter's liability by amount of hull insurance on theory that underwriters could compel collection of hull insurance for their benefit in absence of any clause in policy on tug giving underwriters benefit of any interest in any insurance which might cover any vessel damaged through fault of tug, notwithstanding provisions of cross-liabilities and tower's liability clauses in policy on tug. *Aetna Insurance Co. v. Henry DuBois Sons Co.*, 144 F.2d 262 (2d Cir. 1944), aff'g *Aetna Insurance Co. v. Henry DuBois Sons Co.*, 53 F. Supp. 516 (S.D.N.Y. 1943).

The extended running-down and stranding clauses used in the tower's liability policy do not cover damage caused by reason of the vessel in tow striking against the banks of a canal, or touching bottom, nor do these clauses cover damage to the tow. The term "collision" in a marine policy means the striking together of two vessels, or the striking of a vessel, while navigating, with a floating object. It does not mean contact between a vessel and the bottom or side of a channel. *Lehigh & Wilkesbarre Coal Co. v. Globe and Rutgers Fire Insurance Co.*, 6 F.2d 736 (2d Cir. 1925), aff'g *Lehigh & Wilkesbarre Coal Co. v. Globe and Rutgers Fire Insurance Co.*, 1924 A.M.C. 589 (S.D.N.Y. 1924) (otherwise unreported).

Second Circuit
District Court

Although a tugowner was specifically included as a named assured in barge's P & I policy, the policy did not cover the towing tug's liability for negligently bringing the barge into collision with bridge without any fault on the part of the barge itself. *The New York & Long Branch Railroad v. United States*, 1976 A.M.C. 2253 (S.D.N.Y. 1976).


A running-down or a collision clause in the marine policy of insurance on a vessel, providing that the insurer will indemnify the assured "if the vessel hereby insured shall come in collision with another vessel and the assured becomes liable to pay and shall pay, any sum or sums for damages resulting therefrom to said other vessel," applies only where there is an actual contact.
between the insured and another, and the insurer is not liable in case of a collision between a tow of the insured vessel and another, although the insured vessel may have been subjected to liability for such collision. *Coastwise Steamship Co. v. Aetna Insurance Co.*, 161 F. 871 (S.D.N.Y. 1908).

**Fourth Circuit**
**United States Court of Appeals**

Where a barge in tow collided with another vessel without fault on the part of the barge, the collision or running-down clause in a policy insuring the barge was intended to furnish the barge owner indemnity for damages paid in consequence of a collision only when the insured vessel was at fault, and not when she was in no way to blame for the accident. The clause "provided the insured vessel is herself at fault" is implied in the running-down clause. *Harbor Towing Corp. v. Atlantic Mutual Insurance Co.*, 189 F.2d 409 (4th Cir. 1951).

**Fifth Circuit**
**United States Court of Appeals**

Damage to an unmanned oil barge, without motive power, and in complete control of the tug's crew was within the coverage of the Tug's Syndicate Form Hull Insurance policy, and not within the coverage of the barge's protection and indemnity policy, which latter expressly provided against liability where the assured had other coverage. *United States Fire Insurance Co. v. Gulf States Marine & Mining Co.*, 262 F.2d 565 (5th Cir. 1959), rev'd *Gulf States Marine & Mining Co. v. Norwich Union Fire Insurance Society*, 168 F. Supp. 863 (S.D. Tex. 1958).

Where a collision between a barge in tow of a tug and a steamship moored to a dock was caused by faulty navigation of the tow by the owner of the barge and tug, the insurer could not be liable to owner under a P & I policy excluding from risk accidents caused by actual fault or privity of the insured as shipowner. *Eggers v. Southern Steamship Co.*, 112 F.2d 347 (5th Cir. 1940).
In a collision between a pushboat with its tow and anchored vessels, a marine insurance policy covered the assured’s fleet wherever moored, since the policy specifically stated that it covered accidents occurring anywhere in the world. *Walter G Hougland, Inc. v. M/V Carport and The Barge G-1*, 194 F.Supp. 723 (E.D. La. 1961).

Seller’s insurance policy covered collision which occurred after sale but before buyer took delivery of tug, even if the delivery of the tug to buyer was not necessary to constitute transfer of title. *S. C. Loveland v. East West Towing*, 415 F.Supp. 596 (S.D. Fla. 1976).

**Florida**

Exclusion of loss, damage, expense or claim arising out of or having any relation to the towage of any other vessel or craft precludes coverage of liability for collision with uninsured vessel being towed. *Emmco Ins. Co. v. Southern Terminal & Transport Co.*, 333 So. 2d 80 (Fla. App. 1976).

**New York**

Bumping or pounding together of vessels being towed by the same tug is a "collision" within the meaning of that term in a policy covering collisions while the vessels shall be in the tow of a tug. *Tice Towing Line v. Western Assurance Co.*, 214 N.Y.S. 637, 216 App. Div. 202 (1926).

**Ohio**


**Foreign Cases**

A policy of marine insurance was issued for a vessel in tow and covered collisions with any other ship or vessel. The sailing vessel Niobe was being towed when her tug came into collision with and sank another vessel. The Niobe and the tug both paid damages and both were held to blame. The collision of the tug with the damaged vessel is also a collision between the Niobe and the other vessel since there is an identity between a tug and its tow. *McCowan v. Baine and Johnston, The "Niobe,"* [1891] A.C. 401. But see *Western Transit Co. v. Brown*, 161 F. 869, 870 (2d. Cir. 1908); and *Trinidad Corp v. American S.S. Owners Mut. P & I Assoc.*, 229 F.2d 57, 59 (2d Cir. 1956) (the Second Circuit expressing approval of the dissent in *The..."
(5) Liability for loss of or damage to any other vessel or craft, or to property on such other vessel or craft, not caused by collision, provided such liability does not arise by reason of a contract made by the assured.

Where there would be a valid claim hereunder but for the fact that the damaged property belongs to the Assured, the Assurer shall be liable as if such damaged property belonged to another, but only for the excess over any amount recoverable under any other insurance applicable on the property.

Law Reviews

The following are examples of risks covered by Clause 5: (1) wash damage resulting from an insured vessel’s excessive swells; (2) suction or crowding of another vessel causing her to go aground or strike some other vessel or object; (3) the spreading of a fire on the insured vessel and her cargo, due to her negligence, to a nearby vessel and her cargo; (4) negligently fouling the hawser of an existing tug, damaging the tug or causing her to damage other property; and (5) striking and parting a line by which another vessel is moored to a dock. 43 Tulane L. Rev. 578-579 (1967).

Treatises

The following are examples of risks covered by Clause 5: (1) damage resulting from the insured vessel proceeding at excessive speed in narrow or crowded waters creating a wash sufficient to cause another vessel to break loose from its moorings or being damaged by being forced against other vessels or structures; (2) damages caused by propeller suction created as a result of power dock trials; (3) dropping cargo on lighters, barges or other vessels alongside the insured vessel; and (4) causing another vessel to go ashore or to collide with a third vessel by crowding or through improper navigation.


[S]well damage, forcing another vessel aground, or causing it to collide with a third vessel or object are items covered under the Damage Caused Otherwise Than by Collision clause of the protection and indemnity policy. A. Parks, *The Law and Practice of Marine Insurance and Average 954* (Cornell Maritime Press, 1987).
Where a marine policy obligated insurer to repay insured's payment to any person for liability arising when insured's tug or her tow collides with another vessel and where it was further agreed that policy should also cover tug's legal liability for any collision, grounding, stranding or loss or damage occurring to tow, the policy was held to cover tug's liability to cargo owner for proceeding through heavy seas, causing towed barge, owned by insured, to pound, leak, and sink as against contention that insured tower's liability coverage included only damages paid to owner of tow. Bee Transportation Co. v. Connecticut Fire Insurance Co., 76 F.2d 759 (2d Cir, 1935), rev'g Bee Line Transportation Co. v. Connecticut Fire Insurance Co., 6 F. Supp. 816 (E.D.N.Y. 1934).

Damage caused to a shrimper which sank when it was struck by floating pontoons and pipeline into which the insured vessel collided was covered as damage to any other vessel not caused by collision. Trinidad Corporation v. American Steamship Owners Mutual Protection & Indemnity Ass'n, 130 F. Supp. 46 (S.D.N.Y. 1955), aff'd, 229 F.2d 57 (2d Cir. 1956), cert. denied, 351 U.S. 966, 76 S. Ct. 1032, 100 L. Ed. 1486 (1956).

A vessel testing her engines sent a stream of propeller wash across a narrow channel causing a tow to strike a bridge is covered under Clause 5. Tucker v. Palmer et al, Trustees, 45 F.Supp. 12, 1942 AMC 726 (S.D.N.Y. 1942).

Wake (swell) damage caused by insured vessel is covered under Clause 5. The Priscilla, 15 F.2d 455, 1926 A.M.C. 927 (S.D.N.Y. 1926), The El Mundq, 41 F.2d 291, 1930 A.M.C. 224 (E.D.N.Y. 1930), and Arminda, 1927 A.M.C. 1523 (S.D.N.Y. 1927).

Owner and operator of a jack-up rig which capsized in the Gulf of Mexico sought coverage under common ownership clause which they argued expanded coverage beyond "any other vessel" to include scheduled vessel. Held: "any other vessel" means "nonscheduled vessel," and there is no coverage for a scheduled vessel because it is not an "other vessel." Gulf Island, IV v. Blue Streak Marine, Inc., 940 F.2d 948 (5th Cir. 1991).

Damage to barge that sank after it was moored by assured's tug when wash entered a man-hole negligently left open, was within the coverage of a Tug Syndicate form policy and therefore not within the coverage of the P & I policy. United States Fire Insurance Co. v. Gulf States Marine & Mining Company, 262 F.2d 565 (5th Cir. 1959), rev'g, Gulf States Marine & Mining Company v. Norwich Union Fire Insurance Soc'y, 168 F. Supp. 863 (S.D. Texas 1958).
2. PROVIDED SUCH LIABILITY DOES NOT ARISE BY REASON OF A CONTRACT MADE BY THE ASSURED

Federal Cases

Fifth Circuit
United States Court of Appeals

No coverage was available to the owner of a barge, a named assured, for damage caused by tug's collision with a submerged gas pipeline because such liability arose by reason of a contract of towage made by the assured, a liability expressly excepted from coverage. *Dow Chemical Company v. Tug Thomas Allen* 349 F. Supp. 1354, 1974 A.M.C. 781 (E.D. La. 1972) (also the barge was not a named vessel under the policy).

3. DAMAGED PROPERTY BELONGS TO THE ASSURED

Federal Cases

Fifth Circuit
United States Court of Appeals

"[D]amaged property belongs to the Assured" means damaged property that is, or that is on, "any other vessel," and not the scheduled vessel. A scheduled vessel is not damaged property covered by this clause. *Gulf Island, IV v. Blue Streak Marine, Inc.*, 940 F.2d 948 (5th Cir. 1991).

(6) Liability for damage to any dock, pier, harbor, bridge, jetty, buoy, lighthouse, breakwater, structure, beacon, cable, or to any fixed or movable object or property whatsoever, except another vessel or craft, or property on another vessel or craft.

Where there would be a valid claim hereunder but for the fact that the damaged property belongs to the Assured, the Assurer shall be liable as if such damaged property belonged to another, but only for the excess over any amount recoverable under any other insurance applicable on the property.

1. LIABILITY FOR DAMAGE

Federal Cases

Second Circuit
United States Court of Appeals

A dredge's pipeline and pontoon supporting it was not a "vessel or craft" within protection and
indemnity policy providing coverage for vessel owner's liability for damage to any fixed or movable object or property whatsoever, except another "vessel" or "craft," and therefore insurer was liable under the policy for claims paid by vessel owner for damages caused by the negligent operation of its vessel in striking the pipeline and supporting pontoon which in turn struck another vessel. *Trinidad Corporation v. American Steamship Owners Mutual Protection & Indemnity Ass'n*, 130 F. Supp. 46 (S.D.N.Y. 1955), aff'd, 229 F.2d 57 (2d Cir. 1956), cert. denied, 351 U.S. 966, 76 S. Ct. 1032, 100 L. Ed. 1486 (1956).

**Second Circuit**

**District Court**

Damage caused to a bridge by the allision with it of a barge negligently under tow by a United States Coast Guard tug was not a liability covered by a P & I policy covering the barge, notwithstanding that tower was an additional assured. *New York & Long Branch R.R. v. United States*, 1976 A.M.C. 2253, (S.D.N.Y. 1976).

**Fifth Circuit**

**United States Court of Appeals**

The term any peril covers those risks associated with the seas including damage caused by collision without regard to crew negligence. *In re Gulf & Midlands Barge Line, Inc* 509 F.2d 713 (5th Cir. 1975).

**Eleventh Circuit**

**District Court**

Seller's insurance policy covered collision which occurred after sale but before buyer took delivery of a tug, even if the delivery of the tug to buyer was not necessary to constitute transfer of title. *S. C. Loveland v. East West Towing*, 415 F.Supp. 596 (S.D. Fla. 1976).

2. **ANY DOCK, PIER, HARBOR, BRIDGE, ETC.,**

**Federal Cases**

**Fifth Circuit**

**United States Court of Appeals**

In *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365, 1983 A.M.C. 2059 (5th Cir. 1983) (en banc, five judges dissenting), the P & I policy indemnified inter alia against such sums as the assured shall have become legally liable to pay on account of "loss of, or damage to, or expense in connection with any fixed or movable object... Plaintiff, the operator of an offshore oil rig, had time chartered a vessel to serve as a standby tender and had itself included as an additional named assured in the owner's P & I policy. As the result of owner's negligence the vessel sank directly beneath the rig. When the owner refused to remove the hulk, plaintiff removed it and sought recovery under the policy. Plaintiff contended that the expense was covered by the above-quoted language referring to "any fixed or movable object" and argued that the removal
was motivated by apprehension of future claims by third parties. The court rejected the argument on the ground that the quoted language only indemnifies the insured for sums actually paid to third parties and "does not accord protection for steps taken to avert liability." The court also indicated that the action taken by the operator was not "as owner" of the vessel.

In a suit under Louisiana's direct action statute against the insurer for its assured's liability to the owner of a water intake structure on the Mississippi River for damage caused by an allision between it and the lead barge in the tow of the assured, held that the insurer's liability was limited to the assured's liability under the Shipowners' Limitation of Liability Act. 


A policy that undertook to insure for liability for damage to another person's property is liability insurance within the meaning of the Louisiana Direct Action Statute. Therefore the insurer was subject to a direct action under that statute for damage caused by an allision between the assured's tow and causeway. Commission v. Tug Claribel, 222 F. Supp. 521 (E.D. La. 1963), aff'd, 341 F.2d 956 (5th Cir. 1965), cert. dismissed, 382 U.S. 974, 86 S. Ct. 525 (1966), 15 L. Ed.2d 463 (1966), cert. denied, 382 U.S. 974, 86 S. Ct. 538, 15 L. Ed.2d 465 (1966). Cf. Delaune v. Saint Marine Transportation Co., 749 F. Supp. 1463 (E.D. La. 1990) (marine P & I policy is "ocean marine insurance" excepted from the operation of the Louisiana Direct Action Statute, and therefore no direct action was maintainable against Lloyds underwriters).

Damage caused to shoreside properties by oil spilled from a barge that sank when wash entered a man-hole cover negligently left open by a tankerman employed by the assured was within the coverage of a Tug Syndicate form policy and therefore not within the coverage of the P & I policy covering "damage to...any...property whatsoever." United States Fire Insurance Co. v. Gulf States Marine & Mining Company, 262 F.2d 565 (5th Cir. 1959), rev'g Gulf States Marine & Mining Company v. Norwich Union Fire Insurance Soc'y, 168 F. Supp. 863 (S.D. Texas 1958).

State Cases

Alabama

Coverage under first liability policy does not cover damages caused by the bit on a barge hooking and pulling a cable attached to a piling since such pulling does not constitute a collision even though the piling is classified as a structure and the cable is an integral part of such a structure within the context of the marine insurance policy. Protransco, Inc. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd., 349 So.2d 585 (Ala, Civ. App. 1977).

3. EXCEPT ANOTHER VESSEL OR CRAFT, ETC.

Federal Cases

Second Circuit
United States Court of Appeals
Collision damage caused by the insured vessel to floating pontoons supporting a dredge's pipeline was within the coverage of the policy because it did not fall within the "vessel or craft" exception. *Trinidad Corporation v. American Steamship Owners Mutual Protection & Indemnity Ass'n*, 130 F. Supp. 46 (S.D.N.Y. 1955), aff'd, 229 F.2d 57 (2d Cir. 1956), cert. denied, 351 U.S. 966, 76 S. Ct. 1032, 100 L. Ed. 1486 (1956). (Though not discussed by the court, damage suffered by a shrimper that sank when it was struck by the pontoon into which the insured vessel collided was covered as damage to any other vessel not caused by collision).

_Fifth Circuit_
_Court of Appeals_

Collision with jackup drilling rig while jacked up out of water in position to drill was collision with fixed object and not collision with vessel for policy coverage purposes. *Dresser v. Fidelity & Guaranty*, 580 F.2d 806 (5th Cir. 1978).

_State Cases_
_Washington_

A P & I policy insuring tug against liability for damage to any buoy, beacon, etc., with an exception against liability for damage "arising out of or having relation to the towage of any other vessel or craft," held to cover damage to government buoy which fouled in the tug’s towline while the tug was towing a 16-section tow of logs. Within the meaning of the exception, the tow of logs did not constitute a "vessel or craft." A "vessel or craft" means a structure used or capable of being used as a means of transportation on water of persons or property. *Halvorsen v. Aetna Insurance Co.*, 1954 A.M.C. 1896 (Wash. Super. Ct. 1954) (otherwise unreported).

_Foreign Cases_

Where a steamship's anchor and propeller became fouled in the fishing nets of a fishing vessel which when sighted was over a mile away, there was no collision with a ship or vessel within the meaning of the Collision Clause attached to the usual form of the Hull policy and therefore the insurance society was liable under its protection and indemnity policy for the damage to the nets. *Bennett Steamship Co. v. Hull Mutual Steamship Protecting Society*, [1913] 3 K.B. 372, aff'd, [1914] 3 K.B. 57.

4. OIL SPILLS, ETC.

_Law Reviews_

[D]amage to any harbor or property includes oil pollution. 43 Tulane L. Rev. 579 (1967).

_Treatises_

Oil pollution arising from a collision is largely excluded from hull policies and is a risk

**Federal Cases**

**Fifth Circuit**

*United States Court of Appeals*

Damage caused to shoreside properties by oil spilled from a barge that sank when wash entered a man-hole cover negligently left open by a tankerman employed by the assured was within the coverage of Tug Syndicate form policy and therefore not within the coverage of the P & I policy covering "damage to any property whatsoever." *United States Fire Insurance Co. v. Gulf States Marine & Mining Company*, 262 F.2d 565 (5th Cir. 1959), rev'd *Gulf States Marine & Mining Company v. Norwich Union Fire Insurance Soc'y*, 168 F. Supp. 863 (S.D. Texas 1958).

**Ninth Circuit**

*United States Court of Appeals*

In action by dredge owner against two of its insurers to recover cost of cleaning up slick caused by sinking of dredge, the court held, among other things: oil pollution to water was damage to tangible property within the meaning of the property damage liability clause. *Port of Portland v. St. Paul Fire & Marine Insurance Company*, 769 F.2d 1188 (9th Cir. 1986).

**Ninth Circuit**

*District Court*

In a suit seeking a judgment declaring that insurer, under a protection and indemnity policy of marine insurance, was obliged to defend the insured in a pending case brought against it by the United States to recover the cost of an oil spill cleanup, the court held: the policy's pollution exclusion clause eliminated insurer's liability for any losses resulting from oil spill. *Healy Tibbitts Construction Company v. Foremost Construction*, 482 F.Supp. 830, 1980 A.M.C. 1600, (N.D.Cal. 1979).

5. **COMMON OWNERSHIP**

**Federal Cases**

**Ninth Circuit**

*District Court*

Damage caused to assured's gantry crane by allision of assured's vessel with it is covered under clause 6 "damage to any property whatsoever" and clause 6(a), which provided coverage for damage to property belonging to the assured as if such damaged property belonged to another. *United States v. National Automobile & Casualty Ins. Co.*, 1962 A.M.C. 971 (N.D. Cal. 1961).
6. TOWAGE

Federal Cases

Fifth Circuit
United State Court of Appeals

Liability for damages arising from an allision between a tug and platform were excluded from coverage by insured's protection and indemnity policy because such policy contained exclusions of tower's liability and losses covered by a hull policy. Employer's Insurance of Wausau v. International Marine Towing, 864 F.2d 1224 (5th Cir. 1989).

The term any peril covers those risks associated with the seas including damage caused by collision without regard to crew negligence. In re Gulf & Midlands Barge Line, Inc 509 F.2d 713 (5th Cir. 1975).

Eleventh Circuit
District Court

Seller's insurance policy covered collision which occurred after sale but before buyer took delivery of tug, even if the delivery of the tug to buyer was not necessary to constitute transfer of title. S. C. Loveland v. East West Towing, 415 F.Supp. 596 (S.D. Fla. 1976).

State Cases

Washington

A P & I policy insuring tug against liability for damage to any buoy, beacon, etc., with an exception against liability for damage "arising out of or having relation to the towage of any other vessel or craft," held to cover damage to government buoy which fouled in the tug's towline while the tug was towing a 16-section tow of logs. Within the meaning of the exception, the tow of logs did not constitute a "vessel or craft." A "vessel or craft" means a structure used or capable of being used as a means of transportation on water of persons or property. Halvorsen v. Aetna Insurance Co., 1954 A.M.C. 1896 (Wash. Super. Ct. 1954) (otherwise unreported).
Chapter 4

WRECK REMOVAL

(7) Liability for cost or expenses of, or incidental to, the removal of the wreck of the vessel named herein when such removal is compulsory by law, provided, however, that:

(a) There shall be deducted from such claim for cost or expenses, the value of any salvage from or which might have been recovered from the wreck, inuring, or which might have inured, to the benefit of the Assured.

(b) The Assurer shall not be liable for such costs or expenses which would be covered by full insurance under the [ ] or claims arising out of hostilities or war-like operations, whether before or after declaration of war.

WRECK

A sunken vessel damaged to an extent of being rendered un navigable is a "wreck" within a marine policy covering liability for expenses of removal of a wreck. In action on marine policy to recover the cost of removal of a sunken vessel, plaintiff must initially prove that vessel was a wreck within provision of the policy. M.J. Rudolph v. Lumber Mutual Fire Insurance Co., 371 F. Supp. 1325 (E.D.N.Y. 1974).

When removal of a fishing boat blocking a channel was not undertaken to preserve the ship's hull, gear and personalty, but, rather, at the time the salvage effort was commenced, the vessel appeared to be a total loss or a constructive total loss, the cost of the removal fell under the "wreck removal" provisions of the vessel's P & I policy, rather am under the "sue and labor" provisions of the vessel's marine hull insurance. The fact that the hull insurance underwriter solicited bids to restore the vessel subsequent to her removal was nothing more than an attempt to mitigate its liability. Zurich Insurance Company v. Pateman, et al., 692 F. Supp. 371 (D.N.J. 1988).

SALVAGE RIGHT

In exchange for his right to total recovery for loss of vessel, insured is obligated to transfer his interests in ship to insurer. Continental Insurance Co. v. Clayton Hardtop Skiff, 239 F. Supp. 815 (D.N.J. 1965) vacated 367 F.2d 230 (3rd Cir. 1966).
"Compulsory removal" is a term of art in admiralty law and refers to a situation in which a hull has been abandoned by the owner and the hull underwriter but, pursuant to government order, must be removed from navigable waters. *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500 (2nd Cir. 1972).

Where owner was served with summons charging it with obstructing waterfront property under rule providing that if the waterfront property is obstructed commission may have it removed and charge the owner for such expense, the owner was under compulsion to remove wreck. *M.J. Rudolph v. Lumber Mutual Fire Insurance Co.*, 371 F. Supp. 1325 (E.D.N. Y. 1974).

Under Missouri law, a marine indemnity policy providing coverage for "any neglect or failure to raise, remove, or destroy" the wreck of an insured vessel did not provide coverage for liability arising when ship struck assured's sunken barge after expiration date of policy term and insured's failure to remove barge had largely occurred during policy term. *Eagle Leasing Corp. v. Hanford Fire Insurance Co.*, 540 F.2d 1257 (5th Cir. 1976), *cert. denied* 431 U.S. 967 (1977).

In 1981, the Fifth Circuit, disagreed with the Second Circuit's 1972 holding in *Seaboard Shipping Corp. v. Jocharanne Tugboat Corp.*, 461 F.2d 500 (2nd Cir. 1972), and concluded that no express order from a governmental agency requiring the removal of the vessel was needed. Instead a three-pronged test was suggested, that is, a removal is "compulsory by law" if (a) it was reasonably required by law, or (b) failure to remove would expose the insured to liability of such magnitude as to justify removal; and (c) the insured believed that removal was necessary to avoid legal consequences of the type covered by the policy. *Progress Marine, Inc. v. Foremost Ins. Co.*, 642 F.2d 816 (5th Cir. 1981), *cert. denied* 454 U.S. 860 (1981).

Two years later, sitting *en banc*, the Fifth Circuit modified its own *Progress Marine* test by eliminating the requirement that the insured subjectively believe removal was reasonably necessary, but held that the assured could not recover from the P & I underwriter because (a) Conoco was not the owner of the vessel and was not negligent, and therefore was not legally obligated to remove the wreck; and (b) since Conoco was neither negligent nor the owner of the vessel, it was not exposed to any third party liabilities of a magnitude sufficient to justify incurring the removal expense. The court did, however, allow Conoco recovery against the vessel owner, whose negligent crew caused the sinking, and hinted in a footnote (n. 2) that the owner's liability to Conoco was probably covered by the P & I policy, but that question was not at issue. *Continental Oil Co. v. Bonanza Corp.*, 706 F.2d 1365 (5th Cir. 1983).

The term "compulsory by law" in a maritime P & I Policy should be interpreted according to the reasonable expectations of the parties. *East Coast Tender Service v. Winzinger, Inc.*, 759 F.2d 280 (3rd Cir. 1985) (adopting the interpretation of "compulsory by law" as set forth in *Progress Marine*).
Progress Marine standard applied and removal was "compulsory by law" when a shipowner was directed by the Coast Guard to remove a wreck from a channel and reasonably concluded that the failure to remove the wreck would expose it to liability in an amount "sufficiently great to justify the expense of removal." Zurich Insurance Company v. Pateman, et al., 692 F. Supp. 371 (D.N.J. 1988).

Removal of a wreck is "compulsory by law" if it is directed by valid government order, statute or regulation, or if the wreck owner's probable tort liability without the removal could reasonably be expected to exceed the probable removal costs. Grupo Protexa v. All American Marine Slip, 753 F. Supp. 1217 (D. N.J. 1990), rev'd 954 F.2d 130 (3rd Cir. 1992); 856 F. Supp. 868 (D. N.J. 1993); aff'd 20 F.3d 1224 (3rd Cir. 1994).

Under the 1986 amendments to the United States "Wreck Act," 33 U.S.C. §409, et seq., a vessel owner is responsible for promptly marking and removing any wreck which poses a hazard to navigation or, in the alternative, the owner will be strictly liable to the United States for the cost of the Government's removing the wreck from its navigable waters.

AS OWNER

Under the SP-23 form, the underwriters insure against losses incurred by the insured "as owners of the vessel named herein." One of the risks covered is liability for expense of removal of wreck "of the vessel named herein."

No coverage where a dumb barge, under the complete control of a tug owned and operated by the same entity and insured under the same fleet policy as that of the barge, sank due solely to fault of the tug. The owner was not liable for the cost of the barge's removal "as owner" of the barge. St. Paul Fire & Marine Ins. Co. v. Vest Transp. Co., 500 F. Supp. 1365 (N.D. Miss. 1980), aff'd per curiam, 666 F.2d 932 (5th Cir. 1982).

Chartered operator of a vessel could not recover from the owner-operator's P & I underwriter for the cost of removal of the vessel's wreck because the chartered operator was not exposed to any liability "as owner" of the vessel; a time charterer has no obligation to remove the wreck. The court also held that the charterer could not recover under the policy provision covering "expense in connection with any fixed or movable object" because it incurred the expense as a lease operator, not "as owner" of the vessel. Continental Oil Co. v. Bonanza Corp., 706 F.2d 1365 (5th Cir. 1983).

GENERAL REFERENCES

33 U.S.C. § 409 et seq.


Chapter 5

LOSS TO CARGO

(8) Liability for loss of, or damage to, or in connection with cargo or other property, excluding mail and parcel post, including baggage and personal effects of passengers, to be carried, carried, or which has been carried on board the vessel named herein:

Despite the fact that the insurer had not expressly assumed liability for damage due to delay or inherent nature of goods, insurer under marine policy is liable for loss of goods due to delay and due to inherent nature of goods when stranding is found to be the proximate cause of the loss. Lanasa Fruit Steamship & Importing Co. v. Universal Insurance Co., 302 U.S. 556, 1938 A.M.C. 1 (1938).

The exclusion in a P&I policy for shortage of cargo did not apply when the shortage resulted from cargo escaping from cases that were negligently allowed to rust and be destroyed by seawater. Eagle Star & British Dominions Insurance Co. v. George A. Moore and Co., 9 F.2d 296, 1926 A.M.C. 126 (9th Cir. 1925).

No warranty of seaworthiness can be implied from comprehensive language of Protection and Indemnity policy. Eagle Star, supra.

There is no implied warranty of seaworthiness in a Protection and Indemnity Policy and it is not voided absent fraud or willful exposure of the vessel to danger on the part of the owner. Sorenson and Neilson v. Boston Insurance Co., 20 F.2d 640, 1927 A.M.C. 1288 (4th Cir. 1927), cert. denied, 275 U.S. 555 (1927).

There is no implied warranty of seaworthiness in a Protection and Indemnity policy. TN. No. 73, 1939 A.M.C. 673 (S.D.N.Y. 1939), aff’d on other grounds, Commercial Molasses Corp. v. New York Tank Barge Corp., 114 F.2d 248, 1940 A.M.C. 1361 (2d Cir. 1940), aff’d, 314 U.S. 104, 1941 A.M.C. 1697 (1941).

In a mutual fault collision in which amounts paid by the non-carrying vessel in respect of cargo carried aboard the insured vessel served only to diminish the balance struck in favor of the owner of the insured vessel in the division of damages, the collision and resulting damage did not, as a matter of law, impose any liability on the insured vessel; and accordingly, her underwriter is not liable as it did not insure against any loss sustained by the owner of the insured vessel. New York and Cuba Mail Steamship Co. v. American Steamship Owners' Mutual Protection & Indemnity Association, Inc., 72 F.2d 694 (2d Cir. 1934), cert. denied, 293 U.S. 622 (1934). See also John C. Moore, Liability for Damage to Property Carried, to Be Carried, or
Pontoons being transported by towage are neither "hulls" nor "cargo" under a policy to insure legal liability "... as to Hulls and cargoes owned, operated and chartered or forwarded by the insured ...." Connors Fire and Marine Insurance Co., 88 F.2d 637, 1937 A.M.C. 344 (2d Cir. 1937).

Where damage to cargo of tobacco caused by heat and moisture from cargo stowed nearby over a period in excess of one month and during which one Protection and Indemnity policy expired and another began, insurers are required to reimburse assured for damage accruing during lives of their respective policies. Expert witness used to determine apportionment of damage. Export Steamship Corp. v. American Insurance Co., 106 F.2d 9, 1939 A.M.C. 1095 (2d 1939), cert. denied sub nom, American Steamship Owners' Mutual Protection & Indemnity Association v. Export Steamship Corp and American Export Lines, 309 U.S. 686 (1940).

Under policy insuring against losses without assured's actual fault and privity, fault and neglect of managing officers of assured precluding recovery on Protection and Indemnity policy was affirmatively indicated from the fact that assured's marine superintendent had examined the ship's log books which indicated inadequacy of fire and boat drills. New York and Cuba Mail, supra.

A P&I policy is intended to cover, inter alia, assured's liability for loss of passengers' baggage, regardless of the negligence of the officers and crew of the assured in causing the loss. New York and Cuba Mail, supra.

P&I policy covering liability for loss of cargo "from any cause whatsoever" does not indemnify the assured against losses which may arise from his intentional acts and does not cover loss by willful scuttling of the vessel at sea. Fidelity-Phoenix Fire Insurance Co. v. Murphy, 226 Ala. 226, 146 So. 387, 1933 A.M.C. 444 (Ala. 1933),

Charterer's liability policy, insuring against those liabilities normally covered by a Protection and Indemnity policy, covers the liability of the charterer for loss of cargo due to unseaworthiness of the vessel notwithstanding the owner's privity. Martin and Robertson, Ltd. v. Orion Insurance Co., 1971 A.M.C. 515 (Cal. Sup. Ct. 1970).

There can be no imputation of concealment when, before the policies were issued, the carrier placed in the hands of the underwriter a letter from the Captain reciting the circumstances of the voyage thereby giving each party an equal opportunity to acquire knowledge of facts contained therein. Vasse v. Ball, 2 Dall. 270, 1 L. Ed. 377 (Pa. 1797).

Privity or knowledge of the shipowner to the extent that it voids coverage under the Protection and Indemnity policy has been construed strictly, and today, coverage can be denied only in cases of criminal acts or intent to defraud. L. Buglass, Marine Insurance and General Average in the United States, 258-259 (1973).
A tower's legal liability policy for collision, grounding, stranding or loss of or damage to tow covers liability of tug owner to cargo owner as well as to owner of tow when tug negligently proceeds through heavy seas and causes damage to tow and cargo. *Bee Line Transportation Co. v. Connecticut Fire Insurance Co. of Hartford*, 76 F.2d 759, 1935 A.M.C. 670 (2d Cir. 1935).

Decay of cargo of lemons caused by delay due to collision but due to arrest resulting therefrom is not within coverage of policy insuring liability for "... decay, must, or mold, etc. which may reasonably be supposed to have been in consequence of the stranding, sinking, burning or collision of the vessel or through delay resulting therefrom ...." *Amoroso v. Sea Insurance Co.*, 245 N.Y. 329, 157 N.E. 156 (N.Y. 1927).

Use of the term "property" covers additional goods onboard ship not included under "cargo" such as passengers' baggage and crew's effects, John C. Moore, *Liability for Damage to Property Carried, to Be Carried, or Which Has Been Carried; Both-to-Blame Cases and Liability for Recovery over by Non-Carrier; Liability for Cargo's Proportion of General Average Not Otherwise Collectible, Policy Exclusions and Protective Clauses*, 43 TUL. L. REV. 581, 582 (1969).

The term "... in connection with..." covers liability for not only physical damage to property or cargo but also damage or loss due to delay in shipment. *Id.*

The term "... to be carried ... or which has been carried ...." extends coverage to the entire period for which the insured is responsible for the shipment of goods subject to the specific exclusions of subclauses (p) and (q). *Id.*

Protection and indemnity policy pays only for legal liabilities of shipowner in respect to cargo and is component of familiar insurance set up for cargo transportation which may also include all risk marine policy taken out by cargo interests or "open-marine" policy held by carrier. *In re Litigation Involving Alleged Loss of cargo from Tug Atlantic Seahorse, "Sea Barge 101 " Between Puerto Rico and Florida in December, 1988*, 772 F. Supp. 707 (D. P.R. 1991).

**Provided, however, that no liability shall exist under this provision for:**

(a) Loss, damage or expense arising out of or in connection with the custody, care, carriage or delivery of specie, bullion, precious stones, precious metals, jewelry, silks, furs, bank notes, bonds or other negotiable documents or similar valuable property, unless specially agreed to and accepted for transportation under a form of contract approved, in writing, by the Assurer.

The purpose of this clause is to provide the insurer an opportunity to compel the insured to take advantage of his right of contractual agreement limiting its liability with respect to special cargo. John C. Moore, *Liability for Damage to Property Carried, to Be Carried, or
Which Has Been Carried; Both-to-Blame Cases and Liability for Recovery over by Non-Carrier; Liability for Cargo's Proportion of General Average Not Otherwise Collectible; Policy Exclusions and Protective Clauses 43 Tul. L. Rev. 581, 582 (1969).

(b) Loss of, or damage to, or in connection with cargo requiring refrigeration unless the space, apparatus and means used for the care, custody and carriage thereof have been surveyed by a classification surveyor or other competent disinterested surveyor under working conditions before the commencement of each voyage and found in all respects fit, and unless accepted for transportation under a form of contract approved, in writing, by the Assurer.

The effect of this clause is to insure a higher standard of care than that required by the classification societies because of the possibility of great damage resulting from even minor malfunctions in refrigeration equipment. John C. Moore, Liability for Damage to Property Carried, to Be Carried, or Which Has Been Carried; Both-to-Blame Cases and Liability for Recovery over by Non-Carrier; Liability for Cargo's Proportion of General Average Not Otherwise Collectible; Policy Exclusions and Protective Clauses, 43 Tul. L. Rev. 581, 591 (1969).

(c) Loss, damage, or expense in connection with any passenger’s baggage or personal effects, unless the form of ticket issued to the passenger shall have been approved, in writing, by the Assurer.

No annotations found.

(d) Loss, damage, or expense arising from stowage of underdeck cargo on deck or stowage of cargo in spaces not suitable for its carriage, unless the Assured shall show that every reasonable precaution has been taken by him to prevent such improper stowage.

In a policy of marine insurance, there is an implied condition of proper stowage. Natchez Insurance Co. v. Stanton, Buckner & Co., 10 Miss. (1 S&M.) 340 (Miss. 1840).

Where cargo policy stipulated film to be carried "under deck," i.e., under the main deck or in a structure built in the frame of the vessel, loss of film carried on deck and in the officers' quarters as per carriers' rule was not covered by the policy because such carriage was not customary even though film was frequently carried on forecastle and poop spaces. Transatlantic Shipping Co. v. St. Paul Fire and Marine Insurance Co., 298 F. 551, 1924 A.M.C. 628 (S.D.N.Y. 1924), aff'd, 9 F.2d 720, 1926 A.M.C. 83 (2d Cir. 1925).

Insurance policy "... upon all kinds of lawful goods and merchandises, laden, or to be laden, on board ..." does not cover cargo stowed on deck. Allegre's Administrators v. Maryland Insurance Co., 2 Gill and J. 139 (Md. 1830).
A policy of insurance on goods does not cover that property stowed on deck unless such liability is expressly assumed in the policy. Notwithstanding that it was customary to carry cargo not subject to dampness on deck without notice to the shipper, a policy on copper does not cover copper in pigs stowed on deck as it could not be shown that any insurer had ever paid such losses except under special contract. Taunton Copper Co. v. The Merchants Insurance Co., 40 Mass. (22 Pick.) 108 (Mass. 1839).

Marine insurance policy on Mexican doubloons does not attach to doubloons stowed below deck instead of the customary stowage in the Captain's cabin for such stowage is not a risk insured against. Leitch v. Atlantic Mutual Insurance Co., 66 N.Y. 100 (N.Y. 1876).

Settlement with owner of cargo by assignee of charterer for damage sustained to cargo stowed on deck without notice to consignee was a risk insured by policy on cargo onboard charterer's vessel. Kuehne and Nagel, Inc. v. Baiden, 369 N.Y.S.2d 667 (N.Y. 1975).

Under English law, policy requiring underwriter to indemnify shipowner for all claims that might be made as a result of carrying cotton on deck instead of under deck as per bill of lading cannot be vitiated by underwriter's claim of unseaworthiness due to improper stowage of cargo when the only evidence was the assertion by the underwriter that light cargo was in the holds and heavy cargo was on deck and insufficiently secured. Blackett Magalhaes & Columbia v. The National Benefit Assurance Co., (1921) 8 Lloyd's List L.R. 293.

In order to limit coverage of losses due to improper stowage, which may constitute deviations, such losses are excluded except where the improper stowage occurs despite every reasonable precaution of the assured. John C. Moore, Liability for Damage to Property Carried, to Be Carried, or Which Has Been Carried; Both-to-Blame Cases and Liability for Recovery over by Non-Carrier; Liability for Cargo's Proportion of General Average not Otherwise Collectible; Policy Exclusions and Protective Clauses, 43 TUL. L. REV. 581, 593-594 (1969).

(e) Loss, damage, or expense arising from any deviation, or proposed deviation, not authorized by the contract of affreightment, known to the Assured in time to insure specifically the liability therefor, unless notice thereof is given to the Assurer and the Assurer agrees, in writing, that such insurance is unnecessary.

Deviations have been held not to invalidate coverage under a P&I policy if the vessel owner is unaware of deviation or if deviation occurs contrary to owner's instructions. John C. Moore, Liability for Damage to Property Carried, to Be Carried, or which has Been Carried; Both-to-Blame Caves and Liability for Recovery over by Non-Carrier; Liability for Cargo's Proportion of General Average Not Otherwise Collectible; Policy Exclusions and Protective Clauses, 43 TUL. L. REV. 581, 593 (1969).

If the assured is not privy to the deviation, coverage under the P&I policy generally remains valid. L. Buglass, Marine Insurance and General Average in the United States, 254 (1973).
(f) Freight on cargo short delivered, whether or not prepaid or whether or not included in the claim and paid by the Assured.

No annotations found.

(g) Loss, damage, or expense arising out of or as a result of the issuance of Bills of Lading which, to the knowledge of the Assured, improperly describe the goods or their containers as to condition or quantity.

Coverage under a P&I policy is voided by this clause only in instances in which the carrier has liability to a bona fide third party purchaser based on issuance of a bill of lading. John C. Moore, Liability for Damage to Property Carried, to Be Carried, or Which Has Been Carried, Both-to-Blame Cases and Liability for Recovery over by Non-Carrier; Liability for Cargo's Proportion of General Average Not Otherwise Collectible; Policy Exclusions and Protective Clauses, 43 TUL. L. REV. 581, 594 (1969).

(h) Loss, damage, or expense arising out of delivery of cargo without surrender of Bill of Lading.

Since the law obliges the carrier to require the surrender of a bill of lading and since delivery without such surrender through mere negligence is rare, losses resulting therefrom are not recoverable under the Protection and Indemnity policy. John C. Moore, Liability for Damage to Property Carried, to Be Carried, or Which Has Been Carried, Both-to-Blame Cases and Liability for Recovery over the Non-Carrier; Liability for Cargo's Proportion of General Average not Otherwise Collectible; Policy Exclusions and Protective Clauses, 43 TUL. L. REV. 581, 594 (1969).

And provided further that:

(aa) Liability hereunder shall in no event exceed that which would be imposed by law in the absence of contract.

No annotations.

(bb) Liability hereunder shall be limited to such as would exist if the Charter Party, Bill of Lading or Contract of Affreightment contained the following clause (in substitution for the clause commonly known as the Jason Clause):

“In the event of an accident, danger, damage or disaster before or after commencement of the voyage, resulting from any cause whatsoever, whether due to negligence or not, for which, or for the consequences of which, the shipowner is not responsible, by statute or contract or otherwise, the shippers, consignees or owners of the cargo shall contribute with the
shipowner in general average to the payment of any sacrifices, losses or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in response of the cargo.”

When cargo is carried by the vessel named herein under a bill of lading or similar document of title subject or made subject to the Carriage of Goods by Sea Act, April 16, 1936, liability hereunder shall be limited to such as imposed by said Act, and if the Assured or the vessel named herein assumes any greater liability or obligation than the minimum liabilities and obligation imposed by said Act, such greater liability or obligation shall not be covered hereunder.

When cargo is carried by the vessel named herein under a charter party, bill of lading or contract of affreightment not subject or made subject to the Carriage of Goods by Sea Act, April 16, 1936, liability hereunder shall be limited to such as would exist if said charter party, bill of lading, or contract of affreightment contained the following clauses: a clause limiting the Assured’s liability for total loss or damage to goods shipped to Two Hundred and Fifty ($250) Dollars per package, or in case of goods not shipped in packages, per customary freight unit, and providing for pro rata adjustment on such basis for partial loss or damage; a clause exempting the Assured and the vessel named herein from liability for losses arising from unseaworthiness, even though existing at the beginning of the voyage, provided that due diligence shall have been exercised to make the vessel seaworthy and properly manned, equipped, and supplied; a clause providing that the carrier shall not be liable for claims in respect of cargo unless notice of claim is given within the time limited in such Bill of Lading and suit is brought thereon within the limited time prescribed therein; and such other protective clauses as are commonly in use in the particular trade; provided the incorporation of such clauses is not contrary to law.

The foregoing provisions as to the contents of the Bill of Lading and the limitation of the Assurer’s liability may, however, be waived or altered by the Assurers on terms agreed, in writing.

In marine Protection and Indemnity policy issued to barge-carfloat operator which was considered railroad subject to Interstate Commerce Commission regulation, rather than vessel, boilerplate limitation of liability clause derived from COGSA was superceded by special conditions rider which limited insurer's liability to that set forth in insured's published tariff. New York Cross Harbor Railroad Terminal Corp. v. Atlantic Mutual Ins. Co., 852 F.2d 38 (2d Cir. 1988).
(cc) Where cargo on board the vessel named herein is the property of the Assured, such cargo shall be deemed to be carried under a contract containing the protective clauses described in the preceding paragraph, and such cargo shall be deemed to be fully insured under the usual form of cargo policy, and in case of loss thereof or damage thereto the Assured shall be insured hereunder in respect of such loss or damage only to the extent that they would have been covered if said cargo had belonged to another, but only in the event and to the extent that the loss or damage would not be recoverable under a cargo policy as hereinbefore specified.

(dd) The Assured’s liability for claims under Custody Cotton Bills of Lading issued under the conditions laid down by the Liverpool Bill of Lading Conference Committee, is covered subject to previous notice of contract and payment of an extra premium of two (2¢) cents per ton gross register per voyage, but such additional premium shall be waived provided every bale is re-marked at port of shipment on another portion of the bale.

(ee) No liability shall exist hereunder for any loss, damage or expense in respect of cargo before loading on or after transported on land or on another vessel. No liability shall exist hereunder for any loss, damage or expense in respect of cargo before loading on or after discharge from the vessel named herein caused by flood, tide, windstorm, earthquake, fire explosion, heat, cold, deterioration, collapse of wharf, leaky shed, theft or pilferage unless such loss, damage or expense is caused directly by the vessel named herein, her master, officers or crew.

No annotations.
Chapter 6
FINES, PENALTIES, MUTINY, QUARANTINE, DEVIATION AND GENERAL AVERAGE EXPENSES

(9) Liability for fines and penalties, including expenses necessarily and reasonably incurred in avoiding or mitigating same, for the violation of any of the laws of the United States, or of any State thereof, or of any foreign country; provided, however, that the Assurer shall not be liable to indemnify the Assured against any such fines or penalties resulting directly or indirectly from the failure, neglect, or default of the Assured or his managing officers or managing agents to exercise the highest degree of diligence to prevent a violation of such laws.

Under this clause, an Assured may claim against the Insurer for all fines and penalties assessed by a federal, state or foreign government. This may include fines imposed by any court, tribunal or authority of competent jurisdiction for failure to maintain safe working conditions, failure to comply with the regulations for declaration of goods or documentation of cargo, smuggling or violation of any customs regulation, breach of immigration regulations, any act of neglect of a seaman or any other servant or agent of the master. Christopher Hill et al., Introduction to P & I Insurance, 75 (2d ed. 1996), The member may also recover fines imposed an any agent or seaman, but only if it is me the member may be liable to reimburse. E.R. Hardy Ivamy, Marine Insurance, 219 (4th ed, 1985). A fine resulting from the deliberate misconduct of a seaman will only be reimbursed if the member is compelled by law to pay the fine or had reasonably paid the fine to obtain the release of an arrested vessel. Hill, supra, at 71.

While this clause has previously allowed recovery for fines incurred for oil pollution, P & I Clubs have begun offering distinct pollution control liability insurance up to a maximum of $500 million and up to an excess of $200 million for tanker-owner members. Hill, supra, at 75. Oil pollution insurance from P & I Clubs covers the losses, damages, costs and expenses caused by the discharge or escape of oil or any hazardous substance from an insured vessel, or incurred due to the threat of such discharge or escape. Id. at 71. This includes measures taken to avoid or minimize pollution or prevent an impending discharge or escape of oil or my hazardous substance from the insured vessel. Id. Because pollution coverage is generally quite broad, it may include recovery for defense costs, fines and penalties, and possibly punitive damages, James P. Walsh, Environmental Coverage Issues Under Marine

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1 The author wishes to acknowledge the assistance of Erin Bruce in the preparation of this chapter.
Insurance Policies, 7 U.S.F., Mar. L.J. 1, 18 (Fall 1994). Although the, P&I Clubs have continued to provide oil pollution coverage for ships operating in U.S. waters, they have refused to issue evidence of financial responsibility for ships to receive the Certificates of Financial Responsibility (COFRs) from the US Coast Guard, as required by the Oil Pollution Act of 1990. Id. at 5. The Clubs have refused to back the OPA 90 certificates because of higher limits of liability under the Act, the ability to lose their right to limit liability, broad recoverable damages and the allowance for similar state legislation. John Trew and Robert Seward, The Britannia Guide to Oil Pollution Legislation, 85 (1999). Further, they would submit to direct action which would change their traditional role of indemnity underwriters. Id.

In some states, insurance coverage of punitive damages claims is contrary to public policy. Id. at 20. For example, the Insurance Code of California forbids payment of insurance for a willful act. Id., Cal. Ins. Code § 533 (West 1993). On its face, Clause 9 has been held not to exclude coverage for punitive damages, even when the punitive damages arise out of personal injury or loss of life covered by Clause 1 of the SP-23. Punitive damages are within the nature of fines and penalties covered by Clause 9. Taylor v. Lloyd's Underwriters of London, 1994 WL 118303 at *6 (E.D. La 1994).

If a ship is confiscated in lieu of the assessment of fines, some P & I Clubs will pay an innocent ship owner market value of the confiscated ship. L. Buglass, Marine Insurance and General Average in the United States 411 (3d ed. 1991). However, at the discretion of the Club, it may provide a letter of undertaking to assist in securing the release of a vessel which has been arrested for reasons such as customs penalties mid other state-imposed fines. The letter stipulates that in consideration for the release of the vessel, the Club will pay such sums as may be awarded against the member in proceedings before a court of competent jurisdiction up to a maximum amount, although in some countries, clearance is refused until a fine is paid. Hill, supra, 120-121.

P & I Clubs ordinarily reimburse their members for the expenses incurred in keeping stowaways on board until they can be released on share, and the costs of repatriating them to their country of origin, even though Clause 9 does not expressly cover such costs. Hill, supra, at 84. Recently, stowaway coverage has also reimbursed the costs of a ship that picked up "boat people, in South East Asia and maintained them on board until they were allowed on shore. Id.

The policy does not define "highest degree of diligence," but presumably this standard requires more care than mere "due diligence" or reasonable fitness," the standards for seaworthiness. Further, under this clause, "the Assured or his managing officers or managing agents" as well as the master and his crew would be charged with the knowledge of all laws and government regulations if they could be ascertained by using the "highest degree of diligence."

(10) Expenses incurred in resisting any unfounded claim by the master or crew or other persons employed on the vessel named herein, or prosecuting such persons in case of mutiny or other misconduct.
Mutiny requires the commission of an overt act by one or more crew members, including the Mate and any other officer subordinate to the master, while on a US vessel either on the high seas or on any "waters within the admiralty and maritime jurisdiction of the United States." Benedict on Admiralty, § 117 at 9-37 (7th ed. Rev. 1996). A mutiny does not require intent to usurp the master's command. Concerted disobedience or encouraging disobedience in other members of the crew is sufficient. Id. Currently, mutiny is frequently associated with labor disputes as some settlement methods attempted by crew members have been deemed mutiny. Benedict, supra, § 117 at 9-38; Southern S.S. Co. v. National Labor Relations Board, 316 U.S. 31, 62 S. Ct. 886, 86 L. Ed 1246, 1942 A.M.C. 515 (1942); Algic 1938 A.M.C. 531 (4th Cir. 1938).

Other misconduct of the master or crew would include charges of barratry. Barratry is an act committed by the master or mariners of a ship involving "deliberate and willful disobedience by the master or mariners of an owner's oral or written instructions." Albany Ins. Co. v. Jones, 1996 WL 904756 (D. Alaska) at *4 quoting U.S. Fire Ins. Co. v. Cavanaugh, 732 F.2d 832, 835 (11th Cir.). cert. denied, 469 U.S. 1036 (1984). Barratry "comprehends all wrong done by master or mariners against interests of the owner of the ship, but it does not include errors in judgment or ordinary cases of negligence." E.R. Hardy Ivamy, Maine Insurance, 161 (4th ed. 1985). In order for conduct to constitute barratry, there must be intentional fraud, breach of trust or a willful violation of the law. Compania de Navigacion, La Flecha v. Brauer, 168 U.S. 104, 124, 18 S.Ct. 12, 17 (1897). Under this clause, the costs of prosecuting the master or crew on charges of barratry would be covered. Barratry has been held to include smuggling off-eases, other breaches of municipal or international law which result in a loss to the Assured, breach of an embargo, trading with the enemy, deviation for the purposes of the master, changing sides during a civil war and deliberately sinking the ship. Id. at 161-68.

As an aside, the applicable standard which the Assured may be required to meet in order to recover such expenses may be provided by Federal Rule of Civil Procedure 11. In other words, it may be necessary for the Assured to establish that the claim was without merit. Under U.S. law, this requirement is tantamount to a judicial determination that the attorney representing the master and/or crew did not comply with Federal Rule of Civil Procedure 11. Rule 11 imposes three affirmative duties on an attorney. (1) to conduct a reasonable inquiry into the facts which support any pleading, motion or other document signed by the attorney, (2) to conduct a reasonable inquiry into the law such that the document embodies existing legal principles or a good faith argument for the extension, modification, or reversal of existing law; and (3) that the document is not submitted to delay, or harass, or increase the costs of litigation. Childs v. State Farm Mutual Auto. Ins. Co., 29 F.3d 1018, 1023 (5th Cir. 1994). If the claim is unfounded and the Insurer settles the claim with the Assured, the Insurer may, through subrogation, seek recovery from the master and/or crew's attorney under Federal Rule of Civil Procedure 11. There are similar provisions under the laws of various states and foreign countries.

(11) Liability for extraordinary expenses resulting from outbreak of plague or other contagious disease, including such expenses incurred for disinfection of the vessel named herein or persons on board, or for quarantine, but excluding the
ordinary expenses of loading and/or discharging, and the wages and provisions of crew and passengers; each claim under this provision is subject to a deduction of Two Hundred ($200) Dollars. It is provided further, however, that if the vessel named herein be ordered to proceed to a port when it is or should be known that calling there will subject the vessel to the extraordinary expenses above mentioned, or to quarantine or disinfection there or elsewhere, the Assurer shall be under no obligation to indemnify the Assured for any such expenses.

Quarantine expenses are recoverable if incurred because of an outbreak of a contagious disease on board and an attendant order that the ship be disinfected. In order to recover under this clause, the disease requiring quarantine or disinfection must be contagious, not merely infectious. Thus, any expenses incurred because of Acquired Immune Deficiency Syndrome (AIDS) or other sexually transmitted diseases would not be covered. In contrast, the rules governing most P&I Clubs in Scandinavia and the United Kingdom use the term “Infectious” instead of “contagious” and may be interpreted more broadly. See Britannia P&I Club Rule 19(16), Skuld P&I Club Rule 21.1. The SP-23 does not address the risks the AIDS epidemic poses to seamen and passengers. See generally, Mindy James, Article, The Availability of Maintenance and Cure to Seamen with AIDS, 11 U.S.F. Mar. L.J. 333 (1998-1999) (discussing the legal ramifications of AIDS in the maritime community). The owner may recover costs for disinfection of the ship or of persons on board under quarantine or public health requirements. E.R. Hardy Ivamy Marine Insurance 218-219 (4th ed. 1985). The Clubs will reimburse the net expense of the quarantine; their liability is reduced by the wages and cost of provisions for the crew and passengers and expense of loading or unloading. The costs included are bunkers, insurance and port charges. Christopher Hill et al., Introduction to P & I Insurance, 84 (2d ed. 1996).

(12) Net loss due to deviation incurred solely for the purpose of landing an injured or sick seaman in respect of port charges, incurred, insurance, bunkers, stores, and provisions consumed as a result of the deviation.

A deviation is an intentional departure from the stated or customary route not contemplated by the parties at the formation of the contract. ADA, 1926 A.M.C. 1 (Ct. App. NY 1925). In the case of an inexcusable deviation from the anticipated route, the insurer is discharged from liability as from the time of the deviation. However, because a master is obligated “to bear away to some port of distress as soon as possible” to obtain medical assistance for a seriously injured or dangerously ill seaman, a deviation for that purpose is considered reasonable. The Iroquois, 118 F. 1003, (9th Cir, 1902); 70 Am. Jur. 2d Shipping § 366 (1987). The Marine Insurance Act of 1906 excuses reasonable deviation “for the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or where reasonably necessary for the purposes of obtaining medical or surgical aid for any person on board the ship."

If the ship must deviate to seek medical care for someone who is injured or ill, "the owner can recover port and other charges solely incurred for the purpose of landing or
securing the necessary treatment for an injured or sick person being carried in the ship including
the net loss to the owner in respect of fuel, insurance, wages, stores and provisions incurred for
such purpose or while awaiting a substitute for such person." Ivamy, supra at 217. Deviation
expenses can also be recovered by a ship with an on-board hospital facility which comes to the
aid of an ill seaman aboard another ship. Peninsular and Oriental Steam Navigation Co. v.
Overseas Oil Carriers, 553 F.2d 830 (2nd Cir. 1977).

(13) Liability for, or loss of, cargo’s portion of general
average, including special charges, in so far as the Assured
cannot recover same from any other source; subject however,
to the exclusions of Section (8) and provided, that if the
Charter Party, Bill of Lading, or Contract of Affreightment
does not contain the quoted clause under Section 8 (bb) the
Assured’s liability hereunder shall be limited to such as would
exist if such clause were contained therein.

Under this clause, the Assured is protected from the inability to recover cargo's
proportion of general average even if the Assured failed to exercise due diligence to make the
vessel seaworthy or if the Assured breached another provision of the contract of affreightment
not specifically delineated in the exclusions clauses. This protection is limited to the Assured's
liability as determined by the inclusion of Clause 8(bb) in all contracts of affreightment entered
into by the Assured. See L. Buglass, Marine Insurance and General Average in the United
States, 413-414 (3d ed. 1991); J. Moore, Liability for Damage to Property Carried, to be Carried
or which Has Been Carried; Both-to-Blame Cases -and Liability for Recovery over by Non-
Carrier, Liability for Cargo's Proportion of General Average Not Otherwise Collectible Policy
is not intended to overlap in anyway with any other type of insurance carried by the Assured,
ordinarily, the Clubs’ underwriters will not reimburse the assured for the ship’s sacrifices, which
should be reimbursed by a ship’s hull underwriters. Christopher Hill et al., Introduction to P &
I Insurance, 93 (2d ed. 1996).

The insolvency of the cargo owner does not prevent the Assured from recovering,
but the Insurer is not liable for any sacrifices. Therefore, if the uncollectible general average
contained any sacrifices, the amount recoverable will be reduced accordingly, Buglass, supra,
at 413-414.

There is no coverage "which will indemnify the assured against a loss which he
may purposely and willfully create or which may arise from his immoral, fraudulent or
felonious conduct.” Rose Murphy, 1933 AMC 444 (Ala. 1933).
Chapter 7

COSTS OF DEFENSE, NOTICE
AND SETTLEMENT OF CLAIM,
ASSISTANCE AND COOPERATION

(14) Costs, charges and expenses reasonably incurred and paid by the Assured in defense against any liabilities insured against hereunder in respect of the vessel named herein, subject to the agreed deductibles applicable, and subject further to the conditions and limitations hereinafter provided.


Acknowledging that there is no federal law directly addressing the issue, the Washington Court of Appeals, in Ross v. Frank B. Hall & Co. of Washington, 73 Wn.App. 630, 870 P.2d 1007 (1994), held that the SP-23 form was unambiguous to the extent that defense expenses were included within the policy limits. According to the court, Provision 14 (identical to the clause cited above), in addition to the "law costs" provision, supports a conclusion that the defense costs are covered under the policy, subject to the deductible. Because the insurer's liability was limited to the amount cited in the policy, the "language plainly shows that [the insured] did not have an open-ended obligation to pay defense costs." Id. At 636.

The SP-23 form has been found to be ambiguous with respect to expenses incurred by the insurer when defense counsel is employed by the insurer and the insurer, not the insured, is its client. Fees and costs, in that instance, would not be included in policy limits. Verrett V. Ordoyne Towing Co., Inc., 1977 AMC 795 (E.D. La. 1974); Faris, Ellis, et al v. Jobob Towing, Inc., 342 So.2d 1284 (La. App. 1977). However, to the contrary, in Board of Comm’rs of Port of Orleans v. Guidry, supra, the court held that it makes no differences
whether the insurer or the insured appoints defense counsel, the costs are included within, and not in addition to, policy limits.

Where a P&I insurer is sued pursuant to a direct action statute, the defense costs are incurred by the insurer in the defense of itself and, hence, the defense costs cannot be charged to the policy limits. *Verrett v. Orodyne Towing Co., Inc.*, 1977 AMC 795 (E.D. La. 1974) (rules of Steamship Mutual Club). Additionally, costs expended solely to further the insurer's interest, such as interpleader actions and declaratory judgment actions on coverage issues, cannot be included within the policy limits. *McKeithen v. S/S FROSTA*, 430 F.Supp. 899, 906-07 (E.D. La. 1977); *Board of Comm'r v. Guidry*, 425 F.Supp. 661, 663-64 (E.D. La.) (SP-38), aff'd, 564 F.2d 95 (5th Cir. 1977). See also *Offshore Logistics Services, Inc. v. Mutual Marine Office*, 462 F.Supp. 485 (E.D. La. 1978), appeal dismissed, 639 F.2d 1168 (5th Cir. 1981).

**GENERAL CONDITIONS AND/OR LIMITATIONS**

**PROMPT NOTICE OF CLAIM**

Warranted that in the event of any occurrence which may result in loss, damage and/or expense for which this Assurer is or may become liable, the Assured will use due diligence to give prompt notice thereof and forward to the Assurer as soon as practicable after receipt thereof, all communications, processes, pleadings and other legal papers or documents relating to such occurrences.

1. **PURPOSE OF CLAUSE**

   The primary purpose of a notice requirement is to provide the assurer with the opportunity to make a prompt and thorough investigation of the accident, negotiate for a settlement or otherwise represent its interests during the pendency of the litigation. *Elevating Boats, Inc. v. Gulf Coast Marine, Inc.*, 766 F.2d 195, 199 (5th Cir. 1985) (P&I Policy). Unless provided for in the policy, there is no fixed length of time beyond which notice is untimely, and most jurisdictions require that the insurer establish "actual prejudice" as a perquisite to denying coverage on the basis of late notice.

2. **ILLUSTRATIVE CASES**


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A. Prejudice Required

As illustrative examples, in Elevating Boats, Inc. v. Gulf Coast Marine, Inc., 766 F.2d 195, 198-200 (5th Cir. 1985), the insured notified its insurer of the claim two weeks before trial. The Fifth Circuit Court of Appeal sustained the P&I insurer's late notice defense, holding that the insurer was prejudiced because it did not have the opportunity to represent its interests during the litigation, to negotiate for settlement and to make a prompt and thorough investigation. 4 In Peavey Co. v. M/V ANPA, 971 F.2d 1168 (51 Cir. 1992), the Fifth Circuit distinguished Elevating Boats and found that an insurer was not prejudiced by the insured's delayed notice of the claim, almost ten months after the allision. By the time the assured received notice of the incident, the wharf had been repaired, the cargo had been removed and the subject vessel had already sailed from the Port of New Orleans, never to return. The assured claimed that it was denied the opportunity to make an investigation and was prejudiced by the insurer's late notice. The court held that the insured had taken the necessary actions to protect the interests of both itself and the insurer. See also American Emp. Ins. v. Metro Transit Auth, 802 F.Supp. 169 (N.D. Ohio 1992); American Emp. Ins. v. Metro Transit Auth, 802 F.Supp. 169 (N.D. Ohio 1992); Cessna Aircraft Co. v. Hartford Acc. & Indem. Co., 900 F.Supp. 1489, 1515 (D. Kan. 1995); Hunt v. Kling Motor Co., 841 F.Supp. 1098, 1101 (D.Kan. 1993), aff’d 65 F.3d 178 (10th Cir. 1995).

Where there are no contested facts relating to the lack of timely notice, the issue of whether the insurer was substantially prejudiced from the untimely notice "may be determined by the court as a matter of law" in some cases. See e.g. Hunt v. Ford Motor Co., 65 F.3d 178 (10th Cir. 1995) and Security Nat. Bank of Kansas City v. Continental Ins. Co., 586 F.Supp. 139 (D.Kan. 1982). Cf. FDIC. v. Oldenburg, 34 F.3d 1529,1547 (10th Cir. 1994).

B. Prejudice Not Required

Several jurisdictions do not require that prejudice be shown as a prerequisite to a late notice defense. For example, in Virginia, the insured's timely notice to the insurer is a condition precedent to coverage. The insurer, in that instance, does not need to show that it was actually prejudiced. State Farm and Casualty Co. v. Scott, 236 Va. 116, 372 S.E. 2d 383, 385 (1988); State Farm Mut. Auto Ins. Co. v. Porter, 221 Fa. 592, 272 S.E. 2d 196, 199 (Va. 1980); Granite State Minerals, Inc. v. American Ins. Co., 435 F.Supp. 159,165-66 (D. Mass. 1977).

3 Hunt v. Ford Motor Co., 65 F.3d 178 (10th Cir. 1995).

4 A prompt notice requirement in a marine insurance policy does not extend to every seemingly trivial accident which occurs. Where an accident appears minor and the Assured responds to the accident in an ordinarily prudent manner, the prompt notice clause is not necessarily violated if the loss is greater than reasonably anticipated. Lemar Towing Co. v. Fireman's Fund Insurance Co., 352 F.Supp.652,1973 AMC 1844 (E.D. La. 1972), aff’d, 471 F.2d 609, 1973 AMC 1843 (5th Cir. 1973) (summary calendar).
Likewise, even in jurisdictions where prejudice ordinarily needs to be shown by the insurer, if the policy language requires notices as a "condition precedent" to coverage and the insured fails to give such notice, courts have generally held that the claim is no longer covered by the policy, regardless of whether the insurer can demonstrate prejudice. See e.g. MGIC Indemnity Corp. v. Central Bank of Monroe, 838 F.2d 1382 (5th Cir. 1988) (applying Louisiana law); Navigazione Alta Italia v. Columbia Casualty Co., 256 F.2d 26, 27-29 (5th Cir. 1958).

**SETTLEMENT OF CLAIMS**

The Assured shall not make any admission of liability, either before or after any occurrence which may result in a claim for which the Assurer may be liable. The Assured shall not interfere in any negotiations of the Assurer, for settlement of any legal proceedings in respect of any occurrences for which the Assurer is liable under this Policy; provided, however, that in respect of any occurrence likely to give rise to a claim under this Policy, the Assured are obligated and shall take steps to protect their (and/or the Assurer's) interests as would reasonably be taken in the absence of this or similar insurance. If the Assured shall fail or refuse to settle any claim as authorized by the Assurer, the liability of the Assurer to the Assured shall be limited to the amount for which settlement could have been made.

1. **LAW TO BE APPLIED**

   There apparently is no maritime rule with respect to the settlement of claims provision. Hence, under Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310 (1955), state law would given this issue.\(^5\)

2. **NON-MARINE CASES**

   In Cay Divers, Inc. v. Raven, 812 F.2d 866 (3d Cir. 1987), the Third Circuit held that a settlement by an assured did not constitute an admission of liability under a settlement clause similar to that in the SP-23 form where the assured was defended by independent counsel instructed by the assurer under a reservation of rights. See also Insurance Co. of North America

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\(^5\) Addressing the aforementioned clause in the context of an insured's inefficient removal operations of a sunken vessel, the Third Circuit Court of Appeal found the language to be restricted to "settlement of claims." According to the Court, this language, in conjunction with the proviso with respect to the insured's obligation not to "interfere in any negotiations" carried on by the insurer, suggests that the clause is a cooperation clause governing claims asserted by third parties, and not intended to defeat coverage should the insured fail to act prudently in mitigating damages. *Grupo Protexas, S.A. v. All American Marine Slip*, 954 F.2d 130 (3d Cir. 1992).

A court has noted in dicta that an insurer's right to limit its liability to the amount of a proposed settlement is absolute. Pratt v. United States, 340 F.2d 174, 179 n. 13 (1st Cir. 1964). Applying Texas law, a court held that an insurer has an absolute right to settle a claim within the policy limits under a professional liability policy. Dear v. Scottsdale Ins. Co., 947 S.W. 2d 908, 915 (Tex. App. - Dallas).


ASSURED TO ASSIST WITH EVIDENCE AND DEFENSE, ETC.

Whenever required by the Assurer, the Assured shall aid in securing information and evidence and in obtaining witnesses and shall cooperate with the Assurer in the defense of any claim or suit or in the appeal from any judgment, in respect of any occurrence as hereinbefore provided.

There apparently are no reported decisions specifically addressing the cooperation provision in a maritime case. Hence, under Wilburn Boat Co. v. Fireman's Fund Insurance Co., 348 U.S. 310 (1955), state should govern this issue.

**LAW COSTS**

The Assurer shall not be liable for the cost or expenses of prosecuting or defending any claim or suit unless the same shall have been incurred with the written consent of the Assurer, or the Assurer shall be satisfied that such approval could not have been obtained under the circumstances without unreasonable delay, or that such cost and charges were reasonably and properly incurred, such cost or expense being subject to the deductible. The cost and expense of prosecuting any claim in which the Assurer shall have an interest by subrogation or otherwise, shall be divided between the Assured and the Assurer, proportionately to the amount which they would be entitled to receive respectively, if the suit should be successful.

The Assurer shall be liable for the excess where the amount deductible under this policy is exceeded by (A) the cost of investigating and/or successfully defending any claim or suit against the Assured based on a liability or an alleged liability of the Assured covered by this insurance, or (B) the amount paid by the Assured, either under a judgment or an agreed settlement based on the liability covered herein, including all costs, expenses of defense and taxable disbursements.

The question of defense costs being charged against policy limits, or in addition thereto, is discussed earlier under paragraph (14) of the insuring agreement - "Costs and Charges." Certain other issues are noted herein.

1. **DUTY TO DEFEND**

   There is disagreement whether the insurance has a duty to defend under a P&I policy. The SP-23 form does not contain any specific language obligating the assurer to provide a defense to the assured.

   It has been held that an assurer has no duty to defend under Form SP-23 holding that a clause within a policy which confers a right upon an insurer to defend does not create a duty to defend. *Healy Tibbitts v. Foremost Ins. Co.*, 1980 A.M.C. 1600, 1609, 482 F.Supp. 830, 837 (N.D. Ca. 1979). Also, no duty to defend has been held under form SP-38. *Board of Comm’r v. Guidry*, 425 F.Supp. 661, 663-64 (E.D. La.) (SP-3 8), aff’d, 564 F.2d 95 (5th Cir. 1977) (SP-38). In interpreting P&I Association Rules, in *Basargin v. Shipowners’Mut. Protection & Indem. Ass’n. (Luxembourg)*, 1995 A.M.C. 1463, 1469 (D. Alaska 1995), the court held that the fact an insurer retains the right to defend does not create a duty to defend. The same

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6 The question of whether defense costs are included within the policy limits or in addition thereto is discussed under the section entitled "costs, charges & expenses," *supra*. 

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conclusion was reached in *Botany Bay Marina, Inc. v. Great American Ins. Co.*, 1992 AMC 2993, 2996, 760 F.Supp. 88, 90-91 (D.S.C. 1991) interpreting a marine insurance policy containing wording similar to the Law Costs paragraph of SP-23. For an outline of principles underlying the absence of a duty to defend in indemnity policies, as distinguished from liability policies, see *Becnel v. United Gas Pipeline Co.*, 655 So.2d 409 (La. App. 5th Cir. 1995).

However, without any discussion of the policy form or wording, the Louisiana Supreme Court has held that there is a duty to defend under P&I policy. *Steptore v. Masco-Const. Co.*, 643 So.2d 1213 (La. 1994) (form not noted). Further, absent an express clause to the contrary, at least one court has held that an insurer has a duty to defend an insured against any alleged claim that potentially falls within the scope of coverage. *Underwriters at Lloyds v. Denali Seafoods, Inc.*, 729 F.Supp. 721 (W.D. Wash. 1989). The court in *Denali* held that a Protection & Indemnity marine insurance policy (form not noted) was subject to a duty to defend notwithstanding recognition that the policy does not contain express language stating that the insurer will defend. *Id* at 724.7

2. **DEDUCTIBLE**

No cases were found under Form SP-23 holding that the deductible applies to defense costs and fees. However, by providing that the assurer is liable only for the excess above the deductible, the policy wording in SP-23 appears to avoid the ambiguity found in *Faris, Ellis, Cutrone v. Jobob Towing, Inc.*, 342 So.2d 1284 (La. App. 1977), wherein a marine policy wording (not a P&I policy) provided that the deductible applied to "any and all claims (including claims for sue and labor, collision liability, general average, and salvage charges) resulting from any one occurrence." After a successful defense of the assured by counsel appointed by the assurer, counsel sued the assured to collect their attorney's fees and costs, which did not exceed the policy deductible. The court held that the wording "all claims" was ambiguous and denied a recovery, noting counsel's engagement by the assurer.

3. **DUTY TO POST A BOND**

It has been held that a P&I insurer has no duty to post a bond to secure the release of a vessel sued *in rem* following a collision. *Landry v. S. S. Mutual Underwriting Assoc.*, 1960 AMC 54,177 F.Supp. 142 (D. Mass.).

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Chapter 8

SUBROGATION

The Assurer shall be subrogated to all the rights which the Assured may have against any other person or entity, in respect of any payment made under this policy, to the extent of such payment, and the Assured shall, upon the request of the Assurer, execute all documents necessary to secure to the Assurer such rights.

The Assurer shall be entitled to take credit for any profit accruing to the Assured by reason of any negligence or wrongful act of the Assured’s servants or agents, up to the measure of their loss, or to recover for their own account from third parties any damage that may be provable by reason of such negligence or wrongful act.

INTRODUCTION

Subrogation is broad enough to include every instance in which one person, not acting as a mere volunteer, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter. E.g., Compania Anonima Venezolana De Navegacion v. A.J. Perez Export Co., 303 F.2d 692 (5th Cir.), cert. denied, 371 U.S. 942 (1962).

The right of subrogation is a creature of equity, and is "enforced solely for the purpose of accomplishing the ends of substantial justice." Pearlman v. Reliance Insurance Co., 371 U.S. 132, at 136 n. 12, 83 S.Ct. 232 (1962)(the courts have reserved for themselves broad discretion to reach "equitable" results in subrogation cases); Complaint of Admiral Towing and Barge Co., 767 F.2d 243, 250 (5th Cir. 1985)(subrogation was first recognized as a right in equity to prevent the unjust enrichment of a party who owed a claim that had been satisfied by another party).

A subrogated underwriter can enforce its assured's contractual right to indemnity, as well as seek indemnity or contribution on a delictual basis. American Auto Insurance Co. v. Twenty Grand Towing, Inc., 1969 AMC 2360 (La.App.1969)[workers' compensation].

I. BASIC PRINCIPLES OF SUBROGATION.

A. SUBROGATION RIGHTS PASS BY EQUITY AND LAW (AND/OR BY CONTRACT)


The insurer's equitable right of subrogation arises as a matter of law, is not dependent upon any contract and no further assignment or transfer is necessary. Phoenix Insurance Co. v. Erie & Western Transportation Co., 117 U.S. 312 (1886)[Cargo]; Ingersoll Milling Mach. Co. v. M/V BODENA, 829 F.2d 293, 309, 1988 AMC 223 (2nd Cir. 1987).

Subrogation rights may simultaneously arise through contract clauses, e.g., insurance policy clauses granting subrogation See, The POTOMAC v. Cannon, 105 U.S. 630 (1882); Insurance Company of North America v. West of England Shipowners Mutual Insurance Association, 890 F. Supp. 1302 (E.D. La. 1995)(applying Louisiana law, subrogation takes place in favor of a third person who pays the debt of another only when provided for by contract or law).

The right of subrogation may also be provided for by specific statute. E.g, Interstate Commerce Act 49 U.S.C. § 10927(a)(3)(Supp. 1994)(expressly provided for subrogation by a paying carrier against a responsible connecting motor common carrier).

B. SUBROGATION RIGHTS PASS UPON PAYMENT (TO THE EXTENT OF PAYMENT)

1. RIGHTS PASS UPON PAYMENT

Unpaid insurance claims do not give underwriters subrogation rights. Meredith v. The IONIAN TRADER, 279 F.2d 471, 474 (2d Cir. 1960)(until payment is made, the underwriter cannot sue in the name of the assured without the assured's authority, even where the policy contains a clause which requires the assured to cooperate in the prosecution of claims under the direction and control of the underwriter); Bunge Corp. v. London & Overseas Ins. Co., 394 F.2d 496 (2d Cir. 1968; cert. denied, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363 (1968); Royal Insurance Co., Ltd. v. S/S MARACAIBO, 488 F. Supp. 514 (S.D.N.Y. 1980)(payment by an agent on behalf of insurer is adequate to give insurer a right of subrogation).

2. RIGHTS PASS TO THE EXTENT OF PAYMENT

An underwriter is subrogated only to the amount paid to its insured. In cases of partial reimbursement of the insured, the insured may retain the right to pursue its own action for uninsured losses (e.g., uninsured loss, deductible, lost profits and excess valuation). Aetna Ins. Co. v. United Fruit Co., 304 U.S. 430, 436 (1938); Seguros Banvenez, S.A. v. S/S OLIVER DRESCHER, 761 F.2d 855, 861 (2d Cir. 1985). See, The POTOMAC v. Cannon, 105 U.S. 630 (1882).

Unless the assured abandons the subject property to underwriters and/or is fully divested of his rights and interest in the property in favor of underwriters, there may be a split of the equitable rights passing to the subrogee and certain legal rights remaining with the subrogor. A&S Transport Co. Inc. v. TUG FAJARDO, 688 F.2d 1, 2, 1983 AMC 10 (1st Cir. 1982). See, Alex L. Parks, The Law and Practice of Marine Insurance and Average 1085 (1987).

3. IN THE EVENT OF AN EXCESS RECOVERY

As a general proposition, upon payment of an insured loss, co-insurers of the same risk are subrogated to the rights of the insured and participate pro rata in any recovery. Standard Marine Insurance Co. v. Scottish Metro. Assur. Co., 283 U.S. 284 (1931). (However, when an insured separates and separately insures two distinct elements of a risk (cargo damage versus loss of anticipated profits), both insurers cannot share by subrogation in the assured's right to recover against wrongdoers for one of the risks alone).

In Aetna Ins. Co. v. United Fruit Co., 304 U.S. 430, 431 (1938)[Hull], the Supreme Court was presented with the issue of how far hull insurers on a valued marine hull insurance policy were entitled, in the case of a total loss, to participate by way of subrogation in a recovery by the insured against the responsible tortfeasor. The Court set forth what is commonly referred to as the American Rule regarding marine hull insurance: recovery is apportioned according to the insured portion versus uninsured loss, including deductible, each part less a pro rata share of the costs of the recovery. (Other rules are observed in British and P&I Club practice. See, Leslie J. Buglass, Marine Insurance and General Average in the United States 451 (3d ed. 1991)).
If an insurer pays only part of the assured’s loss, the assured is entitled to recover the residue); Seguros Banvenez, S.A. v. S/S OLIVER DRESCHER, 761 F.2d 855, 861 (2d Cir. 1985)[Cargo]; Risdal v. Universal Insurance Co., 232 F. Supp. 472, 1964 AMC 1894 (D. Mass. 1964)[Hull]. See, Insurance Co. of N. America v. S/S ITALICA, 567 F. Supp. 59, 63 (S.D.N.Y. 1983). The right of subrogation does not confer a right to recoup any more than what the insurer paid out. Aetna Ins. Co. v. United Fruit Co., 304 U.S. 430, 436, 1938 AMC 707, 711 (1938)[Hull] ("a marine insurer is entitled to share in the insured's recovery of damages only by way of subrogation "whose sole object and justification is to make indemnity to the insured up to the amount of the policy, the measure of the liability of the insurer").

4. OTHER

An insurance company does not forfeit subrogation rights by contesting coverage. Ingersoll Milling Mach. Co. v. M/V BODENA, 829 F.2d 293, 309, 1988 AMC 223 (2d Cir. 1987); Bunge Corp. v. London & Overseas Ins. Co., 394 F.2d 496 (2d Cir. 1968); cert. denied, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363 (1968); Rose & Lucy, Inc. v. F/V ST. ANNA MARIA, 284 F. Supp. 141, 1968 AMC 1612 (D. Mass. 1968)[hull & P&I](resisting payment by raising coverage defenses or delaying payment does not constitute a waiver of or bar to the right of subrogation).


Underwriters are entitled to salvage upon payment of the claim: "From the very nature of the contract of insurance as a contract of indemnity, the insurer, when he has paid to the assured the amount of the indemnity agreed on between them, is entitled, by way of salvage, to the benefit of anything that may be received, either from the remnants of the goods or from damages paid by third persons for the same loss." Phoenix Ins. Co. v. Erie & Western Transp. Co., 117 U.S. 312, 321, 6 S.Ct. 750, 753, 29 L.Ed. 873 (1886).

For a discussion of loan receipts, see section [1F4] below.

C. EFFECT OF COVERAGE DEFENSES

In a suit by the subrogated underwriter, it is no defense that there may have been coverage defenses available to the underwriter that would have precluded paying under the policy. Nord-Deutscher Lloyd v. Insurance Co. of North America, 110 F. 420 (4th C.C.A. 1901)[Cargo]; Insurance Company of North America v. West of England, 890 F. Supp. 1302 at 1308 (E.D. La. 1995)[P&I](Underwriter subrogated to the rights of its insured has assured's right to assert waiver of P&I Club misrepresentation defense).

There is authority for the proposition that conditions of an insurance policy that concern the coverage or the scope of coverage cannot be waived, whereas grounds for forfeiture of the policy can be waived. Insurance Company of North America v. West of England, 890
Where assured vessel owner had no interest in fixed object damaged by acts of pilot conning assured vessel, and policy did not insure liability of assured to owner of said property, underwriter making payment to assured on account of damage to said property was volunteer, and acquired no rights of subrogation, Chase v. Hammond Lumber Co. [The WATSONVILLE], 79 F.2d 716, 1935 AMC 1502 (9th Cir. 1935).

An insurance company does not forfeit subrogation rights by contesting coverage. Ingersoll Milling Mach. Co. v. M/V BODENA, 829 F.2d 293, 309, 1988 AMC 223 (2d Cir. 1987); Bunge Corp. v. London & Overseas Ins. Co., 394 F.2d 496 (2d Cir. 1968); cert. denied, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363 (1968); Rose & Lucy, Inc. v. F/V ST. ANNA MARIA, 284 F. Supp. 141, 1968 AMC 1612 (D. Mass. 1968)[hull & P&I](resisting payment by raising coverage defenses or delaying payment does not constitute a waiver of or bar to the right of subrogation).

D. VOLUNTARY PAYMENTS

Several cases have dealt with situations in which the underwriters have voluntarily paid claims they had no legal liability to pay. In some cases, subrogation is not allowed. Chase v. Hammond Lumber Co. [THE WATSONVILLE], 79 F.2d 716, 717 (9th Cir. 1935)(there was no legal liability to pay the claim, therefore, as volunteers, underwriters had no right to subrogation); Insurance Company of North America v. West of England, 890 F. Supp. 1302 (E.D. La. 1995) [P&I](if a P&I Club pays without an underlying obligation, legal subrogation will not apply).


Where an insurer pays one of several insureds (i.e., the manufacturer instead of the shipper or purchaser of the goods) and the insured who was paid had no insurable interest at the time of the loss, the insurer may be treated as a volunteer with no right to subrogation through an additional insured who as consignee was the party who should have been paid. See, Aetna Ins. Co. v. S/S ORTIGUERA, 583 F.Supp. 671 (S.D.N.Y. 1984)[Cargo](discussing proper party to sue ocean carrier in cargo subrogation and "superior equities" among parties to the commercial sales transaction: Subrogation allowed on the facts); Centennial Insurance Co. v. M/V CONSTELLATION ENTERPRISE, 639 F. Supp. 1261, 1264-65 (S.D.N.Y. 1986)(allowing subrogation against defense that the insurer was not the real party in interest when the insurer was suing as subrogee of one party but had made payment to another and the policy insured both as affiliates, and both insureds ratified the litigation in accordance with Fed. R. Civ. P. 17(a)).
E. SUBROGEE DERIVES ITS STATUS FROM THE SUBROGOR

Where an insurer pays a claim to its assured, the insurer "stands in the shoes of the insured:" (1) The assured has no right of recovery against the wrongdoer, (2) the insurer has the rights to recovery against the wrongdoer, (3) a claim made by the insured for recovery will be deemed one asserted on behalf of the insurer, the real party in interest, and (4) the validity of any defenses will be evaluated as if the assured had brought the actions. Phoenix Ins. Co. v. Erie & Western Transp. Co., 117 U.S. 312, 321 (1886); The POTOMAC v. Cannon, 105 U.S. 630 (1882); Taisho Marine & Fire Ins. Co., Ltd. v. M/V SEALAND ENDURANCE, 815 F.2d 1270, 1274 (9th Cir. 1984)[Cargo]; Complaint of Admiral Towing and Barge Co., 767 F.2d 243, 250-51 (5th Cir. 1985)[P&I]; Insurance Company of North America v. West of England, 890 F. Supp. 1302 (E.D. La. 1995)[P&I] (subrogated underwriters have no greater rights than insured did); Citizens Casualty Co. of New York v. Seafood Packers, Inc., 1972 AMC 770 (D. Mass. 1971)[P&I](subrogated underwriter stands in the shoes of its assured and cannot recover unless it makes an affirmative case against the target defendants). See, The TRICOLOR, 1932 AMC 1256 (S.D.N.Y. 1932)[Cargo](subrogated underwriters' procedural rights may not be any greater than those of the insured: court exercised discretion to decline jurisdiction). See, Insurance Co. of North America v. Puerto Rico Marine Management Inc., 599 F. Supp. 199, 203-204 (D. Puerto Rico 1984); Farr Mann & Co. v. M/V ROZITA, 903 F.2d 871, 1990 AMC 2021 (1st Cir. 1990); Gibbs v. Hawaiian Eugenia Corp., 966 F.2d 101, 106, 1993 AMC 43 (2d Cir. 1992), complaint dismissed, on remand, 1993 U.S. Dist. LEXIS 296 (S.D.N.Y. Jan. 14, 1993); Alex L. Parks, The Law and Practice of Marine Insurance and Average, 1087 (1987).

A subrogated claim is not in any way diminished or extinguished by subrogation; it is merely "taken over" by another who stands in the place of the original claimants. See, e.g., Ingersoll Milling Mach. Co. v. M/V BODENA, 829 F2d 293, 309, 1988 AMC 223 (2d Cir. 1987).

Occasionally, the subrogor may have no subrogation rights to transfer upon payment of the insurance claim. Gradmann & Holler GmbH v. Continental Lines, S.A., 504 F.Supp. 785 (D.P.R. 1980)(the assured had no rights of recovery to pass to underwriters)[CARGO]. See, e.g., Phoenix Ins. Co. v. Erie & Western Transp. Co., 117 U.S. 312, 325 (1886)(the assured was barred from subrogating against the responsible party by waiver of rights of subrogation).

F. BASIC LITIGATION ISSUES

1. PARTIES PLAINTIFF AND RULE 17

Defendant is entitled to have a subrogated underwriter named as party plaintiff. Cosid, Inc. v. The Vessel ROLWII, 1972 AMC 2157, 2160-61 (7th Cir. 1972)[Cargo](discussing cases and evolution of practice from always pleading in the insured's name for the insurer's use, to federal practice, equity and admiralty practice allowing either party to sue and allowing defendant to have all real parties in interest joined as named plaintiffs).

In a case considering the "real party in interest" issue (F.R. Civ. P. Rule 17a) and "necessary" or "indispensable party" issues (F.R. Civ. P. Rule 19), the court held that the
subrogee must sue in its own name only if it paid the entire loss suffered by the insured (citing
U.S. v. Aetna Cas. & Surety Co., 338 U.S. 366 (1949)) and that the subrogated P&I Club as a
partial subrogee was not a necessary or indispensable party:

Cases decided since Rule 19 was amended in 1966 have gone both
ways on the issue of whether a partial subrogee is a "necessary"
party. The parties have not directed our attention to, and our own
research has not disclosed, any Second Circuit cases on the point.
We think determination of whether the partial subrogee is a
"necessary" or "indispensable" party must be made on a case-by-
case basis. [Citations deleted]

(S.D.N.Y. 1977)[P&I][discussing cases] (P&I Club was a partial subrogee given voyage
deductible and presence of losses not paid by that policy).

Where the insurer is the real party in interest after paying a claim, it should bring
S.Ct. 750, 29 L.Ed. 875 (1886)[Cargo] (even where only part of a claim or loss is paid); Hiram
Walker & Sons, Inc. v. Kirk Line, 877 F.2d 1508, 1510, n.1 (11th Cir. 1989), reversed on other
grounds and remanded, 963 F.2d 327 (11th Cir. 1992)(where suit was brought in the name of
the assured and counsel for plaintiff stated, on the record at bench trial, that he was bringing suit
for the use and benefit of the insurer, the court held there was no prejudice to the defendant
which required a dismissal); William D. Branson, Ltd. v. Tropical Shipping and Constr. Co.,
Ltd., 598 F. Supp. 680 (S.D. Fla. 1984)[Cargo](an insured shipper paid in full by its insurer who
sues the common carrier in a federal court is not the real party in interest; held, the action against
the carrier should be dismissed unless the insured joined or substituted the insurer as the real
party in interest within 20 days under Rule 17(a) Fed. R. Civ. P.).

A lawsuit in admiralty must be brought by the real party in interest in his own
name: An underwriter who has paid a part of a cargo loss and has obtained assignment from
other underwriters who have paid on the loss cannot sue for the entire loss in its own name.
Petition of Companhia de Navegacao Lloyd Brasileiro for Limitation of Liability (MANDU-
DENDERAH), 1936 AMC 816 (E.D.N.Y. 1936)[Cargo] also, at 1937 AMC 1062, 1066-67
(E.D.N.Y. 1937)(an insurance company that has not paid the loss in full or bought the claim is
not the real party in interest: A mere collection agent of a formal claim is not sufficiently the real
party in interest); Blasser Bros. v. Northern Pan American Line, 628 F.2d 376 at 385 (5th Cir.
1980)(after partial payment of the assured's loss, the court allowed underwriters to file a cross-
claim under F.R. Civ. P. Rule 13 to efficiently resolve the entire controversy). See, e.g.,
R. Civ. P. Rule 17(a).

Where a lawsuit was timely filed by underwriters in the name of the assured
before the claim was paid, i.e. without authority, one court held the lawsuit was a nullity.
Meredith v. The IONIAN TRADER, 279 F.2d 471, 474 (2d Cir. 1960)[Cargo](until payment
is made, the underwriter cannot sue in the name of the assured without the assured's authority,
even where the policy contains a clause which requires the assured to cooperate in the
prosecution of claims under the direction and control of the underwriter); Bunge Corp. v. London & Overseas Ins. Co., 394 F.2d 496 (2nd Cir. 1968; cert. denied, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363 (1968); Royal Insurance Co., Ltd. v. S/S MARACAIBO, 488 F. Supp. 514 (S.D.N.Y. 1980)(payment by an insurer's foreign selling agent on behalf of insurer is sufficient to give insurer a right of subrogation); Compare, Centennial Insurance Co. v. M/V CONSTELLATION ENTERPRISE, 639 F. Supp. 1261, 1265 (S.D.N.Y. 1986)[Cargo](lawsuit filed in underwriters' name was ratified by assureds; Subrogation allowed under F. R. Civ. P. Rule 17(a))(see discussion of Impleader, infra at § 1F3.)

In cases of partial reimbursement of the assured's loss, the assured may retain the right to pursue its own action for uninsured losses (e.g., uninsured loss, deductible, lost profits and excess valuation). Aetna Ins. Co. v. United Fruit Co., 304 U.S. 430, 436 (1938); Seguros Banvenez, S.A. v. S/S OLIVER DRESCHER, 761 F.2d 855, 861 (2d Cir. 1985). The POTOMAC v. Cannon, 105 U.S. 630 (1882).

Purchasers of vessel who paid pending cargo claims against vessel were treated as subrogated to interests of cargo claimants, but not allowed to recover from vessel's P&I Club under Louisiana Direct Action Statute, LSA-R.S. 22:655: Discussing: (1) reasons why under the terms of the statute, (2) alternate claims for indemnity, (3) Louisiana Direct Action Statute, and (4) plaintiff's duty to arbitrate claims pursuant to P&I Club Rules. Deutsche-Schiffahrtsbank A.G. v. Bilbrough and Company, Ltd., 563 F. Supp. 1307, 1984 AMC 27 (E.D. La. 1983)[P&I].

In a case involving subrogated P&I underwriters of barge operators seeking reimbursement from barge owners after cargo owners had been compensated by ocean carrier who recovered from barge underwriters, court acknowledged the procedural shortcuts permitted and noted that all three claims could be determined in one suit without the consecutive determinations and satisfactions of liability that would otherwise have been necessary to have fixed the ultimate liability of one of the parties. Am. Molasses Co. of N.Y. v. S/S SEATRAIN-HAVANA, 103 F.2d 772, 1939 AMC 1043 (2nd Cir. 1939)[P&I].

2. PARTIES DEFENDANT

A Ryan-indemnity suit by subrogated underwriter of shipowner against stevedore/general agent was permitted pursuant to oral contract for stevedoring services, although contract between stevedore/general agent and shipowner provided that shipowner's underwriters shall not have any right of subrogation against the General Agent, and the P&I policy insured risks of stevedore/general agent as "Policyholder and General Agent," since liability was predicated upon indemnitors' acts as stevedore and not its acts as general agent. United States v. Alaska Steamship Co., 491 F.2d 1147, 1974 AMC 630 (9th Cir. 1974)[P&I]. But see, Caballery v. Sea-Land Service, Inc., 1973 AMC 479 (D.P.R. 1973)[P&I] (where shipowner's P&I policy contained clause providing that insurance was "extended to protect the charterers . . . in whatever capacity," charterer who acted as stevedore was additional assured under the policy and Ryan-indemnity suit by subrogated P&I underwriter was dismissed) and Nardelli v. Stuyvesant Co. of New York, 258 F.2d 718, 1958 AMC 2408 (5th Cir. 1958), rehear'g denied and opinion modified 269 F.2d 592 (5th Cir. Fla. 1959)[Hull](where charterer was an additional assured, underwriter could retain subrogation rights against charterer only by express language of policy).
3. **IMPLEADER**

Underwriters may implead parties potentially liable to assured by a cross-claim pursuant to F. R. Civ. P. Rule 14(a) before insurance payment is made when it is sued on the policy of insurance. *Welded Tube Co. of America v. Hartford Fire Insurance Co.*, 1973 AMC 555 (E.D. Pa. 1973)[Cargo]; *St. Paul Fire & Marine Insurance Co. v. United States Lines Co.*, 258 F.2d 374, 1958 AMC 2385 (2d Cir. 1958), cert. denied 359 U.S. 910, 79 S.Ct. 587, 3 L.Ed.2d 574 (1959)[Cargo](subrogation was allowed and underwriters were allowed to implead within the one year COGSA time to sue, even though payment by underwriters occurred later than the one year period: Vessel interests were on adequate notice and not prejudiced - Rule 14 upheld); *Blasser Bros. v. Northern Pan American Line*, 628 F.2d 376, 384-5 (5th Cir. 1980)[Cargo] (the court allowed an insurer who had not paid its assured to maintain a cross claim against the carrier pursuant to F. R. Civ. P. Rule 13 in partial consideration of concern that a subsequent action by the insurer might be barred by the COGSA statute of limitations). Compare, Fed. R. Civ. P. 24 (under the Federal Rules of Civil Procedure, insurance carriers with pending but unpaid insurance claims, i.e., without subrogation rights, are not allowed to intervene to protect their potential subrogation interests).

4. **LOAN RECEIPTS**

Loan receipts were devised by insurers to avoid depriving cargo interests of the use of funds pending determination of whether the ocean carrier or cargo underwriters would be liable for a loss, particularly in view of bill of lading "benefit of insurance" clauses. Those clauses allowed the carrier to benefit from cargo insurance and effectively to defeat a cargo insurer's subrogation rights against the carrier. Loan receipts were also used to keep alive the carrier's liability and prevent the inequitable shifting of the carrier's burden onto the shipper's insurer. Loan receipts have been accepted by courts and used to avoid benefit of insurance clauses. *Luckenbach v. W.J. McCahan Sugar Refining Co.*, 248 U.S. 139, 145 (1918).

*Jones Tug & Barge Co. v. S.S. LIBERTY MANUFACTURER*, 1978 AMC 1183 at 1193 (C.D. Cal. 1976)[P&I](discussing cases)(after reviewing the history and accepted uses of the traditional loan receipt, the court noted:

The differences between the traditional loan receipt transaction approved in Luckenbach and that found in this case are: (1) that the payment was not made to the insured, but rather to one having a claim against the insured; (2) the insurer does not proceed through or by its insured but against him; and (3) Britannia's liability was not contingent. Britannia has not cited a case approving a loan receipt transaction in such a case.)


The strongest support the courts and commentators have advanced in favor of the loan receipt device is that it avoids jury prejudice which would otherwise be directed against an

Underwriters sometimes appear to use a loan receipt to avoid the bar against underwriters subrogating against one of their assureds. *Willamette-Western v. Columbia Pacific Towing Co.*, 466 F.2d 1390, 1391, 1972 AMC 2128 (9th Cir. 1972)(loan receipts cannot be used to enable underwriters or their insured to sue an additional insured). See also, *Jones Tug & Barge Co. v. S.S. Liberty Mfr.*., 1978 AMC 1183, 1196 (C.D. Cal. 1976)[P&I] (the Jones Tug court concluded that the loan receipt in that case was used solely to avoid the doctrine that an insurer may not be subrogated against his own insured (even though initially against the fund derived from the sale of the insured's vessel) and was therefore invalid as against public policy when used in that fashion.)

Some cases have rejected the loan receipt device when it is used solely to avoid subrogation without a concomitant advantage to the assured, i.e., a true loan, resulting in courts characterizing the transaction as a payment resulting in subrogation. *Jones Tug & Barge Co. v. S.S. LIBERTY MANUFACTURER*, 1978 AMC 1183, 1193 (C.D. Cal. 1976).

In a claim in which P&I barge operator underwriters paid ocean carrier for cargo damage and received in return a loan receipt, the loan receipt expressly provided for a lawsuit against the barge owner in personam and underwriters were able to recover from barge owners in personam the amount of the loan. *Am. Molasses Co. of N.Y. v. S/S SEATRAIN-HAVANA*, 103 F.2d 772, 1939 AMC 1043 (2d Cir. 1939)[P&I][P&I underwriters took by subrogation whatever rights their assured had acquired through payment or loan, except only what P&I underwriters agreed not so to acquire).

5. **APPLICABLE LAW**


6. OTHER

Addressing co-insurance, settlement and assignment issues, the court analyzed the net possible claim of the assured against remaining defendants. The POTOMAC v. Cannon, 105 U.S. 630 (1882).

The Ninth Circuit recognizes a maritime tort lien irrespective of contractual obligations (i.e., allowing in rem action and lien by subrogated underwriters even where there was no contract of carriage between the vessel and the cargo owner subrogor). Albany Insurance Co. v. M.V ISTRIAN EMPRESS, 1995 AMC 2261 at 2262 (9th Cir. 1995)(Cargo)(citing All Alaskan Seafoods, Inc. v. M/V SEA PRODUCER, 882 F.2d 425, 430, 1989 AMC 2925, 2941 (9th Cir. 1989)(quoting Supreme Court dicta in The JOHN G. STEVENS, 170 U.S. 113, 124-125 (1898)).


II. BARS TO SUBROGATION

A. GENERAL BAR AGAINST UNDERWRITERS SUBROGATING AGAINST THEIR OWN ASSURED

1. Underwriters can not subrogate against their own assured.

The general rule is that an insurer cannot subrogate against or recover from its own assured or an additional assured for any part of its payment for a risk insured under the policy unless there are clear exceptions manifested in the insurance policy. See, E.g., Great Lakes Transit Corp. v. Interstate S.S. Co., 301 U.S. 646, 654, 57 S.Ct. 915, 918 (1937) Caballery v. Sea-Land Service, 1973 AMC 479 (D.P.R. 1973)(P&I). Rig Tenders, Inc. v. Santa Fe Drilling Co., 585 P.2d 505 (Alaska 1978)(P&I); Jones Tug & Barge Co. v. S.S. LIBERTY MANUFACTURER, 1978 AMC 1183, 1194-6 (C.D. Cal. 1976)(P&I)(reviewing policy reasons for the principle and declining to allow P&I underwriters to proceed against a fund derived from sale of the vessel); Lanasse v. Travelers Insurance Co., 450 F.2d 580, 1972 AMC 818 at 822 (n. 8) (5th Cir. 1971), cert. denied sub nom, Chevron Oil Co., California Co. Division v. Royal Insurance Co., 406 U.S. 921, 92 S.Ct. 1979, 32 L.Ed.2d 120 (1972)(P&I); Dow Chem. Co. v. M/V ROBERTA TABOR, 815 F.2d 1037, 1043-45 (5th Cir. 1987)(a party obligated by contract to insure for the benefit of another but who retains the right to self insure (and does) stands in the shoes of an insurer and cannot subrogate against the party it was obligated to insure: But in this case, the self insured party was allowed to sue the party it was obligated to insure on a risk that would not have been covered by the insurance); Royal Exch. Assur. of America, Inc. v. S/S PRESIDENT ADAMS, 510 F. Supp. 581 (W.D. Wash. 1981)(Cargo)(underwriters can not recover, even against an insured under an unrelated policy (piercing corporate veil and treating two insurers as one), but allowing assured to bring an uninsured claim against carrier, even after accepting insurance payments from underwriter which was barred from subrogating).
A **Ryan-indemnity** suit by subrogated underwriter of shipowner against stevedore/general agent was permitted pursuant to oral contract for stevedoring services, although contract between stevedore/general agent and shipowner provided that shipowner's underwriters shall not have any right of subrogation against the General Agent, and P&I policy insured risks of stevedore/general agent as "Policyholder and General Agent," since liability was predicated upon indemnitee's acts as stevedore and not its acts as general agent. United States v. Alaska Steamship Co., 491 F.2d 1147, 1974 AMC 630 (9th Cir. 1974)[P&I]. Compare, Caballery v. Sea-Land Service, Inc., 1973 AMC 479 (D.P.R. 1973)[P&I](where shipowner's P&I policy contained clause providing that insurance was "extended to protect the charterers . . . in whatever capacity," charterer who acted as stevedore was additional assured under the policy and **Ryan-indemnity** suit by subrogated P&I underwriter was dismissed).

To permit the insurer to obtain information from the insured to use against the insured would constitute a conflict of interest and constitutes a breach of the policy. Royal Exch. Assur. of America, Inc. v. S/S PRESIDENT ADAMS, 510 F. Supp. 581 (W.D. Wash. 1981);

2. **Underwriters can not do indirectly what they can not do directly.**

Underwriters cannot do indirectly what they cannot do directly. Jones Tug & Barge Co. v. S.S. LIBERTY MANUFACTURER, 1978 AMC 1183 (C.D. Cal. 1976)[P&I]; Lanasse v. Travelers Insurance Co., 450 F.2d 580 at 585, 1972 AMC 818 at 825 (5th Cir. 1971), cert. denied sub nom. Chevron Oil Co., California Co. Division v. Royal Insurance Co., 406 U.S. 921, 92 S.Ct. 1979, 32 L.Ed.2d 120 (1972)[P&I](an underwriter can not in its own name (or in the more appealing name of its assured) recover against an additional assured in the face of an explicit policy provision waiving subrogation) e.g., Marathon Oil Co. v. Mid-Continent Underwriters, 786 F.2d 1301, 1304, 1987 AMC 2165 (5th Cir. 1986)(court did not allow underwriters' attempt to avoid a subrogation waiver by settling a personal injury claim with an agreement that, if the injured person recovered from the subrogation-immune insured, the underwriters would recover half of what they had paid.)

Loan receipts cannot be used to enable underwriters to do indirectly what they cannot do directly, i.e. sue their own insured or, through a loan receipt, appear to have their insured sue an additional insured. Willamette-Western v. Columbia Pacific Towing Co., 466 F.2d 1390, 1391, 1972 AMC 2128 (9th Cir. 1972). See also, Jones Tug & Barge Co. v. S.S. Liberty Mfr., 1978 AMC 1183, 1196 (C.D. Cal. 1976)[P&I] (the loan receipt was used solely to avoid the doctrine that an insurer may not be subrogated against his own insured (even though initially against the fund derived from the sale of the insured's vessel) and was therefore invalid as against public policy when used in that fashion.) See Discussion of Loan Receipts supra at [IF4].

3. **Additional Assured Issues**

Some courts have expressly validated cross-insurance endorsements in towage contracts. E.g., Dillingham Tug and Barge Corp. v. Collier Carbon & Chemical Corp., 707 F.2d 1086, 1090, 1984 AMC 1990 (9th Cir. 1983), cert. denied, 465 U.S. 1025 (1984); Marathon Oil
Co. v. Mid-Continent Underwriters, 786 F.2d 1301, at 1302, 1987 AMC 2165 (5th Cir 1986); see, Alex L. Parks, The Law of Tug, Tow and Pilotage, 76 (3d Ed. 1994).

However, simply being named as an additional insured may not save an entity from being subrogated against. Alex L. Parks, The Law and Practice of Marine Insurance and Average 1095-96 (1987)(discussing cases including United States Fire Ins. Co. v. Gulf States Marine & Mining Co. [SAMPLE No. 1], 262 F.2d 565, 1959 AMC 397 (5th Cir. 1959)(the tug and barge owners each had their hull policies cross-endorsed, but the tug owner was not endorsed as an additional insured on the cargo policy; the cargo underwriters recovered from the tug's underwriters)).

Many insurance policies and contracts loosely group a vessel with her owners and/or operators for various purposes. This may prevent underwriters from subrogating against one or more responsible parties for a loss, because those parties are directly or indirectly insured by the same underwriters. See, Dant & Russell, Inc. v. Dillingham Tug & Barge Co., modified, 895 F.2d 507 (9th Cir. 1990)(a marine cargo policy that waived subrogation against any craft belonging to the assured or a subsidiary or an affiliated company of an assured was held to waive subrogation against a vessel in rem demise chartered to a charterer who was named as an additional insured on the policy: The waiver did not prevent the cargo owner's cross-claim against vessel charterer for its uninsured loss). See, also, Taylor v. Bunge Corp., 845 F.2d. 1323, 1327, 1988 AMC 2610 (5th Cir. 1988). (Under the Longshore and Harborworkers' Act (LHWCA)(33 U.S.C. §§ 901-950 (1994)), an injured longshoreman may recover compensation from his employer, and then tort damages from the vessel (if negligence can be attributed to it), even when the vessel owner is the same entity as his employer).

Where owner agreed to obtain and pay cost of insurance on a vessel, and to relieve charterer of charterer's liability for all damages covered by insurance, the owner's hull underwriter could not assert a claim against the charterer. The DUTCHESS, 16 F.2d 1003 (E.D.N.Y. 1926)(hull)(underwriters can stand in no better position than its insured).

Insurance carried for account of "whom it may concern" covers anyone having an insurable interest in the insured property at the time of happening of the loss. The JOHN RUSSELL, 68 F.2d 901, 1934 AMC 7 (2d Cir. 1934)(cargo)(citing Scottish Ins. Co. v. Hagen, 186 U.S. 423 (1902)(when barge owner paid for insurance on cargo ("for whom it may concern") and barge owner retained an interest in the property insured under the policy, owner's subrogated cargo underwriter could not assert claim against barge owner).

Owner demised vessel to corporation that was partially owned by owner of vessel and charter party called for charterer to procure and pay for insurance naming owner as assured, and to pay for repairs, the cost of repairs to be reimbursed to charterer out of insurance proceeds. Underwriters could not assert claim against charterer as an additional assured. Nicholson Transit Co. v. Nicholson Universal Steamship Co., 60 F.2d 90, 1932 AMC 1049 (6th Cir. 1932)(hull). But see, Am. Molasses Co. of N.Y. v. S/S SEATRAIN-HAVANA, 103 F.2d 772, 1939 AMC 1043 (2d Cir. 1939)(P&I)(insurance clause which waives subrogation against vessels owned, operated or chartered by the assured does not waive subrogation against owners of those vessels).
Clause in P&I policy naming parties and others "in whatever capacity" broadly construed to include vessel chartering or operating party acting in stevedore capacity. Caballery v. Sea-Land Service, Inc., 1973 AMC 479 (D.P.R. 1973)[P&I]; Rig Tenders, Inc. v. Santa Fe Drilling Co., 585 P.2d 505 (Alaska 1978)[P&I](clause in P&I policy adding others who "are specially named as additional assureds" makes such others assureds for purposes of the policy and subrogation).

See discussion of limitations of underwriters suing their own assureds supra at Point 2A1, discussing situations in which "underwriters' assureds" were carefully reviewed.

IV. Construing Bars

Courts have generally broadly interpreted the insurance policy waiver of subrogation clause whereby P&I underwriters agree to waive all of their subrogation rights against additional assureds and barred subrogation on that basis. E.g., Lanasse v. Travelers Insurance Company, 450 F.2d 580 (5th Cir. 1971). (Judge Brown found that although Chevron (as a non-vessel owner) could not claim the affirmative benefit of coverage under the vessel owners' P&I policy (since the liability imposed was not that arising through the status of a shipowner), it was without doubt an additional insured under the P&I policy and could not be subrogated against directly or indirectly by underwriters or in the name of their insured) see also, Robert T. Lemon II, The Lanasse Rule and the Additional Assured's Dilemma Under American-Forum P&I Policies, 21 J. MAR L. & COM. 503, 508-10 (Oct. 1990); Wiley v. Offshore Painting Contrs., Inc., 711 F.2d 602, 1984 AMC 1144, reh'g denied, in part, op. withdrawn in part, 716 F.2d 256, 1984 AMC 1155 (5th Cir. 1983).

Even though underwriters may deny the additional insured coverage if it does not qualify for coverage under the policy terms, the separate and distinct waiver of subrogation clause would protect the additional assured against subrogation by underwriters. Marathon Oil Co. v. Mid-Continent Underwriters, 786 F.2d 1301 at 1304, 1987 AMC 2165 (5th Cir. 1986).

V. Person Cannot Subrogate Against Themselves

Where defendant was a corporation wholly owned by the United States, United States' subrogated underwriter could not assert claim against defendant. Defense Supplies Corp. v. United States Lines Co., 148 F.2d 311, 1945 AMC 423 (2nd Cir. 1945), cert. denied, 326 U.S. 746, 66 S.Ct. 43, 90 L.Ed. 446 (1945)[Cargo].

Underwriter may not exercise its right of subrogation when both vessels involved in collision are owned by the same assured. Globe v. Rutgers Fire Insurance Co. v. Hines, 273 F. 774 (2nd Cir. 1921), cert. denied 257 U.S. 643, 42 S.Ct. 54, 66 L.Ed. 413 (1921).

B. SOVEREIGN IMMUNITY


C. TIME BARS


The statute of limitations on a subrogation action against the responsible party based on a first party loss is the same as for an action by the insured, regardless of the date the insurer pays the loss. E.g., Insurance Company of North America v. Puerto Rico Marine Management, Inc., 599 F. Supp. 199, 204 (D.P.R. 1984).

Statutory requirement for prompt notice to the tortfeasor or party breaching the contract of carriage under COGSA does not bar the claim, but rather provides for rebuttable or other evidentiary presumptions. E.g., Pacific Employers Inc. Co. v. M/V GLORIA, 767 F.2d 229, 239 (5th Cir. 1985); Carriage of Goods By Sea Act, 46 U.S.C. § 1303(6)(1995 Supp.).

When a lawsuit was timely filed by underwriters in the name of the assured before the claim was paid, i.e. without authority, one court held the lawsuit was a nullity. Meredith v. The IONIAN TRADER, 279 F.2d 471, 474 (2d Cir. 1960)[Cargo]. Compare, Centennial Insurance Co. v. M/V CONSTELLATION ENTERPRISE, 639 F. Supp. 1261, 1265 (S.D.N.Y. 1986)[Cargo](timely lawsuit filed in underwriters' name was ratified by assureds: Subrogation allowed under F. R. Civ. P. Rule 17(a)).

One case interpreted a one year statute of limitations in a contract between vessel and stevedore as controlling all claims pursued by vessel against a stevedore, including those brought by the vessel pursuant to subrogation rights obtained from cargo interests and rights received by assignment from vessel owners, operators and charterers, none of whom was a party to the contract. A/S IVARANS REDERI d/b/a Ivaran Lines v. Universal Maritime Service, 1979 AMC 745 (S.D.N.Y. 1979)[P&I].

See Discussion of impleader and other means of dealing with procedural and time bar issues at Part IF3, supra. Also, see discussion of different time bar issues in indemnity and contribution claims infra at Part 2D.

D. INDEMNITY AND CONTRIBUTION ISSUES

A claim for contribution is separate and distinct from a cause of action for the underlying tort and generally does not accrue - and the statute of limitations generally does not start to run - at the time of the underlying tort. Rather, the cause of action for contribution starts
to run from the time of payment of the underlying claim, or payment of the judgment, of more than the fair share of that party's negligence. E.g., States S.S. Co. v. American Smelting & Ref. Co., 339 F.2d 66, 70 (9th Cir. 1964); cert. denied, 380 U.S. 964 (1965).

A claim for indemnity does not accrue and the statute of limitations generally does not start to run at the time of occurrence of the underlying actionable act. See, Erastus C. Benedict, 2 Benedict On Admiralty, Ch. 1 (7th ed. 1994). Rather, it commences at the time of the payment of the underlying claim, or payment of the judgment, by one whose liability is secondary to a person whose liability is primary. In re American Export Lines, 568 F.Supp. 956 at 962 (S.D.N.Y. 1983); U.S. Cold Storage of Cal. v. Matson Nav. Co., 162 Cal. App. 3d 1228, 1234, 209 Cal. Rptr. 144 (1984)(even though the cargo owner's underlying claim against the carrier was barred by the one-year COGSA statute of limitations, the storage facility nonetheless would be allowed to seek indemnity from the carrier). See, also, American Pres. Lines, Ltd. v. Coastal Transp., Inc., 1992 AMC 2809 (W.D. Wash. 1992)(an ocean carrier which was liable for cargo damage could bring an indemnity action against a connecting carrier after expiration of the contractual time bar in the connecting carrier's bill of lading measured from the date of the loss).

Having paid pursuant to its policy, P&I underwriter is subrogated to its assured's right to seek indemnification under the assured's comprehensive liability insurance. Terra Resources v. Lake Charles Dredging & Towing, 695 F.2d 828 (5th Cir. 1983)[P&I]; American Auto Insurance Co. v. Twenty Grand Towing, Inc., 1969 AMC 2360 (La.App.1969) [workers' compensation](subrogated underwriter can enforce its assured's contractual right to indemnity, as well as seeking indemnity or contribution on a delictual basis).

E. GOOD FAITH SETTLEMENT AGREEMENTS

The proportionate share approach governs the effect of settlements on the liability of remaining defendants in admiralty tort cases. The effect is to (1) reduce the total damages that are assessed against non-settling defendants by an amount proportionate to the fault attributable to the settling defendants and (2) bar later contribution claims among defendants. McDermtott, Inc. v. AmClyde, 511 U.S. 202 (1994). See, also, United States v. Reliable Transfer Co., 421 U.S. 397 (1975).

III. CONTRACTUAL WAIVER OF SUBROGATION

A. INSURANCE POLICIES MAY WAIVE SUBROGATION

Some policies of insurance contain a broad waiver of subrogation, e.g.,

"The right of subrogation against the Assured or subsidiary or affiliated corporations or companies or any other corporations or companies associated with the Assured through ownership or management is waived." (Emphasis added)

We note that the waiver clause by its terms is broader as to entities benefitting from the waiver than the scope of the clause defining the named assureds, because an unrelated company could be associated with the assureds through 'management'."

Boston Old Colony Insurance Co. v. M/V AMERICAN ARROW, 1982 AMC 1746 at 1748 (S.D.N.Y. 1982)[non-P&I policy]. See, e.g., Lanasse v. Travelers Insurance Co., 450 F.2d 580, 1972 AMC 818 at 822 (n. 8) (5th Cir. 1971), cert. denied sub nom, Chevron Oil Co., California Co. Division v. Royal Insurance Co., 406 U.S. 921, 92 S.Ct. 1979, 32 L.Ed.2d 120 (1972)[P&I]("While the vessel(s) named herein is/are working for any of the following [Chevron] the one for whom the vessel(s) is/are working at any given time is named as an additional assured during that particular time and all rights of subrogation hereunder are waived with respect to the one for whom the vessel(s) is/are working at that particular time."); Caballery v. Sea-Land Service, Inc., 1973 AMC 479 (D.P.R. 1973)[P&I]; Rig Tenders, Inc. v. Santa Fe Drilling Co., 585 P.2d 505 (Alaska 1978)[P&I]; see, also, Dant & Russell, Inc. v. Dillingham Tug & Barge Co., modified, 895 F.2d 507 (9th Cir. 1990)[Cargo].

Other policies have a narrower waiver of subrogation. Am. Molasses Co. of N.Y. v. S/S SEATRAIN-HAVANA, 103 F.2d 772, 1939 AMC 1043 (2nd Cir. 1939)[P&I](insurance Clause which waives subrogation against vessels owned, operated or chartered by the assured does not waive subrogation against owners of those vessels.)

B. TRANSACTIONAL CONTRACTS MAY WAIVE SUBROGATION

1. Clauses Waiving Subrogation

Parties can waive subrogation and cut off the subrogation rights of their underwriters by a contract entered into before a loss. See, e.g., Phoenix Ins. Co. v. Erie & Western Transp. Co., 117 U.S. 312 (1886)(a stipulation between the carrier and owner that the carrier would have the benefit of the owner’s insurance prevented the insurer from subrogating against the carrier); Complaint of Admiral Towing and Barge Co., 767 F.2d 243, 249 (5th Cir. 1985)[P&I](charter party language calling for charterer to obtain cargo insurance and waive subrogation against the owner of the tug); U.S. v. Alaska Steamship Co., 491 F.2d 1147, 1974 AMC 630 (9th Cir. 1974)[P&I]; Alex L. Parks, The Law of Tug, Tow and Pilotage, 754 (3d Ed. 1994)(reviewing cases).
Where tug and tow agreed in towing contract that owner of tow was to maintain insurance on cargo or barge, with a waiver of subrogation against tug's owners, underwriters of cargo or barge could not maintain an action against owners of tug. Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679, 1974 AMC 2254 (5th Cir. 1974)[Hull], cert. denied 419 U.S. 836, 95 S.Ct. 63, 42 L.Ed.2d 63 (5th Cir. [Fla.] 1974) (limiting Bisso); Allied Chemical Corp. v. Gulf Atlantic Towing Corp., 244 F. Supp. 2, 1965 AMC 776 (E.D. Va. 1964)[cargo](discussing cases) Peter Kiewit Son's Co. v. Anderson Tug & Barge Co., 1989 AMC 400 (N.D. Cal. 1988).

2. **Bisso Issue**

Towing contracts usually require the vessel being towed to name the towboat as an additional insured on its insurance policies and to expressly waive subrogation against the towing boat. In Bisso v. Inland Waterways Corp., 349 U.S. 85, 1955 AMC 899 (1955) the Court held that a contractual exemption of a towboat owner from responsibility for his own negligence is prohibited as against public policy. Bisso, 349 U.S. at 90.

Bisso has been narrowly construed: Contract provisions requiring each party to have the other named as an additional insured under policies with a waiver of subrogation clause are not contrary to the public policy against exculpatory clauses. Twenty Grand Offshore, Inc. v. West India Carriers, Inc., 492 F.2d 679 at 685 (5th Cir.) cert. denied, 419 U.S. 836 (1974); Dillingham Tug & Barge Corp. v. Collier Carbon & Chem. Corp., 707 F.2d 1086, 1984 AMC 1990 (9th Cir. 1983), cert. denied 465 U.S. 1025 (1984); Willamette-Western Corp. v. Columbia Pacific Towing Co., 466 F.2d 1390, 1391, 1972 AMC 2128 (9th Cir. 1972).

3. **Parties protected against subrogation under a Waiver of Subrogation**

Once an insurance underwriter issues a policy covering an additional insured and waiving "all subrogation rights" against it, the underwriter cannot recoup from the additional insured any portion of the sums paid to settle a risk covered by the policy, even on the theory that the recoupment is based on the additional insured's exposure for risks not covered by the policy. Marathon Oil Co. v. Mid-Continent Underwriters, 786 F.2d 1301, 1302, 1987 AMC 2165 (5th Cir. 1986).

Some waivers of subrogation have been pierced when they were ambiguous or failed to expressly waive recovery against an entity in all of its multiple capacities. United States v. Alaska Steamship Co., 491 F.2d 1147, 1156, 1974 AMC 630 (9th Cir. 1974) (because the action was against Alaska Steamship in its capacity as an independent stevedore contractor, and not as the insured's general agent, the suit was found not to be in subrogation against the underwriter's insured, and was therefore allowed). Other cases have held to the contrary, e.g., Willamette-Western v. Columbia Pacific Towing Co., 466 F.2d 1390, 1391, 1972 AMC 2128 (9th Cir. 1972)[P&I] Caballery v. Sea-Land Service, Inc., 1973 AMC 479 (D.P.R. 1973)[P&I](reviewing waiver issues and cases)(where P&I policy waived subrogation against named parties and others by description as well as the phrase "and/or in whatever capacity" the waiver was construed broadly: Underwriters could have limited their waiver if they wished). See, Peter Kiewit Son's Co. v. Anderson Tug & Barge Co., 1989 AMC 400 at 406 (N.D. Cal. 1988)(language in the certificate identifying additional assureds indicating that there is a
"Waiver of Subrogation to [named persons]" limits whatever waiver there may be to the towers specifically named therein).

Certificates of insurance naming additional assured on P&I, hull and cargo policies were issued after the casualty, therefore additional assureds were precluded from claiming reliance on them. The legal effect of the certificates on plaintiff underwriters' right to pursue subrogation against intended additional assureds is therefore nil). Peter Kiewit Son's Co. v. Anderson Tug & Barge Co., 1989 AMC 400 at 406 (N.D. Cal. 1988).

When party (charterer) was required by charter party to secure cargo insurance and waiver of subrogation against the "owner of the tug," and contrary to the parties' intentions, sub-charterers unilaterally changed what entities would present themselves as liable to cargo interests with resulting changes to who was exposed to liability as owner of the tug, the court held the sub-charterer cannot be permitted to take advantage of its unilateral acts to defeat various other entities' rights (including waiver of subrogation) under the Charter Party. Complaint of Admiral Towing and Barge Co., 767 F.2d 243, 249 (5th Cir. 1985)[P&I](interpreting waiver of subrogation clause broadly: Where sub-charterers were barred from subrogating, so too were their P&I underwriters).

See, general discussion of additional assured issues at part 2A3 supra.

IV.

REMEDIES FOR FAILING TO EFFECTIVELY WAIVE SUBROGATION OR NAME ADDITIONAL ASSURED.

The measure of damages for cargo owner's breach by obtaining cargo insurance without a waiver of subrogation clause in favor of vessel interests would be the amount of damages recovered by cargo underwriters against vessel interests. Alamo Chemical Transportation Co. v. M/V OVERSEAS VALDES, 469 F. Supp. 203, 212 (E.D. La. 1979); Complaint of Admiral Towing and Barge Co., 767 F.2d 243, 251 (5th Cir. 1985)[P&I](allowing tug owner indemnification from COGSA cargo carriers in the event of future claims by cargo interests following from failure of cargo carriers to obtain cargo insurance providing for waiver of subrogation against owner of tug). See, Seley Barges, Inc. v. TUG EL LEON GRANDE, 396 F. Supp. 1020, 1025 (E.D. La. 1974), aff'd 523 F.2d 628 (5th Cir. 1975)(carrying insurance with a relatively high deductible breached the agreement, therefore the barge owner could not recover damages it would not have suffered but for the breach); Peter Kiewit Son's Co. v. Anderson Tug & Barge Co., 1989 AMC 400 (N.D. Cal. 1988)(assured failed to cause its underwriters to name the tug as an additional insured and to waive subrogation as called for in towing agreement: Discussing effect but ultimately finding it irrelevant to the results based upon the facts).

C. RELEASES AND POST-LOSS IMPAIRMENTS OF SUBROGATION

1. Releases by the Insured

When an insured settles with or releases a third party from liability for a loss that the third party has caused, without reserving the rights of the insurer, the insured violates the rights of underwriters, because the insurer's subrogation rights against that party may be

If the assured settles claims against third parties who do not have knowledge that the assured has been compensated under an insurance policy, the assured's settlement cuts off the subrogated underwriter's rights. Compare, Southern Cotton Oil Co. v. United States, 12 F.Supp. 933, 1935 AMC 1239, rev'd on other grounds, 84 F.2d 509, 1936 AMC 1172 (5th Cir. 1936);[Cargo](issue discussed, no evidence presented) with Lone Star Steamship Co. v. Kirby Lumber Co. [The SOUTHLANDS], 37 F.2d 474, 1930 AMC 337 (5th Cir. 1930), aff'd The SOUTHLANDS, 37 F.2d 474 (C.C.A. 5 (Tex.) 1930).[Cargo](once underwriter has made payment and right of subrogation has attached, it is beyond power of assured to release the third party liable for loss).

Under the LHWCA, an injured worker and a third party tortfeasor may agree to any settlement that does not violate the LHWCA or public policy. See, R.G. Speaks v. Trikora Lloyd P.T., 838 F.2d 1436, 1437, 1988 AMC 1860 (5th Cir. 1988), reh'g denied, 846 F.2d 752 (5th Cir. 1988)(the longshoreman and the third party settled for an amount less than the compensation lien, with the third party agreeing to "take care of the workers' compensation intervention interest": thereafter, the court awarded the compensation carrier its full lien from the third party).

The presumption is that underwriters would not voluntarily give up right of subrogation. Samincorp. v. The S/S RIVADELUNA, 277 F. Supp. 943 (D. Del. 1967).[Cargo].

2. Assignment of Subrogee's Rights


Following an allision with a railroad bridge, railroad interests assigned to vessel owners and charterers their claims (and the claims of others) against third party defendants pursuant to a settlement agreement: The court held that in admiralty, the assignee of a cause of action which has been settled is entitled to recover from a joint tortfeasor only that amount actually paid to it in settlement. In The Matter of the Claim of Gypsum Carriers, [Pacific Carrier Lim. Procs], 465 F. Supp. 1050, 1979 AMC 1311, 1330 (S.D. Ga. 1979)[P&I].

SELECTED REFERENCES:

ERASTUS C. BENEDICT, 2 BENEDICT ON ADMIRALTY, CH. 1: CONTRIBUTION AND INDEMNITY IN MARITIME PERSONAL INJURY ACTIONS. (7th Ed. 1993).

LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES (3d ed. 1991)
CHARLES DAVIS, MARITIME LAW DESKBOOK, § FF, SUBROGATION RIGHTS OF INSURERS AGAINST THIRD PARTIES RESPONSIBLE FOR THE LOSS (1994 ed.)


SAUL SORKIN, 4 GOODS IN TRANSIT, § 49.01-03 (Subrogation)(1994).
Chapter 9

COVER ELSEWHERE

Provided that where the Assured is, irrespective of this insurance, covered or protected against any loss or claim which would otherwise have been paid by the Assurer, under this policy, there shall be no contribution by the Assurer on the basis of double insurance or otherwise.

ANALYSIS

There are three general types of “other insurance” clauses: excess, pro rata and escape. Excess insurance provides additional coverage once the policy limits of other available insurance are exhausted. Pro rata provisions allocate financial responsibility between concurrent policies based upon the percentage of coverage one policy bears to the net amount of coverage under all applicable policies. An escape clause attempts to release the insurer from all liability to the insured if other coverage is available. Institute for Shipboard Education v. Cigna Worldwide Insurance Co., 22 F.3d 414 (2d Cir. 1994).


The “other insurance” clause set forth in the SP-23 form has generally been regarded as an “escape clause.” According to the law of the state of Pennsylvania, an “escape clause” is void and therefore any policy with an escape clause, such as the SP-23, will be considered primary insurance. Institute for Shipboard Education, supra. The majority rule, however, provides that the policy with an escape clause, which expressly provides that the insurance does not apply to any loss covered by other specified types of insurance, including the excess insurance type, is absolved from liability. As a general trend, however, the courts apply a rule that the more favorable clause will be enforced and the insurer who has the escape clause will be primary to the excess clause insurer. Between an escape clause and a proration clause, the escape clause will prevail. Couch on Insurance 2d at Section 62.76 (2d ed. 1983).

When the court is faced with the possibility of neither policy providing coverage, such as in the instance where both policies contain escape clauses, the court will find the clauses “mutually repugnant” and make both policies liable for the claim. Insurance Company of North America v. West of England Shipowners Mutual Insurance Association, 1995 U.S. Dist. LEXIS
ASSIGNMENTS

No claim or demand against the Assurer under this policy shall be assigned or transferred, and no person, excepting a legally appointed receiver of the property of the Assured, shall acquire any right against the Assurer by virtue of this insurance without the expressed consent of the Assurer.

I. APPLICATION AND INTERPRETATION OF THE CLAUSE

IN GENERAL - ASSIGNMENT NOT ALLOWED

Plaintiff, a longshoreman employee of a shipyard, was severely injured. He entered into a settlement with the vessel owners (Prudential Lines), the shipyard (Avondale Shipyard, Inc.) and Norris Industries. Prudential Lines went into voluntary receivership. Plaintiff reduced his settlement to a court-approved judgment pursuant to which: Plaintiff loaned Prudential Lines $476,000 and Prudential Lines paid plaintiff $300,000 in cash and purchased an annuity, making the present value of the Prudential Lines’ contribution to settlement of $476,000. Thereafter, Prudential Lines claimed against the defendant P&I club for the $476,000 amount of the settlement and assigned to plaintiff (under their loan agreement) Prudential Lines’ entitlement to indemnification from its Club. The court denied plaintiff’s claim of assignment, discussing cases, based upon the non-assignability clause in the P&I Policy which “clearly prohibits assignment of claims.” Oberton v. American Steamship Owners Mutual Protection and Indemnity Association, 1992 A.M.C. 1545 (S.D.N.Y. 1992). See also Oberton, 1993 AMC 23172 (S.D.N.Y. 1983).

Insurance policies have long been considered personal in nature and, absent a basis for finding waiver or estoppel, where a liability policy requires the written consent of the insurer to effectuate the transfer of the insurance interest, the policy loses its force as contract upon conveyance of the property without such consent: Mortgagee held not entitled to policy benefits on this and other grounds. Meridian Trading Corp. v. National Automobile & Casualty Ins. Co., 1966 AMC 391, 45 Misc. 2d 847, 258 N.Y.S.2d 16 (1964) (interpreting similar but not the same P&I policy language above (citing N.Y. cases).

II. ASSIGNMENT APPARENTLY ALLOWED - BUT SUBJECT TO THE ARBITRATION CLAUSE

An injured seaman (Sosa) obtained a judgment against vessel owner and operator (Tracey) and sought to collect under an assignment of Tracey’s right against the P&I Club.
(Oceanus) as well as pursuant to an assignment of Oceanus’ (in receivership) rights against reinsurers (underwriters at Lloyd’s and Certain Institute of London Underwriter Companies) as well as by direct action against the reinsurers. The court held: (1) no direct action by Sosa or the insured (Tracey) was allowed against the reinsurers in the absence of an assignment of the reinsured under English, Bermuda and Texas law; and (2) even if Sosa obtained assignment of Tracey’s rights against Oceanus and Oceanus’ rights against the reinsurers, Sosa was required to comply with the English arbitration procedures set out in the reinsurance contract. Nonetheless, reading between the lines, the court appears to have given effect to the assignment even though underwriters did not give their written assent. Arkwright-Boston Manufacturer’s Mutual Ins. Co. v. Ross, 1991 AMC 627 (S.D. Tex. 1990).

In a case in which new vessel owners bought a vessel covered by a P&I policy as a U.S. Marshall’s sale and paid outstanding lien claims, new vessel owners asserted claims as subrogees and indemnitees against the P&I Club, the Court held, inter alia, that:

(a) The Louisiana Direct Action Statute applies to tort claims and not to contract claims, and all causes of action arising through the purchase of the vessel arose through contract (or quasi-contract in the case of indemnity) and could not be brought under the Statute; and

(b) To the extent subrogation claims sound in tort could be brought subject to the Louisiana Direct Action Statute, they were subject to the P&I Agreement which called for arbitration in London of all disputes (granting stay pending arbitration). (The published case made no mention of a non-assailability clause of P&I benefits). Deutsche-Schiffahrtsbank, A.G. v. Bilbrough and Company, Ltd., 563 F.Supp. 1307, 1984 AMC 27 (E.D. La. 1983).

A seaman with a judgment against the vessel and assignment of vessel’s rights against the P&I Club, can not enforce that judgment against the vessel’s P&I Club, except pursuant to the London arbitration clause found in the Rules of the P&I Club. Maritime law neither permits nor prohibits an injured third party from directly suing a vessel owner’s insurance provider. State law governs. Alaska has no direct action statute and the P&I Club has no liability until the judgment is paid. Basargin v. Shipowners’ Mutual Protectin & Indemnity Association, 1995 AMC 1463 (D. Alaska 1995).

III. ASSIGNMENT ALLOWED - NOTWITHSTANDING THE ANTI-ASSIGNMENT CLAUSE

The Alaska Supreme Court refused to enforce the no-assignment clause in a P&I Policy (clause unspecified; policy underwritten by Pacific Marine Ins. Co. and various Underwriters at Lloyd’s and Institute of London Underwriters), in a case in which a seaman on a crab boat was injured and as part of the resolution of his claim against vessel interests, the seaman received an assignment of vessel owner’s claims against their P&I Club and a
subsequent confession of judgment with his limited covenant not to sue vessel interests. Fulton

A typewritten rider that names an insured “for account of whom it may concern”,
is inconsistent with and supercedes the printed terms, including a non-assignability or change
of interest clause, so that a sale of the vessel without the consent of the insurer does not
invalidate the coverage of the policy and underwriters must pay any loss to all persons whose
interests were intended to be covered. Howell v. Globe & Rutgers Fire Ins. Co., 1928 AMC
1806, 231 N.Y.S. 67 (1928) (discussing cases) (interpreting a different non-assignability
clause).

A marine insurance policy was issued to the owner of a sloop, who sold the vessel
to the plaintiff, and assigned to him the (hull) policy of insurance, although such assignment
was prohibited in the absence of the insurer’s written consent, which was never obtained. The sloop
went on the rocks, and on the next day the insurer engage a firm of marine engineers to “proceed
to the scene of the loss and do the necessary.” On the following day, the plaintiff discussed the
loss with the insurer, and revealed his purchase of the sloop. Approximately six weeks later,
the insurer refused to pay. The court held that the six weeks’ delay in refusing payment while
the insurer’s salvors worked on the wreck and led the insurer to expect a prompt settlement
constituted a waiver of the clause prohibiting assignment of the policy. Hilton v. Federal Ins.
Co., 1932 AMC 193, 118 Cal.App. 495, 5 P.2d 1932 (interpreting a different non-assignability
clause from that above).

IV. MINOR NOTES - GENERAL BACKGROUND CASES

Admiralty will entertain a suit by an assignee. Moran Towing & Transportation

Plaintiff became the express assignee of the assured shipowner’s claims as loss
payee under a marine hull insurance policy. New York State law does not prohibit a direct suit
by an assignee of an insurance claim against a marine property underwriter. The traditional rule
is that an assignee who gives notice of the assignment to the underwriters may not be prejudiced
by subsequent dealings, (e.g. releases) between the original parties. Caribe Carriers, Ltd. v. C.E.
any non-assignability clause).
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 judgement 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.

The Assurer shall not be liable for any claim not presented to the Assurer with proper proofs of loss within (6) months after payment thereof by the Assured.

I. GENERAL REMARKS

Each of these time-based conditions is included in the section of the policy dealing with general conditions and limitations. Each requires that an action be taken within a prescribed period of time. The first requires "prompt notice" of "any occurrence" which may result in a [covered] loss. The second excuses the assurer from liability for any claim not presented with proper proof of loss within six months after payment. The third requires that any suit on the policy be brought within one year after entry of final judgment or payment of claim.

Although only a few decisions dealing with the time for proof and suit provisions in P & I policies have been found, there are reported federal and state decisions concerning similar limitations in liability, hull and cargo policies that appear analogous to and uphold the validity of limitations like those set out above. The vast majority of decisions that uphold the "time for suit" clause do so in a formalistic fashion. However, there is a split of authority on breach of the prompt notice of loss and reporting clauses, the majority holding that delay will not preclude liability unless prejudice is shown. Some states have statutes specifically dealing with the timing of suits on insurance policies, but these are generally found not to apply to policies of marine insurance.

Because cases tend to deal with both limitation and delay, representative decisions are annotated here regardless of limitation type, and are instead divided by policy type into three groups, viz: (1) P&I/Legal Liability Policies; (2) Hull Policies and (3) Cargo Policies.
II. VALIDITY OF NOTICE AND SUIT LIMITATIONS

A. P&I/Liability Policies

Suit filed against P&I Insurer more than 2 years after ship struck shore crane. There had been timely notice of loss but insurers relied upon clause 17 requiring suit within 2 years after the loss "shall have been paid." Since the vessel and the shore crane were in common ownership, there was no need for payment and the insurers were held liable under the Common Ownership Clause #5 (a). United States v. National Automobile & Casualty Insurance Co., 1962 A.M.C. 971 (N.D. Cal. 1961).

Insured not estopped from asserting claim under its P & I policy for oil spill defense and indemnity even though 27 months after sinking of assured’s barge and six months after filing of suit where broker had mailed notice of loss to surplus lines broker and where, in any case, there was no substantial prejudice. Healy Tibbits v. Foremost Ins. Co., 482 F. Supp. 830, 1980 A.M.C. 1600 (NDCA 1979).

Where excess marine P & I policy contained no notice of claims clause and had no ambiguous language on the issue of notice, "custom and practice" was not admissible to vary the terms of the policy and, therefore, could not justify excess insurer’s disclaimer of liability based on absence of notice. Declaratory relief from payment of judgment denied. Nilsen v. Mutual Marine Office, Inc., 428 F.Supp. 1375, 1977 A.M.C. 1239 (D.C. Mass. 1977).

Policy insuring against Jones Act liability required notice or suit within thirty-six months after end of policy period. The plaintiff filed no claim or suit within 36 months. This limitation was held valid under Louisiana state law. Excess P & I coverage was also held not to cover because it incorporated the limitations of the primary policy. James I. McMillian v. Coating Specialists, Inc., Lloyds, et al., 427 F.Supp. 54, 1978 A.M.C. 690 (E.D. La. 1976), followed Scarborough v. Travelers Ins. Co., 718 F.2d 702 (36 months past policy claim period) (5th Cir. 1983); accord Touchstone v. Land & Marine Applicators, 628 F.Supp. 1202 (E.D La. 1986) affd. 860 F.2d 435 (5th Cir. 1988); Elevating Boats v. Gulf Coast Marine, 595 F.Supp. 160 (E.D. La. 1984) (failure to give timely notice to P & I carrier prejudicial) affd. 766 F.2d 195 (5th Cir. 1985) discussed infra.

Where a New York marine insurance policy requires that the assurer receive prompt notice of a possible claim, compliance with the provision is a condition precedent to recovery, absent waiver, estoppel or extenuating circumstances. Notice to P & I insurer five months after accident and one month after hull underwriter’s disclaimed liability held to violate prompt notice clause; recovery denied. Neptune Lines, Inc. v. Hudson Valley Lightweight Aggregate Corp., 1973 A.M.C. 125 (S.D.N.Y. 1972)

Where a clause requires notice "as soon as may be practicable," notice to the Assurer some six months after the final claim arises is untimely, there being no evidence of any mitigating circumstances. Plaintiff’s claim of earlier oral notice not substantiated at trial. New York law may not require prejudice to underwriter which is probably the minority view. American Stevedores, Inc. v. Sun Insurance Office, Ltd., 1964 A.M.C. 1549 (N.Y. Sup.Ct. 1964) (see Big Lift v. Bellafonte, infra).
Even where the policy contains "condition precedent" language precluding recovery in the event of failure to give timely notice, the courts have required a showing of prejudice holding that "...[A]lthough an insurer may oppose a third party claim on the grounds that the insured failed to provide proper notice, the defense will be successful only if the insurer can demonstrate a 'very clear case' of prejudice". Auster Oil & Gas, Inc. v. Stream, 891 F.2d 570, 579 (5th Cir. 1990), aff'd MGIC Indemnity Corp v. Central Bank of Monroe, 838 F.2d 1382 (5th Cir. 1988). See Gulf Island IV v. Blue Streak Marine, Inc., 940 F.2d 948, 956 (5th Cir. 1991). "Where actual prejudice is found, a breach of a condition precedent to the insurer's obligation to provide coverage will excuse the insurer's duty to provide coverage under the policy." Elevating Boats, Inc v. Gulf Coast Marine, Inc., 595 F. Supp. 160, 165 (E.D.LA. 1984), aff'd, 766 F.2d 195 (5th Cir. 1984). In Elevating, a P&I policy required "...due diligence to give prompt notice of any occurrence which might give rise to a claim". The assured waited 15 months after suit to notify the underwriter, resulting in substantial prejudice to the underwriter in defense of the assured. The court also held that marine insurance interpretation was a matter of federal law, citing St. Paul Fire & Marine v. Vest Transp. Co., 656 F.2d 932, 941 (5th Cir. 1982). When the Fifth Circuit affirmed, it agreed that federal law applied to policies of marine insurance, but found no applicable federal law. Rather, it applied Louisiana law and upheld non-coverage based on the prejudicial preclusion of the underwriter's participation in settlement negotiations, defense, third-party practice and the basic opportunity to adequately investigate.

An indemnity bond providing a 15 month limit for filing of suit was held valid under Michigan law. Goosen v. Indemnity Insurance Company of N.A., 234 F.2d 463 (6th Cir. 1956). "...[T]he law is well established that an insurer by contract provisions of its policy may limit the time within which suit may be brought on the policy." Goosen, 234 F.2d at 465.

A one-year limit for suit in a public liability policy is valid under Illinois law. Radick v. Underwriters at Lloyds, 137 F.2d 21 (7th Cir. 1943) but it may be waived, which waiver may be a question fact. Cox v. English American Underwriters, 245 F.2d 330 (9th Cir. 1957).

An insured, not being aware of its rights under a liability policy taken out for its benefit by a stevedoring company, defended a personal injury suit and paid a judgment. It then sued the insurer. The court held that the notice clause had been breached and because the insurer had no opportunity to defend the plaintiff could not recover. Navigazione Alta Italia v. Colombia Casualty Co., 256 F.2d 26, 29 (5th Cir. 1958), 1958 A.M.C. 1099.

B. Hull Policies

A hull insurance policy issued in Mexico provided for a 12 month suit limit from date of loss, which provision was found to be in accord with Mexican statutes. However, the vessel owner filed suit in Texas one to two years after loss where the state statute purported to invalidate any provision barring suit to a period of less than 2 years. The U.S. Supreme Court held that the suit could not be maintained in violation of the contract clause and that the Texas statute could not be enforced in contravention of agreements reached by and between foreign nationals which would otherwise be violative of the due process clause of the Constitution. Home Insurance Company v. C.J. Dick, 281 U.S. 397 50 S.Ct. 338, 74 L.Ed. 926 (1930), 1930 A.M.C. 981.
Under Louisiana law, in the absence of statutory prohibition, a clause in an insurance policy fixing a reasonable time within which to file suit is valid so long as it does not provide for a period of less than 12 months after the inception of loss. *S.E.A. Towing Company v. Great Atlanta Insurance Company*, 688 F. 2d 1000 (5th Cir. 1982), (1983 AMC 1520) cert. den., 460 U.S 1038. As a consequence, a suit brought 4 years after discovery of damage is barred, as a matter of law. *Transload & Transport, Inc. v. American Marine Underwriters, Inc.*, 94 B.R. 416, 419 (E.D. La. 1988), citing *S.E.A. Towing*, 688 F.2d 1000.

The provision in a hull policy that prescribed a one-year limit in which to bring suit is valid and enforceable as to a suit filed after more than the one-year statutory limitation imposed by Louisiana statute. *S.E.A. Towing Company, Inc. v. Great Atlantic Insurance Company*, 688 F.2d 1000, 1983 A.M.C. 1520 (summary) (5th Cir. 1982), cert. denied, 103 S.Ct. 1429.


Suit on a maritime hull policy filed more than two years after the loss. The policy contained a twelve-month limitation with a proviso that if the state law invalidates such limit then claim shall be void unless suit is filed within the shortest limit of time permitted by state law. The Texas statute specified two years. As this was a diversity action and the contract was executed in Texas, the Texas law was applied and the court of appeals reversed the trial court judgment for the shipowner, which had applied a four year, written contract, statute of limitation. *Port Arthur Towing Company v. Mission Insurance Company*, 623 F.2d 367, 1982 A.M.C. 606 (summary)(5th Cir. 1980).

Where a hull policy required "prompt" notification of an "occurrence... which might result in a claim...", the court held that where the accident was March 12, 1979, suit filed March 9, 1990, notice given to the underwriter March 12, 1990 and defense undertaken for 5 months before a "reservation of rights" letter was sent to the assured qualifying that defense, there was no showing of prejudice. In any case, the underwriter had waived prejudicial lack of timely notice by failure to so state when it accepted the defense. *V/O Export Khleb v. M/V Anpa*, 773 F. Supp. 832 (E.D. La 1991), aff'd, *Peavey Co. v. M/V Anpa v. Zurich Inc. Co.*, 971 F.2d 1168, 1993 A.M.C. 264 (5th Cir. 1992).

Under Massachusetts law, a 3-month delay in giving notice of loss defeated recovery under a hull policy requiring notice "as soon as practicable". The purpose of notice requirement is to give the insured timely opportunity to investigate the loss. The opinion states, "in view of the fact that the policy involved here is a Marine Insurance contract, its notice provisions are governed by State, i.e., Massachusetts, law rather than Federal law since there is no Federal statutory or judicially established admiralty rule by the Supreme Court covering such notice provisions." *Granite State Minerals, Inc. v. The American Ins. Co.*, 435 F. Supp. 159, 162 (D.C. Mass. 1977), citing *Wilburn Boat*, 75 S.Ct. 368 (1955).

On a motion for summary judgment brought by the underwriter and opposed by the assured, the court held that Michigan's 12-month time for suit was enforceable. On the issue
of waiver or lulling, the motion must be supported by competent evidence indicating misrepresentation by the underwriter or inducement to refrain from bringing an action which induced an assured to forestall commencement of an action beyond the limitation period. Finding no such evidence, the court entered judgment for the underwriter. Vhalantones v. Zurich American Ins. Co., 750 F. Supp. 248 (E.D. Mich. 1990).

In a case of arson damage to a hull where the policy required "prompt notice" of loss, the court found that an 11-month delay in notice presented an issue of fact as to whether or not and under what conditions such a delay was reasonable and/or prejudicial. O'Donnell-Usen Fisheries, et al. v. Bathurst, et al., 1988 A.M.C. 2126 (Mass. 1987).

Waiver was raised in a case involving hurricane damage to an assured's sailboat where suit was filed after policy's 12-month limitation period expired. The assured, who claimed waiver, pointed to negotiations and investigation following the expiration of the policy's 12-month time for suit provision. The court held that although waiver and "lulling of the assured" could in some cases constitute an excuse for late filing, it could not be relied upon where the activity of which the assured complains occurred after the expiration of the 12-month period. Edward V. Mele v. Mutual Marine Office, 1992 A.M.C. 1717 (N.Y. 1991).

A mortgagee settled a damage claim against a vessel whose owner and insurance company had declined to defend, followed by suit to recover the settlement amount. The suit was not brought within the limitation for suit period in the policy. The claim was dismissed and appeal followed. The court upheld the dismissal and pointed out that the insured would have been barred from settling the claim without consent of the insurance company in any event. Meridian Trading Corp. v. National Automobile & Casualty Ins. Co., 258 N.Y.S. 2d 16 (1966), 1966 A.M.C. 391 (1966).

The one-year time limit clause in a hull policy governed by English law was also found to be valid under Washington law. Pacific Queen Fisheries v. Atlas Assurance Co., 307 F.2d 700 (1962), 1962 A.M.C. 574 (9th Cir. 1962), cert den. 372 U.S. 907.

Where the policy provided,"no suit or action for the recovery of any claim arising under this policy shall be maintained unless... commenced within 1 year from... loss..." the court, in holding suit not timely filed, stated: "we have uniformly held that a clause in such a contract fixing a limitation of time in which suit is sustainable is a valid one." Heffner v. Great American Ins. Co., 218 Pac. 206 (Wash. Sup. Ct. 1923), 1924 A.M.C. 249 (1923). O'Donnell-Usen Fisheries v. Bathurst, 1988 A.M.C. 2126 (D.C. Mass. 1987).

A federal court found a 31 month delay was "unreasonable" as a matter of law under New York state law regardless of lack of prejudice. The casualty resulted in damage both to the hull and to the vessel's cargo giving rise to both first and third-party claims. The court observed that notwithstanding immediate notice to the P & I carrier 31 ½ months of delay to the hull underwriter is unreasonable as a matter of law, violative of the policy provision requiring notice "as soon as practicable" and prompting it to state, "it is the law of New York that compliance with a notice of loss provision in the contract of Marine Liability Insurance is a condition precedent to the insurers liability and that the insurer need not show that it was

C. Cargo Policies


The 12-month time for suit is also enforceable in California: "such a covenant shortening the period of limitations is a valid provision of an insurance contract and can not be ignored with impunity as long as the limitation is not so unreasonable as to show imposition or undo advantage. One year was not an unfair period of limitation." C&H Foods, Co. v. Hartford Ins. Co., 211 Cal. Rptr. 765 (1984), 163 Cal. App. 3rd 1055 but not if the carrier had taken a previously inconsistent position Orion Ins. v. Fireman's Fund, 46 Cal.App.3d 374, 1975 A.M.C. 1183 (1975).


Payment on account after the expiration of the one-year period does not estop the underwriter from relying on the timebar nor does a later offer of more money revive an obligation to pay or waive a defense against the suit filed 2 years and 5 months after the date of loss. Helios Trading Corp. v. Great American Ins. Co., 1993 A.M.C. 2157 (S.D.N.Y 1993).

But where the damage is not clear, as with the gradual deterioration of bottled wine that had been overheated, failure to provide notification within a reasonable period of time can be excused due to the lack of appearance of the injury. Grand Reserve v. Hartford Fire Ins. Co., 1984 A.M.C. 1408 (N.D. Ill. 1982).

Suit brought 4 years after loss on a policy of cargo insurance requiring suit to be filed within one year from date of loss held too late to comply with the valid policy period of limitation. H.D. Brandyee, Inc. Co. v. Globe & Rudgers Fire Ins. Co., 1930 A.M.C. 7 (N.Y. Ct.App. 1929).
III. TIME LIMITS AND EXTRA CONTRACTUAL LIABILITY

To what extent contractual limits apply to extra-contractual liability is itself worthy of its own review article. We here attempt to simply note the issues.

It has been said that as a matter of basic law that every contract of insurance is one of "...the utmost good faith," a breach of which will allow the contract to be avoided by the other party. British Marine Insurance Act of 1906, §17; Lloyd's v. Montford, 1993 A.M.C. 1549 (C.D. Cal. 1992), aff'd, 1995 A.M.C. 1201 (9th Cir. 1995). Neither party will do anything to prevent the other from receiving the benefit of the bargain. Restatement (2nd) of Contracts §205 (1981). Violation of these principals has given rise to a separate tort, based on the contract, termed the "tort of bad faith" (See, e.g., Grunberg v. Aetna Ins. Co., 510 P.2d 1032, 1038 (Cal. 1973)). Since the remedy of consequential and punitive damages is not, in and of itself, the cause of action, the applicable limitation period within which the action must be brought will ordinarily be that which applies to the underlying action. (See, e.g., Wossow v. Commercial Mechanisms, Inc., 293 NW 2d 897 (1980), 97 Wis. 2d 136). See also Gordon v. State Farm and Casualty Co., 895 F.2d 1036 (5th Cir. 1990) (fire policy; "no action" clause cuts off statutory bad faith claim).

Although some courts have referred almost exclusively to state law in determining their response to extra contractual liability and utmost good faith, e.g. Albany Insurance Co. v. Anh Thi Kiev, 927 F.2d. 882 (5th Cir. 1990), cert. den., 502 U.S. 901 (1991), some courts have held that federal maritime law covers the issue of consequential and punitive damages in the context of a claim for breach of a contract of marine insurance. See, e.g., Ennia General Ins. Co. & Lloyd's Underwriters v. V&W Seafood Enterprises, 1987 A.M.C. 1488 (C.D. Cal. 1985) holding punitive damages not recoverable in a hull claim merely for filing an action for declaratory relief (related proceeding reported at 1987 A.M.C. 1494). Where a well-settled admiralty rule has been found to apply, no state law Wilburn Boat analysis need be made (See Knight v. U.S. Fire Ins. Co., 804 F.2d 9 (2d Cir. 1986), cert. den. 480 U.S. 932, 1987 A.M.C. 2407 (1987).

Generally no consequential or punitive damages are recoverable where, due to late notice or otherwise, there is no underlying coverage. American Nat’l Red Cross v. Travelers Indem. Co., 896 F.Supp. 8, 11-12 (DDC 1995).

IV. GENERAL REFERENCES

Validity of contractual time period, shorter than statute of limitations, for bringing action 6 A.L.R.3d 1197, § 17 (1966) HN: 1

18A Couch on Insurance § 75:4, - NATURE OF STATUTE. (1983) HN: 1

18A Couch on Insurance § 75:77, - EFFECT OF INVALIDITY. (1983) HN:1

44 Am.Jur.2d Insurance § 1881, - STATUTORY RESTRICTIONS UPON CONTRACTUAL LIMITATIONS HN: 1
Chapter 12

LAY-UP RETURNS AND CANCELLATION PROVISIONS

At the expiration of this policy, the Assurer is to return __________ for each thirty (30) consecutive days during the term of this insurance the vessel may be laid up in a safe port; or __________ for every thirty (30) consecutive days during the term of this insurance the vessel may be laid up in a safe port without loading and/or discharging and without crew or cargo on board, provided the Assured give written notice to the Assurer as soon as practicable after the commencement and the termination of such lay-up period.

The lay-up provision requires the Assurer to reimburse the Assured for each thirty day period that the vessel is laid-up in a safe port, with a potentially different rate depending on whether there are crew and cargo aboard and whether cargo operations are underway. The Assurer's obligation is conditioned upon the Assured providing written notice "as soon as practicable" after the commencement and conclusion of the lay-up period. We have discovered no cases construing this reimbursement clause; however, the cases discussed below should at least provide guidance concerning its main terms.

The determination whether a vessel is properly "laid-up" depends mainly upon local custom. In Goodman v. Fireman's Fund Ins. Co., 1979 AMC 2534 (4th Cir. 1979) a plaintiff sued to enforce an all risks hull policy which warranted that the vessel would be laid-up between October 1 and May 1. The critical issue under the policy was whether the vessel was "laid up" during the time warranted, given that the Assured had failed to close the port and starboard sea valves and to drain the engine's cooling system. The court concluded after considering "local custom" where the boat was stored that the vessel was not properly laid-up. Hence, the court denied the Assured's claim. See also Providence Washington Ins. Co. v. Lovett, 119 F. Supp. 371, 1955 AMC 384 (D. R.I. 1953); Gehrlein's Prod. Tooling Corp. v. Traveler's Fire Ins. Co., 1957 AMC 1029 (S.D.N.Y. 1957).

One New York state court has held that a vessel may be laid-up in a wet or dry berth, absent a more specific requirement in the policy concerning the type of berth to be used. Eamotte v. Employer's Commercial Union Ins. Co. of America, 372 N.Y.S.2d 712, 1976 AMC 204 (N.Y. App. Div. 1975), aff'd, 389 N.Y.S.2d 837 (1976).
Cancellation Provision

(a) If the vessel named herein should be sold or requisitioned and this policy be cancelled and surrendered, the Assurer to return the premium at the rate prescribed for each thirty (30) consecutive days of the unexpired term of this insurance.

(b) If the event of nonpayment of premium within sixty (60) days after attachment, this policy may be cancelled by the Assurer upon five (5) days' written notice being given to the Assured.

(c) In the event that Sections 182 to 189, both inclusive, of the U.S. Code, Title 46, or any other existing law or laws determining or limiting liability of shipowners and carriers, or any one of them shall, while this policy is in force, be modified, amended or repealed, or the liabilities of shipowners or carriers be increased in any respect by legislative enactment, the Assurer shall have the right to cancel said insurance upon giving thirty (30) days' written notice of their intention so to do, and in the event of such cancellation, make return of premium upon a pro rata daily basis.

The Cancellation clause in the SP-23 form sets out several specific instances in which one party or the other, depending on the contingency, has the right to cancel the policy. We have discovered no cases construing this provision. The cases discussed below, however, may be useful in understanding its key terms.

I. SUBSECTION (a)

Subclause (a) states that either party may cancel the policy if the vessel is either "sold" or "requisitioned", and requires the insurer to reimburse the Assured for premium at a designated rate for the remaining 30 day periods under the policy, provided the policy has been cancelled and surrendered. The policy does not specify which party can avail itself of the right of reimbursement; however, the Assured, as the beneficiary of the rebate, would probably be more likely to invoke it. As written, subclause (a) clearly places the burden upon the Assured to cancel and surrender the policy as a condition precedent to obtaining any reimbursement of premiums.

A. Requisition of Vessel

There is a dearth of case law concerning the requisitioning of vessels. One case, however, attempts to define the term "requisition." In Flota Mercante Dominicana, C. Por A. v. American Mfrs. Mut. Ins. Co., 312 F. Supp. 58 (S.D.N.Y. 1970), a vessel that had berthed in Santo Domingo, Dominican Republic during civil disturbances sank after being hit by artillery shells fired by American forces. Shortly before the casualty, the Dominican national police had boarded the vessel in search of food, clothes, transportation and brief refuge. Later, after the
police had fled in the ship's lifeboats, rebel forces occupied the vessel and drew fire from American troops. The vessel was then struck by two artillery shells and sank.

The Assured sued American Manufacturers Mutual Insurance Company ("AMMI") under a war risks policy. AMMI raised several defenses, arguing in part that coverage automatically terminated when the vessel was "requisitioned" prior to the loss by the country of registry or ownership, in this case, by the Dominican Republic's national police.

The trial court, however, rejected this defense on the ground that the vessel had not been requisitioned. Quoting the treatise International Law §147 (7th Ed. 1955) by Oppenheim, which defined requisition as "the demand for the supply of all kinds of articles necessary for the army", the court stated that "there is an aspect of formalism [to requisition] which flows from considered military decisions." The court invoked the rule of contra proferentum and found that requisition meant "something much closer to formal civil condemnation than a swift rummage through the ship by four hundred or more hungry, frightened policemen who made off with the food and lifeboats and some of the goods." Hence, the court found that the brief occupation of the vessel by the Dominican police did not constitute a requisition, and held AMMI liable under the policy.

B. Adequacy of Cancellation: Who to Notify

In Wisconsin Barge Line, Inc. v. Coastal Marine Transport, Inc., 414 F.2d 872 (5th Cir. 1969), the court rejected a marine insurer's defense of cancellation where the Assurer had failed to notify an additional assured, a barge owner, that it was cancelling the hull policies covering the tug. The court held that a cancellation notice provided to an insurance broker--who was not authorized by the Assured to accept notices upon its behalf--was ineffective under Louisiana state law. The court therefore found continued coverage for the barge owner. But see Federal Deposit Insurance Co. v. Timbalier Towing Co., Inc., 497 F. Supp. 912 (N.D. Ohio 1980)(holding that broker was under no duty to notify loss payee that it was being deleted from policy.)

C. Adequacy of Cancellation: Return of Premium

An Assurer who failed to return premiums to an Assured after receiving a retracted notice of cancellation from the Assured's mortgagee was held liable for the loss of the Assured's vessel. After determining that the mortgagee's retraction was effective to reinstate coverage--provided the Assurer had not actually accepted cancellation--the court declared that the Assurer's failure to return the premiums was "further confirmation" that coverage was in effect at the time of the loss. Saskatchewan Government Ins. Office v. Padgett, 245 F.2d 48 (5th Cir. 1957).

D. Adequacy of Cancellation: Cure of Breach before Cancellation

In Commercial Union Ins. Co. of New York v. Daniels, 343 F. Supp. 675 (S.D. Tex. 1972), a federal district court held that an Assured's breach of a marine insurance policy which triggered a cancellation clause merely suspended coverage until the breach was cured. The court found that the Assured had changed management of its vessel in violation of the
cancellation clause, and then resumed compliance with the clause. Given that the Owners were in compliance with the cancellation provision at the time of the loss, the court declared that the forfeiture of coverage was merely temporary, and that coverage had been reinstated. The court, however, vitiated coverage on other grounds.

II. SUBSECTION (b)

The second cancellation subclause, which grants the Assurer the right to terminate the SP-23 policy for nonpayment of premiums, applies during the first 60 days "after attachment" and requires the Assurer to provide five (5) days' written notice before cancellation becomes effective. Generally, the Assurer must comply precisely with the notice requirements in a cancellation clause, and, if required by the policy, must return premiums and provide written notice in exact compliance with the minimum period before cancellation will be deemed effective.

In Coastal Savings Bank v. Arkwright Boston Mut. Ins. Co., 686 F. Supp. 17, 1988 AMC 2890 (D. Me. 1988), a court held a marine insurer liable to a loss payee/mortgagee for the loss of a vessel where the Assurer failed to provide 15 days written notice of cancellation, as the policy required. See also Tarleton v. DeVeuve, 113 F.2d 290, 298 (9th Cir. 1940); Ruby Steamship Corp. v. American Merchant Marine Ins. Corp., 1929 AMC 258 (N.Y. App. Div. 1928). The Assurer's failure to provide written notice of cancellation to the mortgagee, in the court's view, effectively continued coverage under the policy. Citing Wilburn Boat, the trial court also noted that under Maine law cancellation was deemed ineffective until 10 days after the Assurer provided written notice of cancellation to the mortgagee.

III. SUBSECTION (c)

Finally, the policy permits the Assurer, in its discretion, to cancel the policy upon 30 days notice if the United States Limitation of Liability Act or "any other existing...laws determining or limiting liability of shipowners and/or carriers, shall...be modified, amended or repealed, or the liabilities of shipowners or carriers be increased....", provided the Assurer reimburses the Assured "upon a pro rata daily basis."

One recent, notable alteration of the liability of a certain class of vessel owners and operators under United States law occurred in August 1990, when President Bush signed into law the Oil Pollution Act of 1990 ("OPA '90"), 33 U.S.C. §2701 et seq. (1990). OPA '90 specifically precludes owners and operators whose vessels are carrying petroleum in bulk in United States waters from invoking the Limitation of Liability Act of 1851 to limit their liability. Id. at §2718.

Technically, subclause (c) of SP-23's cancellation provision grants the Assurer the right to cancel coverage for SP-23 policy holders falling into this class of vessel owners and operators upon 30 days notice. We are unaware, however, of any reported decisions in which an Assurer has invoked the cancellation clause in SP-23 to avoid the higher liability limits placed upon vessel owners and operators by OPA '90.
Chapter 13

EXCLUSION OF HULL COVERAGE AND WAR RISKS

Notwithstanding anything to the contrary contained in this policy, no liability attaches to the Assurer:

For any loss, damage, or expense which would be payable under the terms of the ___________ form of policy on hull and machinery, etc., if the vessel were fully covered by such insurance sufficient in amount to pay such loss, damage, or expense.

Phrase “would be payable” construed to mean “could be payable” so that, despite a hull cover exemption clause, a protection and indemnity (“P & I”) policy still covers collision losses which could not be covered by an American hull policy in standard form regardless of whether collision losses were actually covered by any existing hull policy or not. The amount of coverage provided by the hull policy is immaterial. Thus, despite the clause exempting hull cover, a P & I policy would still cover such items as excess collision. Steamship Mutual Underwriting Ass’n, Ltd. v. Landry, 281 F.2d 482, 485 (1st Cir. 1960).

Under language identical to the hull cover exemption of form SP-23, P & I policy does not provide coverage where loss of coverage under hull policy is due to breach of implied warranty of seaworthiness. Employer’s Insurance of Wausau v. International Marine Towing, 864 F.2d 1224, 1224-25 (5th Cir. 1989).

Because P & I policies have historically been designed to insure against risks for which standard commercial coverage is unavailable, claims for liability which “could be covered or would be payable under the standard form of hull policy are excepted from the P & I policy,” including sue and labor expenses. Seaboard Shipping Corp. v. Jocharanne Tugboat Corp., 461 F.2d 500, 503, 505 (2d Cir. 1972).

For a discussion of Landry, supra, 281 F.2d 482, and an argument that the hull cover exemption clause of form SP-23 was never intended to allow P & I policies to cover excess collision, see LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES, 503-04, 3d ed., 1991.

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1 The author would like to acknowledge the contribution of William M. Cooney to the preparation of this chapter.
Following Landry, supra, 281 F.2d 482, many P & I underwriters amended their hull cover exemption clauses to include the phrase “whether or not the vessel were fully covered by such [hull] insurance” in order to make clear that the absence of hull cover would not trigger liability under the P & I policy so long as hull cover could be obtained. Hugh S. Meredith, Fines, Penalties, and Other Miscellaneous Liabilities; Expenses of Defense; General Conditions and Exclusions; Grounds for Cancellation; Second Seaman’s Policy; Club Letters of Guarantee or Undertaking, 43 TULANE L. REV. 602, 607 (1969).

For any loss, damage or expense sustained by reason of capture, seizure, arrest, restraint or detainment, or the consequence thereof or of any attempt thereat; or sustained in consequence of military, naval or air action by force of arms, including mines and torpedoes or other missiles or engines of war, whether of enemy or friendly origin; or sustained in consequence of placing the vessel in jeopardy as an act or measure of war taken in the actual process of a military engagement, including embarking or disembarking troops or material of war in the immediate One of such engagement; and any such loss, damage and expense shall be excluded from this policy without regard to whether the Assured’s liability therefor was based on negligence or otherwise, and whether before or after a declaration of war.


Inclusion of the risk of detention by civil authorities during peacetime under F.C. & S. clause (similar to form SP-23 F.C. & S. clause except that it also included “confiscation, pre-emption, requisition or nationalization”) is “consistent with the general purposes of the Clause, which is to exclude from coverage losses arising from unforeseeable actions of sovereign states.” Blaine Richards & Co., Inc. v. Marine Indemnity Insurance Co. of America, 635 F.2d 1051, 1053 (2d Cir. 1980).

Risk of detention by civil authorities during peacetime is included under F.C. & S. clause of P & I policy where qualified by the phrase “whether in time of peace or war and whether lawful or otherwise.” Blaine Richards & Co., Inc. v. Marine Indemnity Insurance Co. of America, 635 F.2d 1051, 1052-53 (2d Cir. 1980).


Government action need not be specifically directed to the detention of insured property in order to qualify as a “restraint” of that property under P & I policy’s F.C. & S. clause if such action is forcible and has the same consequences as a restraint. Commodities Reserve Co. v. St. Paul Fire & Marine Insurance Co., 879 F.2d 640, 645 (9th Cir. 1989).

Where a seized vessel is allowed to proceed to her destination only upon a “guaranty” that contraband would be returned to the seizing authority following delivery of non-contraband cargo, and vessel complies accordingly, there is a “seizure” of the contraband within the meaning of a F.C. & S. clause, notwithstanding delivery of non-contraband. The Hellig Olav, 282 F. 534, 539-40, 544-45 (2d Cir. 1922).

Whether loss suffered subsequent to requisition is a “marine risk” or a “war risk” depends on whether loss was a consequence of “warlike operation.” Libby, McNeil & Libby v. United States, 87 F. Supp. 866, 877 (Ct. Cl. 1950).

Deciding whether the cause of a loss is a war risk requires determination of the “real efficient cause” of the loss, rather than the cause nearest in time to the loss. Ope Shipping Ltd. v. Allstate Insurance Co., 687 F.2d 639 (2d Cir. 1982).

“[T]he characterization of an act as barratrous is independent of the motives which provoked the act.” Thus, where a crew commits barratry in order to take part in armed conflict, the event is not a “war risk” unless barratry is specifically included thereunder. National Union Fire Insurance Co. of Pittsburgh v. Republic of China, 254 F.2d 177, 187 (4th Cir. 1958).

While the violent taking of a ship may constitute “barratry,” such action is not necessarily a “seizure” within the meaning of a F.C. & S. clause of P & I policy. National Union Fire Insurance Co. of Pittsburgh v. Republic of China, 254 F.2d 177, 185 (4th Cir. 1958).

Practical necessity is not a “restraint” under F.C. & S. clause of P & I policy. Crist v. United States War Shipping Administration, 163 F.2d 145, 150-52 (3d Cir. 1947).

A blackout is a “wartime restraint” where imposed by naval authorities. Risks incident to war but not imposed by military authorities are not “restraints” within the meaning of the policy. Quinn v. United States, 72 F. Supp. 94, 97 (D.Hawaii 1947).
Chapter 14

EXCLUSION OF CANCELLATION OF CHARTER AND LIABILITY ARISING OUT OF TOWAGE

[Notwithstanding anything to the contrary contained in this policy, no liability attaches to the Assurer:]

For any loss, damage or expense arising from the cancellation or breach of any charter, bad debts, fraud of agents, insolvency, loss of freight hire or demurrage, or as a result of a breach of any undertaking to load any cargo, or in respect of the vessel named herein engaging in any unlawful trade or performing any unlawful act, with the knowledge of the Assured.

A freights policy containing a similar provision has been held under English law not to cover loss where the parties did not mutually consent to cancellation of the charter party, although performance of the charter was rendered impossible by damage which the vessel sustained from stranding. Jamieson v. Newcastle Steamship Freight Insurance Association, 2 Q.B. 90, 7 Aspinall’s Reports of Maritime Cases 593 (Court of Appeals 1895).

For any loss, damage, expense, or claim arising out of or having relation to the towage of any other vessel or craft, whether under agreement or not, unless such towage was to assist such other vessel or craft in distress to a port or place of safety, provided, however, that this clause shall not apply to claims under this policy for loss of life or personal injury to passengers and/or members of the crew of the vessel named herein arising as a result of towing.

For any claim for loss of life or personal injury in relation to the handling of cargo where such claim arises under a contract of indemnity between the Assured and his subcontractor.

Towage has been held to include delivery of the barge to an apparently safe berth and in an apparently safe position. Accordingly, a similar provision was held to exclude losses resulting when the vessel towed two barges and moored them negligently so that the barges later

A similar provision was held not to exclude coverage for damages resulting from towage of a sixteen-section tow of logs as the logs were not a “vessel or craft” within the meaning of the exclusion. Halvorsen v. Aetna Ins. Co., 1954 AMC 1996 (Super. Ct., King County, Wash. 1954).

A similar provision in a hull policy was held to exclude coverage for losses arising when generator failure aboard the tug resulted in both tug and its tow alliding with an offshore platform. The court also found that coverage had been voided due to a breach of the implied warranty of seaworthiness. Employers Ins. of Wausa v. International Marine Towing, 864 F.2d 1224, 1989 AMC 2974 (5th Cir. 1984).

A policy containing a similar provision also carried an endorsement providing that the P&I policy “provides Excess Collision and Tower’s Liability”. The court held that this endorsement constituted excess hull coverage, and is not an additional enumerated P&I risk for collision and tower’s liability. Ins. Co. of North America v. Board of Commissioners of the Port of New Orleans, 733 F.2d 1161, 1985 AMC 1460 (5th Cir. 1984).

Injury to a member of the crew of the tug who was assisting in unloading a barge was held covered under a provision insuring against liability arising out of towage for loss of life or personal injury only to passengers and/or members of the crew, since the unloading was part of the towage operation and one of the duties of the tug’s crew members. Upper Columbia River Towing Co. v. Glens Falls Ins. Co., 179 F.Supp. 705 (D. Ore. 1959).
Chapter 15
LIMITATION OF LIABILITY
TO THAT OF SHIPOWNER

It is expressly understood and agreed if and when the Assured under this policy has any interest other than as a shipowner in the vessel or vessels named herein, in no event shall the Assurer be liable hereunder to any greater extent than if such Assured were the owner and were entitled to all the rights of limitation to which a shipowner is entitled.

I. IN GENERAL

In American-form P&I policies, such as the SP-23 form, the P&I underwriter seeks to limit its exposure to the assured and to third parties in a variety of ways. First, the P&I underwriter specifically identifies in the policy those risks for which the P&I underwriter agrees to indemnify the assured. American-form P&I policies indemnify vessel owners against certain legal liabilities which are normally incurred by vessel owners incident to their operation or use of the vessel. The P&I policy is not a "comprehensive general liability" policy, and it does not purport to cover the entire range of liabilities which are likely to be encountered by a vessel owner. Instead, the P&I underwriter agrees to indemnify its assured only against those risks specifically enumerated in the policy, and so in that sense, the P&I underwriter limits the extent of its liability, or limits its exposure, by specifically describing those risks for which the underwriter will agree to provide indemnity.

Second, the P&I underwriter limits its exposure in the American-form P&I policy by limiting the "amount" of the coverage provided. The P&I underwriter limits the amount of its liability by inserting "policy limits" as to the maximum amount for which the P&I underwriter agrees to indemnify its assured under the policy. By virtue of these "policy limits," the P&I underwriter agrees to indemnify the Assured for the specifically enumerated covered risks up to a specified sum, but not exceeding that sum. The policy limits constitute the P&I underwriters' maximum exposure under its policy. (This often results in the practice whereby the assured will obtain a "primary" P&I policy, and to the extent necessary, obtain an "excess" P&I policy, and possibly even a "bumbershoot" policy, so as to protect the vessel owner against claims involving high exposure.) These policy limits are valid and enforceable, and the P&I underwriter is not liable -- even in direct action jurisdictions -- in excess of the policy limits.

Third, the P&I underwriter indirectly limits the amount of its coverage in the "insuring clause" of the P&I policy. As a condition precedent to any right of recovery under the P&I policy, the "insuring clause" provides that the assured must be found legally liable "as
owner" of the insured vessel. The effect of this "as owner" language is that the P&I underwriter provides coverage to its assured only in a capacity in which the assured is "prima facie" entitled to limit its liability, since only those assureds having “owner” status -- i.e., vessel-related liability -- are entitled to limitation of liability, and so only those having "owner" status are entitled to coverage under the P&I policy. In other words, American-form P&I policies purport to cover specifically enumerated liabilities incident to a vessel owner's use or operation of its vessel, but coverage under these policy forms is further restricted in that coverage is afforded to the assured only for liability the assured incurs "as owner of the insured vessel." Liabilities incurred by the assured in some other capacity are not protected or covered under the P&I policy, and so by restricting coverage to "as owner" liability, the P&I underwriter further limits its exposure.

In an effort to protect themselves in direct action jurisdictions against third-party claims in excess of the assured's legal liability, P&I underwriters seek to limit their liability to third parties by inserting in their policy a provision which is commonly referred to as a "Crown-Zellerbach clause," in which the P&I underwriter stipulates that the maximum indemnity the P&I underwriter will provide is limited to the assured's limited liability in those situations where the assured vessel owner is found to be entitled to limitation of liability under the applicable maritime law. The effect of such "Crown-Zellerbach" clauses is to allow the P&I underwriter to claim by contract the assured's statutory defense of limitation of liability (which would not otherwise be available to the P&I underwriter).

II. INDEMNITY LIMITED TO SPECIFIC RISKS

The P&I policy is not "comprehensive general liability policy," nor does the P&I policy purport to cover all possible liabilities which a vessel owner is likely to encounter in the course of its use and operation of the vessel. Instead, the P&I policy only insures the vessel owner against those risks specifically set forth in the policy, and no others. See Wiley v. Offshore Painting Contractors, Inc., 711 F.2d 602, 613 n. 23, 1984 AMC 1144, 1153 n. 23 (5th Cir. 1983), on reh., 16 F.3d 256, 257, 1984 AMC 11559, 1156 (5th Cir. 1983); Texas Eastern Transmission Corp. v. McMoRan Offshore Exploration Co., 877 F.2d 1214, 1227 (5th Cir. 1989); Continental Off Co. v. Bonanza Corp., 706 F.2d 1365, 1372, 1983 AMC 2059, 2069 (5th Cir. 1983).

III. SHIPOWNER'S LIMITATION OF LIABILITY AND DIRECT ACTION STATUTES

The Limitation of Liability Act, 46 U.S.C. §§ 183-189, allows the vessel owner to limit its legal liability to the value of the vessel owner's interest in the vessel and its pending freight, provided the loss or damage did not occur within the privity or knowledge of the vessel owner. See 46 U.S.C. § 183. This statutory right of limitation of liability is available only to the vessel owner and vessel bareboat (demise) charterer; time charterers and voyage charterers, and others who lack an ownership interest in or a dominion relationship to the vessel, are not entitled to limitation of liability under this statute. This statutory right of limitation of liability is not available to the vessel owner's P&I underwriter.
In non-direct action jurisdictions, the lack of this statutory defense is of no moment to the P&I underwriter, since the P&I policy is written in such a way that the underwriter will indirectly benefit from the shipowner's limited liability. First, in non-direct action jurisdictions, the P&I underwriter is liable under its policy only to the assured. Second, in the P&I policy's "insuring clause," the P&I underwriter conditions its payment to the assured on the assured first being found legally liable and actually paying that liability before the underwriter will indemnify the assured; the underwriter is not liable to indemnify its assured unless and until the assured has actually paid its own liability. The P&I underwriter can then indirectly benefit from the shipowner's limited liability due to the fact that the underwriter is only liable to indemnify the 'assured and then only for that for which the assured has actually paid. If the shipowner is found entitled to limitation of liability, then the P&I underwriter will benefit too, since it only has to pay that for which the shipowner must pay. The "pay to be paid" language of the policy's "insuring clause," then allows the P & I underwriter to indirectly claim the benefit of the shipowner's limitation of liability.

However, whether the P&I underwriter can limit its liability under its policy to the statutory limited liability of its assured shipowner is of critical importance in direct action jurisdictions, since those jurisdictions allow an injured third party (non-assured) claimant the right to sue the tortfeasor's liability insurer directly for the assured's tort liability, and since those jurisdictions construe P&I policies as constituting "liability" policies for purposes of falling within the ambit of the direct action statutes. The Louisiana Direct Action Statute, L.R.S. §22:655, provides an injured third party, who has a cause of action against the assured, a right of direct action against the assured's liability insurer, if the liability policy was issued or delivered in Louisiana or the accident or injury occurred in Louisiana. The Puerto Rico Direct Action Statute, 26 L.P.R.A. §2003, provides for a similar right of direct action against an assured's liability insurer. Both the Louisiana Direct Action Statute and the Puerto Rico Direct Action Statute have been found to apply to marine P&I policies, such that the P&I underwriter is directly liable under its policy to the injured third party.

Therefore, it becomes of critical importance to the P&I underwriter, when sued pursuant to a direct action statute, that the underwriter can limit its liability to that of its assured, where the assured is found to be entitled to limit its liability under the Limitation of Liability Act. Since the vessel owner's statutory right of limitation liability is not available to the vessel owner's P&I underwriter, if the P&I underwriter is going to limit its liability under its policy to third-party claimants to that of its assured's limited liability, then the P&I underwriter must look to its policy and determine whether it has contractually stipulated in its policy that its maximum indemnity under its policy is limited to that of the assured's limited liability. Commonly referred to as "Crown-Zellerbach clauses" (after the case of the same name) these contractual stipulations allow the P&I underwriter to be protected against liability in excess of the assured's liability in direct action jurisdictions. By virtue of such clauses, the P&I underwriter's right of limitation of liability then becomes a matter of contract rather than a matter of statute.

IV. AVAILABILITY OF LIMITATION DEFENSE TO UNDERWRITERS

In a 4-1-4 opinion, majority of court recognized that marine P&I underwriter is not entitled to "limitation of liability" under 46 U.S.C. § 181 et seq. [See 347 U.S. at 421-22, 74 S.Ct. at 615.] Majority of court set forth procedure that shipowner's limitation of liability
proceeding should be concluded first before proceeding with the direct action against the shipowner's P&I underwriter, and so majority of court remanded matter with instructions that Louisiana direct action against P&I underwriter be continued until after completion of shipowner's limitation of liability proceeding. *Maryland Cas. Co. v. Cushing* 347 U.S. 409, 74 S.Ct. 608 98 L.Ed. 806 (1954).

Limitation of Liability under 46 U. S.C. § 183 et seq. is available only to vessel owner and vessel bareboat charterer, and statutory defense is not available to vessel owner's P&I underwriter sued pursuant to the Louisiana Direct Action Statute. Limitation of liability under federal statute is not available to P&I underwriter sued in a direct action suit. *Olympic Towing Corp. v. Nebel Towing Co.,* 419 F.2d 230 (5th Cir. 1969) [subsequently overruled by *Crown-Zellerbach Corp. v. Ingram Industries, Inc.,* 783 F.2d 1296 (5th Cir. 1986)].

En banc Fifth Circuit holds that P&I underwriter may claim the benefit of assured-vessel owner's statutory defense of limitation of liability under 46 U.S.C. § 183 by inserting clause in P&I policy to the effect that the P&I underwriter's maximum liability shall not exceed the assured's liability and in the event the assured is entitled to limit his liability then the maximum liability of the P&I underwriter shall not exceed the amount of such limitation. *Crown-Zellerbach Corp. v. Ingram Industries, Inc.,* 783 F.2d 1296 (5th Cir. 1986).

Vessel owner's P&I underwriter does not have standing under Limitation of Liability Act, 46 U.S.C. § 183 et seq., to demand that federal court interpret whether its P&I policy allows the underwriter to limit the amount of its liability to the amount of the vessel owner's liability. Furthermore, vessel owner's P&I underwriter cannot require that the limitation injunction cover the P&I underwriter, as the injunction issued in a limitation of liability proceeding protects only the vessel owner and vessel bareboat charterer, but not their P&I underwriter. Since the Limitation of Liability Act does not afford the P&I underwriter any right of limitation of liability, the P&I underwriter has no statutory basis to demand protection in the claimants' stipulations. However, favoring the procedure suggested in *Maryland Cas. Co. v. Cushing,* in which the limitation action precedes the direct action against the P&I underwriter, the court stayed the state court proceedings against both the shipowner and its P&I underwriters until after conclusion of the limitation of liability proceeding. *Magnolia Marine Transport Co. v. LaPlace Towing Co.,* 964 F.2d 1571 (5th Cir. 1992).

The Limitation of Liability Act, 46 U.S.C. § 183 et seq., does not afford any protection to the P&I underwriter nor does it afford the P&I underwriter any right of limitation of liability. *Texaco Inc. v. Williams,* 47 F.3d 765 (5th Cir. 1995).

V. "CROWN-ZELLERBACH" CLAUSES

Overruling, but at the same time distinguishing, *Olympic Towing Corp. v. Nebel Towing Co.,* 419 F.2d 230 (5th Cir. 1969), the U.S. Fifth Circuit (sitting en banc) held that the P&I underwriter could contractually claim in its policy the shipowner's statutory right of limitation of liability under 46 U. S.C. § 183 by stipulating in its policy, that in the event the assured was entitled to limit its liability then the maximum liability of the P&I underwriter under
its policy would not exceed the amount of the assured's limitation. P&I underwriter's limitation of liability provision valid and enforceable under Louisiana law.

At issue was the interpretation and effect of the following limitation of liability provision contained in a London P&I Club's "Rules":

When a member for whose account a ship is entered in this class is entitled to limit his liability, the liability of the class shall not exceed the amount of such limitation ....

The court held that such a provision was valid and enforceable under Louisiana law and was not contrary to Louisiana public policy (which holds that liability insurance is for the benefit of the injured party and not for the protection of the assured). Accordingly, if P&I policy contains a clause which allows the P&I underwriter to limit its liability to that of the assured vessel owner's judicially declared limited liability, then the P&I underwriter is entitled to claim the benefit of the shipowner's limitation of liability under 46 U.S.C. § 183 as against the direct action claims of third parties. Crown-Zellerbach Corp. v. Ingram Industries, Inc., 783 F.2d 1296 (5th Cir. 1986) [en banc].

The question whether a P&I policy contains a "Crown-Zellerbach" clause can be determined by either a state court or federal court, and the interpretation of the P&I policy is not necessarily a function of the federal court's limitation of liability proceeding. The Limitation of Liability Act, 46 U.S.C. § 183 et seq. does not afford the P&I underwriter any statutory right of limitation of liability nor does the Act afford the P&I underwriter any statutory basis to demand protection in the court's limitation injunction or to demand protection in the claimant's stipulations. The P&I underwriter's rights are purely contractual, not statutory, and so the P&I underwriter's right to limit its liability to that of the shipowner's judicially-declared limited liability depends solely upon the terms and conditions of its P&I policy. In a direct action jurisdiction, the absence of a Crown-Zellerbach clause subjects the P&I underwriter to liability beyond the vessel owner's limited liability up to the P&I policy's policy limits. If the P&I underwriter fails to contract in its policy for the right to limit its liability to third parties to that of the assured's limited liability, then the underwriter's direct action liability to third parties may exceed the value of the limitation fund without violating federal or state law. The Limitation of Liability Act protects only the vessel owner and does not preclude a claimant from recovering more than the value of a limitation fund from a party not entitled to the Act's protection, such as the P&I underwriter. The existence of a Crown--Zellerbach clause in the P&I policy does not give the P&I underwriter standing under the Limitation of Liability Act to assert limitation of liability defensively nor does it give the P&I underwriter standing to require protective stipulations from claimants who seek to pursue common law remedies in state court outside the federal court limitation action. The existence of a Crown--Zellerbach clause only allows the P&I underwriter to limit its liability to third parties to the limited liability of the assured in the event the assured is found to be entitled to limitation of liability. Magnolia Marine Transp. Co. v. LaPlace Towing Corp., 964 F.2d 1571 (5th Cir. 1992).

The Limitation of Liability Act does not afford any protection to the P&I underwriter nor does it afford the P&I underwriter any statutory right of limitation of liability. Any right to limit liability on the part of the P&I underwriter is purely contractual in nature and
depends upon the existence of a Crown--Zellerbach type clause in the P&I policy. The court indicated that claimants could, but were not required to, include the P&I underwriters in the joint stipulations filed in order to allow those claimants to pursue common law remedies in state court outside the federal court limitation of liability proceeding. *Texaco Inc. v. Williams*, 47 F.3d 765 (5th Cir. 1995).


Interpreting the West of England P&I Club Rules, the court held the P&I underwriter was entitled to limit its liability to that of assured vessel owner's limited liability by virtue of Crown-Zellerbach clause which provided:

> The Association shall in no circumstances be liable hereunder for a sum in excess of the liability in law of the Member for damages or otherwise and, when a Member is entitled to limit his liability, the liability of the Association shall not exceed the amount of such limitation. Where the Association is sued directly by a third party, it shall be entitled to adopt each and every denial, defense and right to limitation of liability that would have been available to the Member in such proceedings where the Member and not the Association to be the party sued.


P&I policy may validly provide that P&I underwriter cannot be liable for more than the assured's judicially declared limitation of liability. By virtue of Crown-Zellerbach clause in the P&I policy, court declined to modify injunction so as to permit direct action against vessel owner's P&I insurer, and court stayed trial of direct action against P&I underwriter until after completion of limitation of liability proceeding. *In re Louisiana Bunkers, Inc.*, 1988 AMC 1597 (E.D. La. 1988).

The Limitation of Liability Act does not afford any protection to the P&I underwriter. Any right to limit liability on the part of the P&I underwriter depends upon the terms and conditions of its P&I policy. *In re Nobles (Motorboat FL 1258 FV)*, 842 F.Supp. 1430 (N.D. Fla. 1993).

In order for direct action liability of underwriter to be limited to the insured shipowner's liability under the Limitation of Liability Act in accordance with Crown-Zellerbach, the P&I policy need not contain a particular form of clause or any reference to the Limitation of Liability Act; rather, it is sufficient that the policy provide that coverage is limited to the insured's liability. Clause contained in worker's compensation/employer's liability policy which provided "We will pay all sums you legally must pay as damages because of bodily injury..." constitutes a Crown-Zellerbach clause. Court further held that Crown-Zellerbach did not establish any standard language requirement, and that the language simply should be sufficient
to state that the insurance company's liability is limited to that of the insured. Rogers v. Texaco Inc., 638 So.2d 347, 1994 AMC 2148 (La. App. 4th Cir. 1994).

On motion to modify limitation of liability stay to allow claimants to sue P&I underwriter in state court under Louisiana Direct Action Statute, claimants argued P&I policy did not include specific "Crown-Zellerbach language" to allow P&I underwriter to contractually acquire the shipowner's statutory defense of limitation of liability. However, court concluded the P&I policy "clearly contemplated" the P&I underwriter indemnifying the shipowner "only for those amounts [shipowner] is legally obligated to pay." The court found that was all the Crown-Zellerbach rule required. Me court found the P&I policy contained the necessary Crown-Zellerbach language, and refused to modify injunction to allow claimants to proceed in state court against P&I underwriter. In re Nika Corp., 1996 WL 648838 (E.D. La. 1996).

P&I underwriter may limit its liability to that of the shipowner's liability only if the P&I policy contains a provision fixing the underwriter's maximum liability to that of the assured shipowner's judicially declared limitation of liability. P&I underwriter does not have standing to assert the shipowner's statutory right of limitation of liability under 46 U.S.C. § 183, and so court will grant motion to strike affirmative defense of limitation of liability under 46 U.S.C. § 183 asserted by P&I underwriter in its answer, but court will allow P&I underwriter to amend answer to assert contractual right of limitation of liability pursuant to the terms and conditions of P&I policy, given that P&I policy contained requisite Crown-Zellerbach clause. Fountain v. L & M Botruck Rental, Inc., 1995 WL 574446 (E.D. La. 1995).

Where claimants in limitation of liability proceeding filed stipulations in order to satisfy requirements to lift stay order to proceed in state court, court held that P&I underwriters were not entitled to stipulations in their favor requiring that claimants stipulate P&I underwriters' right to limitation of liability. Nevertheless, court found claimants' proposed stipulations deficient in that the stipulations failed to afford shipowner/assured the right to preserve its insurance coverage by prioritizing shipowner's claim to its insurance proceeds in the event that it was found entitled to limitation and its insurers were subject to direct action under the Louisiana Direct Action Statute. In re Plimsoll Marine, Inc., 1998 WL 373404 (E.D. La. 1998). See also Magnolia Marine Transport Co. v. LaPlace Towing-Co., 964 F.2d 1571, 1579-80 (5th Cir. 1992).

VI. "CROWN-ZELLERBACH" AND THE SP-23 FORM

It is not altogether certain whether the SP-23 form's "other than as shipowner" language qualifies under Crown-Zellerbach to allow the P&I underwriter to limit its liability in a direct action jurisdiction to that of its assured's limited liability. The courts have given inconsistent signals regarding this issue, perhaps due to the fact that the SP-23 form's "other than as shipowner" language is vague and ambiguous when compared to the limitation of liability language contained in the London P&I Club rules which was the subject of the Crown-Zellerbach and A.W. Brister decisions.

In Olympic Towing Corp. v. Nebel Towing Co., 419 F.2d 230 (5th Cir. 1969), the P&I underwriter contended that it was entitled to assert its assured shipowner's statutory right to limit liability under 46 U.S.C. § 183, but the court rejected that contention, holding that
the statutory right of limitation of liability under 46 U.S.C. § 183 was a defense "personal" to the shipowner and so not available to the shipowner's P&I underwriter. The P&I underwriter did not contend that the terms and conditions of its P&I policy (specifically the "other than as shipowner" language) allowed it to limit its liability to third parties to the assured vessel owner's limited liability. Although the P&I policy form is not identified in Nebel Towing, it appears that the P&I policy was the SP-23 form, since the "as owner" and "other than as shipowner" language quoted by the court is identical to that of the SP-23 form. See 419 F.2d at 236 & 236 n. 22. Rather than contending that the P&I policy's terms and conditions allowed it to limit its liability to the limited liability of its assured, the P&I underwriter argued that the "as owner" and the "other than as shipowner" language of its policy precluded any direct action. The court rejected this contention on the grounds that such policy language constituted a "no action clause," which was invalid and unenforceable under Louisiana law. See 419 F.2d 236-37. Nevertheless, the question whether the P&I policy afforded the underwriter the right to limit its liability was not before the court.

Crown-Zellerbach Corp. v. Ingram Industries, Inc. suggests that the SP-23 form's "other than as shipowner" language does not qualify as sufficient language to allow the P&I underwriter to limit its liability in a direct action jurisdiction to that of its assured vessel owner. In the panel decision, Crown-Zellerbach Corp. v. Ingram Industries, Inc., 745 F.2d 995 (5th Cir. 1985) Judge Brown wrote a strong dissent to the panel majority's reliance on Nebel Towing, in which he distinguished the policy in Nebel Towing from the policy in Crown-Zellerbach, explaining that the P&I policy in Crown-Zellerbach contained a policy condition in which the P&I underwriter expressly limited its liability to that of the shipowner's limited liability, whereas the policy in Nebel Towing contained no such clause. 745 F.2d at 1003. In a footnote, Judge Brown observed that the only language in the P&I policy at issue in Nebel Towing even remotely similar to that in Crown-Zellerbach was the "other than as shipowner" language, but Judge Brown felt this language was not sufficient to allow the P&I underwriter to limit its liability to the assured's limited liability. See 745 F.2d at 1004 n. 17, quoting 419 F.2d at 236 n. 22.

Writing for the en banc majority in Crown-Zellerbach v. Ingram Industries, Inc., 783 F.2d 1296 (5th Cir. 1986), Judge Brown again distinguished the P&I policy in Crown-Zellerbach from the P&I policy in Nebel Towing, finding that while the former contained a clause which expressly limited the P&I underwriter's liability to the assured's limited liability, the Nebel Towing policy did not:

The P&I policy in Nebel Towing did not by its terms limit the insurer's liability to the vessel owner's limited liability. That meant that the P&I underwriter, in its effort to limit its liability, had to contend that as the insurer it had the right to claim the vessel owner's statutory right to limit its liability. 783 F.2d at 1299

Judge Brown then went on to reiterate his previous observation in his dissent to the panel decision in which he noted that the closest the Nebel Towing P&I policy came to the Crown-Zellerbach policy term was the "any interest other than as shipowner, language, which Judge Brown rejected as sufficient to constitute "limitation of liability" language:
This clause [Nebel Towing's SP-23 form language] applied only to the suppositional situation of the assured having an interest other than as shipowner in the vessel. This supposition's condition could not have significance in Nebel Towing since it was uncontradicted that the insured vessel was under bareboat charter to the assured which the court properly considered as an owner. 783 F.2d at 1300 n. 9.

However, in Randall v. Chevron U.S.A., Inc., 788 F.2d 1398 (E.D.La. 1992), the district court assumed that the "other than as shipowner" clause in the SP-23 form was sufficient for Crown-Zellerbach purposes:

The intent of the "other than owner" clause is "to limit the underwriter's liability to an amount no greater than that which the insured would be entitled to limit liability if the assured were the owner." Thus, deleting the "other than owner" clause simply waives the insurer's right to limit its liability to that of the shipowner, who possesses the statutory right to limit liability to the value of its vessel and pending freight. 788 F.Supp. at 1402.

The court cites the Parks Insurance Treatise as support for its assumption, but the Parks Treatise relied on the AIW-form language and not the SP-23 form language. See 2 Parks The Law and Practice of Marine Insurance and Average, p. 1024 (1987). On appeal, the question whether the "other than as shipowner" language constituted Crown-Zellerbach language was not considered by the Fifth Circuit. Instead, the Fifth Circuit's decision focused on the interpretation of the "as owner" language of the P&I policy's insuring clause. See Randall v. Chevron U.S.A., Inc., 13 F.3d 888, 906-909 (5th Cir. 1994).

In Hodgen v. Forest Oil Corp., 862 F.Supp. 1567 (W.D. La. 1994), the district court again assumed that the "other than as shipowner" language would allow the underwriter to limit its liability to its assured shipowner's limited liability, the court so assuming by virtue of the district court's opinion in Randall v. Chevron U.S.A., Inc. However, the P&I policy at issue in Hodgen was the AIMU form and not the SP-23 form.
Chapter 16

LIMITATION OF LIABILITY
TO THAT IMPOSED IN THE
ABSENCE OF CONTRACT

Unless otherwise agreed by endorsement to this policy, liability hereunder shall in no event exceed that which would be imposed on the Assured by law in the absence of contract.

The purpose of this clause is to limit coverage for the assured to actual damage and to exclude coverage for liquidated damages which may be chargeable to that assured pursuant to contract and payable even in the absence of actual damages. Accordingly, coverage for contractual liquidated damages will be excluded to the extent such damages exceed actual proof of covered loss. See Bender Shipbuilding & Repair Co. v. Brasileiro, 847 F.2d 1551, 1991 AMC 220 (11th Cir. 1989).

This provision has not been the subject of many reported cases. One analogous case involved virtually identical language in a P & I policy that provided coverage to an additional assured for liability assumed under contract by the named assured. The court held that the additional assured would be covered only for liability that could be imposed by law against the named assured, not by contract. See Landry v. Oceanic Contractors, Inc., 548 F. Supp. 337, 346-47 (E.D. La. 1982), aff'd, 731 F.2d 299, 304-05 (5th Cir. 1984).

In another case, the court cited the reasoning of the court in Bender Shipbuilding, supra, and held that the policy at issue did not cover the assured’s contractual liabilities for liquidated damages of which the assurer had no specific knowledge. Trinity Industries, Inc. v. Insurance Company of North America, 916 F.2d 267, 1991 AMC 267 (5th Cir. 1990).

The court in Baza v. Chevron Oil Service Co., citing language similar to this clause, held that expenses incurred by the assured because of its contractual liability to an additional named assured under the policy were excluded from coverage. See Baza v. Chevron Oil Service Co., 1996 WL 453127 (E.D. La 1996).
Chapter 17

LIMIT OF AMOUNT INSURED:
ANY ONE ACCIDENT OR OCCURRENCE

Liability hereunder in respect of any one accident or occurrence is limited to the amount hereby insured.

I. GENERALLY

Pursuant to charterer's instructions to load only cargo for which clean bills of lading could be issued, vessel master refused to load contaminated cargo, and charterer sought coverage for its resulting losses and arbitration expenses under marine policy that covered an "accident involving the vessel;" held, charterer's losses did not result from an “accident” because charterer had prior knowledge that cargo was contaminated. Continental Grain Co. v. Fireman's Fund Ins. Co., 1997 U.S. Dist., LEXIS 2005, 1997 A.M.C. 2663 (S.D.N.Y. 1997).

The issue of what constitutes “one accident or occurrence” typically arises in one of three situations: (1) when injury or loss is suffered by several victims; (2) when damage or loss occurs to several items of property owned by the same party; and (3) when several acts of the same nature each cause damage to a party or his property. See generally Annot., "Liability Policy - Each Accident," 64 A.L.R. 4th 668 (1988); Parks, 2 The Law and Practice of Marine Insurance and Average 1025 (Cornell Maritime Press, 1987).

Where P&I insurer agreed to settle plaintiffs death claims against its insured for "maximum coverage under the policy," the P&I insurer's liability is the policy's maximum limit less the reasonable attorney’s fees and expenses incurred by the underwriter in defending the action. Darville v. Rahming Shipping Ltd., 1988 AMC 1782 (S.D. Fla. 1987).

Louisiana Direct Action Statute recognizes the validity of "policy limits" contained in P&I policy; Louisiana Direct Action Statute limits the amount that third-party claimants can recover from insurers to amounts which the insurer is liable "within the terms and limits of the policy," citing L.R.S. §22:655. Albany Ins, Co. v. Bengal Marine, Inc., 857 F.2d 250, 256 (5th Cir. 1988).

P&I underwriter which had agreed to insure 60% part of shipowner's 100% coverage up to $500,000.00 limit is liable only for 60% of assured's settlement of personal injury claim. Under Louisiana law in solido liability doctrine, underwriter has not responsibility for the remaining 40% share of the risk when the separate underwriter covering that share
became insolvent. The P&I policy, in which underwriter limits its total exposure to "60% p/o 100%," limited underwriters liability to 60% of each claim regardless of amount of claim. P&I underwriter which limited its liability to 60% of any claim was not liable in solido with underwriter which was responsible for the other 40% of claim. P&I underwriter is only liable up to the amount of its policy limit. *American Marine Underwriters, Inc. v. Holloway*, 826 F.2d 1454 (5th Cir. 1987).

**II. INJURY TO OR LOSS OF SEVERAL VICTIMS**

Where the grounding of a tugboat and subsequent salvage operations destroyed oyster beds, the claim of each lessee of the oyster beds constituted a separate occurrence under a protection and indemnity policy providing coverage "in respect of any one accident or occurrence." *Tesvich v. 3-A's Towing Co.*, 547 So. 2d 1106 (La. App. 4th Cir. 1989), *cert. denied*, 552 So. 2d 383 and 552 So. 2d 384.

Where a protection and indemnity policy provided coverage "in respect of loss, damage, costs, fees, expenses or claims arising out of or in consequence of any one occurrence," and stated that "a series of claims hereunder arising from the same occurrence shall be treated as due to that occurrence," five deaths resulting from the capsizing of a utility vessel were held to be a single occurrence. *Albany Ins. Co. v. Blain*, 1987 A.M.C. 1469 (N.D. Cal, 1987) (applying California law).

Under a policy that provided $300,000 coverage for a ferry as to "claims arising out of or in consequence of any one occurrence," the insurer's liability as to a collision between the ferry and a tanker was limited to $300,000 for all claims arising out of the collision. While the policy covered "such sums as the assured ... shall have become legally obligated to pay and shall have paid on account of - costs and expenses ... of investigating and/or defending" claims, the expenses incurred by the insurer in defending claimants' direct action against the insurer and prosecuting an interpleader action were not included in the $300,000 limits. *McKeithen v. S.S. Frosta*, 430 F.Supp. 899 (E.D. La. 1977).

In a declaratory judgment action to determine coverage for asbestos claims, the assured was held obligated to pay, as to each vessel insured under the policy, a single deductible for all claims arising out of the presence of asbestos on board that vessel. *Skinner Corp. v. Fireman's Fund Ins. Co.*, 1996 U.S.Dist.LEXIS 9321, 1996 AMC 15 17 (W.D. Wash. 1996) (applying Washington law).

**III. INJURY TO OR LOSS OF SEVERAL ITEMS OF PROPERTY**

Where leased cargo containers were abandoned by a lessee carrier upon carrier's insolvency, the occurrence of the bankruptcy was held not to constitute a triggering incident for purposes of clause applying policy limits to losses from "any one vessel or by any one usual connecting conveyance or at any one place at any one time." The court reserved its decision as to the proper application of the $10,000 deductible for each occurrence. *Interpool Ltd. v. U.S. Fire Ins. Co.*, 553 F. Supp. 385 (S.D.N.Y. 1983).
IV. SEVERAL ACTIONS OF THE SAME NATURE

Where a stevedore's grab buckets inflicted multiple holes and dents in a vessel's tanktops by repeated contact during discharge operations, the entire incident was deemed to be one accident subject to a single application of the $10,000 deductible. *Michaels v. Mutual Marine Office, Inc.*, 472 F.Supp. 26 (S.D.N.Y. 1979) (applying New York law).
Chapter 18

CHOICE OF LAW IN P&I INSURANCE

I. INTRODUCTION

This monograph addresses choice of law with reference to protection and indemnity ("P & I") policies.

a. P & I Policies are Maritime Contracts

Policies which insure against marine third-party liabilities, such as P & I policies, are maritime contracts and a form of marine insurance. See Transco Exploration Co. v. Pacific Employers Ins. Co., 869 F.2d 862 (5th Cir. 1989) (excess marine liability policy); Suydam v. Reed Stenhouse of Washington, Inc., 820 F.2d 1506 (9th Cir. 1987) (primary P&I policy); Granite State Minerals, Inc. v. American Ins. Co., 435 F. Supp. 159 (D. Mass. 1977) (comprehensive general liability policy insuring wharfinger against liability arising from maritime operations); Employers' Mutual Liability Insurance Co. of Wisconsin v. Pacific Inland Navigation Co., 358 F.2d 718 (9th Cir. 1966) (comprehensive general liability policy insuring a vessel owner); see also Insurance Co. of North America v. Board of Comm'rs of the Port of New Orleans, 733 F.2d 1161, 1166 (5th Cir. 1984) (same analysis applies to both P & I and hull insurance policies).

B. Jurisdiction in Federal Courts

Since policies which insure against marine risks or liabilities are generally classified as "maritime" contracts, federal courts have an independent basis of subject matter jurisdiction (admiralty jurisdiction) over claims thereunder. See Suydam v. Reed Stenhouse of Washington, Inc., supra at 1507 (P & I policy).

C. Concurrent State Court Jurisdiction

Marine insurance disputes do not fall in the realm of exclusive admiralty jurisdiction. Magnolia Marine Transp. Co., Inc. v. LaPlace Towing Corp., 964 F.2d 1571, 1577 (5th Cir. 1992) ("[F]ederal courts have jurisdiction over contract actions, including those arising from marine insurance policies, concurrent with any other common law courts having jurisdiction for that purpose.") Thus, both state courts and federal courts have concurrent jurisdiction with respect to P & I policies, id., and in appropriate circumstances, marine insurance disputes can be removed from state court to federal court. See 28 U.S.C. § 1441 et seq. (removal generally); Taylor v. Lloyds Underwriters of London, 972 F.2d 666 (5th Cir. 1992), cert. denied, --- U.S. ---, 113 S.Ct. 1366 (Feb. 22, 1993) (case removed from state court on diversity grounds).

D. Choice of Law Principles are Part of the Substantive Maritime Law

The substantive law applicable to a claim cognizable in admiralty is maritime law, whether the claim is asserted in a federal court or a court of a state of the United States, and irrespective of the basis for jurisdiction. Chelentis v. Luckenbach Steamship Co., 247 U.S. 372, 62 L.Ed. 1171 (1918).


II. DOMESTIC MARINE INSURANCE DISPUTES

A. Maritime or State Insurance Law

In domestic marine insurance disputes, courts must first decide whether federal or state insurance law provides the rule of decision. Wilburn Boat Co. v. Fireman's Fund
Insurance Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), is the starting point for this determination. In Wilburn Boat, the United States Supreme Court held that in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice, state law governs the interpretation of marine insurance policies. 348 U.S. at 321, 75 S. Ct. at 374, 99 L.Ed. at 337; Suydam v. Reed Stenhouse of Washington, Inc., 820 F.2d 1506, 1508 (9th Cir. 1987); Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485 (11th Cir. 1986).

One example of the refinements made to Wilburn Boat appears in the recent decision of Albany Ins. Co. v. Anh Thi Kieu, 927 F.2d 882 (5th Cir. 1991). In Albany, the Fifth Circuit first resolved a maritime law-state law conflict under Wilburn Boat. The Albany court identified three instructive (though not dispositive) factors which a court should consider in resolving the maritime law-state law conflict:

1. whether the federal maritime rule constitutes "entrenched federal precedent;"
2. whether the state has a substantial and legitimate interest in the application of its own competing rule; and
3. whether the state's rule is materially different from the federal maritime rule.

927 F.2d at 886-87 (citations omitted). Other federal appellate courts apply a similar analysis. See e.g. Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485, 1488 (11th Cir. 1986) (analysis and application of the Wilburn Boat factors).

B. Choice of which State Law to Apply

If state law is determined to be applicable, it must next be determined which state law governs. Albany, 927 F.2d 890; see also Austin v. Servac Shipping Line, 794 F.2d 941, 948 (5th Cir. 1986) (noting that "Wilburn Boat, however, does not address the question of which state's law to apply"). As indicated in § I(D), supra, federal maritime rules govern. Albany, supra, 927 F.2d at 890.

In Albany, the court used a two-step process to choose the applicable state law. First, the court applied two choice of law rules to "identify only the states which have sufficient contact with the policy and the parties that their laws can be applied." 927 F.2d at 891 (emphasis supplied). Only the law of the state where the insurance policy was formed or the law of the state in which the policy was delivered qualified for this first group. Id. If more than one state's law qualifies (as was the case in Albany), a second test is applied to resolve the conflict: the state law which should be applied is that of the state with the greatest interest in the resolution of the issues. Id.; Taylor v. Lloyds Underwriters of London, 972 F.2d 666, 669 (5th Cir. 1992), cert. denied, --- U.S. ---, 113 S.Ct. 1366 (Feb. 22, 1993) (citations omitted). Other courts apply a similar, though less structured analysis. See e.g. Suydam v. Reed Stenhouse of Washington, Inc., 820 F.2d 1506 (9th Cir. 1987) (Washington law applied to interpretation of warranty clause in P & I policy underwritten in London insurance market where insurance was placed through Washington broker while vessel was in Washington and claim giving rise to

III. CHOICE OF LAW IN ABSENCE OF STATE LAW PRECEDENT

If a court holds that because of Wilburn Boat state law controls, but no state precedent exists, the maritime nature of the contract dictates that the court anticipate that the courts of the state would look to English law. See Antilles Steamship Co. v. American Hull Insurance Syndicate, 733 F.2d 195, 1984 AMC 444 (2d Cir. 1984); but see Royal Ins. Co. of America v. A & C Ship Fueling Corp., 1992 AMC 1686, 1693 (E.D.N.Y. 1992) (court construing insurance clause, finding "dearth of case law in this area in both New York and federal courts," chooses rule by analogy to New York precedent without reference to English law); Arkwright-Boston Mfrs. Mut. Ins. Co. v. Energy Ins. Agency, Inc., 659 F. Supp. 97, 99 ("The parties urge the application of federal maritime law which does not allow exemplary damages. There being no federal maritime law on this particular issue, the choice of law is between England and Texas.").

IV. CHOICE OF LAW IN INTERNATIONAL MARINE INSURANCE DISPUTES

Where there is a question as to whether the law of a country other than that of the United States applies, a court should apply U.S. maritime choice of law rules to resolve that issue. State Trading Corp. of India, Ltd., v. Assuranceforeningen Skuld, 921 F.2d 409, 414 (2d Cir. 1990) (Connecticut state law rejected in favor of either Norwegian or Panamanian law; choice of which foreign law applied not resolved); Thebes Shipping, Inc. v. Assicurazioni Spa, 599 F. Supp. 405, 424 (S.D.N.Y. 1984). Under those rules, a flexible analysis of the interests of the states or nations whose law may arguably apply should be made. See Lauritzen v. Larsen, 345 U.S. 571, 582, 73 S.Ct. 921, 928, 97 L.Ed. 1254 (1953) (conflicts resolved "by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved"); Edinburgh Assurance Co. v. R. L. Burns Corp., 479 F. Supp. 138, 1980 AMC 1261 (C.D. Calif. 1979); aff'd, 669 F.2d 1259 (9th Cir. 1982).

V. CHOICE OF LAW CLAUSES

The validity of choice of law clauses in maritime contracts is governed by maritime law principles. Sembawang Shipyard, Ltd v. Charger, Inc., 955 F.2d 983, 986 (5th Cir. 1992). Under maritime law principles, choice of law stipulations are presumptively valid. Sembawang, 955 F.2d at 986; compare Stoot v. Fluor Drilling Serv., Inc., 851 F.2d 1514, 1517 (5th Cir. 1988) (construing non-insurance indemnity clause, court states, "[U]nder admiralty law, where the parties have included a choice of law clause, that state's law will govern unless the [nominated] state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law"). Thus, it is submitted that maritime law principles should be used to test the validity of choice of law clauses in policies of marine insurance.
Recent jurisprudence has made both choice of forum and choice of law clauses more widely enforceable. See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. ---, 111 S.Ct. 1522, 113 L.Ed.2d 622 (1991) (choice of forum clause); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972) (choice of forum clause); Sembawang, supra, 955 F.2d 983, 986 (5th Cir. 1992) (court holds that parties' contractual choice of Singapore law is "presumptively valid" under Shute; court refuses to distinguish Shute and The Bremen on the grounds that those cases involved forum selection clauses instead of choice of law clauses).
Chapter 19

UBERRIMA FIDES AND CONCEALMENT IN
THE MARINE INSURANCE POLICY APPLICATION

I. DEFINITION AND HISTORY

Uberrima fides, which is translated as "utmost good faith", is defined as "[t]he most abundant good faith; absolute and perfect candor or openness and honesty; the absence of any concealment or deception, however slight." *Black's Law Dictionary*, 1520 (6th ed., 1990). Although its applications are now somewhat limited, uberrimafides once applied to all policies of insurance. *Stipcich v. Metropolitan Life Ins. Co.*, 277 U.S. 311, 316, 48 S. Ct. 512, 72 L.Ed. 895 (1928) ("Insurance contracts are traditionally contracts uberrimae fidei.")

It probably originated in the Civil Law expounded by early continental writers. See 2 John Duer, *The Law & Practice of Marine Insurance* 381 n. (a) (N.Y. 1845). The first statement of its incidents as to disclosure in English law was by Lord Mansfield, who said in a war risk case that insurance is a contract based on speculation, where the facts are securely in the knowledge of the insured, and underwriters should therefore be entitled to trust and rely upon the full disclosure of all relevant circumstances concerning the risk insured. *Carter v. Boehm*, 97 Eng. Rep. 1162, 1164 (K.B. 1766). He laid down the rule that any misrepresentation or failure to disclose a material fact, regardless of intent on the part of the insured (applicant), means that the actual risks do not match the risks contemplated, causing a failure of the meeting of the minds. *Id.*

The doctrine was firmly established in the American law of marine insurance by at least two Supreme Court decisions, *M’Lanahan v. The Universal Ins. Co.*, 26 U.S. (1 Pet.) 170, 18 5, 1998 AMC 285, 296, 7 L.Ed. 98 (1828) and *Sun Mutual Insurance Co. v. Ocean Insurance Co.*, 107 U.S. 485, 510, 27 L.Ed. 337, 1 S. Ct. 582 (1883). See Leslie J. Buglass, *Marine Insurance & General Average in the United States* 10 (2d ed. 1981) ("a contract of marine insurance is a contract based on the utmost good faith"); Alex L. Parks, 1 *The Law & Practice of Marine Insurance & Average* 216 (1987). California's statutory treatment of marine insurance, taken from the Field Code, a Nineteenth Century codification of Anglo-American law, is greater than that of most states, and since it is generally the same as the admiralty law on this subject, see *CIGNA Property and Casualty Ins. Co. v. Polaris Pictures Corp.*, 159 F. 3 d 412, 420, 1999 AMC 1, 11 n. 3 (9th Cir. 1998), it is sometimes cited here.

II. SCOPE AND DURATION

An underwriter may presume to rely on his belief that a potential insured has disclosed all facts material to the risk insured. *M’Lanahan*, at 185. The Supreme Court has held that the insured's disclosure must be so complete as to put the insurer in the exact same position.

In order to put the insurer in such a position, the insured must disclose all "facts, material to the risk," known or discoverable "by reasonable diligence", and may not hide behind an agent for the purpose of misleading an underwriter. *M'lanahan*, at 185 (knowledge of the insured "infests the act of his agent."). An insured may be required to divulge third party opinions regarding risks and can be held to know facts he reasonably ought to know. *Sun Mutual*, at 510. But the insured has "no duty of diligence to collect knowledge about risks" and need not give his own opinion about risks. Id. The duty is "independent of the intention and is violated by the fact of concealment even where there is no design to deceive." Id. The duty of good faith, and therefore to disclose, is mutual (although rarely invoked by insureds in respect of disclosures). 2 Duer, *supra*, 380-81; Cal. Ins. Code § 332.

An underwriter can be expected, however, to know certain facts, which therefore need not be disclosed by the insured. *Benjamin Buck & Thomas Hendrick v. The Chesapeake Ins. Co.*, 26 U.S. (1 Pet.) 151, 160, 7 L.Ed. 90 (1829) ("A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they ensure, and the established import of the terms used in the contract, must necessarily be imputed to underwriters.") (citing Lord Mansfield in *Pelly v. The Royal Exchange*, 1 Bur. 341); *Contractors Realty v. Insurance Co. of North America*, 469 F. Supp. 1287, 1295, 1979 A.M.C. 1864, 1876 (S.D.N.Y. 1979) ("knowledge of both the design features of the insured yacht and the normal pattern of expectable maintenance and upkeep of such a yacht, which are part of the course and incidents of the trade [and] must necessarily be imputed to the underwriters." (addition in original); see also *Anne Quinn Corp. v. American Mfrs. Mutual Ins. Co.*, 369 F. Supp. 1312, 1315, 1974 A.M.C. 655, 660 (S.D.N.Y. 1973), aff'd without op., 505 F.2d 727 (2d Cir. 1974); Cal. Ins. Code §§ 333, 335, 336, 1900; 2 Duer, *supra*, 552, 559-60; 9 Couch § 38:106.

The duty of disclosure and representation exists beyond the placement of an insurance order and up to the inception of the policy. *M'lanahan*, at 185; see 1 Parks, *supra*, 230-31. It also encompasses corrections of representations and applies to renewals and modifications. See Cal. Ins. Code § 3 6 1; *Navegacion Goya S.A. & American Bulk Carriers Inc. v. Mutual Boiler & Machinery Ins. Co.*, 411 F. Supp. 929,1972 A.M.C. 650, 658 (S.D.N.Y. 1972) (continuing duty to disclose all material facts) The duty can be modified by express agreement. See *King v. Allstate Ins. Co.*, 906 F.2d 1537, 1991 AMC 204 (11th Cir. 1990). While the doctrine is discussed mainly in relation to disclosures, its principal statements have been that the contract is one of utmost good faith or *uberrimae fidei*, without appearing to limit the doctrine to contract formation. See *M'lanahan*, at 185 ("a contract *uberrimae fidei*"); *Stipcich*, at 316; 2 Duer, *supra*, 380 ("a contract ... *uberrimae fidei*, of the most abounding good faith"). The doctrine may therefore be applicable to all the incidents of the contract throughout its life; this view has been taken in England and the doctrine applied to the presentation of claims. *The Litsion Pride*, [1985] 1 Lloyd's Rep. 437, 511 (Q.B.).
III.  MATERIALITY

What must be disclosed are facts material to the risks undertaken. *M'Lanahan*, at 185. Materiality has to do with the effect of the non-disclosure or misrepresentation and involves two important questions by which it is to be tested: 1) the identity of the underwriter to be considered, that is, the actual underwriter (subjective test) or a hypothetical prudent underwriter (objective test); and 2) the degree of the probable influence of the undisclosed facts on that underwriter.


*Sun Mutual* states the test of materiality as the importance of a particular fact "to the underwriter as likely to influence his judgment in accepting the risk," and cites with approval Duer's statement of the test as whether a fact "would probably have influenced the terms of the insurance." 107 U.S. at 509-10. *But see Btesh v. Royal Ins. Co., Ltd., of Liverpool*, 49 F.2d 720, 721, 1931 AMC 1044, 1046 (2d Cir. 1931) ("something which would have controlled the underwriter's decision"). California asks whether a fact would have a probable and reasonable effect on the acceptance of an application, the setting of its premiums, and the establishment of the disadvantages of the proposed risk. *Cal. Ins. Code § 334; Merced*, at 772.

Circumstances can be of such obvious importance to a prudent underwriter that no special evidence of their materiality is needed. In *Sun Mutual*, the Court held that the materiality of undisclosed concurrent charters and consequent overinsurance was "so manifest to common reason as to need no proof of usage or opinions of those engaged in the business [of insurance]." 107 U.S. at 509; *see also* Knight *v. United States Fire Ins. Co.*, 804 F.2d 9, 1987 AMC 1 (2d Cir. 1986). A particular question asked by an underwriter will ordinarily be regarded as material in any case, *Bella Steamship Co. v. Insurance Co. of North America*, 5 F.2d 570, 1925 AMC 751 (4th Cir. 1925); *Kerr v. Union Marine Ins. Co.*, 130 F. 415 (2d Cir. 1904), especially if the question is written and calls for a written response. *See Cal. Ins. Code § 1900(b); Merced*, at 772.

Materiality may differ according to the type and subject of the policy; the application to P & I policies of cases dealing with hull or cargo policies may depend on circumstances. The following are examples from the Supreme Court and more recent decisions of the lower courts of circumstances found material or immaterial, with indications of the types of policy involved (e.g., hull, yacht, etc.):
Materiality has been found or implied as to the following:

-Age of vessel:

*Certain Underwriters at Lloyd's v. Montford*, 52 F. 3d 219, 1995 A.M.C. 1201 (9th Cir, 1995) (yacht)

-Cargo perishable:


-Condition:

*CfDrake Fishing, Inc. v. Clarendon American Ins. Co.*, 136 F.3d 851, 1998 AMC 1341 (l" Cir. 1998) (hull; requirements stated as condition precedent represented as met)

-Hazardous equipment or modifications:

*The Pacific Queen*, 307 F.2d 700,1962 AMC 1845 (9th Cir. 1962) (hull)

-Intended uses:


-Offenses:

*Atkin v. Smith*, 137 F.3d 1169, 1998 AMC 1239 (9" Cir. 1998) (yacht; conviction of fraud)
-Overinsurance:


-Ownership:

CIGNA Property and Casualty Ins. Co. v. Polaris Pictures Corp., 159 F.3d 412, 1999 AMC 1 (9th Cir. 1998)

-Prior damage or injury:


-Prior insurances, cancellations, non-renewals:


-Prior losses:

CIGNA Property and Casualty Ins. Co. v. Polaris Pictures Corp., 159 F.3d. 412, 1999 AMC I (91h Cir. 1998)
Certain Underwriters at Lloyd's v. Montford, 52 F. 3 d 219, 1995 A.M.C. 1201 (9th Cir. 1995) (yacht)
Travelers Indemnity Co. v. 30'h Street Associates, 1993 AMC 1149 (N.Y. Sup. N.Y. Co. 1992) (cargo)
AIS Ivarans Rederei v. Puerto Rico Ports Authority, 617 F.2d 903, 1982 AMC 2493 (1 st Cir. 1980) (wharfinger's liability)

-Purchase price:

Certain Underwriters at Lloyd's v. Montford, 52 F. 3 )d 219, 1995 A.M.C. 1201 (9th Cir. 1995) (yacht)
-Sailing date:

  *Kerr v. Union Marine Ins. Co.*, 130 F. 415 (2d Cir. 1904) (hull)

-Surveys:


-Value:

  *Bella Steamship Co. v. Insurance Co. of North America*, 5 F.2d 570, 1925 AMC 751 (4th Cir. 1925) (hull)

Materiality has been denied as to the following:

-Cargo details non involving risk:

  *Btesh v. Royal Ins. Co.*, 49 F. 2d 720, 1931 AMC 1044 (2d Cir. 1931) (cargo)

-Offenses:


-Flag change:


-Premiums to others:


-Survey criticisms:

-Owner's warranty suit:

*Contractor's Realty v. Insurance Co. of North America,* 469 F. Supp. 1287, 1979
AMC 1864 (S.D.N.Y. 1979) (yacht)

### IV. CONSEQUENCES OF BREACH

A material misrepresentation or non-disclosure, intentional or unintentional, makes the insurance voidable by either party *ab initio.* *Stipcich,* at 316; *Sun Mutual,* at 510; *Certain Underwriters at Lloyd's v. Montford,* 52 F.3d, at 222, 1995 A.M.C., at 1203-04; *Washington Int'l Ins. Co.,* 773 F. Supp., at 191, 1991 A.M.C.; at 998; Cal. Ins. Code §§ 331, 359. As the cases cited above illustrate, the insurer may either declare the entire policy void and then defend any actions brought by an insured or seek a judgment of rescission. The insurer may take the less drastic course of keeping the policy in force and disputing coverage of a particular loss based on the concealment. A canceling underwriter must return his premiums. *Carter v. Boehm,* 97 Eng. Rep. at 1164.

### V. JURISDICTION AND CHOICE OF LAW

The United States Constitution places maritime law under federal admiralty jurisdiction. *New England Insurance Co. v. Dunham,* 78 U.S. (11 Wall.) 1, 1997 AMC 2394 (1871) confirmed admiralty jurisdiction of marine insurance. The case central to the dispute between the applicability of federal maritime law and state law, which is sometimes contrary, is *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 1955 A.M.C. 467 (1955), in which the Court appeared to hold that, where there is an "established federal admiralty rule on an issue in a marine insurance case, federal law will apply and, absent such controlling federal law, marine insurance contracts may be interpreted under state law. 348 U.S. at 314, 1955 A.M.C. at 471.

The Fifth Circuit has wavered. In *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 889, 1991 A.M.C. 2211, 2214 (5th Cir. 1991), the court set up a new, three-factor test for determining when to apply federal versus state law: 1) whether the federal maritime rule constitutes entrenched federal precedent; 2) whether the state has a substantial and legitimate interest in application of its laws; 3) whether the state's rule is materially different from the federal maritime rule. Id. Contrary prior 5th Circuit authority can be found in *Gulfstream Cargo, Ltd. v. Reliance Ins. Co.*, 409 F.2d 974, 980, 1969 AMC 781, 790 (5th Cir. 1969), holding that there is nothing better established in the law of marine insurance than *uberrima fides*.

On the authority of the Supreme Court and a plurality view in the courts of appeals, it appears that the doctrine of *uberrima fides* in the context of marine insurance policy applications has remained intact, except for a question as to its continued application in the Fifth Circuit.
Chapter 20

THE IMPLIED WARRANTY OF SEAWORTHINESS IN A MARINE PROTECTION AND INDEMNITY POLICY


Courts considering the issue have determined that an implied warranty of seaworthiness is at odds with the very purpose of a P & I policy:

[I]f a warranty of seaworthiness was implied into this [P & I] policy, it would mean in practically every instance the insurance company had assumed no risk, because, generally speaking, a ship is not liable to the cargo unless it is seaworthy. George A. Moore & Co. v. Eagle Star & British Dominions Ins. Co., supra, 5 F. 2d at 361, 1925 A.M.C. at 734.


There are dicta that, while there is no duty of due care under a P & I policy to ensure that a vessel is seaworthy, deliberate concealment of an unseaworthy condition or negligence so gross as to amount to an intentional wrong may void the policy. Continental Ins. Co. v. Sabine Towing Co., 117 F. 2d 694, 698, 1941 A.M.C. 262, 267-68 (5th Cir. 1941), cert. denied, 313 U.S. 588 (1941) (no recovery where loss results from willful, deliberate or intentional acts or of negligence so gross as to amount to this); Sorenson v. Boston Insurance Co., supra, 20 F. 2d at 643, 1927 A.M.C. at 1293-94 (insured's knowledge of unseaworthiness during existence of policy does not void policy unless it amounts to willful, deliberate, and intentional wrong). See Alex L. Parks, 2 The Law and Practice of Marine Insurance and Average 837-39 (1987) for a discussion of the pre-1941 "fault or privity" clauses in P&I policies which allowed insurers to deny coverage of losses occurring with fault or privity of the assured.
The Fifth Circuit, while maintaining that there is no implied doctrine of seaworthiness in P & I policies generally, has nevertheless held that an implied warranty of seaworthiness will be read into an Excess Collision and Towers Liability endorsement that is added to a P&I policy:

[The insured], in effect, purchased extra hull coverage. The fact that this addition of traditional hull policy coverage was in the form of an endorsement to the P & I policy did not automatically transform that coverage to an enumerated P & I risk. The endorsement merely added a hull policy dimension to the P & I policy. This excess collision and tower's liability was subject to the same implied warranty of seaworthiness applicable to all hull policies.... Since the warranty of seaworthiness attached only to the portion of the P & I policy providing hull coverage, only that element of coverage fails. Insurance Co. of North America v. Board of Commr’s, 733 F. 2d 1161, 1166, 1985 A.M.C. 1460, 1466 (5th Cir. 1984).

This is doctrine probably limited to the Fifth Circuit. See Graydon S. Staring & George L. Waddell, Marine Insurance, 73 Tulane L. Rev. 1619, 1637-47 (1999).
Chapter 21

EXPRESS WARRANTIES

The special topic addressed in this chapter is “express” warranties in Protection and Indemnity (“P&I”) policies, and the coverage issues which commonly arise when insurers seek to enforce them. By definition, an express or promissory warranty is a promise by an insured that a stated event will or will not occur, or that some other condition precedent will be fulfilled, or that a particular factual statement is true. British Marine Insurance Act of 1906, §33(1).

Express warranties should be distinguished from exclusions which limit the extent of coverage and are not based on the actions of the insured. Sometimes, the word “warranty” is used in an exclusion, e.g. “Warranted free of claims for...” These are not true warranties. Parks, Law and Practice of Marine Insurance and Average, 1st Ed., Vol. 1 at p. 233. Also, this chapter does not address the question of implied warranties, which is treated in Chapter 19.

We briefly discuss the effect of breach of express warranties and whether it is necessary that the breach cause the loss. We then digest cases involving particular warranties. We include cases dealing with other forms of marine policies when the principles are applicable to P&I policies. Within specific topics, both federal and state cases are organized by geographic areas based on the federal circuits.


1 The authors wish to acknowledge the assistance of Daniel Lichtl in the preparation of this chapter.
I. EFFECT OF BREACH

Most courts hold that coverage is suspended during the time the insured is in breach of an express warranty and that coverage resumes immediately when the breach is cured. *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376 (5th Cir. 1987); *Cotton Blossom Corp., Inc. v. Lexington Ins. Co.*, 615 F. Supp. 87 (D.C. Mo. 1985) (applying both federal maritime and Missouri law); *Reliance Ins. Co. v. The ESCAPADE*, 280 F.2d 482 (5th Cir. 1961). However, some courts have held that, when the policy contains a specific provision that a breach of warranty voids the policy, coverage is terminated. *Certain Underwriters at Lloyd’s v. Montford*, 52 F.3d 219 (9th Cir. 1995).

II. STRICT ENFORCEMENT vs. REQUIRING CAUSATION

Traditionally, courts have held that the breach of an express warranty suspended policy coverage. However, more recently, some courts have required that a particular breach increase the risk that the insured would incur a covered loss or cause the loss. The following cases illustrate this development.

A. The Traditional Rule

The traditional rule has its roots in British law and was applied as federal maritime law before *Wilburn*. Under British Law, an express warranty requires exact and literal compliance by the insured. “Although the loss may not have been in the remotest degree connected with the breach of warranty, the Underwriter is nonetheless discharged in that account from all liability for the loss . . .” Arnould, *Law of Marine Insurance and Average*, 16th Ed., Vol. 2 at pp. 682-683; See also, *Marine Insurance Act*, § 33(3); *Forsikringsak-tieselskapet Vesta v. Butcher*, [1989] 1 Lloyd’s Reg. 331. As a matter of American judicial policy, the British rule was carried forward into U.S. cases in order to keep American marine insurance law in harmony with that of England. *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487 (1924).

The British rule continues to be reflected in U.S. cases decided under British law. In *Hartford v. Lloyd’s*, 1989 A.M.C. 2576 (E.D. Pa. 1989), the defendant issued a policy to Cunard which contained the following: “Warranted: No hold harmless agreements given.” The evidence was clear that Cunard had given hold harmless agreements prior to the existence of the policy and that the warranty had been breached. Pennsylvania choice of law provisions mandated that English law be followed. The court ruled that, under the British rule of strict compliance, the insurer was entitled to rescission of the policy.

Similarly, in *Campbell v. Hartford*, 533 F.2d 496, 1976 A.M.C. 799, 801 (9th Cir. 1976), the Ninth Circuit applied the English rule that “[n]o cause, however sufficient; no motive, however good; no necessity, however irresistible, will excuse the non-compliance with an express warranty” by an insured who violated a lay up warranty. This is the rule even where there is no connection between the breach and the loss.
B. Post- Wilburn Strict Enforcement Cases

Before the advent of the Wilburn choice of law analysis, strict enforcement was the rule in American courts. Wilburn Boat Co. v. Fireman’s Fund Ins. Co., 201 F.2d 833 (5th Cir. 1953); Fidelity Phoenix Ins. Co. v. Chicago Title and Trust Co., 12 F.2d 573 (7th Cir. 1926). However, even after the Wilburn decision some American courts have held that strict compliance was the rule.

4th Circuit

In Capital Costal Corp. v. Hartford Fire Ins. Co., 1974 A.M.C. 2039 (E.D. Va. 1974), the court ruled that the insurer of a vessel was released from liability due to the breach of a crew warranty. Further, the court ruled that this was so even where compliance with the warranty would not have avoided the loss. Interestingly, the court cited a pre-Wilburn case as the basis for mandating strict enforcement of the warranty without addressing the choice of law issue.

5th Circuit

In Graham v. Milky Way Barge, Inc., 824 F.2d 376 (5th Cir. 1987), the court, relying upon Louisiana law, vitiates policy coverage under the insured’s P&I and hull policies due to the insured’s violation of a trading warranty. The court found that no Louisiana anti-technical statute applied and then stated that whether or not the breach increased the likelihood of the of the accident was “irrelevant.”

9th Circuit

The court in Certain Underwriters at Lloyd’s v. Montford, 52 F.3d 219 (9th Cir. 1995) (yacht policy), held that, under California law, breach of an even immaterial warranty will void coverage when the policy expressly declares that such a breach would void coverage. There, the policy contained a “cruising warranty” which provided that a breach of the warranty would “immediately terminate (coverage) and the policy or certificate will be null and void.” Id. at 221. Recognizing that California law strictly enforces even immaterial warranties in marine policies when the policy calls for it, the court held that the insured’s action of taking the vessel outside of the warranty area a month prior to the accident vitiates coverage from that point forward. Id. at 223.

In Port Lynch v. New England International Assurance of America, 754 F. Supp. 816 (W.D. Wash. 1991), the insured breached a trading warranty. Applying the “established” admiralty rule of strict enforcement of warranties, the court denied coverage. In dicta, the court examined the issue under Washington law and found that the “warranty” would be considered an essential term under the contract, thus relieving the insurer of proving that the breach contributed to the loss.
**11th Circuit**

The U.S. Southern District of Florida’s decision in *Home Ins. Co. v. Vernon Holdings*, 1995 A.M.C. 369 (S.D. Fla. 1994) arose out of a claim under a hull policy which had been denied by the insurer on the basis of the breach of a navigation warranty. After finding that federal law applied to the claim, the court held that the warranty had been breached and, as a result, this precluded recovery under the policy. The court noted, however, that had the issue been one of Florida law, the insurer would have to show that the breach of warranty increased the hazard before the breach could be enforced.

**C. “Enhanced” Risk of Loss Required to Enforce Warranty**

Courts interpreting Florida and Massachusetts law have held that, as a prerequisite to enforcing a warranty, the insurer must show that the breach “increased the hazard.”

**1st Circuit**

In dicta, the First Circuit recognized that Massachusetts law requires that an insurer show that the breach of warranty increased the insurer’s risk of loss. *Mutual Fire, Marine & Inland Ins. Co. v. Costa*, 789 F.2d 83 (1st Cir. 1986) (citing, M.G.L.A. chapter 175, § 186).

In *Prado v. Lexington Ins.*, 1990 A.M.C. 2782 (D. Mass. 1990) (hull policy), the U.S. District Court for the District of Massachusetts found that Massachusetts law applied to a policy containing a crew warranty. In Massachusetts, the relevant law requires that, as a prerequisite to enforcing a warranty, the insurer has the burden of proving that the breach increased the insurer’s risk of loss. M.G.L.A. chapter 175, § 186.

**11th Circuit**

In *Windward Traders v. Fred S. James & Co. of N.Y.*, 855 F.2d 814 (11th Cir. 1988), the court applied section 627.409(2) of the Florida Insurance code to an insurer’s claim that the insured breached its policy’s trading warranty. The code provision provides:

> (2) A breach or a violation by the insured or any warranty, condition, or provision of any wet marine or transportation insurance policy, contract of insurance, endorsement, or application therefore shall not render the policy or contract void, or constitute a defense to a loss thereon, unless such breach or violation increased the hazard by any means within the control of the insured. In finding for the insured on the issue, the court specifically stated that, while the warranty had been breached, the insurer could not show the required increase in hazard.

D. **Causation Required**

When state law applies pursuant to *Wilburn*, courts sometimes have required that, for a breach of warranty to vitiate coverage, the insurer must prove that the breach caused the loss.

**4th Circuit**

In releasing an insurer from liability under a lay-up warranty in a hull policy, the U.S. Fourth Circuit cited the “familiar rule” that “breach of an express warranty . . . releases the insurer from any liability **due to the breach.**” *Goodman v. Fireman’s Fund Ins.,* 1979 A.M.C. 2534 (4th Cir. 1979) (emphasis added).

**5th Circuit**

In *Wilburn Boat Co. v. Fireman’s Fund Ins.*, 348 U.S. 310 (1955), itself, the Supreme Court applied a Texas statute to hold that breach of a pleasure use warranty would avoid a loss only if it was shown to have caused the loss.

*Albany Ins. Co. v. Anh Thi Kieu,* 927 F.2d 882 (5th Cir. 1991) (hull policy). In denying the insurer’s defense of breach of warranty, the court applied Texas’ anti-technicality statute which states that a breach of warranty would not constitute a defense to an action on an insurance policy unless the insurer could show that the breach caused or contributed to the loss. *Tex. Ins. Code Ann. Art. 6.14 (Vernon 1981 & Supp. 1990).*

**9th Circuit**

In denying an insurer’s defense of breach of warranty, the U.S. District Court for the District of Oregon applied Washington law which required a causal connection between the breach of notification warranty and a personal injury. *Rondy’s Inc. v. Ins. Co. of North America,* 1986 WL 22352 (D. Or. 1986). On the other hand, in *Highlands Insurance Co. v. Koetze,* 651 F. Supp. 346 (W.D. Wash. 1987), the court applied Washington law to hold that, for a breach of warranty to void a policy, the insurer must show that the breach both increased the risk of the type of loss sustained and also was related to the loss. The court found that having the vessel outside of the trading limits increased the loss, but nevertheless denied the motion on the grounds that there was a question of fact as to whether the breach was related to the injury.

### III. TREATMENT OF PARTICULAR WARRANTIES

#### A. Trading Warranties

(i) **Breach**

**1st Circuit**

In *Ciaramitaro v. The Saskatchewan Government Ins. Office,* 1956 A.M.C. 928 (U.S.D.C. Mass. Dis. 1956), **affirmed in** 1956 A.M.C. 1400 (1st Cir. 1956), the warranty stated that vessel was to be “engaged in day fishing only, out of Gloucester, Mass.” The insured on
occasion would not return to Gloucester and would drop anchor within the shelter of another harbor. At the time of the loss, the vessel was engaged in day fishing. The court reasoned that, at the time of the loss, any breach of warranty was cured.

2nd Circuit

In *La Reunion Francaise, S.V. v. Halbart*, 1999 AMC 14 (E.D. NY 1998), a shipowner participating in a rally from Virginia to the British Virgin Islands lost his sailboat in heavy seas 560 miles off the East Coast. The navigation warranty in the policy limited coverage to the East Coast, Bahamas and Caribbean, and the insurer denied coverage for sailing too far offshore. The court upheld coverage because the navigational limits did not contain a mileage limitation. It determined that “specificity, rather than generality, is the standard practice in marine insurance navigational limits warranties.” Similarly, the court refused to uphold the policy’s “racing exclusion” because “race” was insufficiently defined in the policy.

4th Circuit

In *Whorton v. The Home Ins. Co.*, 1983 A.M.C. 2342 (E.D. Va. 1983), aff’d, 724 F.2d 427 (4th Cir. 1994), the insured’s broker extended the vessel’s navigation limits to include a fishing voyage to Key West, although the insurer later said that the broker was not authorized to do so and denied the extension. The vessel then was lost due to the barratry of the master on an ill-fated drug run beyond even the extended limits. The court held that “[u]nder Virginia law the marine insurer’s solicitation agent had authority to extend policy’s geographical limits to include Key West and insurer could not claim, after the vessel had set out on her voyage, that the extension was not binding on it.” Further, the court held that acts in preparation for the drug run had been committed in Key West. Accordingly, there were acts of barratry committed within the extended navigation limits, and the loss was covered.

5th Circuit

In *Graham v. Milky Way Barge, Inc.*, 824 F.2d 376 (5th Cir. 1987), the court denied coverage under a P&I and hull policies on a jack-up oil rig when the policies specifically limited the rig to the “inland waters of the Gulf states” and to 40 feet of water for “elevating purposes.” After the district court found that there was coverage, the Fifth Circuit reversed, finding that it was undisputed that the rig was working beyond the navigational and operational limits imposed by the policy.

In *Employers Ins. of Wausau v. Trotter Towing Corp.*, 834 F.2d 1206 (5th Cir. 1988), involved a hull policy which limited the insured vessel to the Mississippi River, its tributaries and the Gulf Intercoastal Waterway within 100 miles of Greenville, Mississippi. When the vessel was lost out side of the trading limits established in the policies, the court denied coverage, relying upon language within the policy that any deviation beyond navigational limits voids the policy, under both Mississippi and federal maritime law.

In *Steptore v. Masco Const. Co., Inc.*, 619 So.2d 1183 (La. App. 1st Cir. 1993), reversed on other grounds, 643 So.2d 1213 (La. 1994), the policy limited the subject vessel to navigation along three different facilities along the Mississippi River. Upon learning that the
insured barges were lost in an accident at a different facility than those scheduled in the policy, the court denied coverage relying upon cases supporting strict enforcement of navigation warranties.

*R&W Boat Rentals, Inc. v. Pennsylvania Ins. Co.*, 257 So.2d 448, 1972 A.M.C. 1783 (La. App. 1st Cir. 1972), involved a policy containing a navigation warranty which confined the insured vessel to “the inland waters of Louisiana including the Lakes, Bays, and sounds of this State but excluding any open waters of the Gulf of Mexico.” The policy also provided: “Any deviation beyond the navigation limits provided herein shall void this policy.” When the vessel was lost ten miles out in the open Gulf, the insurer sought to avoid coverage. The court found that the insured was in clear violation of the warranty and found in favor of the insurer.

In *The Home Ins. Co. v. Thunderbird, Inc.*, 1977 A.M.C. 797 (Miss. 1976), the policy limited coverage to not more than “100 miles off shore.” The loss occurred off the shore of Bahamas. The court reasoned that “[b]ecause the limitations on the warranted area are words of limitation, they are strictly construed against the insurer.” The court found “off shore” is not restricted to the shore of the continental U.S. in the absence of a provision in the policy to that effect. Accordingly, the court upheld coverage.

**6th Circuit**

In *Snyder v. Motorists Mutual Ins. Co.*, 1965 A.M.C. 1791 (Ohio App. 1965), the accident occurred approximately four miles from the Florida Keys. The navigation limits were the “continental United States.” After review of several references, the court held that the policy language was ambiguous and resolved the ambiguity in favor of insured.

**9th Circuit**

In *Certain Underwriters at Lloyd’s v. Montford*, 52 F.3d 219 (9th Cir. 1995), the court reviewed a case in which the policy contained a “cruising warranty,” and specifically stated that breach of the warranty would “immediately terminate (coverage) and the certificate of insurance will be null and void.” Following receipt of the insured’s notice of loss, the insurer found that the vessel had traveled outside the range of the warranty the previous month and denied coverage. Notwithstanding the fact that the vessel was stolen while it was within the limits set out in the policy, the court, following California law, agreed that the policy was voided by the earlier breach.

In *Highlands Insurance Co. v. Koetje*, 651 F. Supp. 346 (W.D. Wash. 1987), the policy contained a trading warranty which limited the vessel to certain waters including and surrounding the Puget Sound. (The policy also contained a crew warranty, discussed *infra*.) The insurer moved for summary judgement on the basis that the vessel was working outside the warranty area. Applying Washington law, the court denied summary judgement on the basis that it was unclear whether the breach was related to the injury.

Four years later, the Western District of Washington revisited the trading warranty issue in *Port Lynch v. New England International Assurance of America*. 754 F. Supp.
816 (W.D. Wash. 1991). *Port Lynch* involved an excess hull policy which contained a trading warranty that limited the vessel to use in shrimp processing in southeast Alaska. After the vessel was lost while crabbing over 1,000 miles away in the Bearing Sea, the insurers denied coverage, and the court agreed.

In *U.S. Fire Ins. Co. v. Liberti*, 1989 A.M.C. 1436 (N.D. Cal. 1989), an insurer denied coverage under a warranty in a P&I policy which provided that the insured vessel would be confined to the waters and tributaries of San Francisco Bay. After finding that California law applied, the court focused upon the California rule that there is no right to rescind or avoid policy obligations unless the insurer can either show (1) that the provision is material to the policy, or (2) the policy specifically sets forth that a breach will void the policy. On a motion for summary judgment, the court held that the question of whether the breach of the trading warranty materially affects the risk was a question of fact and that the policy did not contain the requisite language to fulfill the second condition.

In *Harris v. Glenn Falls Ins. Co.*, 1972 A.M.C. 138 (Cal. App. 1971), the court held that a type written warranty that the vessel would be laid up and out of commission in Sausalito, California superseded the privileges provision in the printed policy form. The court rejected the argument that the policy was ambiguous citing Civil Code section 1651, which provides that precedence is given to specific provisions added to a printed form.

In *First Interstate Bank of Or. v. Allstate Ins. Co.*, 701 P.2d 791, 1987 A.M.C. 662 (Or. App. 1985), the policy limited coverage to 50 miles of the United States, and the loss occurred in the territorial waters of Mexico, outside the navigation limits. The policy did not contain a standard mortgagee’s interest clause, but did contain a loss payable endorsement which stated that coverage of the mortgagee would not be invalidated by any change in “the location of the vessel.” The court concluded that the lender had an endorsement that provided coverage even in the event of a loss for which the named insured is not covered.

In *Albany Insurance Co. v. Jones*, 1997 AMC 1407 (D. Alaska 1996), the insurance policy required that the vessel owner or his son (named in the policy as an “alternate skipper”) to be aboard the vessel at all times. The court determined that this crew warranty is similar to navigating warranties, and, accordingly, held that breach of the warranty is governed by the federal maritime rule requiring strict compliance. Therefore, the policy was void when an injury occurred on the insured vessel while the son was aboard an adjacent vessel. The court left open, however, the question of whether the son’s absence from the primary vessel constituted barratry, which would trigger coverage.

**11th Circuit**

In *Lexington Ins. Co. v. Cooke’s Seafood*. 835 F.2d 1364 (11th Cir. 1988), the policy provided that the insured vessel was limited to a certain area within 100 miles of shore. When the vessel began to experience mechanical problems, rather than head in to port, it sought parts from an oil rig located over 100 miles from shore. Thereafter, while moored next to the rig, the vessel was lost in a hurricane. The court applied the strict enforcement rule to void coverage. Notably, however, the court cited an exception to the rule for circumstances where necessity requires that a vessel to exceed navigation limits. Under the circumstances, the court
found that there was not a sufficient need for the vessel to breach the warranty and voided coverage.

In *United States Fire Ins. Co. v. Cavanaugh*, 732 F.2d 832, 1985 A.M.C. 1001 (11th Cir. 1984), the court held that the loss of the vessel by grounding and fire beyond the geographical limit of the policy was not a breach of warranty because the ultimate cause of the loss was barratry. The vessel was found aground and burning 150 miles southwest of Jamaica, well beyond the navigation limits. The court reasoned that “[the vessel] was taken some 400 miles beyond the warranted limits by the unauthorized act of a third party in violation of both written and verbal agreements, an act in which the [owners] were insured. What would have been a breach of warranty is not a breach in this case where the 150 mile limit was exceeded due to the barratrous acts of [the captain].”

Applying federal law, the court in *Home Insurance Co. v. Vernon Holdings*, 1995 A.M.C. 369 (S.D. Fla. 1994), denied coverage for breach of trading limits by the insured. The insured vessel was limited to “trading between the Turks and Caicos Islands, Dominican Republic and Bahama Islands” but was lost after leaving the Turks and Caicos islands en route to Haiti.

In *La Reunion Francaise, S.A. v. Christy*, 1999 AMC 2499 (M.D. Fla. 1999), the court denied coverage to a vessel owner and her estranged husband. The husband sailed the boat to Jamaica, where it sank. The original policy allowed for coverage only between the East Coast of the United States and the Mediterranean and temporarily had been reduced to only the East Coast. The court construed the navigational limits narrowly, and released the insurance company from liability. The wife argued that, under Florida law, coverage was several, and that she should not be bound by the husband’s breach of warranty. The court held that there is established federal admiralty law on navigation warranties, and, accordingly, federal law should govern. Under federal law, the breach of the navigation warranty resulted on loss of coverage for both the husband and wife.

In *Aetna Insurance Company v. Dudney*, 595 So.2d 238 (Fla. App. 4th Dist. 1992), a Florida state appeals court applied federal admiralty law to void insurance coverage due to breach of a warranty in a yacht policy that confined the subject vessel to particular waters during the winter months. Even though the case was heard in Florida, which requires that the insured show an increased hazard as a result of a breach, the court applied “entrenched” federal maritime law mandating strict enforcement.

In *B & S Associates, Inc. v. Indemnity Casualty and Property Ltd.*, 1994 A.M.C. 2960 (Fla. App. 4th Dist. 1994), an all risk policy warranted that the insured sailboat would remain within fifty (50) miles of the United States and the Bahamas. The owner chartered the sailboat, and the sailboat was found on the shores of Jamaica, with the charterer dead from hypoglycemic shock resulting from uncontrolled diabetes. On the basis that the body had been dead for 5 or 6 days, the court reasoned that the accident could have happened in the area of coverage. The court stated “Once the insured establishes a loss apparently within the terms of an all-risk policy, the burden shifts to the insurer to prove that the loss arose from a cause which is excepted.” The court found that the insurer did not provide sufficient evidence that the
accident occurred outside the warranty to exclude coverage. The court reversed the order entering summary judgment for the insurer and held there were at least material issues of fact.

In *Rosenberg v. Maritime Ins. Co., Ltd.*, 1968 A.M.C. 1609 (Fla. App. 3rd Dist. 1968), the insured vessel was covered by a policy containing an express navigation limit confining it to the inland waters of Kentucky. When the vessel was found sunk in Miami, Florida, the insurer sought to avoid coverage. The court found in the insurer’s favor holding that the vessel was in violation of the warranty which resulted in a bar to recovery by the vessel’s owner. See also, *USF&G v. Thompson*, 1990 A.M.C. 444 (Fla. App. 4th Cir. 1989).

*Florida Marine Towing, Inc. v. United National Insurance Co.*, 686 So.2d 711 (Fla. App. 3d Dist. 1997). Relying on U.S. Supreme Court precedent, the court held that “inland waters” means waters on the land side of the coast line. Waters between the coast line and the state boundary three miles offshore are referred to as the “marginal sea.” Accordingly, the vessel breached the navigation limits of “inland waters” when it sank in the Atlantic ocean offshore of the beach. However, the mortgage holder, named as an additional insured on the policy, is not adversely affected by the breach of warranty by the mortgagor.

In *Winter v. Employers Fire Ins. Co.*, 1962 A.M.C. 1972 (Fla. Civ. Ct. Duval 1962), the court held that the phrase “continental United States” was ambiguous and that ambiguity would be resolved in favor of insured. The insured took a trip to the Bahamas and on the way back there was an accident 14 miles off the Florida coast. After reviewing numerous references, the court held that the limits extended to the seaward edge of the continental shelf or to the half way point between the U.S. coast and a foreign island possession. The court reasoned “although coverage may have ceased while the boat was in the Bahamas beyond the prescribe area, the policy again attached upon again returning to the insured area.”

(ii). Held Covered Clauses

Held covered clauses are used by insurers to provide a means of extending warranties when the insureds operations require a change. They usually provide for the particular voyage beyond the limits of the warranty to be reported to the insurer and for the payment of an additional premium. They may affect how the warranty is enforced.

2nd Circuit

In *Bristol Steamship v. London Assurance*, 404 F. Supp. 749 (S.D. N.Y. 1975), the insured obtained port risk insurance which limited the subject vessel to a specific port. The policy also contained a held covered clause which provided: “In the event of deviation to be held covered at an additional premium to be hereafter arranged, provided previous notice be given.” During the policy period, the owner moved the vessel to a new port where it suffered a casualty. The insurer denied the insured’s subsequent claim on the grounds that the insured did not provide adequate notice of the changing of ports. The court did not give the “held covered” clause effect on the grounds that there had been no previous notice or agreement concerning the movement of the vessel. Therefore, the court held that there was no coverage.
In Northwestern National Ins. Co. v. Federal Intermediate Credit Bank of Spokane, 839 F.2d 1366 (9th Cir. 1988), the insured obtained a hull policy that contained both a held covered clause and a trading warranty. Prior to sending the vessel on a voyage outside of the warranty area, the insured notified his broker and sought an extension of the trading limits. The extension was never granted. Unaware that the insurer had not agreed, the insured went ahead with the voyage and the vessel was lost outside the trading limits. The policy’s held covered clause provided that the insured would be covered in the event of a breach of warranty if the insured gave notice when they found out about the breach and when the insurer and insured agreed to the payment of an additional premium. This gave rise to the question of whether the insured’s act of notifying the broker was sufficient to comply with the requirements of the clause. The court found that the broker was not the insurer’s agent and, thus, denied coverage.

In Campbell v. Hartford Fire Ins. Co., 533 F.2d 496 (9th Cir. 1976), the court applied English law in a case involving the breach of a lay up warranty and a claim of coverage under a held covered clause. The policy provided that the held covered clause would have effect when there was a breach of “cargo, trade, locality or date of sailing” warranties in the policy. When the vessel was lost during the lay up period the owner sought coverage, arguing that the held covered clause applied as the breach of the lay up warranty related to “locality.” The court disagreed and found that the clause did not apply on the grounds that a lay up warranty is not concerned with the location of a vessel at a particular time, but rather to the condition of the vessel during the winter months.

Kalmbach v. Ins. Co. of State of Pa., 529 F.2d 552 (9th Cir. 1976), involved a hull policy requiring that the subject vessel be laid up for particular period of time. An endorsement was subsequently added to shorten the lay up period but warranted that prior to navigation during this period a captain’s approval and a favorable long range weather forecast were required. When the vessel was lost during the extension period, the insurer denied coverage due to breach of the warranty. The insured relied on a held covered clause within the policy to maintain coverage despite the breach. In analyzing the held covered clause, the court looked to English jurisprudence which found coverage under a held covered clause despite the breach of warranty. The court found that, while there was an issue of fact regarding the alleged breach of warranty, the held covered clause would prevail in any event, and the court remanded the case for further proceedings to determine whether the warranty had been breached and, if so, what additional premiums the insured needed to pay.

In Hilton Oil Transport v. T.E. Jonas, 75 F.3d 627 (11th Cir. 1996), the plaintiff breached a hull policy’s trading limits warranty but sought coverage under the policy’s held covered clause. In denying the insurer’s motion for summary judgement, the court stated that there was an issue of fact as to whether the policy holder intentionally breached the warranty. If so, the held covered clause would not operate and the insurer would prevail.
Windward Traders v. Fred S. James & Co. of N.Y., 855 F.2d 814 (11th Cir. 1988), involved a claim under a hull policy for the loss of a vessel. The policy contained a navigation warranty limiting the vessel to trade in the Caribbean and also a held covered clause requiring notification to underwriters of a change of location. When the vessel was lost in the Atlantic Ocean, the insurer denied coverage based upon the insured’s failure to notify it that the vessel was outside of the trading limits. In rendering a decision in favor of the insured, the court relied on the Florida Anti-technical Statute which provided that unless the breach of a provision increased the hazard under the policy coverage would stand. It reasoned that the failure to give notice could not have increased the hazard under the policy. Notably, since the insurer did not deny coverage on the grounds of the breach of navigation warranty, the court did not consider the issue of what effect this may have had.

B. Crew Warranties

Under this heading, we include warranties with respect the number of seamen working aboard a vessel, the specific captain in command, and the number of passengers which a particular vessel may carry.

1st Circuit

In Mutual Fire, Marine & Inland Ins. Co. v. Coasta, 789 F.2d 83 (1st Cir. 1986), the policy stated that the insured vessel could carry a maximum of 100 passengers. After two passengers were injured while the vessel was carrying 118, the insurer brought an action for a declaration of no coverage. The trial court and the First Circuit viewed the policy provision as a coverage provision, not a warranty. Nevertheless, the First Circuit noted that had the provision amounted to a warranty, Massachusetts law would apply to require the insurer to show that the larger number of passengers aboard the vessel would have increased the risk of loss to the insurer. In reviewing this question, the court found that the risk of loss would be greater with 118 passengers than 100. Accordingly, coverage was denied.

Prado, Inc. v. Lexington Ins. Co., 1990 A.M.C. 2782 (D. Mass. 1990), involved a warranty that a particular captain be in command of the insured vessel. The court applied Massachusetts law which requires a causal relationship between the breach of warranty and the loss incurred. The issue was whether the insurer carried its burden in proving that having a captain aboard the vessel different than the one named in the warranty actually increased the risk of loss to the insurance company. After examining both captains’ qualifications, the court found that having a different captain aboard did not increase the risk of loss and upheld coverage.

4th Circuit

In Capital Coastal Corp. v. Hartford Fire Ins. Co., 1974 A.M.C. 2039 (E.D. Va. 1974), the policy required that a particular captain be the master of the insured vessel and that the policy did not provide coverage when the vessel was operated by any other master. After the vessel was lost under the command of a captain different than the one named in the warranty, the vessel’s insurer sought to avoid coverage. Applying the strict enforcement standard, the court found that the insured was in breach of the crew warranty and found in favor of the insurer.
In *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), the insured breached an “owner aboard warranty.” The court applied the Texas Insurance Code which contains an “anti-technical” provision stating that an insured’s breach of warranty will not constitute a defense unless the breach caused or contributed to the destruction of the insured property. In ruling against the insurer, the court found that the fact that the owner was not aboard did not make the accident any more likely than had the owner been aboard; however, the court noted that it is possible that, under a different set of circumstances, the breach of an owner aboard warranty might contribute to a loss.

In *Albany Ins. Co. v. Ngo Van Nguyen*, 1996 WL 680252 (E.D. La. 1996), a P&I policy contained an express warranty that the total number of crew members on the vessel at any one time should not exceed three. At the time of the accident, the vessel contained five crew members. Upon a motion for summary judgment by the insurer, the court applied federal admiralty law and found that due to the fact that there were five crew members on the vessel, the warranty had been breached and, therefore, the policy was void.

In *St. Paul Fire & Marine Ins. v. BELLE OF HOT SPRINGS*, 844 F. Supp. 550 (8th Cir. 1988), a P&I policy contained an express warranty requiring that the vessel be “in charge of a qualified master at all times.” During a passenger voyage, the vessel’s licensed master left the helm to a new deck hand while he went to another deck to tend bar. The deck hand subsequently attempted to dock the vessel and allided with a dock. The vessel’s insurer sought to avoid coverage on the basis of breach of warranty. In considering the issue, the court held that the warranty required more than “mere” presence of a qualified master aboard the vessel and that the master must actually be in charge of the vessel to satisfy the warranty. Accordingly, the court ruled for the insurer.

In *Highlands Ins. Co. v. Koetje*, 651 F. Supp. 346 (W.D. Wash. 1987), the policy limited the insured vessel to one crew member. There was an injury when more than one crew member may have been aboard. The court stated that Washington law required that the insurer prove both that the breach contributed to the loss sustained or increased the risk of the type of loss sustained, and that the breach is also related to the injury sustained. The court found that having additional crew members aboard the vessel would increase the risk of loss and would also be related to the kind of injury sustained. However, it refused to grant the motion for summary judgment on the basis that a disputed issue of material fact remained regarding whether the additional crew member was actually aboard the insured vessel.

In *Fireman’s Fund Ins. Co. v. Cox*, 1990 A.M.C. 908 (M.D. Fla. 1989), the policy limited the crew to three. There was a mutiny on board the vessel in which two of the five crew members killed the captain and injured a mate. In attempting to avoid the consequences of the
breach, the vessel owner argued that neither the captain, the mate, nor the cook were “crew” members within the meaning of the insurance policy. The court, looking to the natural and most commonly understood meaning of crew member, found that they were included within the scope of the warranty. In addition, the vessel owners contended that regardless of the number of crew members on board the vessel at the time of the mutiny, the insurer could not escape liability because Florida law requires that the insurer prove that additional crew members increased the hazard to the vessel. See Fla. Stat. §627.409(2). The court stated: “The presence of one or two additional crew members, particularly when the policy expressly set a limit of only three to begin with, is not a mere technical violation of the policy but significantly alters the risk of loss plaintiff would be called on to bear.” On this basis, the court affirmed an earlier summary judgment in the insurer’s favor.

C. Lay-up and Watchmen Warranties

1st Circuit

In Sea Fever Corp. v. Hartford Fire Ins. Co., 1983 A.M.C. 1276 (U.S.D.C. Mass. 1982), the court held that fishing vessel owner was not covered under a marine insurance policy due to breach of lay-up warranty, even though he was unaware of it. The insured’s broker had obtained a policy containing an unusual provision for a fishing vessel policy: that the vessel would be laid-up for two months during the winter. The vessel was lost going to a repair yard during this period. Based on the “marine insurance law of Massachusetts,” the court found that the insured is bound to the terms of the insurance contract whether he knows them or not, or whether, if asked, the insurer would have agreed to the voyage. Accordingly, there was no coverage. However, the insured did recover against the insurance broker for breach of fiduciary duty for not advising of the unusual term.

2nd Circuit

In Sirius Ins. Co. (U.K.) Ltd. v. Collins, 16 F.3d 34 (2d Cir. 1994), the insured vessel was kept on a trailer and the policy required that it be kept in a locked, fenced enclosure, in a garage or building, and that the trailer be secured with a ball lock while attached to a vehicle. The vessel was stolen after the insured placed it on his property without having put it in a locked enclosure and without securing the trailer with a ball lock attached to a vehicle. The defendant argued that, since the theft occurred ashore, litigation under the policy was not within maritime jurisdiction. The court disagreed stating that “all contracts which related to navigation, business, or commerce of the sea” fall within maritime jurisdiction. The court of appeals then affirmed the district court’s holding that the plaintiff’s omissions voided the policy.

In Gehrlein’s Production Tooling Corp. v. The Travelers Fire Ins. Co., 1957 A.M.C. 1029 (S.D. N.Y. 1957), the warranty stated that the yacht was to be laid up from November until May. During the lay-up period, the yacht was moved to a painting berth, where water entered the stern scuppers in an unusual low tide. The court held that lay-up warranty was not breached when the vessel was moved to painting berth in same yard.

In Emil Eamotte v. Employers Commercial Union Ins. Co. of Am., 1976 A.M.C. 204 (N.Y. App. 2nd Dept. 1975), the policy warranted that a yacht would be laid up and out of
commission from November 15 to March 15, but did not indicate whether the yacht would be laid-up in wet or dry storage. The court reasoned that “the criteria to be applied in determining whether the plaintiff complied with the warranty is whether the action taken by [the insured] conforms with the well established local customs and practice as to laying up similar vessels in the particular area where the yacht was kept.” The appellate court found that dry as well as wet storage was a common practice in the area and held that the trial court erred in granting judgment for defendant insurer.

In *Poulos v. Fireman’s Fund Ins. Co.*, 231 N.Y.S. 2d 206, 1962 A.M.C. 1979 (N.Y. Supreme Ct., Suffolk 1962) the court held that insured had violated a lay-up warranty. The warranty stated that the vessel would be laid up from November until May. The court stated: “Leaving a small open boat, uncovered and completely exposed to the elements, tied up at a public marina during the winter months scarcely can be considered safe practice within the meaning of the policy.”

**4th Circuit**

In *Goodman v. Fireman’s Fund Ins. Co.*, 1979 A.M.C. 2534 (4th Cir. 1979), a hull insurance policy stated that the vessel would be “laid up and out of commission” for a particular period of time. The court determined that whether a vessel is laid up depends upon local custom. The court found that the custom in the region was to close the sea valves as a part of winterizing the vessel. Because the insured failed to close the valves, he breached the express lay-up warranty, thus releasing the insurer from all liability.

**5th Circuit**

In *Walker & Sons, Inc. v. Valentine*, 431 F.2d 1235, 1970 A.M.C. 2261 (5th Cir. 1970), the insured tug sank at its berth due to leaking through the stuffing box. The court held that the insured had violated the watchman warranty, therefore, underwriters were not liable. The warranty required that an employee of the insured examine the vessel at reasonable intervals, including the bilges. Whether applying federal maritime law or Mississippi law, a yard superintendent who occasionally walked around the yard but was not expected to board any of the vessels was insufficient.

**6th Circuit**

In *Wigle v. The Aetna Casualty and Surety Co.*, 1959 A.M.C. 2270 (E.D. Mich. 1959), in an effort to winterize the vessel, the insured asked one of his friends to run the motor to remove any water contained in it. The friend forgot to close the seacock valve, and, as a result, the vessel took on water and sank. The court held that there was no peril of the sea and that the negligence of the friend was not insured. The court then stated, “the sinking was directly caused by the omissions of plaintiff and his friends aboard plaintiff’s boat while it was not properly laid up, as warranted in the policy.”
8th Circuit

In *Cotton Blossom Corp., Inc. v. Lexington Ins. Co.*, 615 F.Supp. 87 (D.C. Mo. 1985) the court the insured breached a “watchman” warranty contained in a hull policy. In conducting a Wilburn analysis, the court found that Missouri and federal law were the same in that both provided that the breach of an express warranty in a policy of marine insurance suspends coverage of the underlying policy during the existence of the breach. Accordingly, the court denied coverage.

11th Circuit

*Marine Charter & Storage v. All Underwriters at Lloyd’s of London*, 628 F. Supp. 740 (S.D. Fla. 1986), involved a vessel covered under an all risks yacht policy which contained a lay up warranty obligating the insured to keep the vessel within a certain marina for four months. When the vessel sustained damage outside of the marina during the lay up period the insurer sought to avoid liability. The court agreed, reasoning that the “movement of the vessel imposes an increased risk of casualty upon the underwriters for which they had not been paid.” While the court did not specifically refer to the Florida Anti-Technicality Statute (F.S.A. § 627.409(2)), the foregoing statement makes it apparent the court thought that the breach of warranty increased the risk of loss.

D. Change in Management or Use Warranty

2nd Circuit

In *Commercial Union Ins. Co. v. Horne*, 787 F.Supp. 337 (S.D.N.Y. 1992), the policy warranted that the insured yacht could be chartered for a maximum of five day charters per year. The owner chartered the yacht for five months to a sailing school, and there was a loss during this period. The insured argued that an endorsement extending the navigation limits for the same five month period indicated an intent to cover the charter. Applying Connecticut law, the court reasoned that “[b]y chartering the yacht for a period of five months without receiving an acceptance in writing as required by the policy, the Defendants breached an express promissory warranty and violated the terms of the contract.” Accordingly, there was no coverage.

In *Newark Ins. Co. v. Blair*, 1994 A.M.C. 1061 (S.D. N.Y. 1993), the policy stated that “[i]f you sell, transfer, mortgage or pledge your boat or this policy, policy coverage will cease without further notice to you unless such change is accepted by us in writing.” The insured entered into an agreement to sell the boat. Although the agreement required four installment payments, it said that, upon execution, title transferred to buyer. The buyer sought to be made an additional insured, but the insurer was not informed of any change in ownership interest. The court reasoned under New York state law that “where a warranty in a marine insurance policy pertains to any risk of marine navigation, transit or transportation on seas or inland waters, the breach of such warranty precludes recovery under such policy.” Accordingly, the court granted the insurer’s motion for summary judgment declaring that the policy was void.
In *Parfait v. Central Towing, Inc.*, 660 F.2d 608 (5th Cir. 1981), the policy provided:

This insurance shall be void in case the vessel named herein, or any part thereof, shall be sold, transferred or mortgaged, or if there be any change of management or charter of the vessel, or if this policy be assigned or pledged, without previous consent in writing of this company.

A third party purchased all the stock in the corporation which owned the vessel, and there was an immediate and complete change in directors and executive officers. There was an injury to a crew member, and the issue was whether these corporate changes constituted a change in management of the insured vessel. The Fifth Circuit ruled that it did and denied coverage.

In *Travelers Indemnity Co. v. Gulf Weighing Corp.*, 352 F.Supp. 335, 1974 A.M.C. 2478 (E.D. La. 1972), the court found no breach of the private pleasure warranty in a marine insurance policy. The policy stated “warranted to be used solely for private pleasure purposes and not to be hired or chartered unless approved and permission endorsed hereon.” In this case, the court found that there was no charter agreement. The parties only agreed to share expenses. The court quoted the 5th Circuit when it said “The essence of a charter agreement is that the charterer employs the entire ship or a substantial portion of it for a particular voyage or a particular period of time from one holding himself out as a public carrier.” The court reasoned that the warranty was not breached because the Captain did not receive money for his services and there was no mutuality of assent for a valid charter.

In *Rondys, Inc. v. Insurance Co. of N. Am.*, 1986 WL 22352 (D. Or. 1986), involved two P&I policies which provided that the policies would be void if the subject vessel was sold, transferred, mortgaged or chartered without consent of the insurer. After the vessel was chartered and some crew members suffered personal injury, both insurers denied coverage based upon breach of warranty. The court noted that Washington law mandates that there must be a causal connection between the breach of warranty and the loss sustained. The court ruled in the insured’s favor insofar as neither insurer could prove a causal connection between the change in management and the personal injury sustained.

### E. Class Maintenance and Survey Warranties

In *Berns & Koppstein, Inc. v. Orion Ins. Co.*, 170 F.Supp. 707, 1959 A.M.C. 2455 (S.D. N.Y. 1959), aff’d per curiam, 273 F.2d 415(2), 11960 A.M.C. 1379 (2d Cir. 1960) the court held that the survey requirements in policy had not been breached. In this case, the underwriter required each cargo be surveyed by a specific surveyor and that survey was to occur “immediately prior to shipping.” The specific surveyor subcontracted the surveys for a
particular voyage and the surveys took place from several days to 2 weeks prior to shipment. The court reasoned that there was no breach because it was past practice to subcontract surveys and “immediately” must be given a reasonable interpretation in light of the practicalities of the situation.

5th Circuit

In *New York Marine v. Gulf Marine*, 1994 A.M.C. 976 (E.D. La. 1993), a hull policy provided:

If the classification society of the Vessel or her class therein be changed, canceled, or withdrawn, then unless the underwriters agree thereto in writing, this policy shall automatically terminate at the time of such change of ownership, flag, charter, requisition, or classification.

Sometime after the insurer issued the policy, the classification society conducted a renewal survey and noted several outstanding matters which needed to be fixed. When the repairs were not done after the passage of some time, the classification society suspended the vessel’s classification. Following a loss, the vessel’s insurer denied coverage. Considering a provision in the policy that a breach of warranty would void the policy, the court denied coverage.

The Eastern District of Louisiana revisited the class warranty issue four years later in *P.S. International v. Caribbean Sealift, Ltd.*, 1997 WL 256652 (E.D. La. 1997). The policy contained two “class” warranties. First, the insured was obligated to keep its vessel fully classed throughout the term of the insurance and, second, it had to advise its classification society of any defects arising on board the vessel during the term of the insurance. After a claim was made for cargo damage, the insurer denied liability on the basis that the vessel owner breached both warranties by failing to notify its classification society of certain hull leakage problems and repairs undertaken aboard the vessel prior to the vessel sailing. The court denied the insurer’s motion for summary judgement because it was unsure whether the captain had to be privy to the failure to advise the classification society, which also meant there was an issue of fact whether the failure of the insured to notify the classification society would result in the vessel not being “fully classed.”

In *Oceanic Contractors, Inc. v. Underwriters at Lloyd’s*, 1981 A.M.C. 1264 (La. C.D.C. 1980), the policy stated that “Warranted approval of tug, towage and stowage arrangements by United States Salvage Association and all their recommendations complied with.” The association approved subject to the propriety of insured’s calculations. Underwriters determined that the insured left significant factors out of their calculations. The court held that there was no lack of propriety in the calculations performed by insured. The court stated that the factors assumed by the Underwriters were to some degree arbitrary.
F. Miscellaneous Warranties

High Bilge Alarm

In *Than H. Long Partnership v. Highlands Ins. Co.*, 32 F.3d 189 (5th Cir. 1994), a hull policy required the owner to maintain an operable high water bilge alarm. While out fishing, the vessel sank, and the insurer denied coverage on the basis that the vessel violated the bilge warranty. The Fifth Circuit noted that Louisiana law and federal maritime law both mandated that coverage be denied. Interestingly, the Fifth Circuit stated that it is necessary for a breach of warranty to be a cause of the loss to deny recovery. This directly contradicts the strict enforcement standards announced previously by the Fifth Circuit and other courts concerning federal maritime and Louisiana law. See Graham, supra. Nevertheless, the court found that the insured’s failure to maintain a proper bilge alarm was a cause of the loss and, therefore, a basis for denying coverage.

Express Warranty of Seaworthiness

1st Circuit

In *Certain Underwriters at Lloyds v. Johnson*, 1999 AMC 1452 (D.P.R. 1999), the policy contained a clause which required the vessel to be in seaworthy condition at the inception of the policy. It also contained additional language which provided that it will not afford coverage when the insured fails to exercise due diligence to maintain the vessel in seaworthy condition. The court interpreted these provisions as an express statement of the implied warranty applicable under the “American Rule” which provides that the “insured promises not knowingly send a vessel to sea in unseaworthy condition.” Under this rule, coverage will be denied only if the unseaworthy condition proximately caused the damage. In this case, the vessel was damaged when seawater entered the vessel through one or more of the port lights. The court determined, based on a surveyor’s report, that the owners had prior knowledge of the condition and failed to correct it. Therefore, the loss was not covered.

5th Circuit

In addition to the crew warranty discussed supra, *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), also reviewed the application of an express seaworthiness warranty. The warranty, contained in the insured’s hull policy, obligated the insured to exercise due diligence to maintain the subject vessel in a seaworthy condition. Upon receiving a claim for damage to the vessel in an allision, the insurer denied coverage partially upon the grounds of breach of the seaworthiness warranty due to the vessel’s hull being infested with toredo worms. Applying the Texas anti-technicality statute, the court found that the breach, if any, did not provide a basis for avoiding coverage as the infestation did not contribute to the damage to the vessel.

8th Circuit

In *St. Paul Fire & Marine Ins. v. Belle of Hot Springs*, 844 F.2d 550 (8th Cir. 1988), the master of an excursion vessel left an inexperienced deck hand at the wheel while he
went to the second deck to tend bar. When the deck hand attempted to dock the vessel, there
was an allision resulting in personal injuries. The court held that the owner breached an express
warranty that the vessel be in charge of a qualified master. The court also held that leaving an
unqualified person in charge of the vessel made it unseaworthy and breached the express
warranty that the owner exercise due diligence to keep the vessel seaworthy. Stating that the
policy required strict adherence to warranties, the court held that the insurer was not liable under
its policy.

**Private Pleasure Warranty**

*Reliance Insurance Company v. The ESCAPADE*, 280 F.2d 482 (5th Cir. 1950),
involved a yacht hull policy which contained a “private pleasure warranty” limiting the vessel
to private pleasure use. When the vessel was lost during a charter, the insurer sought to avoid
coverage. However, while the court found that the warranty had been breached and that this
would have suspended coverage, it also found that the insurer was estopped from asserting the
defense because of its actions in connection with the salvage of the vessel. See also, *Travelers

**Warranty Against Gasoline or Explosives**

a vessel which was destroyed by fire while moored at a pier. After the loss, the vessel’s insurer
disclaimed coverage on the grounds that the vessel owners had breached a warranty against
keeping gasoline or explosives aboard the vessel. Apparently, the vessel’s owner had been
using a gasoline powered blow torch aboard the vessel as well as having some gasoline in a can.
The court found for the insurer, requiring strict compliance with the warranty whether or not the
breach contributed to the accident.

**Towage**

In *Commercial Union Insurance Co. v. Flagship Marine Services, Inc.*, 190 F.3d 26 (2d Cir. 1999), the court construed a “towage endorsement” covering towage of vessels not
exceeding 50 feet in length as a warranty that the insured vessel would not tow other vessels in
excess of 50 feet. The court determined a warranty existed because the endorsement appeared
in the policy under the warranty heading and language in the policy supported the finding. The
court denied coverage under either New York or Florida law because the breach of warranty
materially increased the risk assumed by the insurer.
Chapter 22

COVERAGE OF LIABILITY FOR PUNITIVE DAMAGES

I. THE INSURING AGREEMENT

The insuring agreement in the marine Protection and Indemnity Form SP-23 provides that the assured will be indemnified against "all such loss and/or damage and/or expense" which the assured shall "become liable to pay and shall pay on account of the liabilities, risks, events and/or happenings" covered. Absent an express exclusion, the only provision which arguably could affect the coverage of punitive damages is that certain "fines and penalties" will not be indemnified if they result from the failure of the insured to exercise due diligence to prevent such "violations." Though this language perhaps indicates an intention to exclude indemnification of punitive damages, it is not likely to be dispositive under existing law.

II. CHOICE OF LAW: THE INITIAL QUESTION

A small body of case law has held that P&I coverage would not be afforded where punitive damages were awarded, based upon an absence of such specifically enumerated coverage in the policy. *Dubois v. Arkansas Valley Dredging Co.*, 651 F. Supp. 299 (W.D. La. 1987); *Smith v. FrontLawn Enterprises, Inc.*, 1987 AMC 1130 (E.D. La. 1986). In *Smith* the court also noted that the "fines and penalties" provision of the P&I policy "covers situations where there has been a violation of a law and is therefore inapplicable to . . . punitive damage claims based on unseaworthiness and failure to pay maintenance and cure." 1987 AMC at 1131.

The *Dubois* court went further, declaring that even if a policy provided for coverage in express terms, such a provision would be unenforceable as against public policy. *Dubois*, 651 F. Supp. at 302. But see *Daughdrill v. Ocean Drilling & Exploration Co.*, 665 F. Supp. 477, 481 (E.D. La. 1987) (court stated in dicta that because the inherent nature of a P&I policy is to spread the risk of liability among those similarly situated, coverage for punitive damages may foster the underlying public policy goals of such damages). However, the determinative impact of choice of law limits the significance of *Dubois* and *Smith*. See *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666, 669 (5th Cir. 1992) (interpreting the issue of whether punitive damages are covered by a CGL policy the Court held that *Dubois* and *Smith* have not established a specific and controlling federal rule disallowing the recovery of punitive damages from an insurance company) and *Randall v. Chevron U.S.A., Inc.*, 13 F.3d 888, 910 (5th Cir.) as modified, 22 F.3d 568 (5th Cir. 1994), overruled on other grounds, 164 F.3d 901 (5th Cir. 1999), (applying Louisiana law in the absence of a controlling federal rule, punitive damages and the cost of defending a punitive damage claim are covered under a P&I policy). Because of *Wilburn Boat* and choice of law principles, public policy and the interpretation of policy language remain the dispositive factors in deciding whether coverage exists.

III. INTERPRETATION OF POLICY LANGUAGE


However, a minority of courts have looked to the scope of the covered risk to decide whether punitive damages are recoverable by the insured. Thus, language following the terms "caused by" or "arising out of" has been used to limit policy coverage to purely compensatory damages. Punitive damages are deemed by these courts to be a result of the
insured's conduct, not the damages sustained by the injured person. *Gleason v. Fryer*, 491 P.2d 85 (Colo. Ct. App. 1971); *Brown v. Western Cas. & Sur. Co.*, 484 P.2d 1252 (Colo. Ct. App. 1971); *Casperson v. Webber*, 213 N.W.2d 327, 331 (Minn. 1973). The rationale for this position is grounded on the notion that punitive awards are not granted to compensate the plaintiff; rather, such awards are intended to punish the defendant. Consequently, punitive damages are held to fall outside of the category of damages for bodily injury or property damage.

Other courts have looked to the intentions or reasonable expectations of the insured in order to extend or deny coverage. *Lazenby v. Universal Underwriters Ins. Co.*, 383 S.W.2d 1, 5 (Tenn. 1964). Such cases often involve an ambiguity as to the scope of coverage. *Harrel v. Travelers Indem. Co.*, 567 P.2d 1013, 1015 (Or. 1977); *Cieslewicz v. Mutual Serv. Cas. Ins. Co.*, 267 N.W.2d 595, 598 (Wis. 1978). In any event, it is clear that reasonable expectations would not include coverage for damages resulting from intentional misconduct. 7 J. *APPLEMAN, INSURANCE LAW AND PRACTICE* § 4312 at 132-33 (1962). Cf *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (W. Va. 1981) (coverage implied for gross, wanton or reckless conduct).


Nevertheless, not all jurisdictions will automatically apply the doctrine of *contra proferentum* when policy provisions are susceptible to different constructions. See *Baltimore Bank & Trust Co. v. United States Fidelity & Guar. Co.*, 43 6 F.2d 743, 746 (8th Cir. 1971) (applying Missouri law). When commercial insurance *contracts* are involved, courts will consider a construction that "is most reasonable from a business point of view." 9 *ARNOULD, MARINE INSURANCE* § 105 at 88 (1961 ed.). See also *Avondale Indus., Inc. v. Travelers Indem. Co.*, 887 F.2d 1200, 1207 (2d Cir. 1989), cert. denied, 496 U.S. 906 (1990).

IV. PUBLIC POLICY

Once coverage has been established, a second inquiry is necessary to determine whether such an application is void under state law. Some courts have denied insurance coverage of

However, this view is not universally accepted. Courts have generally divided along the following categories:

1. **Coverage Denied as a Matter of Public Policy.**


Courts taking this view contend that allowing tortfeasors to shift the burden of punitive damages to the insurer would defeat the purpose of such awards: deterrence. If entities are permitted to insure against punitive damages, these courts reason, then the deterrence effect of such damages would be nullified. *Dubois v. Arkansas Valley Dredging Co., Inc.*, 651 F. Supp. 299, 302-03 (N.D. La. 1987) (seaman could not recover punitive damages from dredge operator's insurer).


2. **Coverage Denied, Except for the Vicarious Liability of the Insured.**

The line of analysis that coverage should be denied for public policy reasons has, in many jurisdictions, given way to an exception for the vicarious liability of the insured. *Grant
Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981) (applying Florida law after McNulty),
modified on other grounds, 670 F.2d 21 (5th Cir.), cert. denied, 103 S. Ct. 177 (1982). The
rationale for this exception is the same one asserted to deny coverage—only the wrongdoer
should be held accountable. Courts recognizing this exception allow coverage when the insured
is not the "active wrongdoer." Travelers Ins. Co. v. Wilson, 261 So. 2d 545, 548 (Fla. App.
1972). In these situations, the courts acknowledge that the insured is not personally at fault;
rather, the insured is held vicariously liable for another's wrongful conduct. U.S. Concrete Pipe
Co. v. Bould, 437 So. 2d 1061 (Fla. 1983); Country Manors v. Master Antenna Systems, 534 So.
2d 1187, 1192 (Fla. App. 1989). Thus, when an insured is held liable for punitive damages
arising out of an employee's act, it will be granted coverage unless it is guilty of gross
negligence in failing to discharge the employee. Dayton Hudson Corp. v. American Mut Ins.
Co., 621 P.2d 1155 (Okla. 1980) (applying the doctrine of respondeat superior). The relevant
inquiry is whether there are any direct acts of the insured leading to the plaintiffs injuries.

If the insurer denies coverage, it has the burden of proving that the jury's award
was not predicated on the vicarious liability of the insured. Morrison v. Hugger, 369 So. 2d 614
(Fla. App. 1979).

Several other decisions have followed this exception. Norfolk & W. Ry. Co. v.
Hartford Accident & Indem. Co., 420 F. Supp. 92, 95 (N.D. Ind. 1976) (applying Indiana law);
Commercial Union Ins. Co. v. Reichard, 404 F.2d 868 (5th Cir. 1968) (applying Florida law);
Ohio Cas. Ins. Co. v. Weyare Fin. Co., 75 F.2d 58 (8th Cir. 1934) (applying Missouri law). See

V. COVERAGE ALLOWED

A growing majority of courts have rejected the policy argument set forth in
McNulty, and allow coverage for punitive damage liability. See Burrel & Young, Insurability
of Punitive Damages, 62 MARQ. L. REV. 1, 18 (1978). The leading case advancing this view
is Lazenby v. Universal Underwriters Ins. Co., 383 S.W.2d 1 (Tenn. 1964). The Lazenby court
noted the importance of punishing and deterring grievous misconduct, but concluded that
punitive awards were not successful at meeting these objectives. Thus, there was little reason
to preclude the insuring of punitive damages. Under this approach, it would be hard to justify
an award of punitive damages regardless of the availability of insurance. It is apparent that this
result was reached through a balancing of public policy and contract principles. See also
Universal Ins. Co. v. Tenery, 39 P.2d 776, 779 (Colo. 1934) (balancing contract interests with
public policy).

Other cases have stated that a contract should be upheld unless it had a tendency
This view proceeds from a belief that deterrence is not furthered by denying coverage.
Therefore, as long as insuring punitive damages is not shown to promote extreme misconduct,
there is no compelling reason to hold such agreements invalid. Moreover, Harrel recognized
that such contracts do not shift the burden of punitive damages to the insurer because an extra
premium for such coverage should be charged. Id. at 10 19-20. Lastly, it was noted that the
exposure to punitive damages may arise in a wide variety of activities, and often includes
normal business risks. The court concluded that a sweeping rule of noninsurability would be unreasonable and burdensome.

One court has adopted a position that if the policy language is approved by the state insurance commission, then it is not violative of any public policy. *Dairyland County Mut. Ins. Co. v. Wallgren*, 477 S.W.2d 341 (Tex. Civ. App.--Fort Worth 1972).


VI. COVERAGE ALLOWED EXCEPT FOR INTENTIONAL TORTS

Within those jurisdictions which hold that there is no public policy bar to coverage of punitive damages, some jurisdictions except cases of intentional misconduct. Such jurisdictions reason that punitive damages awarded from incidents occurring due to gross negligence can be covered because such incidents can be classified as accidents, and may be part of the cost of doing business. However, such courts reason, intentional torts are by definition not accidents, and should not be viewed as a cost of business. Therefore, public policy prevents coverage of punitive damages arising from intentional torts. *See Southern Farm Bureau Casualty Ins. Co. v. Daniels*, 246 Ark. 849, 440 S.W.2d 582 (1969); *Continental Ins. Cos. v. Hancock*, 507 S.W.2d 146 (Ky. 1973); *Harrell v. Travelers Indem. Co.*, 279 Or. 199, 567 P.2d 1013 (1977); *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964); *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (W. Va. 1981).

In at least one case, however, this view has been specifically rejected. In *St. Paul Mercury Ins. Co. v. Duke University*, 670 F. Supp. 630 (M.D.N.C. 1987) (applying North Carolina law), the district court held that North Carolina public policy prevented insurance coverage of punitive damages awarded for intentional torts. The Fourth Circuit disagreed, holding that there was no such public policy prevention, and holding that Duke University was covered by its insurance policy for punitive damages arising out of intentional torts. *St. Paul Mercury Ins. Co. v. Duke University*, 849 F.2d 133 (4th Cir. 1988).
VII. CONCLUSION

In general, the question of whether a standard form P&I policy (without a specific exclusion) covers punitive damages will be determined under applicable state law, including the particular public policy (if any) of the former state and the state whose law is applicable to the contract of insurance. If insurers do not wish their policies to be construed to cover punitive damages, a specific exclusion should be written into the policy or added by a clearly worded endorsement within the policy. See The Insurability of Punitive Damages: A New Solution to an Old Defense, 16 WAKE FORREST L. REV. 345 (1980). See also APPLEMAN, INSURANCE LAW PRACTICE 4312; COUCH, INSURANCE, Vol. 15A § 56.1.
Chapter 23

DIRECT ACTION STATUTES
AND P & I INSURANCE

I. THE RIGHT OF DIRECT ACTION

Federal maritime law neither authorizes nor forecloses a third party’s right to directly sue an insurance company. Continental Oil Co. v. Bonanza Corp., 677 F.2d 455 (5th Cir. 1982). Cf. Aasma v. American S.S. Owners Mut. Prot. & Indem., 95 F.3d 400 (6th Cir. 1996) (fashioning a federal right of direct action in admiralty, but declining to set aside a “pay first” provision in the policy) and Kiernan v. Zurich Companies, 150 F.3d 1120, 1998 AMC 2533 (9th Cir. 1998) (declining to fashion a federal rule that would prohibit third parties from bringing direct actions against indemnity insurers, but recognizing that such actions are permitted if provided by state law). Therefore, the right of direct action exists only by virtue of enabling legislation, i.e., state law. A state may create a direct action against a marine insurer, at least where the state action is not in conflict with any feature of substantive admiralty law or any remedy peculiar to admiralty jurisdiction. Steelmet, Inc. v. Caribe Towing Corp., 779 F.2d 1485 (11th Cir. 1986); Maryland Casualty v. Cushing, 347 U.S. 409, 74 S.Ct. 608, 98 L.Ed. 806 (1954) (Louisiana direct action statute was permissible as valid regulation of insurance). See Ancona, “The Price of Uniformity: Aasma v. American Steamship Owners Mutual Protection & Indemnity Association,” 21 Tul.Mar.L.J. 593 (Summer 1997).


Louisiana, Puerto Rico and several other United States jurisdictions permit an injured person to name an alleged tortfeasor’s insurer as a direct defendant in a lawsuit based upon the insured’s tortious conduct. See, e.g., Louisiana, La. Rev. Stat. 22:655; Puerto Rico, 26 LPRA §2003; California, Cal. Ins. Code §11580(a) & (b); Rhode Island, R.I. Gen. Laws §27-7-1, 27-7-2; Wisconsin, Wis. Stat. Ann. 632.24; Guam, Guam Gov’t. Code §18305; Arkansas, Ark. Code Ann. § 23-79-210, 23-89-102; Vermont, Vt. Stat. Ann. Titl. 8, § 4203; New York, N.Y. Ins. Law § 3420; Maryland, Md. Code Anno., Ins. § 19-102. See also Schoenbaum, Admiralty and Maritime Law, §19-13 (2d Ed. 1994 and Supp.). Analogous to Louisiana and Puerto Rico’s direct action statutes, most direct action statutes provide that actions are subject to all of the lawful conditions of the policy and the defenses that could be urged by the insurer in an action brought by the insured. However, unlike the Louisiana and Puerto Rico statutes,
the recovery of a judgment against the insured is a condition precedent to the bringing of a direct action in most jurisdictions. For a comprehensive discussion of substantive and procedural aspects of direct action claims, see 7 Couch on Insurance, ch. 104-107 (3rd Ed.).


Direct action statutes mandate a direct action provision into every insurance contract and create a method of executing upon the proceeds of the insurance policy. Direct action statutes are procedural and remedial in character, rather than substantive. Morewitz v. West of England Ship Owners Mut. Protection and Indemnity Ass’n., 62 F.3d 1356 (11th Cir. 1995). Direct action statutes do not create an independent cause of action against the insurer, but merely grant a procedural right of action against the insurer where the plaintiff has a substantive cause of action against the insured. P.S. International, Ltd. v. Caribbean Sealift, Ltd., 1977 WL 256652 (E.D. La. 1997) (citing Descant v. The Administrators of Tulane Education Fund, 639 So.2d 246 (La. 1994)). The public policy behind such statutes is that liability insurance is for the benefit of the injured party rather than for the protection of the insured. See Buglass, Marine Insurance and General Average in the United States, pp. 434-436 (3rd Ed. 1991).

II. DIRECT ACTIONS AND LIMITATION OF LIABILITY

Protection and indemnity insurer sued under the Louisiana Direct Action Statute could invoke the benefits of the Limitation of Liability Act when the P&I policy by its terms, limits the insurer’s liability to the amount which the insured vessel owner may be legally obligated to pay by reason of liability imposed by law. Crown Zellerbach Corporation v. Ingram Industries, 783 F.2d 1296, 1986 AMC 1471 (5th Cir. 1986)(en banc); Rogers v. Texaco, Inc., 638 So.2d 347 (La. App. 4th Cir. 1994). See also Gates, “Crown Zellerbach Dethrones Nebel Towing: Shipowner’s Limitation of Liability is Available to Insurers,” 62 Tul.L.Rev. 615 (February, 1988).


The stay in a limitation action may extend to a shipowner’s insurer. Texaco, Inc. v. Williams, 47 F.3d 765 (5th Cir.) reh’g. and reh’g. en banc denied, 53 F.3d 1283 (5th Cir. 1995). Cf. Matter of Seabulk Offshore, Ltd., 158 F.3d 897 (5th Cir. 1998) (there is no ironclad
rule requiring stay of a direct action lawsuit against shipowner’s insurers provided that the approach followed by the district court achieves the equivalent result of including insurers in the stay order).

In contrast to Louisiana, under the Puerto Rico direct action statute, limitation proceedings need not be stayed so that a direct action and a suit against an insured seeking limitation can proceed simultaneously. *Ema v. Compagnie Generale Transatlantique*, 353 F.Supp. 1286, 1974 AMC 2498 (D.P.R. 1972).

**III. DIRECT ACTIONS AND ARBITRATION**

The Federal Arbitration Act (FAA) does not require plaintiffs bringing direct actions against insurers under direct action statute to arbitrate or to stay their lawsuits during arbitration. *Zimmerman v. International Cos. and Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997) (Louisiana law); *In Re: Talbott Big Foot, Inc.*, 887 F.2d 611 (5th Cir. 1989) (Louisiana law); *Ocean Eagle - Limitation Proceedings*, 1974 AMC 1629 (D. P.R. 1974) (Puerto Rico law); *Morewitz v. West of England Ship Owners Mut. Protection & Indemnity Ass’n.*, 62 F.3d 1356 (11th Cir. 1995) (Alabama law) and *Montauk Oil Transp. v. Steamship Mut. Underwriting*, 859 F.Supp. 669 (S.D.N.Y. 1994) (New York law). However, when plaintiff bases his right to sue on the policy itself, not upon a statute or some other basis outside of the policy, a provision requiring arbitration must be enforced. *Aasma v. American S.S. Owners Mut. Prot. & Indem.*, 95 F.3d 400 (6th Cir. 1996). See also *Heikkila v. Sphere Drake Ins. Underwriting Management, Ltd.*, 1997 AMC 2975 (D. Guam 1997) (under English law, federal maritime law and Guamanian law, a third-party direct action against an insurer is subject to all the terms of the policy, including its arbitration clause, and must be referred to arbitration).

**IV. DIRECT ACTIONS AND CERCLA**


**V. DIRECT ACTIONS AND OCSLA**

The Louisiana Direct Action Statute does not apply to case arising out of allision between vessel and fixed platform on the Outer-Continental Shelf. There were no gaps in federal law which would necessitate adoption of Louisiana’s Direct Action Statute as applicable under the Outer-Continental Shelf Lands Act (OCSLA), and traditional laws of admiralty provided sufficient remedies without the additional means to sue the insurers directly. *Matter of Tidewater, Inc.*, 883 F.Supp. 105 (W.D. La. 1994).

Owner of offshore fixed drilling platform did not have right of direct action against contractor’s insurer under the Louisiana Direct Action Statute following injury to

VI. DIRECT ACTIONS AND ARGENTINE LAW

Although Argentina does not have a statute that provides for a third party’s rights against P&I insurers, the federal appellate court of Argentina has held that when a tortfeasor cannot pay a third-party claim due to insolvency, the judgment against the tortfeasor can be executed against the P&I insurer, notwithstanding that the policy contains a “pay to be paid” (or “pay-first”) clause. *See Compañía de Seguros La Franco Argentina, S.A., CNA Civ. y Com. Fed., 12.383/94* (1996). *See also Rosas, “Argentina: A New Development in Direct Actions Against Indemnity Insurers,”* 22 Tul.Mar.L.J. 191 (1997) (case note).

VII. DIRECT ACTIONS AND ENGLISH LAW

The Third Parties (Rights Against Insurers) Act of 1930 provides a right of direct action for third parties against insurance companies where the insured is bankrupt. However, under English law, when the terms of an insurance policy require the insured to pay its obligation before it may collect against the insurer, the insured must pay before any other party can sue on the contract. *Firma C-Trade S.A. v. Newcastle Protection and Indemnity Association (The “Fanti”) and Socony Mobil Oil Company, Inc. v. West of England Shipowners Mutual Insurance Association (London) Ltd. (The “Padre Island”) (No. 2) [1990] Lloyd’s Rep. Vol. 2, 199 (HL 1990) (P&I clubs are not subject to direct liability to third parties under English law). See also Morewitz v. West of England Ship Owners Mut. Protection & Indemnity Ass’n., 62 F.3d 1356 (5th Cir. 1995); Psarianos v. Standard Marine, Ltd., Inc., 12 F.3d 461 (5th Cir.), cert. denied, 114 S.Ct. 2164, 511 U.S. 1142, 128 L.Ed.2d 887 (1994).


XIII. DIRECT ACTIONS AND AMERICAN LAW

ALABAMA

Alabama law recognizes a direct action claim as a method of executing upon the proceeds of the insurance policy. However, unlike the Louisiana and Puerto Rico statutes, the recovery of a judgment against the insured is a condition precedent to the bringing of a direct action claim against the insurer under Alabama law. *Morewitz v. West of England Ship Owner’s...*
Mut. Protection & Indemnity Ass’n., 62 F.3d 1356 (11th Cir. 1995) (Alabama statute that allows direct action against insurers, rather than English bankruptcy law that prohibits such actions, applied to a P&I policy in a marine wrongful death action).

CALIFORNIA

Under California law, a direct action was available against a vessel operator’s P&I insurer by an injured person who had obtained a judgment against the insured. Williams v. Steamship Mut. Underwriting Ass’n., Ltd., 273 P.2d 803, 1954 AMC 2006 (Wash. 1954); see also Kiernan v. Zurich Companies, 150 F.3d 1120 (9th Cir. 1998) (judgment debtor who obtains a judgment based on an action for bodily injury can bring a direct action under California law).

CONNECTICUT

Connecticut’s Direct Action Statute, Conn. Gen. Stat. § 38-175 (1989), permitting judgment creditor to sue insurer of judgment debtor, may be applied in maritime cases; however, it is subject to federal choice of law rules. State Trading Corp. of India, Ltd. v. Assuranceforeningen Skuld, 921 F.2d 409 (2d Cir. 1990) (finding insufficient contacts between vessel’s sinking and Connecticut); see also Cowan v. Continental Insurance Company, 86 A.D.2d 646, 446 N.Y.S.2d 412 (Conn. 1982) (Connecticut direct action statute did not authorize declaratory judgment action in New York following the time plaintiff’s decedent perished aboard a tug which was covered by P&I policy where plaintiff had obtained no judgment against employer at the time the action was instituted).

FLORIDA

Under Florida law, a third party cannot maintain a direct action against a marine liability insurer for actions accruing after October 1, 1982, the effective date of Florida legislation prohibiting direct actions by third-parties against liability insurers that had been available under the doctrine of Shingleton v. Bussey, 223 So.2d 713 (Fla. 1969) and DaCosta v. General Guaranty Ins. Co., 226 So.2d 104 (Fla. 1969). See National Corporacion Venezolana, S.A., v. M/V MANAURE V, 826 F.2d 6 (11th Cir. 1987) and Steelmet, Inc. v. Caribe Towing Co., 779 F.2d 1485, 1986 AMC 1641 (11th Cir. 1986).

Protection and indemnity policy issued to vessel owner was indemnity policy not liability policy, so that no direct action could lie against the insurer in his capacity as marine indemnity insurer under former Florida law. Weeks v. Beryl Shipping, Inc., 845 F.2d 304 (11th Cir. 1988).


GUAM

In a suit in Guam by a Croatian seaman for injury on a fishing vessel on the high seas against the P&I insurer of his insolvent employer under the Guamanian Direct Action
Statute, the place of negotiation, contracting and performance in England and inclusion of a choice of English law outweigh the interests of Guam or Croatia, and determine that English law governs the contract, under which the policy’s clause for arbitration in England will be enforced. *TCB Special Credits v. F/V CHLOE Z*, 1998 AMC 750 (D. Guam 1997).

**LOUISIANA**

Under Louisiana law, a direct action claim may be brought against an insurer in only three limited instances: if the accident occurred in Louisiana; if the policy was written in Louisiana; or if the policy was delivered in Louisiana. *Landry v. Travelers Indem. Co.*, 890 F.2d 770 (5th Cir. 1989). See also Johnson, “The Louisiana Direct Action Statute,” 43 La.L.Rev. 1455 (July, 1983).

To invoke the Louisiana Direct Action Statute in maritime action for injury sustained on the high seas, the insurance policy in question must have been issued, or delivered, in Louisiana. *Miller v. Griffin-Alexander Drilling Co.*, 715 F.Supp. 164 (W.D. La. 1989).

Louisiana Direct Action Statute did not apply despite claim that policy was “constructively delivered” in Louisiana; nothing in the Louisiana Direct Action Statute precluded a business decision to accept delivery of the policy outside of the state so as to avoid application of the statute to accidents occurring outside of Louisiana. *Id. See also Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981), *cert. denied*, 455 U.S. 944, 102 S.Ct. 1440, 71 L.Ed.2d 565 (1982); *Grubbs v. Gulf Intern. Marine, Inc.*, 13 F.2d 168 (5th Cir. 1994) (recognizing possibility of “constructive delivery”) and *Continental Ins. Co. v. Jantran, Inc.*, 906 F.Supp. 362 (E.D. La. 1995). *Cf. Schexnider v. McDerrett, Inc.*, 688 F.Supp. 234 (W.D. La. 1988) (finding “constructive delivery” in Louisiana) and *Heaton v. Gulf International Marine, Inc.*, 536 So.2d 622 (La. App. 1st Cir. 1988) (seaman was entitled to maintain direct action against insurer where, although it was undisputed that seaman’s injury occurred offshore beyond territorial limits of Louisiana, record did not establish where insurance policy was written or to whom it was delivered). The Fifth Circuit has noted that the Louisiana Supreme Court has “strongly suggested that when an insurer fraudulently refuses to deliver a policy in Louisiana for the purposes of evading the Direct Action Statute, the policy will be considered delivered in Louisiana for purposes of the Direct Action Statute.” 13 F.3d at 171. See also *Temple v. J&L Marine, Inc.*, 1997 WL 204921 (E.D. La. 1997) and *Aggregate Barges, Inc. v. Gulf Marine Towing, Inc.*, 1995 WL 96624 (E.D. La. 1995).

Louisiana Direct Action Statute permits injured party to maintain direct action against marine protection and indemnity insurer, even though part of insurance code containing statute specifically states that its provisions apply to insurance other than ocean marine insurance, and even though P&I insurance might be considered ocean marine insurance within the meaning of the exclusion. *Grubbs v. Gulf Intern. Marine, Inc.*, 625 So.2d 495, 1994 AMC 244 (La. 1993); *Westinghouse Credit Corp. v. M/V NEW ORLEANS*, 39 F.3d 553 (5th Cir. 1994). See also Elmer, “Marine P&I Insurers No Longer Safe from the Louisiana Direct Action Statute (If They Ever Were): Grubbs v. Gulf International Marine, Inc.,” 18 Tul.Mar.L.J. 371 (Summer 1994) and Shariff, “Grubbs v. Gulf International Co.: The Louisiana Supreme Court Declares the Direct Action Statute Applicable to Marine P&I Insurance,” 68 Tul.L.Rev. 1653 (June, 1994).
The Louisiana Direct Action Statute grants personal injury claimant a right of direct action against the tortfeasor’s insurer regardless of any provision in the policy forbidding immediate direct action; terms and conditions of the policy that have the effect of defeating the purpose of the direct action statute, such as “no action” clauses, are annulled or superceded by the statute. *Zimmerman v. International Cos. and Consulting, Inc.*, 107 F.3d 344 (5th Cir. 1997).

Protection and indemnity insurer’s contractual right to have coverage disputes with its insured employer submitted to arbitration did not entitle insurer to stay of the injured workers’ suits against the insurer, which were brought under Louisiana’s Direct Action Statute during insurer’s arbitration with employer. *Id.*

The Louisiana Direct Action Statute allows action against marine insurer of insolvent towage company even though company has not paid its deductible under the policy. *Albany Ins. Co. v. Bengal Marine, Inc.*, 857 F.2d 250 (5th Cir. 1988).


Under Louisiana law, settlement agreement between injured party and tortfeasor does not limit or bar injured party’s right of direct action against non-settling insurer, particularly where injured party specifically reserved rights in settlement agreement. *In Re: Combustion, Inc.*, 960 F.Supp. 1051 (W.D. La. 1994).

Under Louisiana law, excess marine employer’s liability (MEL) insurers lacked standing to assert protection and indemnity (P&I) insurer’s waiver of defense that P&I insurance policy was void ab initio for material misrepresentations; excess insurers were strangers to the policy relationship between the P&I insurer and the insured, paid nothing on behalf of the insured, and were not injured third-parties within the meaning of Louisiana’s Direct Action Statute. *Insurance Company of North America v. West of England Ship Owner’s Mut. Insurance Ass’n*, 890 F.Supp. 1296 (E.D. La. 1995).

Tort victim’s claim against insurer can be maintained despite insured’s failure to notify insurer of filing of claim unless the insurer proves sufficient prejudice to defeat the claim; protection and indemnity insurer showed sufficient prejudice arising from the insured’s failure to notify it of suit to defeat tort victim’s attempt to enforce the judgment taken against the insured; insurer did not receive notification from the insured of suit, nor did it receive notification from the third party; had it known of case, it would have presented defense, given its active involvement in earlier settlement negotiations. *Elrod v. P. J. St. Pierre Marine, Inc.*, 663 So.2d 859 (La. App. 5th Cir. 1995), *writ den.*, 666 So.2d 1098 (La. 1996).

Res judicata barred a wrongful death claim brought under the Louisiana Direct Action Statute against the insurers of a vessel whose owner was exonerated from liability in federal limitation of liability proceeding, notwithstanding contention that the cases did not involve the same parties; the insured and insurers not only shared the same qualities as parties, but their identities virtually merged into one, to the extent of policy limits, and permitting
plaintiffs to proceed against the insurers under the Louisiana Direct Action Statute would result in litigating issues of shipowner’s liability for the accident. *Arthur v. Zapata Haynie Corp.*, 690 So.2d 86 (La. App. 3rd Cir. 1997), writ den., 694 So.2d 252 (La. 1997).

**MAINE**

Maine’s “Reach and Apply” Statute, 24-A M.R.S.A. § 2904, permits a judgment creditor to proceed directly against a judgment debtor’s insurer, provided the insurer is subject to personal jurisdiction. *Sparkowich v. American Steamship Owners’ Mut. Protection & Indemnity Ass’n., Inc.*, 687 F.Supp. 695, 1988 AMC 2182 (D. Me. 1988) (no personal jurisdiction over marine insurer because of lack of minimum contacts).

**MASSACHUSETTS**

Under Massachusetts law, personal injury plaintiff may bring direct action against tortfeasor’s protection and indemnity insurer only after judgment had been obtained against tortfeasor. *Szafarowicz v. Gotterup*, 68 F.Supp.2d 38 (D. Mass. 1999).

**MICHIGAN**


**NEW YORK**

New York law provides for a direct action against insurers on both liability and indemnity policies, but no direct action is allowed on any marine insurance policy. This exception was designed to eliminate a perceived competitive disadvantage to which New York marine insurers were placed by the direct action statute. *See* Alexander, “Admiralty, Federalism, and the New York Direct Action Statute: Seamen’s Rights to Enforce Jones Act Judgments,” 49 Brook. L. Rev. 179 (Winter, 1983).


In a case involving a tug/barge grounding off the Massachusetts coast, the Eighth Circuit held that the law of New York, the place of contracting, negotiating, and performing the marine policy, governed and prohibited a direct action lawsuit. *American Home Assurance Co. v. L&L Marine Serv., Inc.*, 153 F.3d 616 (8th Cir. 1998).

The New York Direct Action Statute, applicable only in the event of insolvency of the insured and available for both liability and indemnity policies, excludes direct actions on


**PUERTO RICO**


Puerto Rico’s direct action statute did not permit injured longshoremen to sue their employer’s insurer when workers’ compensation statute prohibited them from bringing same tort action against their employer; under Puerto Rico’s direct action statute, insurer’s legal liability can be no greater than the extent of its underlying contractual undertaking with its insured. *Ruiz-Rodriguez v. Litton Indus. Leasing Corp.*, 574 F.2d 44 (1st Cir. 1978).

Marine cargo inspector injured aboard vessel could maintain a direct action against a vessel’s protection and indemnity underwriter pursuant to the Puerto Rico Direct Action Statute, regardless of contrary provisions contained in protection and indemnity policy purportedly establishing that underwriter was not liable unless its insured became obligated to pay by final judgment or in fact paid. *Morales-Melendez v. Steamship Mut. Underwriting Assn. (Bermuda), Ltd.*, 763 F.Supp. 1174, 1991 AMC 2475 (D. P.R. 1991).

Indemnification claims by tug bareboat charterer, which in turn time chartered tug, arose from breach of contractual obligations by time charterer and its affiliated cargo carriers to hold tug and its owner harmless from cargo claims, and not from tortious activity;
therefore, bareboat charterer could not proceed directly against underwriters under the Puerto Rico Direct Action Statute. *Complaint of Admiralty Towing and Barge Company*, 767 F.2d 243 (5th Cir. 1985).

**TEXAS**

Texas law does not allow direct actions against insurers, unless injured party was made a beneficiary of the insurance contract by statute. *Matter of Edgeworth*, 993 F.2d 51 (5th Cir. 1993).

Under Texas law, plaintiffs who recovered a judgment against a vessel owner in a personal injury and wrongful death action had no cause of action directly against the vessel’s protection and indemnity insurer, in the absence of any special relationship between the plaintiffs and the insurer. *Psarianos v. Standard Marine, Ltd., Inc.*, 12 F.3d 461 (5th Cir.), cert. den., 114 S.Ct. 2164, 128 L.Ed.2d 887 (1994).

Under Texas law, plaintiff is barred from bringing tort suit directly against tortfeasor’s insurer; non-party to insurance contract may bring suit against insurer to enforce insurance agreement only if non-party is legal beneficiary of contract or judgment creditor of insured. *Essex, Inc., Co. v. Bayou Concession Salvage, Inc.*, 942 F.Supp. 258 (E.D. La. 1996).

Under Texas law, time charterer of owner insured’s vessel lacked standing as third-party beneficiary so as to maintain direct action against insurer to enforce policy indemnity provisions to recover costs of removing sunken vessel from property leased by charterer, notwithstanding insurer’s purported assignment to charterer of any insurance proceeds; policy specifically barred third-party suit, and contained unambiguous “no assignment” clause, which was enforceable under state law. *Conoco, Inc. v. Republic Ins. Co.*, 819 F.2d 120 (5th Cir. 1987).
Chapter 24

A COMPARISON OF THE SP-23 AND SP-38 FORMS

There are three principal P&I policy forms used in the United States; these are the American Club Protection & Indemnity policy, the SP-23 (revised 1/56) and the SP-38 (P&I 1955).¹ This article will offer a comparison of some of the more important coverages contained in the SP-23 and SP-38 standard forms.

There are two major differences between the SP forms. The first is that SP-23 covers liabilities to cargo, whereas the SP-38 does not. The second difference is that for the coverages provided, the scope of coverage in SP-38 is written more expansively than that of SP-23. Thus, as a general proposition, SP-23 offers greater range of coverage on narrower terms that does SP-38, which provides more limited coverage but in broader terms for the coverage which does exist. It has been noted before that the SP-23 is primarily used to cover "brown water" vessels due to a lack of "blue water" or Club business in the United States.²

a. Coverage for Vessel's Owner

i. Owner Defined

SP-23 covers the named assured for "all such loss and/or damage and/or expense as the Assured shall as owner of the vessel...have become liable to pay and shall pay on account of the liabilities, risks, events and/or happenings herein set forth."³ Both SP-23 and SP-38

¹ There have been as many as five P&I forms used in the U.S. In addition to the three above, the American Institute of Marine Underwriters promulgated a P&I form in June 1983 ("AIMU") and the 1962 P&I clauses (Great Lakes) serves as a specialty form for the Great Lakes. See Parks, The Law and Practice of Marine Insurance and Average 1032 (1987).


³SP-23. The SP-38 is similar, providing the underwriter "undertakes to pay up to the amount hereby insured...such sums as the assured, as owner...shall have become legally
incorporate the traditional indemnity scheme of the P&I policies and define the class of people -- owners -- to whom the duty of indemnification arises. Courts addressing this issue have broadly interpreted the term owner to include not only the actual title holder, but those with an interest in the vessel; including bareboat, time, and voyage charterers.\(^4\) The issue of whether the policy extends to cover lienholders and bailees has been a subject of dispute.\(^5\) There has also been a requirement imposed in some circumstances requiring that the liability incurred arise out of the operation of a the vessel insured.\(^6\)

ii. Implications for Time and Voyage Charterers

A common characteristic of both the SP-38 and SP-23 is that in addition to the limitation to indemnify the "owner", they also limit the P&I insurer's indemnification obligation to the amount for which the policy holder would have been responsible had it been the actual vessel owner.\(^7\) This gives the P&I insurer the right to limit its liability under either policy to the amount that the insured could have limited its liability had the insured been the vessel owner. This provision essentially extends to the underwriter the benefits of the Limitation Act, regardless of whether its assured is an owner\(^8\) or charterer.\(^9\) Consequently, time and voyage charterers employing SP-23 or SP-38 need to be aware they could be exposed to damages over the amount to which the owner of the vessel would have had the right to limit its liability. Additional insurance should be procured by a time or voyage charterer which finds itself in that position to cover this potential uninsured exposure.

liable to pay and shall have paid...." SP-38, lines 10-13.


\(^5\)See Vogel, supra, at p. 113 arguing that the SP-23 can only inure to the Assured.


\(^7\) SP-23, General Conditions; SP-38 lines 99-102.

\(^8\) Owners or bareboat charterers are entitled to limit their liability to the value of the vessel and pending freight under the LLA, providing certain conditions are met. Interestingly, the ability of an owner or bareboat charterer to limit its liability under the LLA has been radically curtailed in the area of pollution by OPA. Their silence on this matter may lead to arguments that both the SP-23 and SP-38 appear to have adopted this increased potential exposure by not affirmatively excluding it.

\(^9\) Time or voyage charterers cannot limit their liability under the LLA.
b. Cargo Liabilities

SP-23 covers "liability for loss of, or damages to, or in connection with cargo or other property ... to be carried, or which has been carried on board the vessel...."\(^\text{10}\) SP-23 then goes on to list eight specific exclusions related to the grant of cargo coverage including, but not limited to: passengers effects;\(^\text{11}\) stowage of under deck cargo on deck;\(^\text{12}\) freight on cargo short delivered;\(^\text{13}\) and delivery of cargo without surrender of bills of lading.\(^\text{14}\) In addition, the cargo liabilities granted by SP-23 are subject to specified Jason Clause wording and the COGSA limitations on package liability.\(^\text{15}\) Additionally, SP-23 covers liability for cargo's proportion of general average where those costs are not recoverable by the vessel owner from the cargo owner or its insurance carrier.\(^\text{16}\)

In contrast, the SP-38 does not cover the vessel owner for liabilities arising from cargo damage.\(^\text{17}\) Correspondingly, the SP-38 also does not cover cargo's proportion of general average expenses.\(^\text{18}\)

c. Excess Hull Coverage

SP-23 and SP-38 also differ in their hull policy exclusions. SP-23 excludes recovery for "any loss, damage, or expense which would be payable under the terms of the...form of policy on hull and machinery, etc., if the vessel were fully covered by such insurance sufficient in amount to pay such loss, damage, or expense."\(^\text{19}\) The intent of this exclusion is to segregate losses as between the assured's hull and P&I policies, eliminating the prospects of double insurance. However, in the case of Landry (Steamship Mutual v. Landry), 177 F. Supp. 143, 1960 A.M.C. 54, (D. Mass.), 281 F.2d 484 (1st Cir. 1960), the Court interpreted similar wording as allowing the P&I policy to serve, in effect, as excess insurance...
over the hull policy where the amount of the hull policy was insufficient to cover the actual value of the vessel. In that case, the Protection & Indemnity Association took the position that the wording similar to that now in SP-23 eliminated liabilities covered by the American Institute Time (Hulls) form and, consequently, would not therefore be viewed as covering liabilities for amounts in excess of that coverage. The Court disagreed and allowed the P&I policy to serve as excess hull coverage. It is important to note that the language of SP-23 did not change in reaction to the Landry decision. However, the language of SP-38 was amended to eliminate the potential excess coverage effects of the Landry decision. That policy now states that it does not include liabilities for "any loss, damage, expense or claim collectible under the [blank in which the assured's hull policy is to be named] form of policy, whether or not the vessel named herein is actually covered by such insurance and regardless of the amount thereof." The SP-38 has therefore incorporated the Landry holding into its language to specifically prevent it being applied as excess hull insurance. On the other hand, the language of SP-23 continues to be particularly susceptible to that interpretation.

21 However, see Vogel, supra, at 114 stating that an endorsement is available to the SP-23 policy which would eliminate this problem.

22 Though, interestingly, note that SP-23 requires the owner to exercise due diligence to notify of a real or potential claim while SP-38 states that an owner "will notify this Company..." Compare SP-23, General Conditions with SP-38, lines 63-66.

23 SP-23, General Conditions; SP-38, lines 92-95. "No action shall lie against this Company for the recovery of any loss sustained by the assured unless such action is brought within one year after the entry of judgment or decree in any litigation against the assured, or in the event of a claim without entry of such final judgment or decree, unless such action is brought within one year from the date of the payment of such claim."

24 SP-23, General Conditions. "The Assurer shall not be liable for any claim not presented to the Assurer with proper proofs of loss within six (6) months after payment thereof by the Assured."
SP-38 also differs from SP-23 and most other P&I policy forms in that it incorporates the geographic limits of the vessel's hull policy as a term of the P&I coverage.\textsuperscript{25} This creates an issue for an owner of a vessel covered by a SP-23 form of P&I insurance when a vessel's use is altered during the policy term. SP-38 owners and underwriters must keep the geographic limits of the hull coverage in mind and make necessary alterations should the use of a vessel change over time.\textsuperscript{26}

\textbf{f. Repatriation}

The SP-23 specifically includes coverage for repatriation in its terms of coverage. The policy provides for "[l]iability for repatriation expenses of any member of the crew ... necessarily and reasonably incurred, under statutory obligation, ..." with certain exceptions, such as attendant to the sale of the insured vessel.\textsuperscript{27} Crew wages during repatriation are also covered under SP-23 when the vessel owner is under a statutory obligation to provide for them attendant to the wreck or loss of the vessel.\textsuperscript{28}

In contrast, SP-38 does not specifically mention repatriation costs. However, the SP-38's coverage clause does include "[h]ospital, medical, or other expenses, necessarily and reasonably incurred in respect of loss of life of, injury to, or illness of any members of the crew of the vessel...."\textsuperscript{29} Thus, medical repatriation could be argued as being covered under the terms of SP-38 where necessary.

\textbf{g. Hospital Costs}

SP-23 and SP-38 also differ somewhat in their treatment of hospital costs. SP-23 covers those "hospital, medical or other expenses" reasonably incurred in respect "of any

\textsuperscript{25} SP-38, lines 106-07. "The navigation limits in the policy covering the hull, machinery, etc. of the vessel named herein are considered incorporated herein."

\textsuperscript{26} "This provision has on more than one occasion caused underwriters some difficulty in cases wherein the Hull and Machinery Policies are cancelled and the P&I Policy remains in force on the vessel which is lost outside of the navigating limits which were contained in the Hull and Machinery Policy. In the SP-23 underwriters are required to include navigating limits if they deem them to be of underwriting importance." Vogel, \textit{supra}, p.112.

\textsuperscript{27} ¶ 3 (emphasis added).

\textsuperscript{28} \textit{Id}.

\textsuperscript{29} SP-38, lines 15-16 (emphasis added). Where under a statutory duty to repatriate crew as the result of a loss of a vessel due to collision, an owner might attempt to recover repatriation expenses under SP-38, lines 17-18. "Loss of, or damage to, or expense in connection with any fixed or movable object or property of whatever nature." (Emphasis added.)
member of the crew...or any other person...."\textsuperscript{30} However, SP-38 limits this coverage to "any member of the crew of the vessel named herein."\textsuperscript{31}

h. **Compensation Claims**

SP-23 and SP-38 similarly differ on the treatment of compensation claims. SP-23, unless modified by endorsement, excludes claims "to any employee of the Assured (other than a seaman)...."\textsuperscript{32} SP-38 excludes any claim "arising directly or indirectly under the [LHWCA] or any workmen's compensation act of any state or nation[.]"\textsuperscript{33} The SP-38 compensation exclusion is, therefore, not limited by its language to employees of the insured.

i. **Salvage, General Average and Quarantine**

SP-23 and SP-38 similarly differ on this element of coverage, including insurance. SP-23, ¶ 12. SP-38 does not expressly address this element of coverage, but the argument could be made under the "other expenses" provision of the general hospitalization grant.\textsuperscript{34}

j. **Subrogation**

SP-23 and SP-38 contain similar clauses allowing for the insurer to become subrogated to the owner upon payment of a claim.\textsuperscript{35} However, SP-23 contains a specific paragraph indicating that the insurer "shall be entitled to take credit for any profit accruing to the Assured by reason of any negligence or wrongful act of the Assured's servants or agents, up to the measure of their loss, or to recover for their own account from third parties any damage

\textsuperscript{30} SP-23, ¶ 2. Note also that SP-23 includes cover for the net loss of a deviation due to the necessity of landing a sick or injured seaman. This coverage extends to the extra expenses of the deviation, including insurance. SP-23, ¶ 12. SP-38 does not expressly address this element of coverage, but the argument could be made under the "other expenses" provision of the general hospitalization grant.

\textsuperscript{31} SP-38, lines 15-16.

\textsuperscript{32} SP-23, ¶ 1.

\textsuperscript{33} SP-38, lines 44-45.

\textsuperscript{34} SP-38, lines 38-39. \textit{See also} the SP-38 exclusions for damages arising as a result of, \textit{inter alia}, civil strife, war or detention. Lines 49-59. SP-23 is in agreement. \textit{See} General Conditions.

\textsuperscript{35} SP-23, ¶ 11.

\textsuperscript{36} \textit{See} SP-23, General Conditions; SP-38, lines 89-91.
that may be provable by reason of such negligence or wrongful act." SP-38 does not contain an analogous provision.

Both policies provide that if the Assured's liability is reduced by contract the underwriters will have the benefit of the reduction. However, SP-23 additionally states that the costs of a subrogation action are to be proportionately divided between the underwriter and policy holder in the ratio of "the amounts which they would be entitled to receive respectively, if the suit should be successful." 

k. Grant of Coverage - Property

iii. The Grant of Coverage

SP-38 and SP-23 take very different approaches to their respective grants of coverage in regard to their general property liability clauses. The property grant of coverage in SP-38 is a broad, inclusive definition of one sentence. However, SP-23 takes a more specific approach, breaking its property grant into three distinct provisions, namely those due to: (1) vessel and freight as a result of collisions; (2) to vessel and freight other than from collisions; and (3) to "any other fixed or movable object or property."
iv. Could this Include Pollution?

Neither SP-23 nor SP-38 expressly cover pollution liabilities. However, it has been noted that the effect of the policies' grants of coverage may have implications that underwriters had not necessarily anticipated.\(^{45}\)

As neither SP-23 nor SP-38 expressly address liability for pollution coverage, the issue becomes whether the general grants of coverage could be read as implying such coverage. As indicated above, SP-23 covers "liability for damage to ... any fixed or movable object or property." ¶ 6. Similarly, SP-38 provides coverage for "[l]oss of, or damage to, or expense in connection with any fixed or movable object or property of whatever nature." SP-38, lines 17-18.

One commentator has noted that this grant could arguably provide coverage for pollution liability where the assured is liable for the release of a polluting substance which then damages or causes a loss to property. Where the loss claimed for is from a tangible "contact" event, coverage would appear to be available under both SP-23 and SP-38 to owners of property with which the oil makes contact.\(^{46}\) In addition, it has been suggested that pollution events that do not make contact with any other terrestrial object may also be covered to the extent that U.S. waters, or those of a state, may be considered "property."\(^{47}\)

1. Fines

Additionally, both SP-23 and SP-38 provide coverage for "fines and penalties ... for the violation of any of the laws of the United States, or of any state thereof."\(^{48}\) This coverage could be argued to extend to fines assessed under OPA '90, various other federal statutes (such as the Migratory Bird Act), and/or the oil pollution statutes of any state. The significant constrictions on any such alleged coverage is the requirement of both policies that coverage for fines does not lie where the fine arises directly or indirectly from the "failure, neglect or default of the Assured or his managing officers or managing agents to exercise the highest degree of diligence to prevent a violation of such laws."\(^{49}\)


\(^{46}\) Complying with the rule of Robbins Dry Dock that purely economic losses, with certain limited exceptions, are not recoverable in maritime law. Robbins Drydock Co. v. Flint, 275 U.S. 303 (1927).

\(^{47}\) Parks, supra, p. 1034-35 n. 823, citing Port of Portland v. WQIS, 549 F.Supp. 233 (D.Or. 1984). SP-38 would be somewhat more vulnerable to this interpretation since it adds "objects or property of whatever nature." Line 18.

\(^{48}\) SP-23, ¶ 9; SP-23, lines 23-27.

\(^{49}\) Id.
m. Tower's Liabilities

SP-38 specifically excludes tower's liabilities from its grant of coverage unless the liability arises from emergency salvage operations or resulting from the loss of life, injury, or illness of any person. SP-23 similarly excludes towage liabilities.

n. Removal of Wreck

The removal of wreck provisions in SP-23 and SP-38 are very similar and both include provisions for a deduction of salvage value.

o. Occurrence

SP-23 states that "[l]iability hereunder in respect of any one accident or occurrence is limited to the amount hereby insured." SP-38 mimics this language but then adds: "(For the purpose of this clause each occurrence shall be treated separately, but a series of claims hereunder arising from the same occurrence shall be treated as due to that occurrence.)"

50 "[T]his Company will not pay for...[a]ny loss, damage, expense or claim with respect to any vessel or craft in tow of the vessel named herein and/or cargo thereon; provided this exclusion shall not apply to salvage services rendered in an emergency to a ship... in distress, nor to loss of life and/or injury to, or illness of any person." SP-38, lines 40-42.

51 SP-23 provides coverage for "[l]iability for loss of, or damage to, any other vessel or craft, or to the freight thereof, or property on such other vessel or craft, caused by collision with the vessel named herein, insofar as such liability would not be covered by full insurance under the [hull policy] (including the four-fourths running-down clause)...." ¶ 4.

However, under the General Conditions, it eliminates coverage "[f]or loss, damage, expense or claim arising out of or having relation to the towage of any other vessel or craft...unless such towage was to assist such other vessel or craft in distress to a port or place of safety, provided, however, that this clause shall not apply to claims under this policy for loss of life or personal injury to passengers and/or members of the crew of the vessel named herein as a result of towing." Again, Vogel, supra, at 116 indicates this may be available by endorsement.

52 See SP-23, ¶ 7 and SP-38, lines 19-21.

53 See SP-23, General Conditions.

54 SP-38, lines 79-82.
p. **Punitive Damages**

Neither SP-23 nor SP-38 expressly exclude coverage for punitive damages. The Fifth Circuit has taken the position that there is no controlling federal precedent as to whether a P&I policy being silent on the issue of punitive damages would allow the coverage to be implied.

q. **Defense (Law) Costs**

As a last note, there are certain differences in the defense costs provisions of SP-23 and SP-38. SP-38 broadly provides for "[c]osts and expenses, incurred with this Company's approval, of investigating and/or defending any claim or suit against the insured arising out of a liability of the assured covered by this policy." First, unlike SP-38, SP-23 makes its defense costs provision subject to the policy's deductible. Second, SP-23 provides that the legal costs of a subrogation action are proportionately divided, as discussed above. Third, where the deductible is exceeded, SP-23 states the underwriter will pay for the excess, being the greater of: (1) the cost of investigating and/or successfully defending the assured from a claim; or (2) the amount paid in judgment or settlement including all defense costs and expenses.

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55 Note, however, that the more recent AIMU policy does exclude punitive damages.

56 *Taylor v. Lloyd's Underwriters*, 972 F.2d 666 (5th Cir. 1992) (since no federal rule, state law on whether punitives are implied to apply). For a full discussion of this issue, see Dimitry & Spagnoletti, "Coverage of Liability for Punitive Damages" *MARINE P&I POLICY ANNOTATIONS*, p.39 (1st Addenda, 1985).

57 SP-38, lines 28-30.

58 SP-23, General Conditions.

59 SP-23, General Conditions.